

Enactment of Vietnam Competition Law 2004
– A case study of harmonizing internal and external factors

BY

TRAN THI MINH PHUONG

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For my beloved mother and late father

ABSTRACT

Vietnam is an economy in transition that has encountered a great deal of obstacles and issues shifting to the market tract. Due to a lack of synchronized legal systems, and the legacy of stagnant economic development and low efficiency dating from the wartime, it has been even more difficult for Vietnam to adapt itself to the new context of globalization. Since Doimoi however, Vietnam has witnessed gradual but important changes in thinking and action. In order to apply the model of “socialist market-oriented economy” in practice, Vietnam enacted the Vietnam Competition Law (VCL) in 2004. After nearly a decade of being in force, the VCL (2004) has attracted lots of critique over its outdated and inappropriate content. In contrast, a number of comments from economic experts and academia still express supportive attitudes and highly appreciate the introduction of the law in 2004. Competition-related issues are now an important concern in the domestic market and the law has strengthened Vietnam’s integration into the regional and global economy.

This thesis identifies the factors determining the promulgation of the VCL (2004). It argues factors came from both internal and external sites. Changes in economic political thinking and negative experience in the national economy for a long period are found to be the main forces for the promulgation from a domestic perspective. While entering a number of regional organizations like ASEAN and APEC and indirect pressure from application for entrance into the WTO and negotiation with the U.S. under the Bilateral Trade Agreement are the main forces from an external perspective. The thesis shows how both external and internal factors contributed to and interacted with each other in the enactment of the VCL (2004). It finds these forces were harmonized in a way that met Vietnam’s international obligations and desire for deeper integration with the global economy while also meeting the requirements of competition law in a transitional economy. These findings suggest further study on the process of harmonization of external and internal forces in the area of competition policy is needed to understand better the process of introducing competition policy in transitional economies.

ABBREVIATIONS

AANZFTA	ASEAN Australia New Zealand Free Trade Agreement
AEC	ASEAN Economic Community
AFCCP	Agency for Fair Competition and Consumer Protection
AFTA	ASEAN Free Trade Area
AMS	ASEAN Member States
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of Southeast Asia Nations
BTA	Bilateral Trade Agreement
CCS	Competition Commission of Singapore
CFTC	Chinese Taipei Fair Trade Commission
CIS	Commonwealth Independent States
EATOP	East Asia Top Officials Program on competition policy
FTA	Free Trade Agreement
IMF	International Monetary Fund
IP	Intellectual Property
JFTC	Japan Fair Trade Commission
KFTC	Korea Fair Trade Commission
KPPU	Komisi Pengawas Persaingan Usaha (Commission for Supervision of Business Competition)
M&A	Merger and Acquisition
MOFCOM, NDRC, SAIC	Ministry of Commerce, National Development and Reform Commission, State Administration of Industry and Commerce (China)
MOIT	Ministry of Industry and Trade (of Vietnam)
MOT	Ministry of Trade (of Vietnam)
OECD	Organization for Economic Co-operation and Development
OTCC	Office of Trade Competition Commission (Thailand)
RBP	Restrictive Business Practice
RTA	Regional Free Trade Agreement

SOEs	State Owned Enterprises
STAR	Support for Trade Acceleration (Project)
UNCTAD	United Nations Conference on Trade and Development
VCL	Vietnam Competition Law
WTO	World Trade Organization

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INTRODUCTION

In an economic sense, competition can be simply understood as the rivalry among firms in selling goods and services to consumers. Firms here might compete in terms of price or product quality where competition generally results in market entry or exit. In particular, a competitive market is one that attracts more and more new companies entering the market. However, a market witnessing severe competition will drive small companies with less competitive advantage out of that market.

Though competition sounds reasonable by its nature, it has not naturally existed in any type of economy throughout the development of the world's major national economies. Similarly, there was no competition in Vietnam's economy during the period of central planning where state intervention "surrogated" any "growing seed" of competition.

Vietnam has not been an exception to the evolution of global economic development in general and the expansion/importation of "competition law" in particular. From the perspective of policy and law makers in Vietnam, the enactment of the Vietnam Competition Law (VCL) in 2004 marked a breakthrough in new economic thinking from the think tank elite that attached significance and necessity to the promotion of competition as part of the open market policy – a crucial component of the Doimoi (or reform) policy since 1986. In that sense, the evolution of competition policy in Vietnam has very much been a bottom up process.

Taking a broader view however, this explanation is not enough and cannot reflect exactly how the enactment of competition law was affected by other elements outside of the domestic reform agenda. This thesis will therefore explore the story of how the VCL (2004) came into effect by integrating the backdrop of changes and the context of the national economy at that time with the external driving forces before and in the process of drafting the law. The thesis asks, "How were the external driving forces harmonized with the internal ones towards the enactment of the VCL (2004)?"

The major conclusions are the VCL (2004) was born to meet the actual requirements of the national economic political context in parallel with responding to the implicit pressures from the Bilateral Trade Agreement with the U.S and the application for WTO membership. Also, it

should be emphasized that this harmonization occurred in the wave of expanding competition law and policy over the world since 1980s. Overall, the study shows that the process of enacting competition law in Vietnam was neither exclusively bottom-up/internally driven nor top down/externally driven, rather, both internal and external influences played critical roles in the shaping of policy outcomes.

This thesis will not touch upon which model of competition law the Vietnam Competition Law (VCL) resembles or follows or even the process of drafting the law. Instead, the major focus is on the question “How competition law came to Vietnam in the early 2000s?” The thesis explores the external and internal driving forces linked with Vietnam’s economic integration.

This study also draws some general lessons and experiences for other developing countries or economies in transition like Vietnam when drafting their competition law as a response to the actual domestic needs of the economy at the same time as managing impacts from external influences.

Before touching on the structure of approaches applied in the thesis and the scope of research, three distinct but easily confused definitions of *competition*, *competition law* and *competition policy* are required.

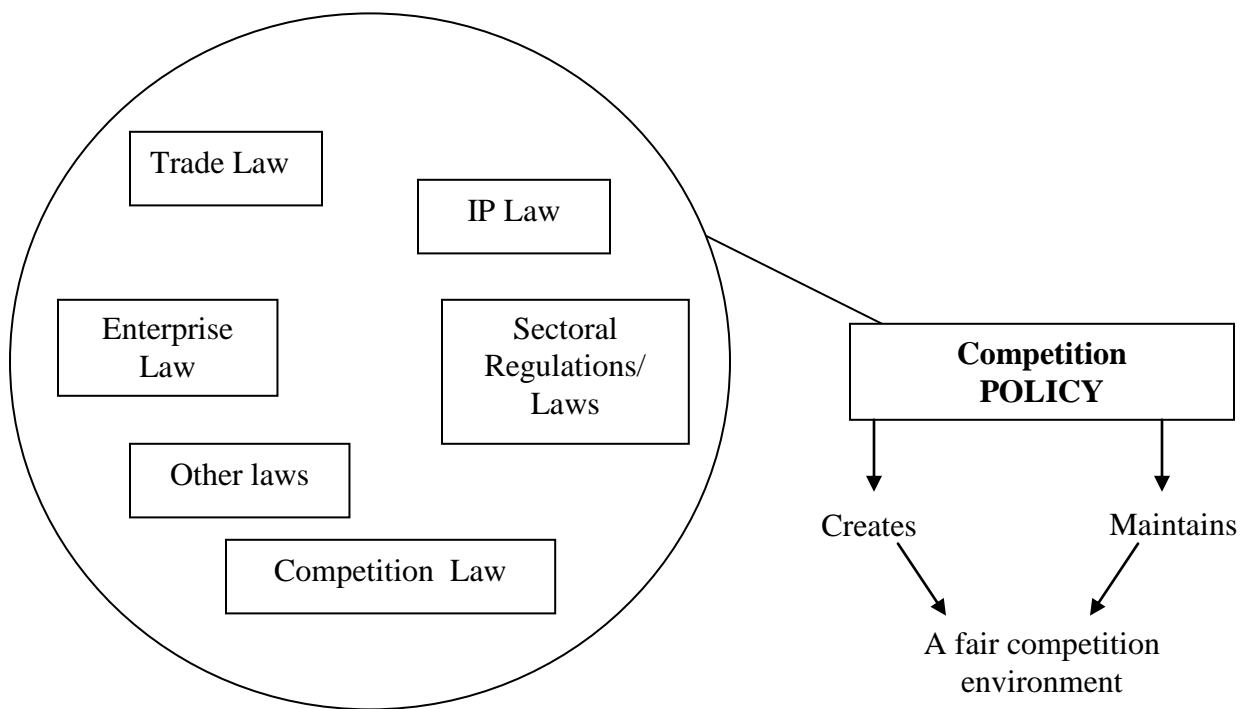
First, according to the Glossary of Industrial Organization Economics and Competition Law from the OECD, “*competition refers to a situation in a market in which firms or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, e.g., profits, sales and/or market share*”.¹

In the modern era, competition is recognized worldwide as being part of any economic activity as it gives impetus for growth, promotes production, increases efficiency and makes socio-economic relations healthy. As in other sectors and from the viewpoint of constructing a legal corridor for implementing competition in reality, laws defining competition are of great importance to the functioning of a modern economy.

¹ Glossary of Industrial Organization Economics and Competition Law, compiled by R.S.Khemani and D.M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, 1993.

Second, “National competition law can be defined as the set of rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or to the abuse of a dominant position”.² Thus, competition policy disciplines constrain both private and government actions, whereas antitrust [competition] rules pertain to the behavior of private entities (firms).³

Finally, and overall, competition policy is therefore “the set of policies and laws which ensure that competition in the marketplace is not restricted in such a way as to reduce economic welfare”.⁴ Obviously then, competition policy has a much broader domain⁵ and competition law is one component of that bigger “circle”.



While sectorial (or industrial) regulations/laws help to create competition among businesses operating in the entire economy, competition law contributes to maintain competition in the entire market. This shows high interaction between competition law and other regulatory laws as well as the significant role of competition law in a market economy. To some extent,

² Bernard Hoekman and Peter Holmes (1999). Competition Policy, Developing Countries and the WTO. *The World Economy*. 22 (6), 875–893, p.876.

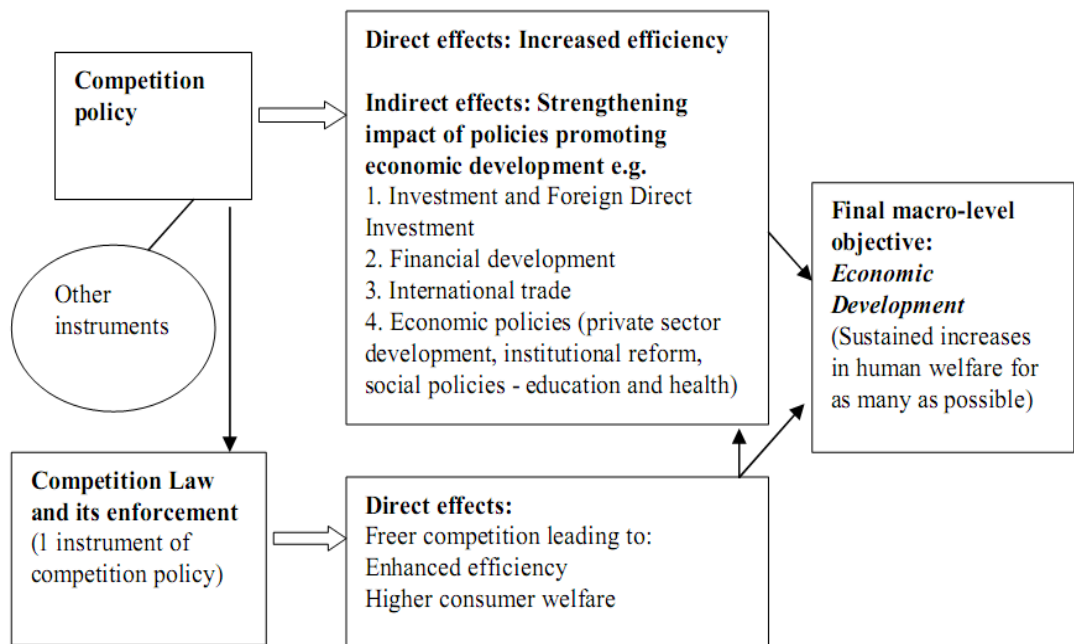
³ Bernard Hoekman, Petros C. Mavroidis (2002). Economic Development, Competition Policy, and the World Trade Organization. World Bank Policy Research Working Paper 2917. p4.

⁴ Massimo Motta (2004). Competition Policy Theory and Practice. New York. Cambridge University Press. 12th printing 2009. p30.

⁵ Bernard Hoekman and Peter Holmes (1999). Competition Policy, Developing Countries and the WTO. *The World Economy*. 22 (6), 875–893. p876.

regulatory laws are necessary conditions and competition law is the sufficient condition for building and preserving a sound competition policy.

The chart below sets out the relationship between competition law, competition policy and economic development. The close linkage once again confirms the fundamental and important role of competition law in the overall picture of economic development via its direct effects and indirect effects witnessed through the harmonization and interaction of other sectorial regulations.



Source: UNCTAD Secretariat (2010). “The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy”. Sixth United Nations Conference to Review all aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. p12.

After nearly ten years of promulgating the VCL, the law has exhibited a lot of loopholes creating obstacles to the investigating agency and the case handling council. While this is an area of further study, this thesis will not focus on this aspect of the VCL. Instead, the scope of study is restricted to the story of the Competition Law Project,⁶ which was responsible for

⁶ In Vietnam, before any law is finally adopted by the National Assembly, it is often called a [specific name] law project. This refers to a long time period of “producing” a law since the first day when the host Ministry/State agency submits the official letter to the Government about the plan to draft and issue a law (this letter covers a lot of explanation but focuses on the necessity of enacting the law, the tentative structure of the law) to the drafting process, launching to drafted versions to multi stakeholders for comments and contribution, submitting the final draft to the National Assembly for adoption.

drafting the law, dating back to early 2000s, and to analyzing the major internal and external drivers of that process.

The thesis employs an analytical, comparative synthetic approach to assess data, information and practices. The thesis will be structured into three chapters. The first one will review the literature on analyzing the factors accounting for adoption of competition law. Chapter two will spend one part on the background of economic situation and changes in Vietnamese economic policies from 1986 to 2000 to tease out the domestic incentives leading to the Competition Law Project. The other part of this chapter will focus on the evolution of competition law in the world and the region and pick several breakthrough events including Vietnam entering ASEAN, APEC and application for WTO membership as well as conclusion of the Vietnam-US Bilateral Trade Agreement to assess how external factors drove the adoption of the VCL (2004). The final chapter puts forward a comparative and accumulative evaluation of the divergence and convergence between the domestic and external impacts on the enactment of the VCL (2004) in order to test whether harmonization worked. The conclusion will restate the overall picture of how the VCL (2004) was enacted in Vietnam and summarize the finding on how internal and external factors interacted in the establishment of competition policy in Vietnam.

CHAPTER I

LITERATURE REVIEW

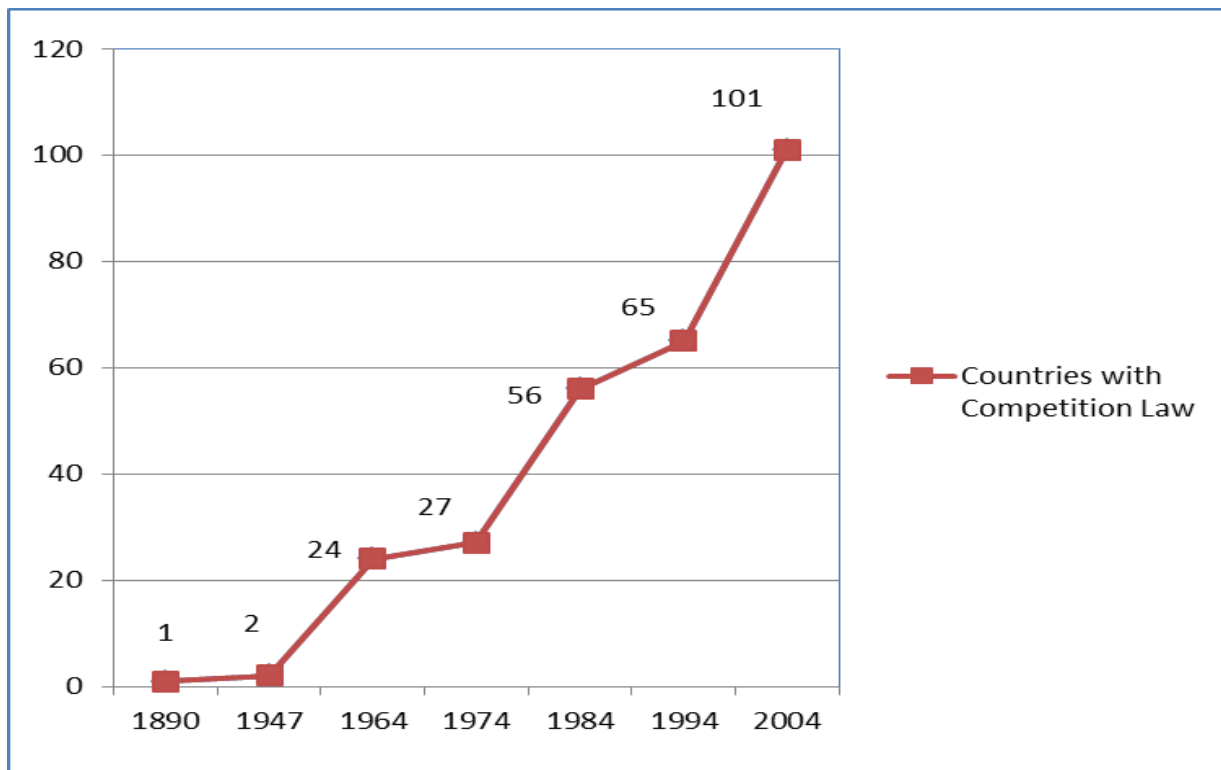
I. Factors influencing the enactment of international competition law

There is little research on the factors affecting the enactment of a Competition Law in developing countries. Competition issues and Competition Law itself have been proliferating in the world since the 1980s. The current literature on enacting a competition act in developing countries however remains largely understudied partly due to the fact that prior to 1980, Antitrust Law was mostly constructed and implemented in developed countries. These countries were then facing the enormous wave of economic globalization and world trade liberalization. As part of this wave, developing countries tended to learn from the predecessors when looking for legislation to regulate competition in domestic activities. They did so to assure the efficient operation of the market and to preserve a fair competition environment for all businesses within their territories. However, from this starting point competition was predominantly seen as a domestic story. Following this, multinational companies and cross-border missions (cartels, mergers, etc) pushed competition to become a multinational issue. These dual forces have meant that not only enforcement of a competition law can be extremely tough after adoption but that even getting to the point of having a competition law is a real challenge. Promulgation of comprehensive law must therefore account for both the internal and external influences and interests. This chapter reviews the literature on the factors accounting for the adoption of competition law from the perspective of developing countries.

