

Assessing the Effectiveness of Vietnam's Competition Law

Shuya HAYASHI*
Nguyen Anh Tuan**

I. INTRODUCTION

In March, 2008 the Vietnam Competition Administration Department ("VCAD") issued a decision which concluded that two joint-stock companies based in Hanoi had engaged in the illegal multi-level sale of functional foods prohibited by the Vietnam Competition Law ("VCL"). The VCAD then imposed fines worth 85 million dong and 60 million dong against these companies. The fines are relatively high compared to the maximum limit fines for this type of violation which is set at 100 million dong. Nevertheless, no appeal was made by the respondents and the decision took effect immediately.¹ This decision is remarkable because it is the first official sanction wrought by the VCAD against a VCL violation in the two and a half years since the law came into force. And, in another sense, it affirms the VCAD's commitment to rigorous punishment for VCL violations. The true story of competition law enforcement in Vietnam is, however, quite complex.

In November, 2004, despite the fact that establishing a competition law regime was one of the major requirements for Vietnam's

* Associate Professor of Law at Nagoya University Graduate School of Law
Corresponding author; <shuya.hayashi@law.nagoya-u.ac.jp>

** Lecturer of Law at Ho Chi Minh City University of Law

¹ See official website of VCAD <<http://vcad.gov.vn/Web/Content.aspx?distid=666&lang=vi-VN>> accessed on April 5 of 2010.

accession into the WTO, the enactment of a competition law was a momentous event because it simultaneously affirmed the state's critical role in economic management and was the cornerstone of building a level playing field between State owned enterprises ("SOEs") and private sector enterprises ("PSEs"). On the 3rd of December, 2004, at session 6th, the National Assembly in legislature XI, passed the Competition Law No. 27/2004/QH11. The VCAD, the major enforcement agency, was established even before the passage of the law, and when the VCL came into force in July 1, 2005, many of its promulgating documents were soon enacted.² Everything seemed to suggest that Vietnam was ready for adopting competition law and many were overoptimistic about the future of a new competition law regime. However, the competition authority soon recognized that increasing social acceptance and compliance with the novel concept of competition law was not an easy task. During the first two years of the new competition regime, competition in domestic markets was still being distorted and there were many complaints from PSEs about the manipulation of market power by big SOEs. Nevertheless, given its inadequate manpower, inexperience and institutional constraints, the VCAD could not fulfill its main task as a competition watchdog to prevent such anticompetitive practices. In becoming more realistic about the situation, the VCAD had to admit that it needed at least two more years to consolidate Vietnam's competition law regime, including its enforcement mechanism.³

² Decree No. 110/2005/ND-CP dated August 24, 2005 on management of multi-level sale of goods, Decree No. 116/2005/ND-CP dated on September 15, 2005 of Government providing detailed regulations for implementation of a number of articles of the law on Competition ("**Decree 116**"), Decree No. 120/2005/ND-CP dated on September 30, 2005 dealing with breaches in the competition ("**Decree 120**"), Decree No. 05/2006/ND-CP dated January 9, 2006 on establishing and determining functions, tasks, powers, and organization structure of the Competition Council, and Decree No. 06/2006/ND-CP on establishing and determining functions, tasks, powers, and organization structure of the Competition Administration Department ("**Decree 06**"), Circular No. 19/2005/TT-BTM on guiding the implementation of a number of provisions prescribed in Decree No. 110/2005/ND-CP, dated November, 8th 2005.

³ That was indirectly stated by Mr. Tran Anh Son, the Deputy Director of VCAD and also one of the draftsmen of the VCL in his interview in June 2006, see <<http://vietnamnet.vn/kinhte/chinh sach/2006/06/586054/>> accessed on April 5 of 2010.

Over the years, the VCAD has put a lot of efforts into building its human capacity and stature with the public, and the sanctions described above are an obvious demonstration of this. However, these violations were just minor compared to other main objects of the competition law, such as cartels, abusive practices and structural changes, and the VCAD has not yet confronted the SOEs which usually have firm political support from sectional ministries. What, then, is the future direction for competition law in Vietnam? Is the VCAD ready to take more vigorous actions? Or, will it need more time to prepare for challenging big businesses? And the ultimate questions, which may remain unanswered for years to come, are thus more complicated: Will the state use VCL as a sword to allow regulators and corporate claimants to challenge anti-competitive behavior? Or, will the VCL be a shield protecting SOEs from foreign and domestic competition from "small and medium sized enterprises"?

The purpose of this article is to inform both lay and expert readers of the current state in the actual enforcement of VCL after its initial first two and a half years and provide some insights into its future development. Part II will try to figure out some significant features of VCL that reflect the particularities of Vietnam's particular model of political economy by analyzing its key provisions. Meanwhile, Part III will delineate the current organizational structures of the Competition Authorities as well as the procedures for dealing with competition pleadings. Part IV will access actual competition enforcement by analyzing some notable cases related to competition informed by both VCAD and the domestic media. Finally, Part V will give some comments on and predictions for the future of Vietnam's competition regime.

II. SIGNIFICANT FEATURES OF VCL

In Vietnam, the main impetus for competition policy in the early years of the country's transition period was to create both a pro-competitive environment for non-state owned sectors to develop, and an "appropriate shield" against anti-competition practices that could harm trade liberalization and market formation.⁴ The VCL was thus originally intended to serve as a legal instrument for (i) institutionalizing the leading communist party's policies on developing a socialist oriented market economy under state regulation, (ii) effectively controlling monopolies and the monopolization of SOEs and multi-national companies investing in Vietnam, thereby facilitating other businesses to fairly compete in domestic markets, and (iii) ensuring the consistency of the VCL with other sectional regulations on competition, such as the Civil Code, the Enterprise Law, and the Commercial Law etc.⁵

The VCA comprises 123 articles in six Chapters, stipulated as follows (See [Table 1]).