Edwards (1967) conducted a comprehensive research on “Control of Cartels and Monopolies: An International Comparison” which digs down into the adoption and practice of competition laws over the period 1945-1964. During that period, there were only 24 countries “engaged seriously in efforts to control restrictive practices by law” and 3 more countries passed competition laws up to 1973.⁷ More recently, a number of journal articles, reports and conferences on the development of competition laws have studied specific regions and some selected economies.

⁷ Edwards (1967) cited in Palim, Mark R A (1998). The worldwide growth of competition law: An empirical analysis. *Antitrust Bulletin*; Spring 1998; 43, 1. p107.

**Chart 1: Increase in the number of countries with Competition Law around the world
prior 2004**



Source: own calculation from data available at Palim (1998) & Kronthaler and Stephan (2007)

The majority of this research was conducted by the OECD, UNCTAD and the EU and published as legal bulletins or introduced as working papers. This is to say that by the late 1990s, the literature on all relevant topics on competition law was modest and scattered in the absence of comprehensive and in-depth research. Among those, Palim (1998) was one of the only using econometric methods (in other words, using quantitative studies of economic variables) in addition to other studies providing information about factors affecting the decisions involved in constructing a competition law.⁸

According to Palim (1998), the most common [classic] explanations for a country to initiate the competition law project at that time included three hypotheses: (i) economic reform; (ii) political liberalization and (iii) level of development. Transferring from direct management of the economy to the increasing reliance on the market was the most cited reason for the growth

⁸ Kronthaler Franz; Stephan Johannes (2007). Factors accounting for the enactment of a competition law – an empirical analysis. *Antitrust Bulletin*; Summer; Vol. 52, No.2. pp137-168.

in competition policy and regulation in the world.⁹ In order to test the renewed interest in competition law, Palim employed two approaches to measuring those three variables: (i) using aggregate measures of economic reform and political liberalization; (ii) using variables for individual institutions and events. Consequently, Palim came up with the key factors imbued in economic development and economic reforms as response to the period 1980-1996 (the so-called booming period of competition law).

In the first approach, Palim picked the period of 1980-1995(6) with the dependent variable as competition law; the independent variables as political change, economic change, level of development. The regression supported the conclusion that *“adoption of a competition law is positively and significantly associated with increased economic freedom and with a higher level of development”*.¹⁰ To confirm the result of the test, Palim also picked a sub-period of 1990-1996 for testing to cross check the first regression. The second regression showed the same outcome.

As for Palim’s second approach, the dependent variable was the same while the only independent variable that was the same was economic development. Palim also employed other underlying events and institutional models such as the EU single market, debt crisis,¹¹ and collapse of Soviet Union.¹² The third regression pointed to the same conclusion:

*“There is empirical support for the hypotheses in the literature that the recent interest in competition law is associated with economic development and economic reform, although there is not support for the hypothesis that political liberalization plays a role in the recent resurgence in competition law.”*¹³

Using Palim’s 1998 study, Kronthaler & Stephan (2007) developed the results and expanded the set of hypotheses and used panel data to test more factors accounting for the enactment a competition law. They drew a new finding about factors influencing the decision to enact a competition law. They found that during the period 1991-2000, twenty-seven of a total thirty-eight countries in the world that adopted competition law for the first time were developing

⁹ Palim, Mark R A (1998), p111-2.

¹⁰ Palim, Mark R A (1998), p117.

¹¹ Palim suggested that competition law was one of the microeconomic reforms undertaken following the debt crisis.

¹² The collapse of the Soviet Union resulted in the transition from the central planning economy to a market economy.

¹³ Palim, Mark R A (1998), p125.

ones,¹⁴ and concluded this “suggests that the level of economic development gradually becomes less relevant as a factor”.¹⁵

Kronthaler & Stephand carried out in-depth research on twelve hypotheses determining a country’s decision to enact competition law that can be divided mainly into economic and political aspects. From the perspective of factors decreasing (“minus”) or increasing (“plus”) the likelihood of a decision to enact competition law they found one factor might be supportive in some cases and not in others. A summary of their findings are illustrated below.

Table 1: Factors affecting the enactment of a competition law

(-) factors	(+) factors
Increase in the share of state-dominated economic activity ¹⁶	Level of economic development ¹⁷
Less comprehensive social security system ¹⁸	The size of the economy ¹⁹
The extent of subsidies and state aid ²⁰	Stronger reliance on market forces ²¹
The high level of corruption ²²	Increasing openness to trade ²³
The extent of political intervention in foreign trade ²⁴	<i>Dependency on FDI</i> ²⁵
	Increasing industrialization ²⁶
	<i>Membership in RTAs</i> ²⁷
The role of the international agencies (via technical assistance and/or financial support in the process of legal construction)	

Among the above factors, almost all come from the domestic economic, political and social contexts and development patterns. Only two other factors, including dependency on FDI and

¹⁴ Kronthaler & Stephan (2007), p140.

¹⁵ Ibid, p.143.

¹⁶ Ibid, p.147.

¹⁷ Ibid, p.143.

¹⁸ Ibid, p.149.

¹⁹ Ibid, p.144.

²⁰ Ibid, p.149.

²¹ Ibid, p.145.

²² Ibid, p.149.

²³ Ibid, p.146.

²⁴ Ibid, p.150.

²⁵ Ibid, p.146.

²⁶ Ibid, p.147.

²⁷ Ibid, p.148.

membership in RTAs, can be classified as external driving forces. The last but not least important determinant is the significant role of the international agencies like the IMF and the UNCTAD. Such organizations showed willingness to help developing and transitional countries in various ways. First, support is provided to countries in difficulties on the condition of certain requirements (sometimes including the implementation of a competition law). Second, assistance is provided to countries that wish to enact a competition law.²⁸ It is interesting to find that “*there are some countries whose competition laws have been introduced at the insistence of the IMF*”.²⁹

For example, Indonesia is a typical case of external driving forces prevailing in the decision to draft the antitrust law. Kovacic (1999) found that “*the International Monetary Fund demands a transition economy [Indonesia] swiftly adopt a full-blown competition law as a condition of receiving emergency financial assistance*”.³⁰

A few years later, Raju (2011) ran panel data using economic and political variables to test the motivations for enacting a competition law by adding political inputs (namely three variables, “*the nature of the political system, the rule of law, and the political ideology of the government in power*”³¹) at the same time as keeping almost all economic variables on the basis of re-using and developing the model applied by Palim (1998) and Kronthaler & Stephan (2007) (especially the latter) to cross-check the results gained by the previous researchers.

Besides sharing the viewpoint that “*economic factors may provide one set of necessary conditions*”,³² Raju pointed out that “*political characteristics provide an equally important set of circumstances that influence the enactment and practice of competition laws*”.³³ In the conclusion of his article, Raju further examines two findings from the results of various specifications. Accordingly, democratic and left-leaning governments are more likely to enact

²⁸ Ibid, p.147.

²⁹ David Lewis (2003). The objectives of competition law and policy and the optimal design of a competition agency. Cited from Kronthaler & Stephan (2007), p.147.

³⁰ William E. Kovacic (1999). Capitalism, socialism, and competition policy in Vietnam. 13 *American Bar Association Antitrust* 57. Summer. p.61.

³¹ Raju Parakkal (2011). Political characteristics and competition law enactment: A cross-country empirical analysis. *The Antitrust Bulletin*: Vol. 56, No. 3/Fall. p626.

³² Ibid, p.610.

³³ Ibid, p.626.

competition laws.³⁴ Lastly, “*the results on the rule of law indicate that many countries with less than desirable systems of law have enacted competition laws*”³⁵

Natalya Yacheistova (2000) conducted a very comprehensive study of competition policy in countries in transition which studied the factors accounting for adopting competition legislation in Commonwealth of Independent States (CIS). Yacheistova found the following significant factors: (i) universal principles of competition regulation used around the world; (ii) recommendations of UNCTAD, OECD and other economic organizations; (iii) the task of demonopolizing highly concentrated economies after the regime changes in the early 1990s.³⁶

Among the US pool of experts studying antitrust relevant topics, William E. Kovacic is regarded as the brightest and most experienced (in both theory and practice). Kovacic has conducted “ground-breaking work”³⁷ since 1994 to protect the argument that “context matters in designing....competition law....for developing countries”.³⁸ During the 1990s, Kovacic contributed much to the literature by conducting a number of studies on the pros and cons of enacting a competition law and how to design an appropriate one by harmonizing the domestic context with universal standards.

Kovacic showed great interest in the countries belonging to the third world and picked some countries like Mongolia, Nepal, Zimbabwe, Ukraine and Vietnam for empirical analysis. The results of those studies led readers to feel his strong support for enactment of competition laws in developing countries where actual needs for competition legislation (domestic/internal needs) are intertwined with external pressures. For Kovacic, both internal and external driving forces were important and varied due to differences in awareness of competition policy from country to country.

Eleanor (2007) further enriched the literature on what affects the enactment of competition laws, especially in developing countries. She recommended that formulating their own law is appreciated in developing countries as with any nation but that the benefits of following a

³⁴ Ibid, p.628.

³⁵ Ibid, p.628.

³⁶ Natalya Yacheistova (2000). Competition policy in countries in transition – legal basis and practical experience. UNCTAD/ITCD/CLP/Misc.16. p.46.

³⁷ See Eleanor Fox (2007), *supra* note 2.

³⁸ Eleanor Fox (2007). Economic development, poverty, and antitrust: the other path. *Southwestern Journal of Law and Trade in the Americas*. Vol.13. p102.

blazoned path is not a bad idea and that anchoring new laws in existing jurisprudence promises greater legal certainty and other efficiencies.³⁹

Sengupta and Dube (2008) argue that, “Over the last decade [1998-2008] or so there has been a considerable interest in developing countries for adopting competition laws, either at the behest of external pressures or as a result of internal developments. It can be inferred from an analysis of motivations in most of the cases, adoption of competition policy has been as a result of pressure from outside agencies (bilateral, multilateral, advisers, etc.) rather than internal policy reforms”.⁴⁰ Unfortunately, Sengupta and Dube raise this highly controversial argument without showing any evidence or any basis for further reference. Therefore, this is the basis for the following study to look more closely at what actually happened in the case of Vietnam and to analyze collected information and data to ascertain the impact of internal and external factors, as well as their harmonization, on the enactment of Vietnam’s Competition Law.

Furthermore, in most cases in the current literature, researchers have studied competition policy in general. As introduced previously, competition policy has a much broader coverage than a competition law. As such, there remains a lot of space for studying the enactment of a competition bill (especially in developing countries) to posit which factors are important drivers of building that law before and during the process. Only a good law (i.e, one that contains fundamental regulations on competition related behaviors and provides regulations solving competition issues in the actual market situations, etc) can help to tackle competition issues in reality and stand well in the face of any internal or external pressure.

II. The factors determining the enactment of the Vietnam Competition Law (2004)

Without exception, the literature on the enactment of international competition law views the passing of the VCL (2004) as a breakthrough marking the economic reform thinking in Vietnam (open door to international investment, production and trade) and its strong desire for regional and international economic integration. After it was passed, the VCL received a lot of compliments from domestic academia, policymakers and public administrators as well as international partners and independent experts.

³⁹ Eleanor Fox (2007). Economic development, poverty, and antitrust: the other path. *Southwestern Journal of Law and Trade in the Americas*. Vol.13. p121.

⁴⁰ Rijit Sengupta & Cornelius Dube (2008). Competition policy enforcement experiences from developing countries and implications for investment. OECD Global Forum on International Investment VII. p4.

Surrounding the story of adopting the VCL (2004), a modest number of studies have been carried out by both international experts and domestic academia. Kovacic (1999) argued the necessity of adopting competition legislation in Vietnam came from the stalled context of the Vietnamese economy after a decade of dramatic growth since Doimoi (1986) as well as looking at the wave of widespread promulgation of antitrust laws in more than forty nations seeking to move from central planning to greater reliance on market processes.⁴¹ However, Kovacic did not go into detail about the reasoning behind the enactment of the VCL, merely emphasizing how cautious Vietnam should be (at that time) to look for and follow a suitable approach when enacting competition law.

Likewise, Alice Pham (2006) and Tu Thanh Nguyen (2012) reviewed the initial outcomes of implementing the VCL and made reference briefly to the development of the VCL. In short, both of them attributed the enactment of the VCL to the economic reform movement and to international economic integration.

G. Sivalingam (2006) also talked a little about the motivations for adopting the competition law in Vietnam. Sivalingam argued that Vietnam was different from Thailand and Indonesia, who were under pressure from the IMF, and different again from Singapore, who were highly influenced by the signing of an FTA with the United States. Sivalingam argues, “*in the case of Vietnam it may be both external pressure (the signing of the US-Vietnam BTA) and internal pressure to reform that may explain the early introduction of competition law. Furthermore, Vietnam had just come out of war and it needed to initiate reforms to attract large inflows of FDI.*”⁴²

Mark Furse (2010) also falls among the very few researchers writing about the VCL (2004). His focus drew attention to the loopholes in the contents and the shortcomings in the enforcement of the law by the Competition Administration Agency of Vietnam. His writing spends little time on the impetus towards the introduction of the VCL, but argues the prospect of WTO accession and the influence of the BTA between Vietnam and the US were the driving factors. Furse also

⁴¹ William E. Kovacic (1999). Capitalism, socialism, and competition policy in Vietnam. 13 *American Bar Association Antitrust* 57. Summer. p57..

⁴²G. Sivalingam (2006). Competition policy and law in ASEAN. 6th Global Conference on Business & Economics, Gutman Conference Center, USA.

noted the key incentive coming from the liberalization of the economy as demonstrated since Doimoi.⁴³

The most recent comprehensive and in-depth research on the VCL has been done by Vinh Thanh Le in his Ph.D thesis. Vinh (2012) pointed out several interesting and meaningful findings related to the promulgation of the VCL (2004). Vinh “*explored how Western competition law ideas have been interpreted, adapted and implemented in Vietnam*”⁴⁴ and concluded that, “*imported competition ideas have been interpreted differently by different groups of state actors*”.⁴⁵ Vinh’s study therefore provides a logical starting point for this work.

Conclusion

In conclusion, facing such modest literature on the factors affecting the decision to enact a competition law around the world with focus on developing countries and even less literature on why and how the Vietnam Competition Law was adopted in 2004, there is a paucity of information, data and research findings. At the same time, the current VCL has faced a great deal of commentary and urgency in proposed revision to the law over the past decade. As such, this study identifies how internal and external variables have influenced the enactment of the VCL (2004). This provides an interesting case study of why competition law is enacted in developing countries and illuminates the dynamic relationship between internal and external drivers. Moreover, by understanding how the VCL came into being and what factors shaped its contents, scholars and policymakers will be in a stronger position to understand where and how revision to the law can be made.

It is commonly and unanimously recognized that economic and political incentives play a significant role when determining the decision to construct, implement and approve competition legislation. Among those incentives, some come from the national context itself and others take root from external pressures and interests. There is little understanding of which factors are more or less prevailing. The following chapters show how in the case of Vietnam both internal and external factors played a role and perhaps more importantly how these factors were

⁴³ Mark Furse (2010). Competition law in Vietnam: a critique. *World Competition*: Vol. 33, No. 1. p165.

⁴⁴ Vinh Thanh Le (2012). Ph.D Thesis “Competition law transfers from an interpretive perspective”. Monash University, Australia. p vi.

⁴⁵ Ibid, p vi.

complimentary and harmonized in a way that created a competition law that took effect as a legal tool for preserving basic competition principles in the market. The reason for looking at inside and outside determinants lies in the fact that the provisions of any law and the implementing mechanism are always best reflected in the highest direction of that law. Revision to the law cannot simply be removal of problematic articles or input of new articles to meet the reality of implementation. By reviewing the factors contributing to the enactment of the VCL, including both internal and external factors, a basis is created for conducting a regulatory impact assessment or other types of studies that are required prior to amending the law.

The outcomes and findings of previous research, as shown in the above review, are also important for identifying the internal and external factors influencing the adoption of VCL (2004) and evaluating the harmonization of those two sources of impact. Over the next two chapters, the thesis will show how internal and external driving forces have shaped the passing of the VCL in December 2004. Chapter two looks separately at both internal and external factors. Chapter three brings these factors together and shows how they were harmonized into the writing of the competition law.

CHAPTER II

THE INTERNAL AND EXTERNAL FORCES DRIVING THE ENACTMENT OF VIETNAM COMPETITION LAW (2004)

I. The domestic lead-up to the Competition Law Project (1986-2000)

1.1 Political backdrop

Party Congressional Resolutions VI, VII, VIII indicating the strategic direction for the market economy

The Communist Party of Vietnam and the Vietnamese Government have institutionalized and developed a reformist stance in consecutive Party Congressional Sessions and official documents. Building and operating a ‘socialist market-oriented economy’⁴⁶ has been a broad policy goal that has been continuously renewed since the sixth National Party Congress (1986).

At the very first Tenure⁴⁷ of Doimoi (understood as renovation or reform) in 1986, the concept of a market economy was not brought in at all. Instead, strong emphasis was put on creating ‘new mechanisms’ in the economy. *“The direction for reforming the economic management mechanism could be confirmed as the elimination of centralization, bureaucracy, subsidy and establishment of a new mechanism that is in conformity with objective rules and the development level of the [national] economy”*.⁴⁸ Nevertheless, this policy goal suggested the economy would transition sooner or later as removing centralization, bureaucracy and subsidies would help the economy move closer to the goal of freeing up the market.

Following this, Party Congressional Resolution VII (1991) concluded, *“The mechanism of operating the multi-sectorial commodity economy following socialist orientation is the market*

⁴⁶ “Socialist market-oriented economy” (in Vietnamese: nền kinh tế thị trường định hướng xã hội chủ nghĩa) is a multi sector commodity economy operating under the market mechanism with State intervention following the socialist orientation. This is unique because no other country in the world employs the exact same phrase, though China has a very similar phrase, the “socialist market economy”. The current Party General Secretary Nguyen Phu Trong states “The socialist-oriented market economy is a new economic model in the period of transition to socialism. Market economy can be translated as the ‘universality’ while the socialist-oriented market economy is the ‘specificity’ of Vietnam, as it conforms to the country’s specific conditions and characteristics.” Available at “Socialist-oriented market economy: concept and development solution” on <http://vietnamembassy-usa.org/vi/node/2861>

⁴⁷ “Tenure” is a short call of the “National Party Congress”

⁴⁸ Ngo Quang Minh (2011). The process of reform in the Party’s thinking about the market economy. Communist Party of Vietnam Online Newspaper. (Quá trình đổi mới nhận thức của Đảng về kinh tế thị trường. http://123.30.190.43:8080/tiengviet/tulieuvankien/tulieuvedang/details.asp?topic=168&subtopic=463&leader_topic=981&id=BT29121136913

mechanism under the monitoring of the State".⁴⁹ This was a highly significant conclusion. At this early stage, the Party recognized the commodity economy and the market mechanism, but only as the operational mechanism of the economy not as the actual development of a market economy. As a result of the 7th Tenure, the market was utilized under the scope of a planning commodity market economy. This was a significant shift nonetheless as prior to 1986, the concept of market had been totally boycotted and was non-existent in any statement or document. Recognition of the market, even in a limited form, was a progressive step in the reform of Party and State economic thinking.

Up until the 8th Tenure (1996), the Party mentioned the linkage between political and economic reforms while stressing that in the course of promoting industrialization, modernization and developing the multi sectorial economy, it is necessary to establish and operate the market mechanism monitored by the State with socialist orientation at the same time.⁵⁰ The 1996 Resolution also indicated that market mechanism proved to have a lot of advantages as improving socio-economic development in a positive manner, therefore, market mechanism was not in contradiction with, but in conformity with the national development with socialist orientation.⁵¹

The strategic direction of the development of the economy became more and more clearly expressed and was increasingly accepted and promoted as being attached to the market mechanism. The role, necessity and the impact of the market was gradually recognized by the Party and the State, reflecting a major "transition" in economic development vision and concepts.

In 2001 the Socio-economic Development Strategy for the period 2001-2010 was endorsed by the Ninth National Congress of the Communist Party of Vietnam and the National Assembly. This important document concluded there is a need to *"establish in a synchronized manner and continue developing and completing different kinds of market in parallel with the formation of a legal and institutional framework for the market to operate dynamically, efficiently, and orderly in a competitive, open, and transparent environment in which anti-competitive practices shall*

⁴⁹ Communist Party of Vietnam, Party Congressional Resolution passing "The Strategy for Stability and Socio-Economic Development till 2010" dated 27 June 1991. (Nghị quyết Đại hội đại biểu toàn quốc lần VII của Đảng: Thông qua "Chiến lược ổn định và phát triển kinh tế - xã hội đến năm 2000, ngày 27-6-1991)

⁵⁰ Ngo Quang Minh (2011).

⁵¹ Ngo Quang Minh (2011).

be controlled and prevented".⁵² This was the first official use of the phrase "socialist-oriented market economy" in the Party Congressional Resolution as is widely considered in Vietnam as the comprehensive modeling of the national economy on the way toward a socialist society.⁵³

In sum, the approach to the market economy by the top leaders of Vietnam has been progressively changed and revised to meet the actual situation and domestic needs in the economy. Based on the actual changes evident in the practice of operating the economy, from a highly centralized planning model to utilizing the market mechanism, Vietnam has witnessed major "evolution" in terms of politico-economic thinking. Recognition of the market mechanism in multi sectorial economic activities has marked the basic but significant foundation for other progress in the course of operating the market economy.

The 1992 Constitution and the amended Constitution of 2001

Though general as the 1992 Constitution (amended in 2001) might be, it does detail the economic system in Chapter II. It states, *"The economic sectors constitute important components of the socialist-oriented market economy. Individuals and organizations from different economic sectors may conduct production and business in industries and trades permitted by law; may jointly carry out long term development and cooperation and shall be equal and shall compete in accordance with the law"*⁵⁴

Specification of the economic system in the Constitution was very meaningful as it laid down a concrete background for overall economic development from that point on. Official indication of the socialist market-oriented economy once again affirmed the consistency of the Party and the National Assembly in the direction of economic development. It was also a bold

⁵² Communist Party of Vietnam, The Strategy for Socio-Economic Development (2001-2010): Report Presented by the Central Committee (8th Tenure) to the 9th Party Congress, cited from Tu Thanh Nguyen (2012), Competition law in Vietnam: a paper or young tiger?, The Antitrust Bulletin: Vol.57, No. 3/Fall 2012, 409-447, p414.

⁵³ On the surface, it is not easy to explain why the official usage of that phrase was so much important and meaningful especially for anyone who is not familiar with the political situation of Vietnam. In fact, before Doimoi, the model of Vietnamese economy was centralized and planning. This reflects exactly the nature of socialism that Vietnam had followed. Then the awkward model showed too many shortcomings and problems, Vietnam gradually turned into a new stage of market economy. However, the overall political umbrella of Vietnam has been still "socialism", so the phrase "socialist market-oriented" was used to differentiate Vietnam from other capitalist economy. More specifically, Vietnam doesn't want to follow the capitalism totally, it still combines the market economy (the "product" of capitalism) with socialism in its political economic strategy.

⁵⁴ Article 16, 1992 Constitution (amended 2001), available at the website <http://www.vietnamlaws.com/freelaws/Constitution92%28aa01%29.pdf>

confirmation of equality and competition for the various economic actors, both state and non-state, across the national economy.

While the Party Congressional Resolution and relevant documents played the role as the “lodestar” for implementing Party and State directives and policies, the Constitution also legalized and institutionalized general viewpoints on key development areas throughout the entire country. Both these official materials granted a very strong backdrop for high level political will to start to build a market economy in Vietnam. Although the process of realizing political reforms in practice required a long-term struggle with much effort contributed by many actors, the political backdrop was comprehensive and appropriate enough in detailing the next steps in operating the market economy (following the socialist orientation).

1.2 Economic backdrop

Doimoi policy as a milestone turning Vietnam to a new model of development

Before 1986, Vietnam followed the model of a centrally planned economy with robust intervention of the “State Hand” in all economic activities. It is not too difficult to imagine how underdeveloped and weak the Vietnamese economy was as a legacy of the national struggles in the two wars from 1945 to 1975. As a consequence, all the domestic production and business activities were conducted in a monopolistic manner where the concept of competition was deemed too “luxurious”.

After gaining national independence and unification, the entire economy was facing many difficulties and obsolescent modes of production. According to the statistics of the Ministry of Industry and Trade, during the period 1975-1985, the country witnessed stagnating import-export activities and chronic trade deficits. The reasons for this poor economic performance were: (i) imports and exports were conducted through the central planning mechanism; (ii) a state monopoly was deployed in foreign trade and the target markets were mostly other socialist countries. Over the entire country, there was only around 30 state owned companies involved in import-export activities, with 70 percent of the total turnover coming from sectors still using Rubles.⁵⁵

⁵⁵ History of development in the period 1975-1985 (Lịch sử phát triển giai đoạn 1975-1985), available at the website of Ministry of Industry and Trade <http://www.moit.gov.vn/vn/Pages/lichsuphattrien.aspx?IDNews=540>

It was characteristic of Vietnam at that time to run its economy through planning and administrative ordinances/orders. Hence, when the economy lagged behind and showed many shortcomings, it made the top leaders seek ways out and come up with new ideas, new measures and new strategies. Coupled with the economic drawbacks and so-called ‘failure’, the political and social models of the time were no longer appropriate. A comprehensive reform program was required.

The ‘Doimoi’ policy was brought into life in 1986 as specified precisely in Party Congressional Resolution VI. Vietnam started to reform step-by-step in three key ‘battles’ including in thinking, economics and politics. Most striking among the comprehensive reforms was the economic reform program. This could be summarized in a few words, ‘market oriented, multi-sector, regional and global integration’.

*Vietnam embarked on Doi Moi policy in 1986 with three main pillars: (i) to shift from a centrally planned economy to a market- oriented one; (ii) to develop a multi-sector economy in which the private sector plays an increasingly important role; and (iii) to actively and effectively integrate into regional and global economy in accordance with Vietnam’s situation.*⁵⁶

Certainly, such big ambitions could not be realized and implemented overnight. Time was the best answer to the real efforts of the Vietnamese Government in conducting a comprehensive reform program with the core focus on economic reform. Because economic activities are the “grass root” of any society’s development, these efforts have had a significant impact on Vietnam’s development.

Even though it was not precisely indicated in any official document the reform program implied that the “*market delivers better outcomes than the state planning; and central to the idea of a market is the process of competition*”.⁵⁷ In general, the very basic benefits of competition can

⁵⁶ Economy of Vietnam, available at the website <http://vietnamconsulateinhouston.org/vi/economy-and-tourism/economy> , accessed on June 4, 2013

⁵⁷ Richard Whish and David Balley (2012). Competition Law. Seventh edition. New York. Oxford University Press. p3-4.

be listed as, “*lower prices, better products, wide choice and greater efficiency than would be obtained under competition of monopoly*”.⁵⁸

Once Vietnam set the goal of building a market-oriented economy through Doimoi, they had no way but to “import” competition legislation into the legal system at the appropriate time. But in an overall picture, Doimoi laid the very first foundation for coming up with the ideas on and developing the Competition Law Project in the following years. Without Doimoi, scholars and policymakers would not have been in a position to consider and to import competition policy from abroad.

Weakness and low efficiency of the economy as a strong incentive for building a legal framework on competition

Before Doimoi, the national economy was in stagnation due to many reasons, including the poor performance of State-Owned Enterprises (SOE). Almost the entire economy had been made up of this single type of economic activity. For such a long time, operation of SOEs followed a familiar pattern: SOEs run their business; if they made a loss the State would make up for that loss; if they made a profit the State would take the profit. Under these circumstances, economic efficiency was low and State intervention was responsible for the failure or success of business activities in all sectors across the economy.

*The national economy [was] regulated by the State mainly through the legal system, macro-economic tools and rarely through administrative measures which are not based on economic efficiency.*⁵⁹

Tu (2001) describes how the Government managed the activities of enterprises via the mechanism of ‘ask and permit’ (cơ chế xin cho). This was a national problem as it distorted natural competition among enterprises especially among public and private ones. It also led to members of those SOEs having no motivation and passion for work and dedication. They had no incentive to up-skill, improve their education or training, or to be critical and creative in their daily work. Too much intervention by the State in all economic activities had led to weakness and very low efficiency in the economy and especially in the economic activities of SOEs.

⁵⁸ Richard Whish and David Balley (2012). Competition Law. Seventh edition. New York. Oxford University Press. p4.

⁵⁹ Nguyen Thanh Tu (2001). Vietnam's competition law and policy development in the process of integration into the world economy.

According to Trinh Anh Tuan (2013), before the VCL (2004) came into force, there was legislation such as the Ordinance on Price, the Ordinance on Telecommunications, the Law on Credit Institutions, Commercial Law, Electricity Law, etc that provided regulations to support anticompetitive practices. However, implementation of this type of legislation was not really effective, partly due to a lack of a complete and consistent legal framework, lack of state management competency on competition and monopoly control, and lack of sanctions.⁶⁰

For a long time (even since 1994 when the Prime Minister issued Decision No.90/TTg on the continuous arrangement of State Corporations),⁶¹ State Corporations have held the role of national champions in international competition resulting in their broad coverage restricting competition between enterprises in public and private sectors.⁶²

In a nutshell, because competition has not been favored or facilitated in business activities of enterprises in the market, the economy has naturally functioned with low efficiency and contained a great many weaknesses. Competition itself is not a multifunctional key to this large “problem” but it has become a bridge to connect all sectors of the economy via the instrument of competition law as a legal framework to force those sectors to work under the mechanism of competition. In fact, competition law works best when in parallel with a package of regulatory laws. Regulatory laws on their own are not adequate for the purpose of maintaining competition in the market and creating competitiveness in the economy.

Right from the beginning of the Doimoi era, the State paid more attention to the macro concept of competitiveness of the nation or the economy because at that time they did not understand well the nature of competition of business activities. From then on ‘competition’ (in Vietnamese “cạnh tranh”) became something negative as people began to understand it as a “fight against each other”. People looked mostly at the bad side of the word without anticipating that competition would become the impetus for economic growth and a key element of the market-oriented economy. It took time to increase the Government’s awareness of the role of

⁶⁰ Trinh Anh Tuan (2013), Developments in Vietnamese Competition Law and Policy, available at the website <https://www.competitionpolicyinternational.com/developments-in-vietnamese-competition-law-and-policy/>

⁶¹ Decision by the Prime Minister on the continuous arrangement of State Corporations (Quyết định của Thủ tướng Chính phủ về việc tiếp tục sắp xếp doanh nghiệp Nhà nước, available at the website http://www.moj.gov.vn/vbpq/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10396)

⁶² Tran Anh Son, The role of competition policy in economic development of Vietnam, available at the website http://www.jftc.go.jp/eacpf/06/6_02_15.pdf

competition in the linkage to economic development, trade liberalization and the goal of building a market economy.

The table below provides more insight into the economic freedom of Vietnam in the period 1995-2003. The overall score indicates the economic freedom index of an economy. The numbers represent the following: free is classified as a score of 10.99 or less; mostly free is a score of 20.0 to 20.99; mostly unfree is a score of 30.0 to 30.99; and, repressed is a score of 40 or higher. In terms of Vietnam's record, for most of the period from 1995 to 2003 Vietnam's economy has been repressed with low levels of business freedom and trade freedom. This once again reinforced for policymakers of the time that Vietnam needed a competition legal framework in the immediate term and a comprehensive competition policy in the long run to support the effective operation of the market and the economy.

Table 2: The Economic Freedom Index⁶³ of Vietnam in selected year

Rule of law				Limited Government		Regulatory efficiency			Open market		
Index year	Overall score	Property rights	Freedom from corruption	Fiscal freedom	Govt. spending	Business freedom	Labor freedom	Monetary freedom	Trade freedom	Investment freedom	Financial freedom
1995	41.7	10	10	68.8	87.1	40	N/A	55.2	44.6	30	30
1996	40.2	10	10	54.8	79.1	40	N/A	63.3	44.6	30	30
1997	38.6	10	10	42.8	78.9	40	N/A	61.0	44.6	30	30
1998	40.4	10	10	43.4	83	40	N/A	66.2	51	30	30
1999	42.7	10	28	43	81.4	40	N/A	70.8	51	30	30
2000	43.7	10	25	53.9	84.1	40	N/A	69.3	51	30	30
2001	44.3	10	26	54.1	86.8	40	N/A	71.1	51	30	30
2002	45.6	10	25	54.1	90.3	40	N/A	80.4	51	30	30
2003	46.2	10	26	62.5	83	40	N/A	86.5	47.6	30	30

Source: Heritage Foundation

Increasing awareness of competition in the interactive relationship with economic growth, construction of the market economy and trade liberalization

⁶³ Economist Adam Smith formed the theories about liberty, prosperity and economic freedom in his work "The Wealth of Nations", in 1776. The Wall Street Journal and The Heritage Foundation, Washington's preeminent think tank, have tracked the march of economic freedom around the world with the influential Index of Economic Freedom. Since 1995, the Index has brought Smith's theories to life by creating 10 benchmarks that gauge the economic success of 185 countries around the world. More information is available at the website <http://www.heritage.org/index/ranking>

Correlation between competition and economic growth

Though Doimoi was ground-breaking in the development of Vietnam, it took many years until after 1991, the year of the collapse of the Soviet Union, the leader of communist countries, for people in Vietnam to come round to its significance and “wake up” to its real meaning.

There are many explanations for why it took time for Doimoi, and support for competition in particular, to be appreciated. One explanation from Alexander Vuving (2005) is that the foreign policy of Vietnam in the post Cold War years, included two grand strategies with differing elements:

Table 3: The two Grand Strategies of Vietnam Foreign Policy after the Cold War

	<i>Anti-imperialism</i>	<i>Modernization</i>
<i>Worldview</i>	<ul style="list-style-type: none"> Fundamental conflict between socialism and imperialism led by the United States Transition from capitalism to socialism Primacy of class (ideology) interest 	<ul style="list-style-type: none"> Multipolarity Interdependence - Globalization - Regional integration Scientific-technological revolution Primacy of national interest
<i>Self-perception</i>	<ul style="list-style-type: none"> Regime > nation 	<ul style="list-style-type: none"> Nation > regime
<i>Ambition</i>	<ul style="list-style-type: none"> Communist victory on a global scale 	<ul style="list-style-type: none"> A rich, strong, democratic, and civilized nation
<i>Immediate</i>	<ul style="list-style-type: none"> Regime protection 	<ul style="list-style-type: none"> Industrialization
<i>Foreign policy orientation</i>	<ul style="list-style-type: none"> Alliance with China Opposition to the United States 	<ul style="list-style-type: none"> Close ties with the West Integration to Asia-Pacific and ASEAN Strategic partnership with the great powers

*Source: Alexander Vuving (2005). The shaping of Foreign Policy Vietnamese Grand Strategy after the Cold War.*⁶⁴

As can be seen in the table above, the two elements of Vietnamese foreign policy and the worldview inherent in each have very different elements. In the post Cold War years it has taken some time for Doimoi to create an environment where ideas and policies such as

⁶⁴ Alexander Vuving (2005). The shaping of Foreign Policy Vietnamese Grand Strategy after the Cold War. p148.

competition are promoted. This required a shift in grand strategy and focus from anti-imperialism to modernization to allow competition to emerge as a key political idea.

As indicated in a study conducted by the Office of Fair Trading of the UK, competition is “a key factor in driving growth”. Firstly, competition creates a “within-firm” effect when placing pressure on the managers of firms to become more efficient.⁶⁵ Secondly, competition causes an “across-firm” effect as the higher productivity firms can increase their market share at the expense of the less productive thanks to competition.⁶⁶ In other words, market entry and exit of firms becomes a cycle. Entry of one firm is paid by the exit of another firm under the pressure of competition. Thirdly, competition drives firms to innovate.⁶⁷ Competition among firms boosts innovation and is an engine for growth and productivity. This might be the most important characteristic of competition from the perspective of economic growth. It is therefore understandable that the absence of competition, subsidy and protectionism would push the economic activities in a “silent mode” because firms would find no need to come up with new ideas about product quality or diversity. They would still be “safe” if they make a loss. In this case, the Government is always there to give a hand and intervene when necessary to save its firms. Without innovation geared by competition, all production activities would stand still, which would lead to a stagnant economy.

The new focus on modernization in the post Cold War years created the environment for these ideas to take hold. However, it is not easy for policy makers and practitioners of any economy to remove subsidies for economic activities entirely. In practice, there is no perfect competition in any economy. Vietnamese policymakers therefore welcomed competition in almost all sectors but in the case of certain essential industries, the Government would not be an outsider. Overall however, policymakers came to view competition as a central element of the transitional economy and a prerequisite condition/evidence of a market oriented economy. This shift is evident in the economic development in Vietnam in the period after Doimoi in 1986.