⁴ Le Hong Hanh, *Building the Competition Policy in the current Vietnam's situation* (Xay Dung Chinh Sach Canh Tranh Tai Vietnam), in *Competition and Building Laws on Competition in the current Vietnam's situation* (Canh Tranh va Xay Dung Phap Luat Canh Tranh Hien Nay o Vietnam) Nguyen Nhu Phat, Tran Dinh Hao ed., Cong An Nhan Dan Publisher 2001, at 116

⁵ Ministry of Trade, *Report to Government in concerning with competition law project*, (To Trinh Chinh Phu Ve Du An Luat Canh Tranh), 2003

Table 1. Structure of the VCL

| |
|--|
| Chapter I : GENERAL PROVISIONS Article 1 – Article 7 |
| Chapter II : CONTROL OF COMPETITION-RESTRICTING PRACTICES Section 1. Competition Restriction Agreements Article 8 – Article 10 Section 2. Abuse of Dominant Position on the Market Article 11 – Article 15 Section 3. Economic Concentration Article 16 – Article 24 Section 4. Procedures for Execution of Exemption Cases Article 25 – Article 38 |
| Chapter III : UNFAIR COMPETITION PRACTICES Article 39 – Article 48. |
| Chapter IV : COMPETITION ADMINISTRATION AGENCY, COMPETITION COUNCIL Section 1. Competition Administration Agency Article 49 – Article 52 Section 2. Competition Council Article 53 – Article 55 |
| Chapter V : INVESTIGATION, HANDLING OF COMPETITION CASES Section 1. General Provisions Article 56 – Article 63 Section 2. Competition Procedure Participants Article 64 – Article 73 Section 3. Competition Procedure-Conducting Agencies / Persons Article 74 – Article 85 Section 4. Investigation of Competition Cases Article 86 – Article 97 Section 5. Hearing Article 98 – Article 104 Section 6. Effect of Competition Case Article 105 – Article 106 Section 7. Settlement of Complaints about Competition Case Article 107 – Article 116 Section 8 Handling of Violations of Competition Legislation Article 117 – Article 121 |
| Chapter VI : IMPLEMENTATION PROVISIONS Article 122 – Article 123 |

Figure 1.

| Basic Structure of the Vietnam's Competition Law | | | | | | | | | |
|--|--|---|----------------------------|------------------|---------|------------------------|------------------------------|----------------------|---|
| Types of conduct | | Scope of application | | Types of Control | | Notification/exemption | | Sanction | |
| | | Single | Group | Ex Ante | Ex Post | Notification | Exemption | Principal | Supplement (among others) |
| Restrictive Agreements (Item I, Chapter II) | | N/A | From 30% | X | X | N/A | (except: Arts. 8.6, 8.7&8.8) | Up to 10% turnover** | |
| Abusive Practices (Item II, Chapter II) | | 30% or more having significant market power | From 50%(2)/65%(3)/75%(4)* | | X | N/A | N/A | Up to 10% turnover | Divestiture |
| Economic Concentration (Item III, Chapter II) | | N/A | From 30% | X | | 30%-50% | 50% or more | Up to 10% turnover | Division or split of the merged or consolidated enterprises |
| Unfair Competition Practices (Chapter III) | | | | | X | N/A | N/A | Up to VND100 mil. | |

Note

* (-)Number of enterprises

** (%) total turnover of the enterprise in breach in the financial year preceding the year in which the breach was committed

Source: by the authors

Accordingly, the VCL for the first time covers almost every aspect of competition policy. (See Figure 1) Moreover, the law also provides the structure for the institutional environment which a competition law necessitates, that is, agencies responsible for handling competition cases in compliance with law. The VCL applies to all types of business, including sole proprietorship, corporations, and trade associations operating in Vietnam. In regard to state control of business operations, VCL prohibits state administrative agencies and officers from performing certain acts that may hinder competition in the market, such as forcing enterprises to transact business with a designated enterprise or discriminating amongst enterprises.

The VCL's scope of application comprises four sets of conduct (See Figure 1).

- (i) First is the Agreements in Restraint of Competition as follows;
 - Agreements that are prohibited (i.e., a certain type of hard-core cartel) in all cases are as follows. This category is no exemption.
 - Agreements on preventing, restraining, disallowing other undertakings to enter the market or develop business;
 - Convincing to enable one or all of the parties of the agreement to win bids for supply of goods or services
 - Agreements that are prohibited *only when* the combined market share of participating parties makes up 30 percent or more, specified as follows;
 - Agreements on directly or indirectly fixing goods or service prices;
 - Agreements on market allocation, sources of supply of goods or services;
 - Agreements on restricting or controlling produced, purchased or sold quantities or volumes of

goods or services

- Agreements on restricting technical and technological development, or restricting investments;
- Agreements on imposing on other undertakings conditions on signing of goods or services purchase or sale contracts or forcing other undertaking to accept obligations which have no direct connection with the subject of such contacts

Agreements in this category are prohibited only when the combined market share of participating parties is 30 percent or more. Besides, these agreements can be exempted under Article 10 of the VCL.

- (ii) Second is the Abuse of Dominant Position. Undertakings shall be considered to hold the dominant position on the market if they have market shares of 30% or, more on the relevant market or are capable of restricting competition considerably. Bases for determining the capability to restrict competition considerably are provided for on Article 22 of the Decree No.166/2005/ ND-CP. Groups of undertakings shall be considered to hold the dominant position on the market if they take concerted action to restrict and fall into one of the following cases;

- 2 undertakings having aggregate market share 50% or more in the relevant market.
- 3 undertakings having aggregate market share of 65% or more in the relevant market.

⁶ Market share threshold is applied to notification standard. In VCL, where the combined market share of the merging parties is between 30 and 50 percent, the concentration must be notified to the Vietnam Competition Administration Department before proceeding with that concentration. Where the combined share of the merging parties is below 30 percent, the concentration need not be notified. Where the combined share of the merging parties are between 50 percent or more, the concentration must be submitted exemption application for the minister of industry and trade or prime minister before proceeding with that concentration.