Interaction between competition and trade liberalization

Competition policy and regulation are a concrete basis for creating a fair and healthy domestic market for the following reasons: *Firstly*, trade liberalization promotes competition from

⁶⁵ Office of Fair Trading (2011). Competition and Growth. p7.

⁶⁶ Office of Fair Trading (2011). Competition and Growth. p.7.

⁶⁷ Office of Fair Trading (2011). Competition and Growth. p. 8.

foreign commodities and services and at the same time, domestic ones face less and less subsidies from the Government (because of privileged policies, tariff policies, etc applied for foreign enterprises). Subsidies are the root of anti-competitive behavior whether purposely or accidentally such as through business agreements, abuse of dominant position/monopoly on the market that causes damage to a fair competition environment among businesses. Those anti-competitive acts will increase the risks to the establishment of a free market. Therefore, anticipated benefits from trade liberalization might be invalid if competition law and policy cannot cover well the whole economy or encounter limited effectiveness in enforcement. On the other hand, with the role as the mechanism to establish and protect competition, competition policy helps promote market relations in economic life, forming market self-regulating mechanisms, etc. In other words, competition policy should be considered as a “tool” in protection of trade liberalization.

Secondly, liberal trade policy and competition policy are not “strange bedfellows”; they are actually “best friends”. A complete system consists of legislation, regulation and implementation commitments towards international agreements in the process of opening a market under a national roadmap. At this point, liberal trade policy provides a basis for establishing a healthy competition environment and competition policy helps maintain the fairness of that environment as well as bringing efficiency for economies involved in the process of trade liberalization.

Competition - a key element of a market economy

In the Report on Competition (circulated for internal use in the Vietnamese Ministry of Trade, 2000), the research team (on the purpose of conducting pre-conditional studies for the Competition Law Project) suggested significant findings related to competition and building a market economy. The followings conclusions in the report show how domestic policymakers had converged on the ideas and arguments related to competition policy as explored above.

First, the report argued that competition is an inevitable output of the market economy and an impetus for economic development. Second, that competition is a significant factor stimulating application of science and technology in production activities. In cases where supply is higher than demand competition among sellers means the one coming up with innovation or better

management/processes that can sell a more quality product at a more competitive price will likely prevail.

Third, the report noted that when supply is lower than demand, markets for the product would become scarce; market price will be pushed higher than average profit. This motivates producers to invest in more production or improve the productivity of the available production bases. This motivation is very meaningful for the development of the entire market and more importantly, it does not come from any administrative order of the Government.

Lastly, the report concluded that due to the pressure and impact of competition, there would be winners and losers in the market but that failing firms are not negative for social welfare as the resources of society move from one producer to another producer who has better and more effective performance. Bankruptcy was not conceptualized as predation or destruction but understood as the removal of a competitor for creativity, and the notion that only efficient companies can survive. This was seen as beneficial for not only technology innovation but also for social welfare.

These findings are extracted from the internal report. It shows the progressive thinking of the supporting team for the drafting of the VCL and is evident of a major strategic shift in the intellectual thinking of the Vietnamese Government. As argued by Kovacic (1999), at the turn of the century, intellectual foundations and social consensus play very important roles in the enactment of a competition law. *“In transition economies, the requisite foundation and social consensus do not emerge spontaneously...The beginnings of the intellectual and social foundations for competition policy are emerging in Vietnam.”*⁶⁸ This shows the importance of domestic drivers of the introduction of competition policy in Vietnam.

Enactment of Competition Law – a reflection of domestic needs for economic development

As a way of bringing Doimoi into real life, the Government started implementing policies on eliminating state budget subsidies (bao cấp). At the same time, competition among businesses emerged and appeared to be increasingly severe, which led the Government to come up with

⁶⁸ Kovacic (1999), p. 58.

remedy measures to “fix” shortcomings in the market. As part of this aim a series of research studies on the competition environment in Vietnam were conducted. The first was from the Research Institute on Market and Pricing Science in 1996, followed by the Central Institute for Economic Management in 2000 and 2002 and the Institute of State and Law in 2001.⁶⁹

From these studies and internal discussion three key factors emerged⁷⁰ and shaped the drafting of the Law:

1. The need for regulating the market economy via a legal system in which Competition Law is a fundamental law

Policymakers agreed there is no competition in a centrally planned economy but competition is the key role in operating a market economy. In other words they decided that for Vietnam to be recognized as a market economy, competition must be prioritized as a major feature.

Totally different from state intervention in business activities before 1986, the 1992 Constitution (which was again amended in 2001) stipulated the multi-sectorial structure of the economy and the desirability of economic sectors competing.⁷¹ This meant that businesses irrespective of ownership model could compete on the market instead of being regulated and intervened by the State as previously.

From this time on, a number of basic laws, such as the Foreign Investment Law (1996), Trade Law (1997) and the Enterprise Law (1999), came into effect to create a proper legal corridor for businesses to “enjoy” competition.

2. The need for controlling monopolies in the context of opening the market for the purpose of international economic integration

⁶⁹ Information about those three institutes are cited from the Report on explaining the Competition Law Project presented by Mr. Truong Dinh Tuyen – Minister of Trade at the Government Meeting dated 28-29 January 2004 (Báo cáo giải trình về dự án Luật cạnh tranh do Bộ trưởng Trương Đình Tuyển trình bày tại phiên họp Chính phủ ngày 28-29/1/2004).

⁷⁰ Those three factors are referred to, cited and translated by the author from the Report on explaining the Competition Law Project presented by Mr. Truong Dinh Tuyen – Minister of Trade at the Government Meeting dated 28-29 January 2004 (Báo cáo giải trình về dự án Luật cạnh tranh do Bộ trưởng Trương Đình Tuyển trình bày tại phiên họp Chính phủ ngày 28-29/1/2004).

⁷¹ See more at Article 15 and 16 of the 1992 Constitution of the Social Republic of Vietnam as amended 25 December 2001, cited from the website <http://www.vietnamlaws.com/freelaws/Constitution92%28aa01%29.pdf>

Policymakers further decided that irrespective of how they are formed or exist, a monopoly creates negative effects in the domestic economy. Monopolies lead to predatory pricing and badly impact consumer welfare. Policymakers decided it would be too ambitious for Vietnam to be expected to let the market operate with no government intervention (i.e., if there was pure competition in all sectors) at that time, so instead, the Government also envisioned that some monopolies would remain and that it would take time to build up a level playing field for all sectors.

As such, these policymakers decided that because anticompetitive and unfair competition acts tended to increase under market conditions and these impacted the initial “positive” effects of competition among businesses, therefore, an umbrella law like a competition law was a good choice and an appropriate instrument for the Government to regulate competition issues in all sectors. Competition law and its sub-law regulations would be a mechanism for maintaining and ruling competition for all players.

Between the late 1990s and early 2000s, joining bilateral and regional free trade agreements became a tendency in economic life globally. Multinational companies increasingly went abroad to look for promising land in developing countries, including Vietnam. In addition, thanks to privilege and favorable conditions to attract foreign investment widely encouraged by the Government, multinational companies were potential competitors to domestic producers and suppliers. Their “globalized vision” posed big threats to domestic enterprises that were disadvantaged in terms of technology, capital and skilled human resources.

The early Vietnamese economy during the initial stage of a long transition availed many opportunities accompanied by threats. Policymakers therefore decided that without a proper legal tool like competition legislation, domestic players stood the risk of losing on their home field.

3. The need for a fair competition environment for the business community

Finally, policymakers recognized the need for a fair competition environment. Even though the 1992 Constitution had stated multi economic sectors existed, were to be equal and should compete, discrimination in treating businesses in different sectors (especially between the private and public sectors) remained a popular challenge.

For example, the Report presented by Minister Tuyen at the Government meeting dated 28-29 January 2004, noted some anonymous examples of anticompetitive behavior. There was direction in X province where it was compulsory to buy cement from local cement companies to use for local construction works. In Y province, the Department of Education ordered schools in their locality to buy ball point pens from local companies.

Such examples were clearly “surrogating” competition and “obvious interference” in the market. Therefore, a major domestic driver of the competition policy was the realization that there were many examples of anticompetitive policies in which production was not promoted and consumption was not fostered.

In summary, this section has shown that there were many domestic drivers of the introduction of competition policy in Vietnam. These include the low effective performance of the economy (due to dominant position of SOEs and too much intervention of the State); the awareness of the concurrent Party and State leaders on the role of competition in the market-oriented economy and the immediate necessity of issuing a legal document on competition to preserve a fair and healthy competition environment for business activities on the market; the readiness and desire for international economic integration. Those factors are interactive and complimentary to each other.

However, the question is whether internal drivers were influential enough to make policy makers come up with the VCL (2004). Actually, if turning back to the history of Vietnamese foreign policy, especially the economic foreign relations during 1990s, there were a series of striking events showcasing the desire of Vietnam to join the international community. This reveals more or less the pressure from outsiders whether in a direct or indirect way. The next section will therefore look at the external factors affecting the decision to endorse the VCL (2004).

II. External driving forces on the Competition Law Project

This section shifts from exploring the domestic drivers of competition policy in Vietnam to the external influences. The section argues that external driving forces had their own weight and impact in triggering the draft and issuance of the VCL (2004). But different from the internal factors which were indicated both directly and indirectly in official documents or statements, the external ones were mostly implied from or evidenced by certain movements of the Government or the political events prior the Competition Law Project commencement. Among external drivers, they can be also categorized into (i) regional or global trends/tendency that drove Vietnam to go on the same track (i.e, to some extent, Vietnam had no way but to follow the general standard of development); (ii) specific political events that created pressure on Vietnam to build up a competition legislation as an important part of the legal system stipulating the activities of various business activities on the market.

2.1 Background of the evolution of Competition Law in the world with particular reference to ASEAN

“It may be the case an approach centered on national antitrust will have a substantial payoff for developing countries in helping them to deal with international “antitrust spillovers”.”⁷²

Table 4: Expansion of Comprehensive Competition Law in East Asia

Establishment Year	Economy	Competition Agency
1947	Japan	JFTC
1980	Korea	KFTC
1991	Chinese Taipei	CFTC
1993	Mongolia	AFCCP
1999	Thailand	OTCC
1999	Indonesia	KPPU
2004	Vietnam	VCAD
2004	Singapore	CCS
2007	China	MOFCOM, NDRC, SAIC

Source: Kazuhiko TAKESHIMA (Chairman, Japan Fair Trade Commission), *Importance of Competition Law & Policy- Japan’s Experience from over 60 years’ Development of the Antimonopoly Act*, 5th East Asia Conference on Competition Law and Policy at the 5th East Asia Conference on Competition Law and Policy on June 29, 2009 in Ulaanbaatar.

⁷² Bernard Hoekman, Petros C. Mavroidis (2002). Economic Development, Competition Policy, and the World Trade Organization. World Bank Policy Research Working Paper 2917. p9.

If we look closer at the proliferation of competition laws in the ASEAN region, Vietnam is one of the early movers and pioneering country in ASEAN. Over a 60-year period, only 9 economies have introduced and implemented competition law. With the exception of Japan, that has a long history of competition enforcement, other economies have only begun to introduce competition policy over the last few decades ago. It is noteworthy that competition policy is spreading in ASEAN and important to explain why Vietnam was one of the early movers.

Table 5: Competition Law Implementation in ASEAN

	Implementation	Year	Details
Brunei	No	-	Sector provisions – Telecommunications Order 2001 National competition law expected by 2015
Cambodia	No	-	Draft law under consideration – Council of Ministers in 2012
Indonesia	Yes	1999	Law No.5 of 1999 Agency: Komisi Pengawas Persaingan Usaha (KPPU, Commission for Supervision of Business Competition)
Lao PDR	No	-	Decree 15/PMO on Trade Competition to prohibit restrictive business practices – enacted in 2004 but not enforced Agency – Trade Competition Commission (Ministry
Malaysia	Yes	2010	Competition Act 2010 Agency: Malaysia Competition Commission (MyCC)
Myanmar	No	-	Article 36(b) of Constitution contains general intention for competition policy National competition law expected by 2015
Philippines	No	-	Competition-related provisions in the 1987 Constitution, Revised Penal Code and New Civil Code. Agency: Office for Competition (DOJ) established in June 2011. Draft legislations under
Singapore	Yes	2005	Competition Act Agency: Competition Commission of Singapore (CCS)
Thailand	Yes	1999	Trade Competition Act B.E.2542 (1999) Agency: Trade Competition Commission
Viet Nam	Yes	2005	Competition Law No.27/2004/QH11 Agencies: Viet Nam Competition Authority (investigation) and Viet Nam Competition Council (adjudication)

Sources: ASEAN (2010b), DOJ website (Philippines)

Source: Cassey LEE, Yoshifumi FUKUNAGA (2013). ASEAN Regional Cooperation on Competition Policy. ERIA discussion paper series. p7.

Dr. Nguyen Minh Chi, Director General of the Legal Department, Ministry of Trade (current Ministry of Industry and Trade) argued in a speech in *Phan Thiet, October 23-24, 2000* that introduced the Competition Law Project, that there are two approaches when building competition law:

- The first approach is of Western Europe and North American countries with long-developed market economies. This is a long-term development from low levels of development to high, from state-governed competition to free market competition and the development of a legal system in Western Europe and North America countries. In these economies competition has been regulated by different and separatist legal documents. In the early period of the market economy, unfair competition practices such as misleading advertisement, business privacy violations, and so on began to be codified in unfair trade practice acts. Regulations to restrict business practices in high-level developed market economies emerged, and included restrictive agreements, abuse of dominant position, merger and acquisition. These were codified by another act – the competition act, antitrust act or antimonopoly act.
- The second approach is of Eastern Europe and Asian countries, developing market economies or economies in transition. When these countries started developing a market economy or changing their economy to market orientation, Western Europe and Northern America economies were already highly developed. Therefore, in order to meet the requirement to develop economically as well as catch up with the globalization trend, Eastern European and Asian countries promulgated competition acts covering both unfair competition practices and restrictive business practices.

This simple distinction shows the relationship between the level of development in a country and the process of international economic integration.

Vietnam is a transitional economy so it now faces the same problems as other transitional economies. In many developed countries, competition acts were enacted only after dozens or even hundreds of years of developing the market economy. However, Vietnam has only been developing a market economy for a short period of time, and therefore the forms and degree of expression of competition rules in fields of trade and services has been very short. The previous section showed how the implementation of market-oriented reforms has created the requirement and desire to implement competition policy. A second track pushing competition policy forward in Vietnam has been the context of regionalization and globalization and the models, standards

and pressures for competition policy from external actors, particularly those in the advanced economies.

2.2 Regionalism and its implications for Vietnam's international integration process

Throughout the history of development and cooperation among countries in the world, a lot of theory has been built up to explain the “spider net” relationship among nation-states. These theories focus on the bilateral, regional and multilateral channels that foster cooperation but more importantly on whether such channels and agreements can solve common obstacles to mutual security, prosperity and so on.

Some argue the world is divided into different regions categorized by political and geographical features and that countries in one region tend to “lean on” each other to cope with similar challenges. While there is much disagreement on a detailed definition of regionalism there is general agreement on a simpler definition:

*Regionalism in International Politics and Economy (IPE) is defined as the condition by which group of nation-states, usually in the same geographical region, agree to cooperate and share responsibility to achieve common goals.*⁷³

Since Haas raised the concept of regionalism (so called Euro-centric regionalism), there has been a lot of debate over the conceptual definitions of “region, regionalism and regionalization”. According to Haas (1958), “*regional cooperation is a vague term covering any interstate activity with less than universal participation designed to meet commonly experienced need*”.⁷⁴ During the 1950s-1960s, other neofunctionalists approached regional cooperation in this way and “*focused mainly on political spillovers to create chains of events whereby regional integration, once started, became a self-powered mechanism*”.⁷⁵ Haas and his contemporary researchers touched upon regionalism as the answer to the phenomenon of

⁷³ David N. Balaam and Michael Veseth (2005). Introduction to International Political Economy. (New Jersey: PearsonPrentice Hall, 2005), p242. cited from Erika (2009), Regionalism in Northeast Asia: Realists view on regionalism in the accession of China, Japan and South Korea to ASEAN+ 3, University of Indonesia, p5.

⁷⁴ Ernst Haas (1958). The Uniting of Europe: political, social and economic forces. Stanford University Press. p16. cited from Erika (2009), Regionalism in Northeast Asia: Realists view on regionalism in the accession of China, Japan and South Korea to ASEAN+ 3, University of Indonesia, p5.

⁷⁵ Richard Baldwin (2011). Sequencing regionalism: Theory, European Practice, and Lessons for Asia. ADB Working Paper Series on Regional Economic Integration. p2.

regionalizing Europe and left out analysis of other regions in the rest of the world. This kind of approach is now considered as the old wave or first generation of regionalism.

The widespread establishment of sub-regional and regional organizations in other corners of the continent paved the way for academia to turn back to regionalism theory later. This is regarded as the new wave or second generation of regionalism.

*“The new regionalism took shape in a multipolar world order and in a context of globalization”.*⁷⁶ This means that in the integration process, core players are not just states any more as non-state actors are also getting involved in this process due to the wave of globalization. Over the past few decades, in economic area, while countries join multilateral trade systems like the WTO, sub-regional or regional organizations still play an important role calling their members to make agreements and implement cooperation mechanisms for regional development.

Though the “super spaghetti bowl” might be used to describe the “overlapping” situation of countries participating in different world and regional organizations/forums, countries appear to be satisfied with this complicated interaction. States can look for and touch upon specific goals from each relationship. Scholars such as Richard Baldwin argue this process can create a “domino effect” whereby regional agreements lead to a propensity to create more regional agreements with more members.

There are some concerns over the emerging establishment of regional organizations and about the possibility of extensive management of a lot of relationships at the same time. However, looking at this phenomenon as a prevailing trend in economic life at the global level, it is apparent that increasingly intensive interdependence among countries, especially countries with the same geographical proximity, push them to move closer together through economic agreements and to promote their common prosperity.

To put it simply, at school you have choices over a wide range of clubs to make friends with whom of similar hobbies and you might join a number of clubs to satisfy (i) your need for harmony with other friends; (ii) your expectation yourself; (iii) your desire to keep up with

⁷⁶ Björn Hettne (2005). Beyond the ‘New’ Regionalism. *New Political Economy*, Vol. 10, No. 4, December 2005. p545.

contemporary trends, etc. Obviously, the student union is big and has wide coverage, it is still not enough for you and clubs offer more chances to get engaged and prove your strength.

Countries in the same geographic area establish a regional organization with a view to maximize their advantages and not to be on the sideline of the playing field. As a matter of fact, any player could foresee a “dark” scenario when there is big gap between domestic and regional development and they have to follow the rules of “give and take”, but most countries have concluded that being regionally integrated brings more good than harm.

To distinguish from regionalization, which “*refers to the more complex processes of forming regions*”,⁷⁷ Björn Hettne (2005) suggested that “*regionalism refers to a tendency and a political commitment to organise the world in terms of regions*”.⁷⁸ Whether being in favor of regionalism or not, countries must admit that it has expanded like wildfire and become an integral part of the economic life of countries, trading companies and transnational corporations.

The assessment above shows why the Vietnamese Government has pursued regionalism and wants to be friends with other countries in the regional and international community. Vietnam has found it necessary to enter into regional or world organizations (whether economic or political ones) to be part of the common wave and tendency of development and interaction. If in the past, Vietnam turned its back to Western countries and received “suspicious eyes” from most ASEAN member countries, since affirming its good will in international integration, Vietnam has moved toward regionalism in line with what has bloomed in ASEAN since the 1990s. The norms and values of competition policy have been nurtured in this process. Below are the stories of Vietnam-ASEAN, Vietnam-APEC, Vietnam-WTO and Vietnam-US written in 1995, 1998, 1995 (till 2007) and 2001 respectively to show how interaction with other countries, combined with domestic reforms, pushed forward the development of competition policy in Vietnam.

⁷⁷ Björn Hettne (2005). Beyond the ‘New’ Regionalism. *New Political Economy*, Vol. 10, No. 4, December 2005. p545.

⁷⁸ Björn Hettne (2005). Beyond the ‘New’ Regionalism. *New Political Economy*, Vol. 10, No. 4, December 2005. p545.

2.3 ASEAN membership of Vietnam

ASEAN was established in 1967 by Indonesia, Malaysia, Philippines, Singapore and Thailand. Nearly 20 years later, Brunei joined the Association in 1984. Vietnam became a member in 1995 followed by Laos and Myanmar in 1997 and then Cambodia in 1999 making up the ASEAN 10.⁷⁹

The ASEAN Free Trade Area (AFTA) came into force on 1 January 1993.⁸⁰ Accordingly, after becoming the official member of ASEAN, Vietnam was under the commitment and obligation to impose average tariff on imports originating from ASEAN countries from 5 to 20% in the period of 2003 and 2006.⁸¹ This commitment expressed the requirement for opening and restructuring the market and the country's desire for international market integration. Of course, there were a lot of challenges and opportunities arising from being an ASEAN member and especially obligations under the framework of the AFTA. In the case of AFTA, Vietnamese companies had to compete with companies from other ASEAN countries. Under these circumstances, if the State did not construct a legal framework to regulate competition in the domestic market (in order to increase productivity and efficiency of domestic production activities), national companies would be in a poor position to survive competition with regional competitors.

At the 9th ASEAN Summit in 2003, the ASEAN Leaders resolved that an ASEAN Community should be established. The resulting ASEAN Community is often known as consisting of 3 pillars: 1) the ASEAN Political-Security Community, 2) the ASEAN Economic Community and 3) the ASEAN Socio-Cultural Community.⁸²

Moreover, the ASEAN Economic Community Blueprint (AEC, 2008) envisaged “a highly competitive economic region”⁸³ as one of the four key characteristics and ASEAN specified action in the field of competition policy> Chief among these actions was to “Endeavour to

⁷⁹ Overview of ASEAN, available at the website <http://www.asean.org/asean/about-asean> (accessed on 29 May 2013)

⁸⁰ Overview of ASEAN (AFTA), available at the website http://www.fta.gov.sg/fta_afta.asp?hl=1

⁸¹ Nguyen Thanh Tu (2001). Vietnam's competition law and policy development in the process of integration into the world economy, available at the website <http://r0.unctad.org/en/subsites/cpolicy/gvaJuly/docs/en12.doc>

⁸² Overview of ASEAN, available at the website <http://www.asean.org/asean/about-asean> (accessed on 29 May 2013)

⁸³ Association of Southeast Asia Nations (2008). Jakarta. ASEAN Economic Community Blueprint. 6p.

introduce competition policy in all ASEAN Member Countries by 2015”.⁸⁴ This meant that there was no direct pressure from ASEAN members to pass a competition bill early. Vietnam fell among one of the few countries in the region that promulgated a Competition Law in the early part of the century.

“ASEAN cooperation (through the implementation of AFTA, ATA, AFAS, infrastructure linkage, development of human resources, etc.) can play an essential role in promoting resource allocation efficiency and economic growth in Vietnam”.⁸⁵ Joining ASEAN revealed to the Vietnamese Government that regional integration was a momentum for Vietnam to find ways to increase the efficiency of the economy. Through this process, competition in the market became a “core” issue. Competition policy was seen as essential for contributing to competitiveness of business operating in the regional market and ultimately a way of promoting the competitiveness of the whole economy in the entire region.

2.4 APEC membership of Vietnam and the Competition Policy and Law Group

In the context of the emergence of regional economic blocs in the world and the increasing interdependence of Asia-Pacific economies,⁸⁶ Asia Pacific Economic Cooperation (APEC) was born in 1989. This organization acts as an open forum for countries in the Pacific Rim to get together and aim at the ultimate goal of boosting economic growth, cooperation, trade and investment in the Asia-Pacific region.⁸⁷

Vietnam gained official membership in 1998 (only 3 years after entering ASEAN) marking a milestone in the process of implementing the foreign policy of openness, multilateralization, diversification and international economic integration.⁸⁸ Through this process Vietnamese policymakers came in contact with groups formulating competition policy in the Pacific Rim.

⁸⁴ Association of Southeast Asia Nations (2008). Jakarta. ASEAN Economic Community Blueprint. 18-19p.

⁸⁵ Vo Tri Thanh (2005). Vietnam’s Trade Liberalization and International Economic Integration, Evolution, Problems, and Challenges. ASEAN Economic Bulletin Vol.22, No.1 (2005), 75-91.

⁸⁶ Vietnam and APEC, available at the website: <http://www.vietnamonline.com/az/vietnam-and-apec.html>

⁸⁷ Vietnam and APEC, available at the website: <http://www.vietnamonline.com/az/vietnam-and-apec.html>

⁸⁸ 10 years after Vietnam entering APEC: it brings practical benefits and upgrades Vietnamese position on the international arena, 2008. (10 năm Việt Nam gia nhập APEC: Đem lại lợi ích thiết thực, nâng cao vị thế Việt Nam trên trường quốc tế) available at the website http://clv-triangle.vn/portal/page/portal/clv_vn/phhtcthd?p_page_id=817391&pers_id=824301&folder_id=&item_id=1308365&p_details=1

The CPLG (Competition Policy and Law Group), formerly known as the Competition Policy and Deregulation Group (CPDG), was established in 1996, when the Osaka Action Agenda (OAA) work programmes on competition policy and deregulation were combined. In 1999, APEC Ministers endorsed the APEC Principles to Enhance Competition and Regulatory Reform and approved a "roadmap" which established the basis for subsequent work on strengthening markets in the region.⁸⁹ Their preamble recognized *“the strategic importance of developing competition principles to support the strengthening of markets to ensure and sustain growth in the region and that these principles provide a framework that links all aspects of economic policy that affect the functioning of markets”*.⁹⁰ Actually, the CPLG was among the very first group dealing with competition issues in Asia.

At the time of Vietnam joining APEC, the CPDG came into force for two years and made a lot of effort to advocate the introduction of competition law in the economies who did not yet have it. The rationale for building competition legislation and implementing competition policy was attached to the correlation between competition and deregulation. This conformed to the status quo of the Vietnamese economy during the period of the 1990s when the open market policy made initial achievements (e.g., dramatic growth of the entire economy). However, state intervention actually increased after a decade of Doimoi requiring more robust deregulation in a number of sectors.

It is not possible to attribute the application of competition policy to the participation of Vietnam in several regional and international organizations as prevailing external factors towards the enactment of the Vietnam Competition Law. To some extent however, without any binding commitment or direct pressure from the membership of those organizations, including APEC, Vietnam came to realize the necessity and the importance of establishing competition policy in the long run and adopting a competition law in the short run to meet with the development standard of the region as well as the world. These organizations helped facilitate knowledge transfer and normative diffusion that supported the domestic changes within Vietnam. In this way, implications for enacting a competition law as a legal corridor for

⁸⁹ Competition law and policy Group, available at the website <http://www.apec.org/Groups/Economic-Committee/Competition-Policy-and-Law-Group.aspx>

⁹⁰ Taken from the material of the 2009 Competition Law Conference, Sydney “In hope of convergence – a regional perspective on competition law”, available at the website <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj23may09.pdf>

preserving competition in regulatory sectors was gradually absorbed by policy and lawmakers in Vietnam during that period.

APEC is characterized by a loose commitment mechanism. APEC tends to provide guideline and encouragement for member economies in integration with other members. Vietnam did not have a competition law until 2004 and even then there were only seven officials working for the competition board under the Ministry of Trade (currently the Ministry of Industry and Trade). Therefore, from 1999 to 2004, the Department of Multilateral Trade Policy, MOT was responsible for external economic relations with partners in terms of competition. During that period, Vietnam had the chance to join a series of programs and meetings under the framework of CPDG (then CPLG). Participation in such APEC activities exerted influence on the process of coming out with basic ideas about competition in Vietnam. While no partner in APEC explicitly told Vietnam that they must implement certain competition policy or law, the working agenda and the cooperation framework under this forum provided a forum for sharing ideas thus stimulating Vietnam's thinking on these issues.

The Osaka Action Agenda was upgraded in 2002. Part One, Section C, 8 specifies the key objectives and guidelines of competition policy in APEC economies:

OBJECTIVE: APEC economies will enhance the competitive environment to increase consumer welfare in the Asia-Pacific region, by (c.) improving the ability of competition authorities, through enhanced capacity building and technical assistance, to better understand the impact of globalization and the New Economy.

GUIDELINES: Each APEC economy will: (b.) enforce competition policies and/or laws ... to ensure protection of the competitive process and promotion of consumer welfare, innovation, economic efficiency and open markets; (c.) disclose any pro-competitive efforts undertaken; (d) implement as appropriate technical assistance in regard to policy development, legislative drafting, and the constitution, powers and functions of appropriate enforcement agencies; and (f)

*undertake additional steps as appropriate to support the development of the New Economy and to ensure the efficient functioning of markets.*⁹¹

This guideline was very general and held no binding principles forcing the member economies to enforce competition policy and/or law. This is understandable as the nature of APEC builds on discussion and communication about various aspects of economic cooperation without any obligations or commitments. Different from the way other international financial organizations, such as the IMF or World Bank (who sometimes set competition enforcement as the requisite condition for other assistance), APEC was much softer focusing on advocating competition law and policy and promoting the awareness of governments without a competition regime. Instead of sticking to the top-down approach, the bottom-up approach seems to be more favored by APEC.

2.5 Vietnam's application for WTO

The second major external driver of competition policy and law in Vietnam was Vietnam's accession to the WTO. The WTO was established in 1995⁹² with the ultimate purpose and mission being to liberalize world trade. This is achieved through WTO agreements that have been signed by the bulk of the world's trading nations. *"These documents provide the legal ground rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits."*⁹³

Competition policy is a legal tool attached to the overall process of international economic integration and should therefore be seen as part of this broader endeavor to lessen international trade barriers and liberalize world trade. While trade policy tends to protect a domestic economy (via trade remedy measures like antidumping or anti-subsidy), competition policy in international trade negotiations is an instrument to minimize the negative impact of domestic policies that might badly affect foreign enterprises' production and transaction activities. Used in parallel with trade policy, competition policy can handle issues arising from competition among market players.

⁹¹ Taken from the Proposal for the *APEC Training Course on Advocacy of competition law and policy* under the framework of CPLG co-prepared by Vietnam Competition Administration Department and the Japan Fair Trade Commission in 2010.

⁹² Understanding the WTO, Who we are?, available at the website http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm

⁹³ Understanding the WTO, Who we are?, available at the website http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm

In fact, there exist no precise provisions under the framework of WTO on national competition law as a binding commitment or considering competition as a compulsory proponent in trade liberalization. “WTO Members are free to adopt any competition law they wish – the only constraint that is potentially imposed is nondiscrimination (national treatment (Art.III))”.⁹⁴ Nevertheless, in order to meet the general requirements of any applicant for WTO membership, there are always clear implications for and great importance attached to building and enforcing competition.

Competition policy goes well beyond the WTO framework. This can be explained by the fact that national competition law differs from member to member countries so it is challenging to reach a standard or harmonize global competition law. While a great number of WTO members, mostly developing countries, have competition policy there are serious issues with effective enforcement. They have the challenge of attempting to implement effective competition policy as in developed and experienced countries. Furthermore, there are many different viewpoints on competition related issues like monopoly, government subsidy, and national protection of domestic industries. Once viewpoints and stances are competing, reaching agreement on this issue among WTO member states has proved impossible in reality.

Developing countries are well aware that competition policy is necessary in the context of increasing economic patterns that span national boundaries and that require a healthy and fair competition environment. Generally, however, they take into account the whole picture of the economy and promote the gradual establishment of competition policy in regulatory sectors or preparation of a comprehensive and general competition law. Because such countries are lagging in economic development they face unavoidable difficulties and obstacles building up competition legislation and policy.

At the same time, developed countries still tend to keep using competition policy as an instrument in certain sectors but are not likely to use it as a macro policy tool as they are more attracted by and interested in industrial development policy rather than in-depth cooperation in the field of competition.

⁹⁴ Bernard Hoekman, Petros C. Mavroidis (2002). Economic Development, Competition Policy, and the World Trade Organization. World Bank Policy Research Working Paper 2917. p14.

In general, developed countries often require developing ones to open their market more and more via a consistent stance on creating a fair competition environment for businesses of all types. To some extent, preserving a fair competition environment for domestic and foreign funded companies is also considered a supporting tool for trade liberalization and investment – the core working principles of the WTO. In the course of economic integration, any country without effective regulation of competition among domestic companies and multinational companies would be economically vulnerable and not be able to take advantage of the opportunities offered by trade liberalization.⁹⁵

Vietnam applied for the official membership of the WTO in 1995 in the context of promoting the process of international economic integration and needed 11 years to conclude required negotiations and finish the necessary procedures for membership. Here, there is a clear line between the internal and external driving forces towards the adoption of the VCL (2004). The desire to open to international economic processes came from within Vietnam and the application for WTO membership was also a domestic need. However, in the course of the very complicated and hard negotiations with the WTO at both the bilateral and multilateral levels, I would like to argue that there was indirect pressure on the issuance of a competition law as one condition for WTO entry. However, this pressure was not really strong and had direct influence on the determination to draft and adopt that law.

There was a huge workload dealing with a great deal of questions and concerns related to technical negotiations with other partners and in explanations prepared by Vietnam. The basic contents were related to tariffs imposed on imports and exports; market access; trade liberalization; investment; and, intellectual property. Policy transparency was also a pre-requisite condition for opening negotiations for opening the market.⁹⁶

If we look at differences between the Vietnam-US Bilateral Trade Agreement (BTA) and WTO accession requirements,⁹⁷ a lot of complicated technical requirements were posed during the course of Vietnam negotiations for WTO membership (the demands under the Vietnam-US BTA will be discussed in the next part). Although there was no specific requirement for

⁹⁵ Report on Competition (circulated for internal use in the Ministry of Trade, 2000).

⁹⁶ The steps of Vietnam's accession to WTO (Trình tự gia nhập WTO của Việt Nam, available at the website <http://vietbao.vn/Kinh-te/Trinh-tu-gia-nhap-WTO-cua-Viet-Nam/40175063/87/>)

⁹⁷ The relationship between the BTA and WTO accession requirements, available at the website http://www.usvtc.org/trade/tpp/bta-wto_part2.pdf

building a competition law in the requirements for accession, it was implied if Vietnam could not offer a comprehensive legal system to meet the basic demands of opening their market, the length of negotiations for membership would have been far beyond what Vietnam underwent in reality.

As analyzed in previous part about the interaction between competition policy (including competition law) and trade liberalization, opening markets can not happen in a centrally planned economy where heavy State intervention is present and SOEs make up the majority of national economic activities. If there is no competition in a domestic market, opening the market will “kill” domestic enterprises even before the “battle” between domestic and foreign enterprises commences.

Understanding this very basic knowledge about the necessity of competition facilitation in trade liberalization and originating from the actual needs of national economic activities at that time, a number of laws related to investment and trade facilitation were drafted and approved by Vietnam’s policymakers and offered to negotiating partners. On the one hand, those laws showed Vietnam’s commitment to improve its legal system to meet with WTO requirements about legal transparency and appropriateness. On the other hand, Vietnamese policymakers realized a need to translate the basic requirements of WTO entry into concrete domestic reforms, including the introduction of competition policy, in the course of concluding these negotiations. As such, the process of negotiating entry to the WTO was an important driver of the development of competition policy in Vietnam.

2.6 Vietnam – the US BTA negotiation and conclusion

The Vietnam – US Bilateral Trade Agreement (BTA) was signed in July 2000. Former Vice Minister Vu Khoan described it as the “longest bridge connecting two sides of the Pacific in the history”⁹⁸. This agreement had been made possible by the US lifting its 19-year-long-trade embargo on Vietnam in 1994 and the two countries normalizing political relations in 1995. Negotiations on the BTA started in 1995 and were concluded initially in negotiations in 1999.

⁹⁸ Vietnam – U.S trade after 10 years of signing the BTA, 2011. (Thương mại Việt Mỹ sau 10 năm ký kết Hiệp định thương mại song phương) available at the website <http://vovworld.vn/vi-vn/Binh-luan/Thuong-mai-Viet-My-sau-10-nam-ky-ket-Hiep-dinh-thuong-mai-song-phuong/61667.vov>

After further discussion and exchanges of letters, the Agreement was signed on July 13, 2000. The US Congress ratified the BTA in October 2001 and Vietnam's National Assembly ratified it in November 2001.⁹⁹

Vietnam entered into the BTA with a legal and policy system that was still heavily influenced by its previous system, with its emphasis on central-planning, state-dominated economic activity.¹⁰⁰ The BTA was much like the WTO agreement, including extensive obligations related to tariffs and quotas and to transparency, dispute settlement, investment, intellectual property protection, market access for services, and business facilitation.¹⁰¹ The Ministry of Justice estimated that close to 100 laws and regulations had to be rewritten or developed to meet the BTA requirements.¹⁰²

Item 2, Article 5 of Chapter III of the US-Vietnam Bilateral Trade Agreement states, *"Where a Party's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Party's specific commitments, the Party shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments"*.¹⁰³ State monopoly was secured in special sector as exclusive monopoly. However, Vietnam committed to substantial market access for US service providers in more than 20 sectors¹⁰⁴ over a period from Year 2 (December 2003) through Year 7 (December 2008).¹⁰⁵

More importantly, BTA obligations injected a strong requirement for Vietnam to reform the legal system within a specific "roadmap". In particular, the BTA placed high significance on greater transparency for laws, regulations, and administrative procedures. The BTA stressed *"upon entry into force, the BTA required the prompt, regular publication in an official journal of all laws, regulations, ... to be made readily available to the public before being enforceable. In addition, it required that Vietnam give US nationals and the US Government the opportunity*

⁹⁹ STAR-Vietnam (2007). Assessment of the five-year impact of the US-Vietnam bilateral trade agreement on Vietnam's trade, investment, and economic structure. National Political Publisher. Note 1, p184.