- 4 undertakings having aggregate market share of 75% or more in the relevant market.

In VCL, an undertaking shall be considered to hold a monopoly position if there is no other undertaking in the relevant market. All abusive conducts of dominant position are prohibited and no exempted by VCL.

- (iii) Third is Economic Concentration. Merger regulation under VCL is relatively biased toward market share thresholds. The VCL prohibits undertakings from proceeding economic concentration if the combined market shares of undertaking participating in the concentration account for more than 50 percent in the relevant market.⁶ However the VCL provides for exemption in certain cases such as follows;

- One of the merging parties is in danger of dissolution or bankruptcy
- The concentration has an effect of expanding export or contributing to socio-economic development and technical and/or technological improvement.

- (iv) "Unfair Competition Practices," ("UCP") including conduct that is contrary to general standards of business ethics and which cause or may cause damage to the interests of the State and/or legitimate rights and interests of other enterprises or of consumers.⁷

This categorization is based on the evaluation of effects of each type of anticompetitive behavior on competition, such as its actual

⁷ Art. 3.4, VCL. Unfair Competition Practices includes a). misleading indications, b). infringement upon business secrets, c). constraint in business, d). discrediting other enterprises, e). disturbing business activities of other enterprises, f). unfair advertising, g). sales promotion for the purpose of unfair competition, h). discrimination by associations, illicit multi-level sales, and i). other unfair competition practices according to the criteria determined in Clause 4 of Article 3 of the VCL as prescribed by the Government.

harmful consequences or its potential threat to the proper operation of competitors, and market structure, as well as consumer welfare.⁸ In this respect, the former is considered far more dangerous than the latter since it can distort competition thereby leading to market failure; meanwhile the latter can only cause harm to competitors and the *fairness of competition*.⁹ VCL therefore has taken a stricter attitude towards Practices in Restraint of Competition ("PRC") in terms of the level of penalties and procedures to be applied.

Although there is no explicit statement in the law of its objectives, by parsing the substantial provisions of the law, one may conclude that the VCL was designed essentially to protect competitors. These tendencies are reflected in two significant characteristics of the VCL. First of all, in most cases, the VCL uses the threshold of 30% market shares to limit the scope of the application of the VCL as a way of protecting vulnerable domestic SMEs from larger rivals. And secondly, the provisions of the VCL tend to focus more on protecting a highly competitive market structure not so much through the regulation of cartels but through strict constraints on monopolization.

- (i) The market share threshold of 30% in the relevant market is used as a common benchmark for bringing the VCL into play in regard to PRC.¹⁰ The reason for excluding small businesses from the reach of the VCL was that the drafters had seen enterprises with a (combined) market share of less than 30% to have no capability of harming the competitive environment or consumers.¹¹ Accordingly agreements in restraint of competition are allowed if the combined market share of the parties to such agreements is less than 30%. The same applies to economic concentrations.¹² An enterprise is only deemed to

⁸ Le Danh Vinh, Hoang Xuan Bac, Nguyen Ngoc Son, *Law on Competition in Vietnam*, (Phap Luat Canh Tranh Tai Vietnam), Tu Phap publisher, 2006, at 235

⁹ *Id.*, at 103-104

¹⁰ This threshold is not applicable to Unfair Competition Practices

¹¹ Ministry of Trade 2003, at 7

¹² Arts 9.2 and 20.1, VCL

hold a dominant market position if it enjoys a 30% market share or above, except for those which do not meet the market share threshold but have significant market power.¹³ The 30% threshold, however, is not applicable to three types of agreements in restraint of competition, namely agreements to prevent or restrain new entrants from entering the market, agreements to exclude rivals from the market and collusive tendering.¹⁴ This is because the first two hinder the formation of a market economy, and the latter has long been a notorious phenomenon and has been vigorously opposed by the public.

- (ii) The law are rigorous towards the abuse of dominant position, cautious about economic concentration, while rather tolerant of cartels. The law enumerates six abuses of dominant market position and eight situations for monopolies to be prohibited per se.¹⁵ No exemption is granted for such conduct. For economic concentration, in principle, all economic concentra-

¹³ Art. 11.1, VCL. According to Art. 22 of Decree No. 116, The "significant market power" shall be decided based on one of the following factors: (1) financial capacity of the enterprise or its owners, including organizations or persons who established or has the right to control or the parent company of that enterprises; (2) technological capability; (3) ownership of or right to use intellectual property objects; and (4) scale of distribution network,

¹⁴ Article 9.1, VCL

¹⁵ Arts. 13 & 14, VCL. Six abuses of dominant market position are as follows;

1. Selling goods, providing services at prices lower than the aggregate costs in order to eliminate competitors
2. Imposing irrational buying or selling prices of goods or services or fixing minimum re-selling prices causing damage to customers
3. Restricting production, distribution of goods, services, limiting markets, preventing technical and technological development, causing damages to customers
4. Imposing dissimilar commercial conditions in similar transactions in order to create inequality in competition
5. Imposing conditions on other undertakings to conclude goods or services purchase or sale contracts or forcing other undertakings to accept obligations which have no direct connection with the subject to such contracts
6. Preventing new competitors from entering the market.

In this way six acts abusing dominant position are included above-mentioned 1.-6. And following acts are also added.