¹⁰⁰ Ibid, p185.

¹⁰¹ Ibid, p184.

¹⁰² Ibid, p185.

¹⁰³ Chapter III, Article 5, Item 2 of the BTA between the US and Vietnam

<http://www.usvtc.org/trade/bta/text/chapter3.htm>

¹⁰⁴ Among those were telecommunication, construction, distribution services, advertising which were at high risks of violation in terms of competition.

¹⁰⁵ Ibid, STAR-Vietnam (2007), p188.

*to comment on draft laws, regulations, ... ”.*¹⁰⁶ It is evident that there is a very bold difference between the loose and encouragement-oriented approach set out by political or economic organizations in the region, namely APEC or ASEAN, and the clear, detailed and ponderable requirements/conditions in the Vietnam-US BTA.

Playing the role as the “stepping stone” of Vietnam to the WTO, most of the legal and administrative reforms required for WTO accession were initiated as part of the BTA implementation.¹⁰⁷ STAR¹⁰⁸-Vietnam (2007) argued that market access obligations were the most significant difference between the Vietnam-US BTA and WTO entry. To put it simply, the BTA required directly only that market access needed to be open for US service providers and investors, not all foreigners. Actually, the US was the founding member of the WTO and has a very strong voice and lots of influence in the biggest trade organization on the globe. Vietnamese policymakers therefore, understood that meeting the requirements under the BTA, on the one hand, would pave the way for partial legal and trade reforms. On the other hand, Vietnam also had to satisfy very precise and challenging demands from the US as an economic partner.

Taking a broad view of the BTA contents and how Vietnam improved its legal system in the period 2002-2006,¹⁰⁹ it is evident that a number of fundamental laws were drafted and adopted to meet with the intermediate requirements specified in the BTA. While the Vietnam Competition Law was not required directly by the BTA, it helped to bring into force the BTA in an indirect manner so as to facilitate market access, trade liberalization and ultimately to reach the goal of the BTA. As roughly indicated in the Introduction of the Competition Law, the law was implied as a comprehensive and framework law that was a legal instrument to preserve the competition environment providing that other regulatory laws are in synthetic effect. In short, the VCL was an important part of the overall reforms to the regulatory system governing the market-oriented economy and needed to facilitate the proper functioning of other laws and regulations directly required by the BTA. In this aspect, the BTA did create a certain “pressure”

¹⁰⁶ Ibid, STAR-Vietnam (2007), p189.

¹⁰⁷ Ibid, STAR-Vietnam (2007), p195.

¹⁰⁸ Project named “Support for Trade Acceleration” (STAR) is a USAID (The U.S. Agency for International Development) technical assistance project in economic growth implemented in Vietnam and supported the Government of Vietnam in implementing the U.S.-Vietnam Bilateral Trade Agreement (BTA) and began reforms needed for accession to the WTO.

¹⁰⁹ For more details, refer to the Key BTA-Related Legal Reforms Completed (2002-2006) in STAR-Vietnam (2007), p191-3.

and motivation to enact the VCL (2004) as it went hand in hand with a package of numerous sectorial laws (namely the Investment Law, the Enterprises Law, the IPR Law, the Commercial Law, and so on).

When looking at the external factors in the enactment of the VCL (2004) among which was the Vietnam-US BTA, Vietnam's commitment to open market access and to liberalize trade is evident. What is more, comments and contributions from US experts were taken into account and reflected in the process of drafting the VCL (2004). Therefore, as with the ASEAN and APEC processes, a degree of diffusion of knowledge and ideas is evident in the negotiations of both WTO accession and Vietnam-US BTA negotiations. While the Vietnam-US BTA did not stipulate requirement for competition policy it was needed to support the other requirements. US experts were therefore instrumental in providing ideas and knowledge from which Vietnam's policymakers could construct their own competition law.

Conclusion

Before the enactment of the VCL (2004), there were many forces pushing policymakers towards this process. Firstly, it is evident that the VCL originated in domestic economic needs for reform and was supported by the political backdrop since Doimoi (1986). The considerable reforms in political thinking of the Party and the State during this period created a new intellectual atmosphere where competition law was viewed as being able to benefit the operation of the whole economy. Policymakers increasingly realized competition policy was a necessary legal instrument for the Government to regulate monopolies in the market, raise the efficiency of business activities and tackle issues arising from unfair competition or competition restraint activities among competitors.

Secondly, it is also evident that there has been a wave of proliferating competition laws in the world since the 1980s and especially in developing countries and CIS countries after 1990. A number of external factors, therefore, including entering into ASEAN and APEC in 1995 and 1998 respectively, applying for WTO membership in 1995 and concluding the BTA with the US in 2001, are important mechanisms for pushing competition policy forward in Vietnam. While there is no direct evidence or statement about a compulsory requirement for Vietnam to adopt the VCL, these negotiations and interactions created the necessity to enact the VCL and

provided the forum for norm diffusion and knowledge sharing. Therefore, both internal and external forces contributed to the creation of competition policy and law in Vietnam.

The next Chapter explores the interactive relationship between the internal and external determinants listed above. It will show where and how they conflicted or complimented each other and how this interaction resulted in the competition policy and law environment we see in Vietnam today.

CHAPTER III

HARMONIZING THE INTERNAL AND EXTERNAL DRIVING FORCES IN THE ENACTMENT OF THE VIETNAM COMPETITION LAW (2004)

In the previous chapter, both internal and external driving forces were indicated and analyzed to test their weight and influence in the enactment of the VCL (2004). As a result, none of them outweighed the others and all those composed a consistent bunch of determinants. This chapter focuses on the focal point of the thesis – the harmonization of the internal and external factors towards the promulgation of the VCL (2004). Before tackling the concern about the convergence and divergence (why and how) of the two categories of factors, the first section will analyse the historic transplant of competition law over the world.

In the 1950s, fewer than 10 jurisdictions around the globe had competition regimes in any form. But since 1980, over 80 competition laws have been constructed and brought into life. Today, people talk much about the competition models of progressive economies like the US, EU and Japan. Dating back to history, while the US took the pioneering role in legislating and enforcing competition law and policy, the EU came later and Japan was the last among those three representatives.

Canada and the US are the first countries in the world to adopt and implement a national antitrust law, 1889 and 1890 respectively.¹¹⁰ Today, there are over 110 competition policy regimes in the world.¹¹¹ According to Prof. William Kovacic, former Commissioner of the US Federal Trade Commission, the emergence and development of competition policy is a remarkable story.

In the late 19th and early 20th centuries competition law ideas spread to and were intensely debated in Germany and other European countries.¹¹² Germany was the first country in Europe to enact the so-called “competition law” (Regulation against abuse of economic power

¹¹⁰ Information taken from the presentation of Prof. William Kovacic, former Commissioner of the US Federal Trade Commission, available at the website: <http://www.icnblog.org/ftc/ftc-1-module-4-28-11/player.html>

¹¹¹ Information taken from the presentation of Prof. William Kovacic, former Commissioner of the US Federal Trade Commission, available at the website: <http://www.icnblog.org/ftc/ftc-1-module-4-28-11/player.html>

¹¹² Vinh Thanh Le (2012). Ph.D Thesis “Competition law transfers from an interpretive perspective”. Monash University, Australia. p45.

positions) in 1923. After the two world wars, competition laws, which initially served for economic purposes, were temporarily set aside to make way for much bigger political concerns.

Since 1957, marked by the establishment of the European Economic Community (EEC), the Community's Competition Law, which was originally influenced by the German competition model, has evolved and has now become a competing model to the US model.¹¹³

As Daniel Berkowitz, Katharina Pistor & Jean Francois Richard (2003) remarked in the "Economic Development, Legality, and the Transplant Effect", 47 EUR. L. REV, "*Law-making should come from within, not without. Legislation should respond to contextual problems that need to be solved. Law is not ideally generated by outsiders who say: We have this law and you should too*"¹¹⁴

As mentioned before, the pool of experts and researchers on competition policy generally come from international organizations or practitioners of competition agencies around the world (mainly from developed countries). However, there remains a huge lack of empirical evidence in this field. As mentioned in the first sections on this thesis, the basic rationale for implementing competition policy in Vietnam can be gleaned from the general consensus in the literature on the importance of competition policy to the promotion of a market economy and opening to international trade and investment.

*The adoption of competition laws is undoubtedly linked to the wave of neo-liberal economic reforms introduced since the 1980's and, in particular, to the issues raised as a result of privatization. It is also part of the broader proliferation of liberal democracies and market-oriented economics becoming the dominant ideological models in the wake of the collapse of the communist bloc.*¹¹⁵

¹¹³ Vinh Thanh Le (2012). Ph.D Thesis "Competition law transfers from an interpretive perspective". Monash University, Australia. p47.

¹¹⁴ Eleanor M. Fox (2007). Economic Development, Poverty and Antitrust: The Other Path. Public law and legal theory research paper series. Working paper No. 07-12. Law and economic research paper series. Working paper No. 07-26, New York University school of law. p114.

¹¹⁵ Paul Cook, Competition policy, Market power and collusion in developing countries, in Leading Issues in Competition, Regulation and Dev. (Paul Cook et al.eds., 2004). Cited from Alice Pham (2006). Development of Competition Law in Vietnam in the face of economic reforms and global integration, The Symposium on competition law and policy in developing countries. Northwestern Journal of International Law and Business. Volume 26, Issue 3 Spring. p547-563.

Chadwick Teo (2003) explains the meaning of competition policy in promoting economic growth on the basis of collecting and developing ideas or contributions from different sources such as Dutz (2002); Nickell (1996); and, Blundell, Griffith and Van Reenen (1995). In particular, there are four key reasons: (i) thanks to competition among businesses, consumers have more choices of goods and services at a lower price and consequently more and more are consumed and produced; (ii) in the context of properly implementing competition policy, efficiency and productivity are promoted; (iii) competition “pushes” enterprises to innovate unstoppably in order to be not outdated and (iv) competition facilitates restructuring in sectors.¹¹⁶

Hoekman & Mavroidis (2002) argue “there are two major decisions to be taken by governments with respect to competition law: (i) whether (when) and how much to invest in such disciplines; and (ii) how to design and enforce the rules”.¹¹⁷

To some extent, Competition Law can be regarded as “the law of laws” as its coverage is very wide and can be applied (in almost jurisdictions) to different sectors. In fact, competition law is often a very comprehensive framework so that it provides fundamental regulations on anticompetitive acts irrespective of specific industries. On the one hand, competition policy obviously helps foster economic growth. On the other hand, competition policy is still something quite new to developing economies especially those in the process of transition. Teo (2003) concluded, “as experience in developed countries show, competition laws take time to implement. ...competition laws should be introduced carefully by developing countries”.¹¹⁸

The adoption of the Vietnam Competition Law in 2004 has been widely supported by economists. Domestically the VCL is seen as a breakthrough in the course of national economic integration into the region and the world. It is fair to say that competition is not the key element affecting this course but it is one of the most decisive factors in opening the market economy supported by trade liberalization and sectorial deregulation.

¹¹⁶ Chadwick Teo (2003). Competition policy and economic Growth. Paper for the ASEAN Conference on fair competition law and policy in the ASEAN Free Trade Area in Bali, 4-8 March 2003. p5.

¹¹⁷ Bernard Hoekman, Petros C. Mavroidis (2002). Economic Development, Competition Policy, and the World Trade Organization. World Bank Policy Research Working Paper 2917. p7.

¹¹⁸ Chadwick Teo (2003). Competition policy and economic Growth. Paper for the ASEAN Conference on fair competition law and policy in the ASEAN Free Trade Area in Bali, 4-8 March 2003. p8.

This chapter finds that competition law has been transplanted in different ways. As for some developed countries, it originated from the domestic actual needs of the economic activities and also came as a part of learning experiences and lessons from the predecessors. Nevertheless, developing countries were either under commitment to establish competition legislation under the framework of a bilateral or regional trade agreement or under the force of fulfilling a specific condition (a way of “give and take”). Vietnam does not fall within any of listed above scenarios. Both inside and outside elements exerted impact on the process of drafting and adopting the competition law.

I. Overview of the Vietnam Competition Law (2004)

The 4th session of the 10th Congress of the Vietnam National Assembly issued Resolution 19/1998/QH10 on 20 December 1998. This resolution covered the law-making program of 1999 and authorized the Ministry of Trade to chair the competition act drafting commission.

The competition act drafting commission was established on April 12th 2000 under Decision number 0621/2000/QD-BTM of the Minister of Trade. Attending the drafting commission were senior officials and experts from the National Assembly Office, Government Office, Ministry of Trade, Ministry of Justice, Ministry of Planning and Investment, Ministry of Finance, Governmental Price Committee, Vietnam lawyer Association, Vietnam Chamber of Commerce and Industry, and the Foreign Trade University.¹¹⁹

The Competition Law Project was initiated by Resolution No. 12/2002/QH11 (16 December 2002) of the National Assembly on the Agenda of Constructing Laws ordinances in the National Assembly (Session XI). On that ground, the Prime Minister issued Decision No. 35/2003/QD-TTg on the 6th of March 2003 which detailed the assignment to the Ministry of Trade as the single agency to host drafting of the Vietnam Competition Law in collaboration with other agencies.¹²⁰

¹¹⁹ Dr. Nguyen Minh Chi, Director General of the Legal Department, Ministry of Trade (current Ministry of Industry and Trade) in a Workshop in *Phan Thiet, October 23-24, 2000* introducing about the Competition Law Project.

¹²⁰ Information collected from materials in Vietnamese for internal circulation at Vietnam Competition Authority.

The drafting board began by translating competition laws in ten economies (China, Thailand, Croatia, Bulgari, Turkey, France, South Korea, Japan, Canada and Chinese Taipei) at the same time as looking at other models of competition law from the UNCTAD and the OECD.¹²¹ According to WTO statistics,¹²² by 2001 there were about 80 WTO countries had competition laws at hand. More strikingly, 50 developing countries and transition countries were out of that number.

Typically, these laws provide remedies to deal with a range of anti-competitive practices, including price fixing and other cartel arrangements, abuses of a dominant position or monopolization, mergers that limit competition, and agreements between suppliers and distributors (“vertical agreements”) that foreclose markets to new competitors. The concept of competition “policy” includes competition laws in addition to other measures aimed at promoting competition in the national economy, such as sectorial regulations and privatization policies.¹²³

Translating the competition laws of the above listed economies showed lawmakers in Vietnam the importance of making an effort to catch up with the prevailing tendency in the world. Around the same time Vietnam officially applied for WTO membership (1995). Building a new law such as the competition law post-2000 showed Vietnam’s “good will” and determination to move closer to world trade norms and standards and that the Vietnamese economy was converging on established practices. Competition actually became one of the “Singapore issues” but was finally dropped out of the Doha Agenda in 2004 in the WTO.¹²⁴ However, this did not mean competition could be left behind. Practice showed that competition found its own way into bilateral or regional free trade agreements from then on. To put it simply, WTO members could not reach agreement on competition but they could find other channels to promote it in light of the significant role of competition to economic growth.

¹²¹ Report on explaining the Competition Law Project presented by Mr. Truong Dinh Tuyen – Minister of Trade at the Government Meeting dated 28-29 January 2004 (Báo cáo giải trình về dự án Luật cạnh tranh do Bộ trưởng Trương Đình Tuyển trình bày tại phiên họp Chính phủ ngày 28-29/1/2004)

¹²² Doha WTO Ministerial 2001: Briefing notes, trade and competition policy, Working group set up by Singapore Ministerial, available at the website http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief13_e.htm, accessed on 7 June 2013

¹²³ Doha WTO Ministerial 2001: Briefing notes, trade and competition policy, Working group set up by Singapore Ministerial, available at the website http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief13_e.htm, accessed on 7 June 2013

¹²⁴ Doha WTO Ministerial 2001: Briefing notes, trade and competition policy, Working group set up by Singapore Ministerial, available at the website http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm, accessed on 7 June 2013

The selection of the above mentioned ten economies gave a selection of competition models for Vietnamese policymakers to pick and choose from: those economies that used to have the same economic system as Vietnam (Russia, China, Bulgaria); other countries in the region (Japan, South Korea) that had built up years of experience at implementing competition; those small-scale economies like Vietnam that had “fresh experiences” building and implementing competition law (Thailand and Chinese Taipei); and finally, those countries applying a Civil Law system like Vietnam and who had established competition regimes for a good period of time (Canada, France or Germany).

In the three years from 2000 to 2002, the Drafting Board organized more than ten seminars welcoming a variety of experts from Australia, Canada, Chinese Taipei, France, Japan, Germany, Russia, the U.S. and UNCTAD to present their advice and consultative opinions to different drafts of the law.¹²⁵ This was a very obvious signal of Vietnam’s “willingness” to learn from the experiences of other developed competition regimes. Actually, this was also a good way for the competition lawmakers to update and keep track with the development of the world at that time. Although differences in economy size, development level and mechanism of operating the national economies; inviting the so-called leading agencies or Russia – a “big brother” of Vietnam in the past appeared to be very helpful to persuade the members of the National Assembly later on. Because incorporating appropriate contributions from foreign experts would be excellent evidences proving that the Competition Law of Vietnam would respond to the necessity of the national economy itself and at the same time be in line with the general tendency in the world. Until now, from the legal construction culture of Vietnam, it is often easier for lawmakers to show the National Assembly members (who finalize the approval of almost laws) that the legal text well reflects domestic needs and keeps up with world standard. At this point, internal and external ideas meet.

In his Report on explaining the Competition Law Project presented at the Government Meeting dated 28-29 January 2004, Mr. Truong Dinh Tuyen, former Minister of Trade, indicated the following three guiding principles throughout the process of drafting the law:

¹²⁵ Report on explaining the Competition Law Project presented by Mr. Truong Dinh Tuyen – Minister of Trade at the Government Meeting dated 28-29 January 2004 (Báo cáo giải trình về dự án Luật cạnh tranh do Bộ trưởng Trương Đình Tuyển trình bày tại phiên họp Chính phủ ngày 28-29/1/2004)

Principle 1: Grasp thoroughly and institutionalize all directions, guidance and policies of the Party in developing a socialist market-oriented economy with State management

As clearly indicated in the Resolution of the VIII Party National Congress [1996] the *“Market mechanism requires a healthy, legitimate and fair civil competition environment. Competition serves the purpose of national development but does not result in a series of failures, waste of human resources and so on”*.¹²⁶

This Party Resolution brought in two affirmative viewpoints on the market mechanism and the objective of competition. In this approach, a competitive environment is a prerequisite condition for operating a market mechanism. At the same time, competition aims at developing the nation. These two concepts appear very simple and general but represent a highly significant change in economic thinking of the think tank elite.

In addition, competition at that time was looked at from a domestic perspective rather than something coming from abroad. To put it simply, “competition” has a quite narrow coverage, as it was defined not to result in serial failure while by its nature, “competition” creates losers and winners. In case of severe competition among firms, the weak one can be easily the loser with little or no market power.

Though general and simple as it was, dating back the time of 1990s, Vietnam was a fresh learner in the transitional economy context. Inclusion of “competition” in the Party Resolution was also a good signal showcasing its “open policy”. Comparatively, competition was nothing during the centrally planned economy before 1986. Ten years later, competition was recognized in the market mechanism and via the goal of national development. “Competition” gradually gained its stance in the economy.

Then the Resolution of the 9th Party Congress continued affirming and giving more guidance to *“enhancing the skeleton role of orienting and regulating the national economy on the market...”*

¹²⁶ See the Report on explaining the Competition Law Project presented by Mr. Trương Đình Tuyền – Minister of Trade at the Government Meeting dated 28-29 January 2004 (In original Vietnamese: Báo cáo giải trình về dự án Luật cạnh tranh do Bộ trưởng Trương Đình Tuyền trình bày tại phiên họp Chính phủ ngày 28-29/1/2004, “Cơ chế thị trường đòi hỏi phải hình thành một môi trường cạnh tranh lành mạnh, hợp pháp, văn minh. Cạnh tranh vì lợi ích phát triển đất nước, chứ không phải làm phá sản hàng loạt, lãng phí nguồn lực, thôn tính lẫn nhau”, translated by the author.

Identify a time duration of reasonable and effective subsidy/protection towards a number of substantial products, be proactive in preparation for international market integration. Limit and control monopoly in business.”¹²⁷

Party Resolutions often incorporate ongoing missions and map out upcoming visions. The 9th Party Resolution directly indicated the guidance on limiting and controlling monopolies. At a broader level, the Party was even aware that as a result of competition, the elimination of subsidies or protection should be there after a certain period and more importantly this would give a momentum for the integration into the international market.

Although the expression and the interpretation in the Party Resolution was not really precise and was not phrased like modern concepts or norms, the content and the meaning were very progressive.

If the VIII Party Resolution regarded competition as a domestic element, it became a bridge to international integration in the IX.

Principle 2: Effective control over monopolies

At that time, the proportion of state sectors in the economy was still high and in many sectors, the State still held monopoly position. In parallel with the economic integration, multinational companies started to invest, produce and do business in Vietnam. Those companies working in certain sectors also held dominant positions in the market. Therefore, the Competition Law was seen as being able to pave the way for controlling monopolies and facilitating fair competition among market players.¹²⁸

If Principle 1 is mostly related to the political will of high-ranking leaders Principle 2 reflects the status quo of the market with state monopoly companies in competition with an increasing number of multinational companies.

¹²⁷ See the Report on explaining the Competition Law Project presented by Mr. Truong Dinh Tuyen – Minister of Trade at the Government Meeting dated 28-29 January 2004 (In original Vietnamese: Báo cáo giải trình về dự án Luật cạnh tranh do Bộ trưởng Trương Đình Tuyển trình bày tại phiên họp Chính phủ ngày 28-29/1/2004, “*Phát huy vai trò nòng cốt định hướng và điều tiết của kinh tế nhà nước trên thị trường...Xác định thời hạn bảo hộ hợp lý và có hiệu quả đối với một số sản phẩm quan trọng, tích cực chuẩn bị để mở rộng hội nhập thị trường quốc tế. Hạn chế và kiểm soát độc quyền kinh doanh*”, translated by the author.

¹²⁸ See the Report on explaining the Competition Law Project presented by Mr. Truong Dinh Tuyen – Minister of Trade at the Government Meeting dated 28-29 January 2004.

Whether the market is monopolized by the state sector or dominated by big foreign companies, such a situation would be harmful for the entire economy. This Principle therefore deals with the very fundamental components of a competition bill.

Principle 3: Ensure consistence with other legal regulations of Vietnam on competition

At that time, regulations on competition were scattered in different legal documents such as the Civil Act, the Foreign Investment Law, the Enterprise Law, the Cooperatives Law, the State Enterprise Law, the Commerce Law, the Credit Organization Law, the Insurance Law, and so on. It was therefore important to keep in mind that the Competition Law could not conflict or overlap with other regulations and the concurrent documents in effect.¹²⁹

These three principles form the basis for how the Competition Law was drafted. To understand how these principles came about the thesis now turns to an analysis of the internal and external driving forces for establishing the competition law. This is divided into two main sections. The first looks at where the internal and external driving forces diverged and how this impacted the founding principles. The second looks at where internal and external driving forces converged and how this impacted the founding principles. This is followed by a brief discussion of harmonization.

II. Divergence between the internal and external driving forces

Divergence here can be understood as the difference/conflict between the internal infrastructure and the requirements from the external partners or the external “ecology”. To some extent, they include the gaps between Vietnam’s development level (in terms of legal, economic and political aspects) and the worldwide standard of a modern competition law. At another level, divergence can be understood as the promotion of certain policy and legal prescriptions by external agencies and the domestic requirements for specific regulations to meet domestic needs. In case of the VCL (2004), divergence can be witnessed from three main perspectives, institutional, administrative and enforcement.

¹²⁹ See the Report on explaining the Competition Law Project presented by Mr. Truong Dinh Tuyen – Minister of Trade at the Government Meeting dated 28-29 January 2004.

2.1 From the institutional perspective

The institutional perspective deals more with the legal infrastructure of Vietnam in preparation for building and adopting the VCL. At the first glance, Vietnam appears not well prepared for that event. The process of building a new law is actually very complicated, time consuming and calls for a lot of resources. This was even tougher because the Competition Law introduced articles around an extremely new concept—“competition” among businesses.

Kovacic (2001) argues “Institutional improvements - such as the establishment of effective judicial systems – must precede or be undertaken in parallel with substantive law reforms”.¹³⁰ In Vietnam’s case, a number of institutional deficits meant that there was some divergence between international best practices and the VCL (2004). Put another way, the VCL was designed to be functional in Vietnam under the then conditions of institutional development. Institutional un-preparedness issues relating to the VCL (2004) can be divided into three groups as below:

- *1. The framework law and the lack of detailed provisions*

Framework laws, acts and ordinances are issued by the National Assembly, which is the single and highest body of the legislative branch. Those framework documents only stipulate the general provisions so to bring the laws into effect guiding sub-laws must be drafted and adopted by the Government and the Ministries. Therefore, there is always a “lag” between constructing a law and implementing it. Actually, without issuance of a package of sub-laws, the competent agencies would not be able to take enforcement action on a law passed through the National Assembly. Therefore, detailed provisions were required to bring the effect of the law into practice and to redress any deficit with international practices.

- *2. The framework law and the “out-of-phase” of the objects of application*

Though the 1992 Constitution (and the amended version 2001) recognized the establishment of enterprises of any type in the market economy and their equality before the law, in reality there existed a number of laws regulating the operations of different types of enterprises. For

¹³⁰ William Kovacic (2001). Institutional Foundations for economic legal reform in transition economies: the case of competition policy and antitrust enforcement. *Chicago-Kent Law Review*, Vol. 77:265. p273.

example, the SOE Law was designed to regulate the establishment and operations of SOEs; the FDI Law was aimed at FDI enterprises; the Cooperatives Law was for cooperatives (which can be understood as the collective economic sector) while the Enterprise Law encompassed enterprises capitalized by private sector (which can be understood as the private capitalist economic sector). Those four laws were applied on the basis of the capital ownership structure of the enterprise and excluded other types of enterprises in the economy at that time, namely “mixed” enterprises under Ministries (such as the Ministry of National Defense, the Ministry of Public Security, the Labor Union, and so on). This has led to enterprises of different capital ownership competing in the market not based on their real capabilities but depending on which type of enterprise they belonged to. The institutional basis for the enactment of the competition law therefore contained loopholes due to the concurrent laws based on enterprise ownership structure. Unfair competition and monopoly can be seen in the different laws meaning application of the VCL diverged from international practice due to existing laws.

- 3. *Gaps between the legal provisions and actual economic development*

Gaps between the legal provisions and level of economic development are understandable in the context of drafting the VCL (2004). These gaps are still problematic at present due to the legal culture in Vietnam. To put it simply, it takes several years to draft and receive approval from the National Assembly for a law to come into effect. In the case of the VCL, if counting from the date of establishing the drafting board, it took 4 years in total with 15 draft versions before getting approved. The final version incorporated a huge number of opinions and comments from the community, enterprises, academia and ministries/branches together with international experts. This lag leads to the law becoming slightly outdated.

The legal culture in Vietnam also requires that everything needs to be “quantified”. For example, in the case of US or EU standard competition law, the “effect doctrine” has been applied in most cases to analyze the antitrust or merger cases. In Vietnam, this standard is invalid. At the time of drafting the law lawmakers had to imagine and estimate what will occur years later and set the rules within certain thresholds. Vietnamese lawmakers explained that this is to limit the power of the implementing agency. This however, created more harm than good. The rigid “quantitative provisions” of the legal document led to the fact that when the law came into effect, such “thresholds” became inappropriate and could not reflect exactly and fully what

was going on in real economic activities. Such weakness impeded the enactment of the VCL (2004) and led to divergence between international best practices. This has also occurred with the Vietnam-US BTA and WTO membership negotiations that required policy transparency and a synergy in legal system.

In fact, the Commercial Law (enacted in 1997 and in effect from 1998) had already taken a major step toward building a competition system¹³¹ as it provided for “competition in commerce”.¹³² Article 8.2 in particular banned “speculation to attain market control; dumping; defaming other business entities; obstructing, enticing, bribing, or threatening the staff or customers of other business entities; infringing trademarks or other industry property rights; and other unlawful acts”.¹³³ This shows Vietnam at that time was following the trend of the basic concepts of competition but did not have a clear boundary between unfair competition and antitrust (simply antimonopoly). The confusion made it more urgent to come up with a competition law separately but it was also an obstacle as the institutional basis was not concrete enough for Vietnam to build up a comprehensive competition law.

As stressed in previous sections, there is a close relationship between competition law and other regulatory laws. A competition law needs to be a framework law and work like an umbrella to regulate anticompetitive acts in all sectors. Vietnam’s lack of experience in institutional building (due to the legacy of a long period of closed market economy) was the first barrier to the enactment of the VCL (2004) and led to divergence between international practices, those external forces, and the actual reality of Vietnam’s competition law.

2.2 From the administrative modeling perspective

The second perspective that shows divergence between Vietnam’s competition law and the external forces that shaped that law is the administrative modeling perspective. Most parts of the economy in Vietnam were traditionally operated via administrative order. This poses a lot of difficulties for competition implementation activities under the scope of the VCL. The implications of international economic integration required Vietnam to let economic activities

¹³¹ William E. Kovacic (1999). Capitalism, socialism, and competition policy in Vietnam. 13 *American Bar Association Antitrust* 57. Summer. p58.

¹³² *Supra* Note 12

¹³³ *Supra* Note 13, 14

operate under the market mechanism. More specifically, enterprises had to compete and comply with market rules instead of following state administrative orders.

This is the most striking and noteworthy difference between the internal context and the “indirect pressure” from the external factors. Once becoming the official member of such regional organizations like ASEAN or APEC; whether under binding commitment or not, Vietnam was still self aware that if it did not change the old rigid system of a centralized planning economy that leaned mainly on administrative orders and deep intervention in almost all economic activities, it would not be able to integrate with other members. However, the legacy of a long established system could not be erased overnight. Therefore, the ongoing use of administrative orders has complicated the drafting, implementation and functioning of the VCL and led to some divergence with those ideas proliferated by external organizations.

2.3 From enforcement mechanism perspective

The final perspective that shows how the drafting of the VCL diverged is the enforcement mechanism perspective. The best practices of developed competition authorities over the world indicate their strong power and great independence in conducting investigation and case handling. As specified in the Model Law on Competition initiated by UNCTAD (2000), “the trend in most of the competition authorities created in the recent past (usually in developing countries and countries in transition) is to award them as much administrative independence as possible. This feature is very important because it protects the Authority from political influence”.¹³⁴

This point reflects clearly the divergence between the contextual conditions in Vietnam and the requirements of externality. The Vietnamese economy still includes room for state-owned enterprises but the Competition Board (then the Vietnam Competition Administrative Department) was established under the Ministry of Trade.¹³⁵ This Ministry was assigned two big functions over consumer protection and trade remedies. Incorporating those three widespread and new functions into one agency was a very basic “mistake”. In the case of Australia, the US and other jurisdictions, there has been one commission in charge of both

¹³⁴ UNCTAD (2000). Model Law on Competition. p33.

¹³⁵ Vietnam Competition Authority Brochure (2010).

competition and consumer protection. However, trade remedies have been placed in another specific area. As such, enforcement of competition law is still a challenge in Vietnam and further complicated by the lack of independence of the competition authority.

Moreover, considering the impact of ASEAN we see that for Vietnam to complete commitments under AFTA, it had to open its market and strictly follow the roadmap on cutting tariffs. Domestic enterprises were to play on the level playing field with not only other domestic ones but also with foreign enterprises and corporations. The lack of policy transparency and weaknesses in the legal construction in Vietnam have hindered the enforcement of the VCL (2004) and led to some divergence with international practices or at least with the practices espoused by external forces that promoted the construction of competition policy in Vietnam.

III. Convergence between the internal and external driving forces

3.1 Why convergence?

The above section showed that the VCL did diverge from the type of competition policy promoted by external forces due to the domestic economic, administrative and institutional conditions in Vietnam. However, it is also apparent that there was a high degree of convergence with international competition regimes in the drafting of the VCL.

Convergence in the scope, coverage and enforcement of competition laws worldwide can be attributed to a number of elements, such as: (i) the widespread trend towards liberalization of markets and adoption of competition policies; (ii) greater emphasis upon consumer welfare, efficiency and competitiveness objectives in the provision or application of competition laws; (iii) greater similarity in economic analyses and enforcement techniques; (iv) the universal condemnation of collusive practices; (v) tightening up of enforcement; (vi) a more prominent role for competition authorities in advocating competition principles in the application of other governmental policies; (vii) the strengthening of international consultations and cooperation.¹³⁶

According to Eleanor M. Fox (2007), in an era of globalization and convergence of antitrust laws, “universal standards” normally refers to the standards of the United States and Europe. For the developing countries, they must also consider the benefits of their own perspective.

¹³⁶ UNCTAD Secretariat (2010). “The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy”. Sixth United Nations Conference to Review all aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. p3.

However, substantial convergence can be achieved and will naturally occur even in the face of both perspectives.¹³⁷

In the context of Vietnam's national economic development and clear awareness of high-ranking leaders about the necessity of promulgating the competition law as an effective instrument to achieve economic goals coupled with the spillover of competition bills in the world during the 1990s, convergence was well reflected in the enactment of the VCL.

In the face of above mentioned divergence between the internal and external driving forces, Vietnam did and has found ways to absorb advances and best practice of experienced competition jurisdictions while keeping in mind the status quo of domestic development and long run strategies.

On the one hand, the general directions incorporated in the 1992 Constitution (amended in 2001) and specified in the Party Congressional Resolutions (ranging from Session VI to IX) were the "lodestar" in implementing the Competition Law Project. Additionally, the actual requirement for economic development drove Vietnam to apply competition in the market.

On the other hand, a number of external pressures from the membership of regional and international organizations within the period of 1990 to 2000 and especially the application for WTO official membership pushed Vietnam to draft and enact the VCL in due course to meet with the national context and objectives and to integrate into the global and regional economy.

In a small comparative analysis of competition laws in four ASEAN country members, Sivalingam (2006) argued "*Singapore and Vietnam introduced competition legislation to promote trade and deeper integration with the American and world economy*".¹³⁸ This reveals that international economic integration was a proxy for convergence with international competition standards in the enactment of the VCL (2004).

¹³⁷ Eleanor M. Fox (2007). Economic Development, Poverty and Antitrust: The Other Path. Public law and legal theory research paper series. Working paper No. 07-12. Law and economic research paper series. Working paper No. 07-26. New York University school of law. *Southwestern Journal of Law and Trade in the Americas*, Vol. 13, p111.

¹³⁸ Sivalingam (2006). Competition policy and law in ASEAN. 6th Global Conference on Business & Economics, Gutman Conference Center, USA. p9.

3.2 How to converge?

The passing of the VCL can therefore also be seen as an important part of Vietnam's regulatory convergence with the region. Entering ASEAN in 1995 exemplified the willingness and readiness of Vietnam to join a regional economic, political and social environment. The application for WTO membership with both pros and cons for the then Vietnamese economy showcased further the desire of Vietnam to integrate into the biggest trade organization in the world.

This was done because policymakers came to believe that *"freeing up the market has [would] hold great economic benefits for developing and transitional countries"*.¹³⁹ This was predicted by Vietnamese policymakers who expected that following the *'more integrated route'*¹⁴⁰ would allow Vietnam to intermingle with the world economy for greater prosperity.

In light of the above divergence between the internal and external factors, the question of how Vietnam could converge, and therefore become more integrated, became apparent. There were big gaps between the conditions for competition in the domestic market, the multiple stakeholders and those who had the highest power to approve the law and the requirements and expectations from and the standards of the relevant foreign partners. Looking over the 15 drafts of the VCL (2004), it is clear that right up until the 7th draft the drafted law still followed the Model Law on Competition introduced by UNCTAD in 2000 and reflected the very key and appropriate provisions of a competition law. However, from the 8th draft on, it started to go in a different direction with a lot of modifications and even unreasonable ones that contravened world standards.