7. Imposing unfavorable conditions on customers
8. Unilaterally modifying or cancelling the contracts already signed without plausible reasons.

tions are prohibited if the participants enjoyed a combined market share in the relevant market of more than 50%. However, an individual exemption may be granted if such economic concentration brings about economic efficiency¹⁶ or the targeted enterprise still falls within the category of SME after the economic concentration.¹⁷ In case of the combined market share of participants in an economic concentration, where this is from 30% to 50%, they may either notify the competition authority prior to commencement of such concentration and wait for its acceptance or file for an individual exemption if it meets the conditions for granting such exemptions.¹⁸ In contrast, except for three types of restrictive agreements mentioned above, all other restrictive agreements are outlawed in all circumstances. However, in the case of cartels that reach a threshold of 30% or more, they can still be granted an individual exemption for a definite period if the cartels in questions aim at reducing prime costs thereby benefiting consumers.¹⁹

Through this approach, the VCL seems to be used as a shield protecting small businesses from big competitors in order to maintain a competitive environment in domestic industries. It is expected to help SMEs, which accounted for approximately 96% of operating enterprises in Vietnam at that time, intensifying their competitiveness through cooperation thereby preventing private monopolization by big businesses.²⁰ However, by focusing too much on protecting market structure,

¹⁶ According to Art. 19 of VCL, parties to an economic concentration may obtain for an individual exemption if it falls within any of the following conditions (1) one or more of the parties participating in the economic concentration is or are at risk of being dissolved or of becoming bankrupt; and (2) the economic concentration has the effect of extension of export or contribution to socio-economic development and/or to technical and technological progress.

¹⁷ According to Decree 90 of the Government dated Nov. 23, 2004, a SME is defined as having a register capital of less than 10 billion dong . or employing less than an average of 300 employees in a year

¹⁸ Art. 18&20 VCL

¹⁹ Art. 10.1, VCL

²⁰ Vinh 2006, 314

the drafters of the VCL seem to have left aside the need to consider the nature of agreements for restraint of trade that may cause harms to consumers. As a result hard core cartels, such as those for price fixing, or market or consumer allocation, amongst enterprises with a combined market share of less than 30% is legal. This is somewhat in contradiction to the common tendency in the majority of jurisdictions that normally consider hardcore cartels to be illegal in themselves.²¹

VCL preserves the right of the state to decide the price, quantity, volume and scope of goods and services in state monopoly sectors, and to control enterprises that produce or supply public utility products or services by placing orders, assigning plans or conducting tenders in accordance with prices or fees stipulated by the state.²² One thing to note is that these provisions will not apply to SOEs when they are conducting business activities: (i) outside state monopoly sectors and (ii) such activities are other than the production or supply of public utility products or services.²³ However, the term "State Monopoly Sectors" itself is not clear and thus, as will be discussed below, may lead to different understanding among the state authorities, scholars and businesses. Moreover, the scope of the application of this provision is also indefinite, e.g. whether such immunity is also applicable when such enterprises conduct unfair competition practices. This provision therefore needs to be clarified in the future.

²¹ For example, See the European Commission Notice on Agreements of Minor Importance which do not appreciably restrict competition under Article 81(1), of the Treaty establishing the European Community (*de minimis*). O.J.C 368, 22.12.2001,p.13-15. The *de minimis* principle is not applied to the agreement containing hardcore restrictions such as those involving price-fixing, limiting output, or the allocation of market or customers.

²² Art. 15.1 & 15.2, VCL

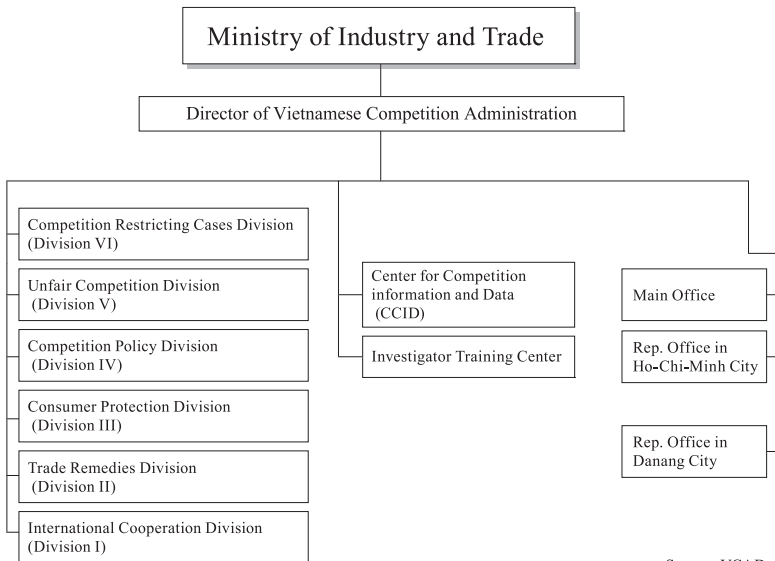
²³ Art. 15.3, VCL

III. COMPETITION PROCEDURES AND AUTHORITIES

A. Competition authorities

The competition authorities are the Vietnam Competition Administration Department ("VCAD") and the Vietnam Competition Council ("VCC"). These two agencies were established by the Vietnamese Government and are responsible for the state administration of competition. The VCC is designed to implement adjudicatory functions and to deal with more complex and sophisticated cases that may be able to distort market structure and to bring about an adverse impact on economic development. In contrast, the main function of the VCAD is to conduct administration and to handle miscellaneous violations, namely UCP(see, the following figure 2.).