This can be explained by the fact that the first 7 drafts were done by the Drafting Board with various consultations from international experts during the period 2000 to 2003. However, after the 6th of February 2003 the 8th draft was sent to the People's Committees at provincial levels and the local Departments of Trade and Tourism (currently Departments of Industry and Trade)¹⁴¹ for comments and contributions. Though the MOT received a lot of different opinions about the detailed provisions of the draft and these transformed the process of drafting; the final

¹³⁹ Ibid, p104.

¹⁴⁰ Ibid, p111.

¹⁴¹ Official document of Ministry of Trade to the People's Committees at provincial levels and local Departments of Trade and Tourism (current Department of Industry and Trade) dated 6 Feb 2003 to explain and report on the Competition Law Project (Vietnam Competition Authority document records).

draft well incorporated those opinions while still keeping the “soul” of the competition law from the beginning.

IV. Harmonizing the internal and external driving forces

This thesis has asked which factors from the domestic domain drove the Ministry of Trade to prepare the document submitted to the Government and then for the National Assembly to include the Competition Law Project into the legal construction agenda. In general, there are some key findings: (i) the Ministry of Trade were directly engaged in external economic activities so they were well aware of the inefficiency and low competitiveness of the national economy, especially the shortcomings from the activities of SOEs; (ii) Vietnam expressed clearly its strategic goal of international economic integration, which means that it had to open the market and accept competition at both levels (competition among domestic enterprises and competition between domestic enterprises and foreign enterprises). The requirements for opening the market became increasingly robust in the presence of multinational companies and corporations. It was therefore deemed necessary to respond to these concerns by introducing a competition law to regulate monopolies in the domestic market and enhance competitiveness of domestic enterprises in an effort to compete against foreign enterprises with their advantageous position in the global and Vietnamese economies.

This leads to two main findings: self-awareness and pressure. First, when joining a game, players must obey certain rules. There is pressure from other players to do this or that. Second, after joining a game a player will find that they need to do this or that to catch up with/harmonize/follow the other players. In the case Vietnam joining the process of regional integration there is both indirect pressure from the other players to follow the rules of the international trading order and self-awareness of the necessity of domestic reforms to make Vietnamese businesses and the Vietnamese economy more competitive. As shown in the analysis above, there is a very small boundary between the two different driving forces for change. The story of the drafting and passing of the VCL (2004) is a story of both pressures to adhere to regional and international rules and norms as well as a self-awareness that adopting international practices, such as the implementation of a competition policy, would increase the strength of the Vietnamese economy.

On the one hand, incentives and urgency originated from the actual needs of the economy (from the activities of enterprises operating in the economy); the existing and lengthy weaknesses of business activities; the determination for international economic integration accompanied by the market opening policy; the reform in economic and political thinking about regulating/controlling monopolies and facilitating [natural] competition with a few exceptions in several special sectors. The necessity of adopting a competition law lied in both the macro economic reforms and the international economic integration process.

On the other hand, Vietnam was under some pressure from other partners. Though not indicated directly as shown in official statements and documents of the Government/State/Party, the external factors determining the promulgation of VCL (2004) can be attributed to the following: (i) the increasing proliferation of competition laws throughout the East Asian region and all over the world especially among developing countries since the 1990s created a kind of “domino effect”; (ii) the active role of the US the EU (within the regional scope only), the UNCTAD in disseminating the role of competition in the market economy via their various types of assistance spread knowledge and diffused norms; (iii) Vietnam’s application for WTO membership in 1995 creates a lot urgency in Vietnam to improve the legal system and the business environment; (iv) a few years of being members of ASEAN and APEC (especially APEC) showed that competition policy and especially competition law had become a popular topic on the meeting agendas; (iv) the commencement of the Vietnam-US BTA released a lot of requirements around establishing a legal framework to regulate anticompetitive behaviors in the market and to introduce transparency in economic and commercial activities with a focus on the public sector.

In fact, the VCL (2004) was in the track of competition development in the region and was an “example” for Vietnam to show their efforts and commitment to opening the market and to welcome investment and the operation of foreign enterprises. This ultimately helped increase the competitiveness of the whole economy.

To weigh up the importance of the external forces for change we can ask what would likely have happened if some of these forces had not been present. For example, if Vietnam did not join ASEAN or APEC, did not sign the BTA with the US or prepare for WTO membership negotiations, would a competition law have been necessary? Or, without recognizing the

weaknesses of the economy and without setting the goal of international economic integration, would Vietnam have come up with an idea about competition? Clearly, from this perspective no single force is enough to explain these changes on their own. No group of factors has enough “weight” to explain adequately the story of enacting the VCL (2004). The foundation of the move toward competition policy was Vietnam’s awareness but certain elements of the VCL were clearly motivated by outsiders. In sum there is a good combination of internal efforts and external support.

Eleanor Fox (2007) suggested that a good antitrust law (developed by developing countries) should respond to the social and economic context of individual countries. *“Developing countries deserve an antitrust law that fits the facts of their markets and responds to their condition and needs. They deserve a law so designed and so characterized that their peoples will embrace it as sympathetic and legitimate rather reject it as foreign.”*¹⁴² Michal Gal (2004) also added that political pressure could affect the adoption of a competition law.

In the case of Vietnam, Carol V. Rose (1998) argues, *“Vietnam never follows exactly one foreign legal model, but instead tries to pick among many. This comes from Vietnam’s history of struggle and protest against foreign invaders. Vietnam has a long history of creating its own state and legal framework, so it does not like to adopt a single foreign model”*.¹⁴³ This is clearly evident in the case of adopting competition policy in Vietnam.

The below section will review the main contents of the VCL (2004) and the independency of the competition management agency stipulated in that law as “examples” showing the harmonization of the internal and external sites of ideas incorporated in the adoption of the VCL (2004).

4.1 Contents of the Vietnam Competition Law (2004)

In terms of the VCL contents from an institutional perspective, Vietnam was the “late comer” so convergence was a wise choice to borrow available formulation then made appropriate adjustments to the concurrent level of development.

¹⁴² Ibid, p125.

¹⁴³ Ibid, p106.

Basic contents covered by any competition act include abusive behaviors (abuse of monopoly or dominant position on the market), cartel (vertical and horizontal agreements) and M&A. As a matter of fact, all three key elements are reflected in the VCL as a way of absorbing “universal norms or standards”. With six chapters and 123 articles, the VCL (2004) covered well all the basic competition practices. What was different from other competition acts is the part on unfair competition. In reality, almost all other competition acts in the world regulate unfair trade practices in a separate law or incorporate this category of competition acts in legal texts on consumer protection.

Vietnam’s legislative process is actually not a process of “writing a story”. Instead, the common tendency has been a process of learning and renewing law in Vietnam’s own way. Therefore, instead of developing a new framework law, it was better to learn from the predecessors (with their both failure and success) and to adapt this to local conditions.

Carol V. Rose (1998) quoted a part in the speech of Prime Minister Vo Van Kiet to the 1993 National Juridical Conference in Hanoi indicating the rationale behind Vietnam’s “open door” policy toward legal assistance in this way:

*We lack many laws. In the economic field, which is a priority in legislation, a legal framework still has to be worked out. With the open door policy, we able to contact various legal systems out of the countries which have a higher level of development in many aspects...we need to study what is suitable for our country to establish step by step a reliable framework for domestic and foreign investment, to ensure effectiveness of state management, and protect freedom and democratic rights of our citizens.*¹⁴⁴

Recently, after eight years of enforcing the law, a lot of loopholes have been raised and criticized, for example, the market threshold of 30% on the relevant market stipulated in the 2004 Competition Law challenged the competition authority when calculating the market share of the violating company. However, at that time, Vietnam “borrowed” this “quantifying” provision from Canada and Germany as it fitted with the legal system in Vietnam. In practice there are always detailed provisions with numbers in legal regulations in Vietnam. This is seen as “a safe way” to limit abuse of power by the state management agencies. For example, in this case, a lot of developed and experienced competition regimes used “effect doctrine” to

¹⁴⁴ Carol V. Rose (1998). The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study. *Law & Society Review*, Vol. 32, No. 1, 93-140. p106.

categorize anticompetitive acts but this approach is not appropriate with the common practice in Vietnam.

4.2 Independency of the competition agency

As provided by the VCL (2004), “the head of the competition-managing agency shall be appointed or dismissed by the Prime Minister at the proposal of the Trade Minister”¹⁴⁵ and “the head of the competition-managing agency shall be appointed or dismissed by the Prime Minister at the proposal of the Trade Minister”¹⁴⁶. Those two items are very clear proofs for the harmonization of internal and external factors witnessed from the adoption of the VCL (2004). At the time of early 2000s, when we look at the model of competition agencies in the world (mainly developed countries) and in East Asia, most of them are independent agencies (being powerful as a ministry-level agency under the direct supervision of the Government or the State). This means that those competition authorities had very independent position and powerful status, which helps them a lot when handling competition cases involved by national champions or big worldwide groups with enormous market power. Competition itself is a very complicated issue and involves regulation of other sectorial agencies so independence of the competition agency is of great importance.

On the surface, the Vietnam Competition Administration Department (VCAD, current Vietnam Competition Authority) was established as an affiliation to the MOT (now MOIT) with separate budget and seal. This was a “relative and progressive independence” in the context of Vietnam’s political and economic system from that time till now. Putting the VCAD under the MOT constrained its independence but the assignment of the agency head by the Prime Minister and the VCAD’s power to initiate any competition case itself supported its independent post. In this case, the restriction on the power of the competition agency reflected the internal site of “culture, practice and thinking” while the enhancement of the enforcement mission of the competition agency in investigating competition cases assured the independent agency model that was popular in the world. If the competition agency had been totally controlled by MOT (now MOIT), it would have been in “passive” mode. However, establishment of a ministry-

¹⁴⁵ Article 49, Vietnam Competition Law, available at the website <http://www.vca.gov.vn/Web/Zone.aspx?zoneid=203&lang=en-US>

¹⁴⁶ Article 50, Vietnam Competition Law, available at the website <http://www.vca.gov.vn/Web/Zone.aspx?zoneid=203&lang=en-US>

level competition agency in Vietnam like other developed jurisdictions was impossible due to unique characteristics of the “socialist market-oriented economy” model.

In short, the design of the VCAD at the time of adopting the VCL (2004) was actually a good combination of internal and external factors. No exact factor predominated as all those were kept in balance to fit the domestic panorama and also to meet with the world best practice.

Conclusion

This chapter explored how the combination of internal and external factors in the enactment of the VCL (2004) were harmonized by Vietnamese policymakers. It is noteworthy that different from the cases of Indonesia or Thailand (those who adopted the antitrust act under the direct pressure from outside – namely the IMF as a solution to solving out the aftermath of the financial crisis in 1997), Vietnam came up with competition concepts and realized them via enacting the Competition Law under both internal and external driving forces.

The harmonization was due to the fact that no internal or external factor was dominant and big enough to affect the decision on drafting and enacting the Competition Law. On the one hand, the actual context and needs of the domestic political economy made the high ranking leaders have no way to deny the importance of competition in operating the market economy. On the other hand, in the course of intermingling with globalization, the open door policy goes hand in hand with enforcing competition. Entering regional organizations like ASEAN or APEC and applying for WTO membership indirectly pushed Vietnam to build up competition policy including competition law. Not less importantly, the conditions included in the negotiation process as well as the implementation of the BTA between Vietnam and the US partially affected the enactment of the VCL (2004).

Moreover, harmonization is evident in the process of drafting the law. The draft law was contributed to and commented on from a wide range of foreign experts on competition in developed jurisdictions or economies bearing certain resemblances with Vietnam. As competition was too new in Vietnam at that time, such opinions from the external experts were much welcome and are reflected in all 15 drafts of the law before being on the table of the National Assembly members. The main contents of the VCL (2004) and the model of enforcing

the law once again indicate the process of harmonization between the internal and the external driving forces in the enactment of the VCL (2004).

The final section reviews all the key issues of the research and points out the core findings of this thesis.

CONCLUSION

Prior to conducting this research, one could ask whether it is necessary to turn back time and analyze what happened in the past and why and how it happened. Trying to ascertain which factors account for the enactment of the VCL (2004) is such an activity. As there have been a lot of comments and criticism over the outdated contents of the current VCL, understanding how the VCL came into being provides a platform for understanding how it can be changed. The Vietnamese Competition Authority is now very active in the ASEAN Experts Group on Competition (AEGC). It is very enthusiastic in sharing its experiences with other AMSs who have yet to introduce a competition law. The outcomes of this research can be useful for policymakers in such countries. Moreover, as focused on at the beginning of the thesis, there is a real lack of literature on competition issues in Vietnam in general and the VCL (2004) in particular. This is the case even though the role of competition in national economic development is an incredibly important area of study for transitional economies like Vietnam.

Since the collapse of the Soviet Union in 1991 marking the end of Cold War dominated by two blocks – socialist and capitalists, a number a transitional economies have attracted the interest of many researchers. There are a lot of stories relating to the “transformation” of economies in transition due to their unique features and economic and political backgrounds. Vietnam is among those countries. Coming out of two wars for a long period in its contemporary history of development (from 1945 to 1975) and following the communist direction, Vietnam had very special socio-economic conditions as well as political ideology. Since Doimoi and the series of significant economic reforms that followed, Vietnam has achieved a good level of economic development and transformation. At the same time, the reformed political thinking focused on the comprehensive foreign policy of “multilateralization, diversification and international economic integration”. Vietnam has witnessed big changes in external economic relations over the past few decades.

In particular, policymakers and politicians began to understand the shortcomings of the centrally planned economy and found ways to approach the market economy with socialist orientation. As advocated by developed countries and academic research, competition plays a very pivotal role in building the market economy. In order to preserve competition in the market, a comprehensive competition policy with the core as a competition law supported by a

set of other sector regulatory laws is necessary. This thesis has shown, however, that it is really tough to build up an effective competition law to meet the fundamental technical requirements and even tougher to build a good one that well reflect the actual needs of the economy in transitional societies so that when implemented the competition law can be beneficial for the operation of the economy. In light of ongoing State subsidy and protectionism in Vietnam, competition has encountered lots of obstacles and challenges.

The globalization of competition laws has meant “over forty formerly communist or socialist states have enacted new competition laws or augmented older competition statutes since 1975 [till 2001]”.¹⁴⁷ This phenomenon, on the one hand, indicates the tendency of world market evolution with increasing recognition of competition as the key element of the market mechanism. Countries who used to follow a socialist command economy are now also keeping updated and cannot stay outside the game any longer. On the other hand, an increasing number of cross border anticompetitive cases drove countries over the world to converge and harmonize more and more. Competition law, a legal instrument to regulate competition in the domestic economy, then ensures competitiveness of national champions in the fight against foreign competitors.

There are different ways of considering the adoption of a competition bill to promote business activities in the market. First, competition might be negated and explained by this argument: “*A transition economy might use a variety of techniques to increase the role of competition as a means for governing economic activity. In the full set of possible competition policy tools, antitrust enforcement might not always be the principal instrument.*”¹⁴⁸ In other cases, it goes like this: “*Developing countries and economies in transition tend to be more vulnerable to anti-competitive practices... For these countries, it is especially beneficial to learn from other countries’ experiences*”.¹⁴⁹

Vietnam was also at the crossroad when deciding to enact a competition law during early 2000s. Obviously, the Party, the State and the Government were gradually aware of the role of competition in the process of operating the market mechanism in the economy. They also

¹⁴⁷ William Kovacic (2001). Institutional Foundations for economic legal reform in transition economies: the case of competition policy and antitrust enforcement. *Chicago-Kent Law Review*, Vol. 77:265. p266.

¹⁴⁸ Kovacic (2001), p281.

¹⁴⁹ UNCTAD/DITC/CLP/2008/2. The effects of anti-competitive business practices on developing countries and their development prospects. Hassan Qaqaya & Geogre Lipimile (Editors). New York and Geneva, 2008.

acknowledged the threats of opening the market and the prices of international economic integration. Vietnam had “closed the door” for ages and lagged behind the world for such a long time. Doimoi confirmed the open policy of the whole country for the first time. At this point, the bad performance of the national economy (low efficiency, weaknesses of enterprises working in the public sector, the negative effects of state intervention in economic activities, and so on) was the key impetus for economic reform in general and for constructing a legal framework to control monopolies in the market in particular.

At the same time, originating from the actual needs of “being friends” and “making friends” with all countries in the international community, Vietnam joined regional organizations, normalized relations with the US – the giant on the world economic and political arena, and applied for membership in the WTO – the biggest trade playing field for countries around the globe. At this point, external driving forces pushed Vietnam toward an open market, to liberalize trade and reform the legal system whether in formal commitments or through indirect ways. This required Vietnam to build up a competition regime with the immediate task of that time being enacting a competition law.

The enactment of the VCL (2004) is a harmonization of internal and external factors. Both the economic and political backdrops of the country were supportive for the enactment while the enactment also met with the requirements of certain partners though in an indirect manner. External driving forces are therefore evident in the internal driving forces and vice versa. For example, Vietnam would desire to integrate into the world economy to increase the competitiveness of the entire economy. In turn, in the process of Vietnam’s international economic integration, foreign partners also required Vietnam to control monopolies and facilitate competition in the market. At this point, the actual needs and the outside demand are intertwined. Harmonization of these forces however has not been an easy process. It has taken great effort of the relevant parties to draft the law in a way that incorporates all domestic and international comments while still keeping with the direction of the highest leading bodies.

Competition was placed high on the agenda of ASEAN, the OECD, APEC, UNCTAD, and EATOP. It has been included in almost all modern FTAs and RTAs in recent years. Vietnam falls among the first four countries in the ASEAN region to enact a competition law. Therefore, besides bringing competition concepts into economic life in response to requisite demands for

facilitating business competition, Vietnam was also very “integrated” and “active” when deciding to promulgate the VCL (2004).

“A competition law is an important tool for creating competitive conditions, yet the creation of a workable competition law is not an easy endeavour”.¹⁵⁰ This thesis has shown just how complicated and challenging that process can be by illustrating the convergence, divergence and harmonization of internal and external forces promoting regulatory change in competition law. Further studies should pursue comprehensive and in-depth works digging down into the case studies of harmonizing the internal and external factors in the contents of the VCL (2004) or the practice of enforcing that law as well as seeking better understanding of how developing or transitional economies introduce competition laws that both meet the requirements of domestic interests and levels of institutional development while also meeting the requirements for international standards of competition to facilitate trade and regional integration.

¹⁵⁰ Michal Gal (2004). “The Ecology of antitrust: preconditions for competition law enforcement in developing countries” in *Competition, Competitiveness and Development: Lessons from Developing Countries*, UNCTAD/DITC/CLP/2004/1.

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