Figure 2. Structure of the Vietnam Competition Administration Department



Source: VCAD

(i) Vietnam Competition Administration Department

Under Article 49 of the VCL the Government establishes and regulates the organizational structure as well as staffing of the administrative body for competition. However, 9 months prior to the enactment of the VCL, in March 2004, the VCAD had been established under the Ministry of Trade, which was recently renamed the Ministry of Trade and Industry ("**MOTI**"). The Director of VCAD ("**the Director**") is appointed or dismissed by the Prime Minister following a proposal from the Minister of Industry and Trade ("**the Minister**") and is accountable to the Minister for all of the activities of VCAD.²⁴ The Minister has the right to appoint and dismiss deputy Directors and heads of representative offices based on the proposal of the Director. However, there is no provision for the official term of the Director. The VCL provides qualifications for the appointment or dismissal of investigators by the Minister at the proposal of the Director.²⁵

The VCAD is delegated to implement a broad scope of duties and powers including competition, anti-dumping, anti-subsidies and the application of self-protective measures and consumer protection. With regard to competition, VCAD has, among other functions, the following, (i) controlling economic concentration, (ii) accepting application dossiers for individual exemption, and advising the Minister or the Prime Minister for decisions in this regard, (iii) conducting investigations, and (iv) handling and sanctioning UCPS.²⁶

Currently, there have been significant changes in the capacity as well as organizational structure of the VCAD since its establishment. As from Sep. 2007 the Prime Minister appointed a new Director of the VCAD who was a former head of the Planning and Investment Department under the Ministry of Trade.²⁷ The number

²⁴ Art. 4, Decree 06

²⁵ Art. 52, VCL

²⁶ Art. 49.2, VCL and Decree 06

of deputy directors to assist the Director also increased from three to five. One of the two new Deputy Directors was the former secretary to the Minister and the other was Vietnam's trade councilor in Japan. In 2007, the total number of key personnel and staffs increased from 36 to 51.²⁸ However, this number of personnel is most definitely not enough for the VCAD to carry out its wide range of duties. Due to the fact that Vietnam is currently the target of antidumping measures by the US and EU, since its establishment, most of the VCAD's resources have been employed in dealing with these antidumping issues.²⁹ The actual number of staff who specialize in competition matters is thus very limited (see, the following Table 2.).

Table 2. Number of Personnel in VCAD

| Year | | 2007 | 2008 | 2009 |
|------------------|-----------|------|------|------|
| Number of Staffs | | 40 | 60 | 85 |
| Average Age | | 32 | 30 | 29 |
| Specialization | Law | 10 | 20 | 30 |
| | Economics | 20 | 35 | 40 |
| | Others | 10 | 15 | 15 |
| Sexuality | Male | 27 | 42 | 50 |
| | Female | 13 | 28 | 35 |
| Degree | Bachelor | 33 | 49 | 62 |
| | Master | 6 | 10 | 17 |
| | Doctor | 1 | 1 | 1 |

Source: VCAD

(ii) *Vietnam Competition Council*

The VCC is an independence organ from MOTI and is responsible for hearing and resolving cases concerning PRC and the review of appeals against decisions of the hearing panels held in accordance with the VCL. Members of the VCC number from 11 to 15, appointed for a five year renewable term and dismissed by the

²⁷ Decree No. 1205/QĐ-TTg dated Sep. 11, 2007 on appointing Mr. Bach Van Mung to be the Head of VCAD

²⁸ Data provided by an officer at VCAD

²⁹ <http://vcad.gov.vn>

Prime Minister at the proposal of the Minister. The Chairman of the VCC ("**the Chairman**") is selected from amongst the members of the VCC.³⁰

As of June 2006, 11 members of the VCC were appointed by the Prime Minister.³¹ The Chairman is the Deputy Minister of MOTI and the two Vice Chairmen are the Deputy Minister of Justice and the Deputy Minister of Finance. The other 8 councilors are high ranking officers selected from the major ministries, including MOTI, the Ministry of Telecommunication and Transport, the Ministry of Agriculture and Rural Development, the Ministry of Planning and Investment, and the Ministry of Construction. At the time of appointment, they were also in charge of their offices at the respective ministries. However, according to an officer working for the VCAD, at least three of them now, including the chairman, have retired from their former positions at the respective ministries. A secretariat is established by the Minister to assist the VCC.³² As of 2006, three officers were appointed to these positions.³³

(iii) The independence of VCAD and VCC

A controversial issue regarding the competition agencies during the drafting phase was the independence of the VCAD and the VCC. The main concern was that a competition authority established under MOTI would be ineffective in controlling and preventing the giant SOEs usually owned by ministries from abusing their natural monopoly position. Moreover, MOTI itself also owned many important SOEs and there was no guarantee that MOTI would not abuse its power as the superior agency directing the decisions of VCAD. The dependence, fairness and objectiveness of VCAD was thus questioned.³⁴ In response to these concerns, the resolution of the drafting board was in favor of placing VCAD under MOTI, but

³⁰ Arts. 53 & 54., VCL

³¹ Decision of the Prime Minister No. 843/2006/QD-TTg, dated June 12, 2006

³² Article 4.2 of Decree No. 05

³³ Decision No. 1378/QD-BTM dated August 28, 2006 of the Minister

allowing the structural organization and key personnel of VCAD to be decided by the Prime Minister.³⁵ However, this was just a temporary solution, because:

- Technically, the real power of the VCAD is weakened by many of the VCL's provisions. For example, one of the VCAD's functions is to control economic concentration, but the Minister is delegated the power to grant exemptions.³⁶ Likewise, the Minister can review, uphold, amend or revoke, in part or whole the Director's decision on the resolution of a UCP complaint.³⁷ In regard to the personnel and budget of VCAD, the Minister recommends to the Prime Minister the appointment or dismissal of the Director and himself decides the staff of the VCAD.³⁸ Because the official term of the Director is uncertain, the Director may not risk to his/her position by opposing the Minister's orders. The budget of VCAD is also not totally independent. Although its budget is directly funded by the state budget, MOTI's financial scheme specifies the amount for each year. Apart from that, there is no other source of income for the VCAD.
- The VCAD's discretion is mostly restrained in dealing with UCP. When dealing with cartels or abuses of monopoly position it must forward the files to the VCC to establish a hearing panel to handle the case. Thus the most important aspects of competition law are left in the hands of the VCC, an agency shaped by "an assembly of key ministries representatives". This could be considered as a way of avoiding potential conflict between competition policies and industrial policies. However,

³⁴ Alice Pham, *The Development Of Competition Law In Vietnam In The Face Of Economic Reforms And Global Integration*, Northwestern Journal of International Law & Business, Spring 2006, at 10

³⁵ Under the Law on Organizational Structure of Government, 2001, this is at the Ministry's discretion.

³⁶ Art.25.1, VCL

³⁷ Art. 107.2, 112 & 113, VCL

³⁸ Decree 06

with the current composition of the VCC, it is easy to envisage political interference in the competition policy and direct VCC's decisions being taken by political leaders.

As soon as the 11 councilors were first introduced to public, it provoked public concerns about the capacity of the VCC in resolving breaches of the VCL, especially those involving the giant SOEs owned by other ministries. There were a number of reasons for doubt about the capacity and independence of VCC. Firstly, the VCC's members were not fulltime councilors, and so they may not be able to spend the appropriate time needed for competition proceedings that are mostly complicated and time consuming. Secondly, the Chairman was the Deputy Minister of MOTI, meaning there was little possibility that he would have enough determination to challenge the big SOEs. Thirdly, given the other councilors of the VCC, except the Chairman and two deputy Chairmen, were officers at Department-level at sectional ministries, the possibility that their judgments would be directed by the higher ranking officers at their respective ministries was quite feasible.³⁹ Until the VCC proves itself workable, the concerns about its incapability and dependency seem to be reasonable.

B. Procedure

The procedure for investigating and dealing with a competition pleading under the VCL can be roughly divided into three stages. (See Figure 3) At the first stage, or the "preview stage," any organization or individual that believes its legitimate rights and interests have been infringed due to a breach of the VCL is entitled to lodge a complaint at the VCAD.⁴⁰ In such circumstances, the complainant has the burden of submitting evidence and must advance an amount equivalent to 30% of the fee for dealing with

³⁹ The detailed discussion is available at <http://www.mot.gov.vn/forum/forum/viewthread?thread=544> (last visited as of Nov. 10, 2007)

⁴⁰ Art. 58, VCL

such a case to the VCAD.⁴¹ The VCAD itself can also initiate an investigation if it discovers a breach of the VCL.⁴² The statutory limitation period for bringing a complaint before the VCAD is two years from the commencement date of the suspected conduct.

Once the complaint is accepted, then the second stage, or the "investigation stage", proceeds. The Director assigns investigators to conduct a preliminary investigation. The time limit for a preliminary investigation is 30 days. If indications of a violation are found, an official investigation is conducted.⁴³ From this step, there are differences between procedures for dealing with UCP and those of PRC.

- (i) For cases concerning UCP, the investigators must identify the grounds for concluding whether there was a breach of the VCL or not, and then submit this to the Director for him to issue a final decision. The time limit for an official investigation is 90 days and can be extended up to 60 days if necessary.
- (ii) For cases concerning PRC, the VCAD examines the relevant market, market shares of the parties subject to investigation, the evidence etc. The time limit is 180 days and can be extended up to 160 days. After completion of the official investigation, the VCAD must submit the investigator's report and forward the complete file of the case to the VCC to establish a hearing panel to hold a detailed hearing.

The third stage, or the "hearing stage", is only available for PRC pleading. In this stage, the hearing panel of at least five councilors conducts a hearing to examine the facts of the case and issue a resolution.

⁴¹ According to Article 53 of Decree 116, the fee for dealing with cases concerning UCP is Dong10 mil. and 100 mil. in cases concerning PRC.

⁴² Art. 86, VCL

⁴³ Art. 87, VCL

As VCL violations are not considered criminal offences, while conducting investigations, VCAD can refer the case for criminal prosecution where indications of a crime are found. Moreover, when proceeding to the Investigation Stage, the Director or the Chairman of VCC, under the recommendation of the complainants, the investigator or the chairman of a hearing panel, can grant administrative preventive measures, including temporary detention of a person, material evidence and facilities in breach of VCL, body searches, and on the-spot investigation, if necessary.⁴⁴

Any related party who does not agree with a part or whole of the decision of the Director or the hearing panel may appeal to the Minister and VCC, respectively. The decisions of the Minister and VCC are final and take effect immediately. However the concerned parties are entitled to challenge a part or whole of those decisions before a provincial administrative court in accordance with the administrative procedures. (For a visual display of appeal procedures, see Figure 4)

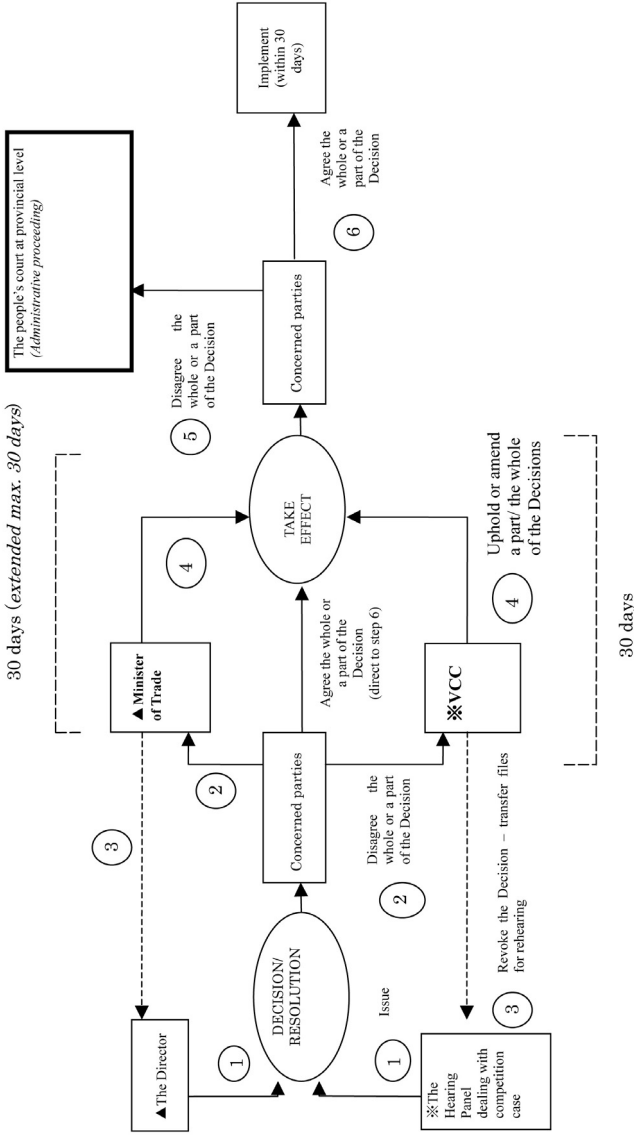
C. Sanction and Enforcement

The applicable sanctions for a PRC is calculated based on a percentage (%) of the total turnover of the enterprise that has found to be in breach for the financial year preceding the year in which the breach was committed. Accordingly, depending on type and seriousness of violations, a fine equivalent to a maximum 10% of turnover may be imposed on the violators. One or more additional penalties and remedies can be also imposed.⁴⁵ Divestitures may be applied for illegal economic concentrations.

⁴⁴ Art. 88, Decree 116

⁴⁵ According to Decree 120, the two additional penalties are (a) withdrawal/revocation of business registration certificate, license or practicing certificate, and (b) confiscation of exhibits and facilities used to commit the breach. The remedy comprises (i) restructure of an enterprise; (ii) division or separation of merged or consolidated enterprises, compulsory re-sale acquired shares of an enterprise; (iii) public rectification; (iv) removal of illegal terms and conditions from a contract or business transaction; and (v) other measures necessary to remedy the effects of the restraint on competition caused by the practice in breach.

Figure 4: Procedures for dealing with complaints against a Decision of the Competition Authorities



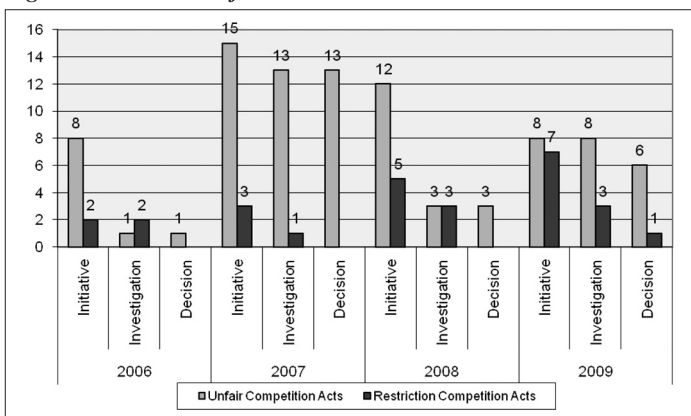
Note:
 ※ Decision of the Hearing Panel
 ▲ Decision of the Director
 Source: by the authors

The level of the fine applicable to an UCP, however, is limited by the Ordinance on Dealing with Administrative Violations.⁴⁶ Where a UCP violation is found, a fine ranging from 5 million dong to 100 million dong, and one or more additional penalties and measures for remedy are applied.

Private damages are not available under the VCL. The injured parties must bring the case before a civil court for damages.⁴⁷ The VCL has not yet introduced a leniency program.

The parties are expected to voluntarily implement a decision on the resolution of a competition related complaint within a time-limit of 30 days from the date of its effectiveness. If one of the parties fails to do so in the 30-day period, the judgment creditor is entitled to lodge a request with a competent state administrative body to enforce the decision. However, the VCL nor its promulgating documents mention the responsibility of the VCAD at the enforcement stage. Thus the matter of enforcement is likely to be out of the competition authorities' hands.

Figure 7. Number of Case Review under the VCL



Source: VCAD

⁴⁶ Art. 14.3, Ordinance of Standing Committee of National Assembly dated July 2, 2002 on Dealing with Administrative violations.

⁴⁷ Art. 117, VCL and Art. 6, Decree 120

IV. A PRELIMINARY ASSESSMENT OF THE VCL ENFORCEMENTS: SOME CASE STUDIES

The VCL has had legal effect for more than two and a half years, and except for the above mentioned decision of the VCAD, at the moment the VCAD is dealing with a few filed cases, including claims against abuse of dominant position, misleading instructions and advertisement aimed at unfair competition, as well as another claim regarding illegal multi-level selling goods. Some claims have not been accepted for adjudication due to a lack of supporting evidence, while others advanced to either preliminary or official investigations. However, we have to wait a little more for a clearer understanding of the competition agencies' position regarding more difficult and controversial matters of the competition law, such as how to define relevant markets, concert practices, or to calculate fines and so on. Notably, accusations of anti-competitive practice under the VCL are much more prevalent in daily newspapers and periodicals than in legal pleadings.

A. Cartels

- Banking

In early 2008, Vietnam faced high levels of inflation and economic growth. The State Bank of Vietnam ("SBV") thus had to carry out tightened monetary policies to slow down economic activity. The supply of dong in the financial markets was getting scarce, thereby causing banks to compete in hiking their interest rate for deposits in dong. In reaction to this situation, the Governor of the SBV issued an official letter dated Feb 26 requesting banks not to exceed the ceiling interest rate of deposit in dong of 12% per annum. The banks in turn tried to decide ceiling interest rates for deposits in dong and USD at several meetings held in March. Eventually, as reported by the mass media, from April 2 of this year members of Vietnam's Bank Association ("VNBA") agreed to new ceiling interest rates for deposits in dong and USD at 11% per

annum and 6% per annum respectively. The banks also fixed the ceiling interest to be paid to deposits in dong for a deposit term of less than 6 months at 10.5% per annum, and agreed not to commence promotional activities through awards in money or in kind.

This agreement was a result of the VNBA's effort, as stated by the general secretary of the VNBA, and was designed to prevent a race between banks to increase interest rates for deposits and to help the SBV implement its tightened monetary policies to curb inflation. From a competition law perspective, this agreement falls within the list enumerated by Article 8.1 and is prohibited by Article 9.1 because the parties to it enjoy more than 30% market share in the relevant market. In a survey by a local newspaper, it was found that there are different opinions regarding the legitimacy of this agreement amongst bankers, businesses and scholars. Some found it "unacceptable" as it would harm customers (depositors) and thereby distort competition in the finance market. Some, however, thought that it was a reasonable solution to reduce the cost of mobilizing capital. Meanwhile, others cautioned that the purpose of this agreement should be first clarified as to whether it aimed at a restraint of competition or at serving the public interest, before judging its legitimacy.⁴⁸ As for the VCAD, it has not yet given any comment on this agreement. It is noteworthy that this is not the first time the VNBA and its members have reached agreements on fixing interest rates since the VCL came into force. In early 2005, the VNBA also played a dynamic role in settling an interest rate fixing agreement between the state owned commercial banks and 19 private commercial joint stock banks.⁴⁹ At that time a similar justification was put forward by the VNBA for its cartel as it were.⁵⁰

⁴⁸ <http://www.sgtt.com.vn/detail42.aspx?ColumnId=42&newsid=31998&fld=HTMG/2008/0326/31998> (accessed on April 5 of 2008.)

⁴⁹ For detailed discussion, see Nguyen Thanh Tu, *Agreement on interest rate amongst banks and the Laws of Competition*, (Thoa Thuan Ve Lai Suat Giua Cac Ngan Hang va Phap Luat Canh Tranh), Nghien Cuu Lap Phap Review, Volume 2/2005

● Oil

Another example of a pricing cartel, which is somewhat similar to the famous Oil Cartel in Japan during 1972 -1973,⁵¹ is the current petroleum resale price control in Vietnam. Given that current domestic enterprises are incapable of refining crude oil, Vietnam's petrol import market is characterized as a typical state collective monopoly. There are only 11 SOEs allowed to import petrol, among them, Petrolimex, Petrol Vietnam, Petec and Saigon Petrol are the four largest importers. They enjoy a 90% market share in the relevant market. Previously, the government controlled the petrol resale price and provided subsidies for the importers. As from May 1, 2007 pursuant to Decree No. 55/2007/ND-CP dated April 6, 2007 ("**Decree 55**"), the Government deregulated the petrol retail market by allowing petrol importers to freely set their resale price. However both MOTI and the Ministry of Finance have the right to intervene in the importers' price adjustment when they find signs of unreasonable price increases.

Before this Decree took effect, with the price of crude oil in international market drastically increasing, there were some rumors in the media and local newspapers that the petrol suppliers would simultaneously increase their retail price, but it was unclear when and by how much. In fact, the key oil importers had decided to raise the petrol retail price by 800 dong per liter, commencing from 0:00 am May 7, 2007. This proposal had the acknowledgment of the Ministries. However, the information was leaked, and it led to a meeting between the Ministries' representatives, including the then Minister of Trade, and key petrol importers to reconsider the time for the petrol price increased in the evening of May 6, 2007. As reported in a local newspaper, the Vietnam Economic Times,

⁵⁰ Central Institute for Economic Development (CIEM), *Report of Vietnam's Economy in 2005*, (Bao Cao Kinh Te Vietnam 2005), at 61-62

⁵¹ For detail discussion see Curtis J. Milhaupt, J. Mark Ramseyer, and Michael K. Young, *Japanese Law in Context - Readings in Society the Economy and Politics*, Harvard University Asia Center, London 2001, 548-569

several solutions were considered at the meeting, such as increasing the retail prices sooner than previously planned, or delaying the increases for several days, so that speculators could not make profit. However, the Ministries finally decided to execute the original plan. The situation became more complicated when the oil price in the international market decreased significantly. As reported in a local newspaper, the price decrease brought about a significant profit, at the time estimated to be between 800 dong and 1.500 dong per liter, for the importers. The Government thus suggested that the importers lower their retail price. However, none of them abided by the Government's suggestion. On August 11, the Government eventually had to request that the Ministries adjust the resale price in accordance with Decree 55. As a result, the retail petrol price was decreased by 500 dong per liter in August 16. From the VCAD's perspective, in her interview on May of 2007, the former Director of the VCAD said it was observing the importers' behaviors and would prosecute any of the concerned parties if there were any indication of a violation. However, in fact, during this time, unlike the JFTC (Japanese Fair Trade Commission) who prosecuted several cartelists and individuals during the oil crisis 1972-1973, the VCAD did not provide any official opinions or take any precise action in response to the price arrangements.

These two cases reflect one of the most difficult issues in enforcing the VCL—the conflicts between the concept of competition and other industrial policies. Under the previous command economy, Vietnam exercised excessive state controls over price and product allocation. During the early years of the transition to a socialist-oriented market economy, state management of the economy was and continues to be manifested in the direct control of large SOEs which allow the state to exercise powers of macro-economic adjustment, and also *de facto* powers for managing the spread and size of domestic private sector enterprises. Meanwhile, with one of the most important tasks of competition law being to promote free and fair competition, the conflict between the two is therefore

unavoidable. To overcome such problems, there were suggestions that a division of tasks should be set forth, such as putting the VCAD in charge of "competition protection" with other tasks, including "technical regulation" and "economic regulation," being handled by the particular ministries concerned.⁵² However, there is actually no clear boundary between competition law and administrative regulations. In the case of Vietnam, the fact that the VCAD is placed within MOTI exaggerates the problem, as exemplified in the above cases of the banking and oil cartels.

In the banking cartel, while there was an acknowledgment of a breach of the VCL, the concerned parties led by the VBA were still committed to those agreements. The justification was that, in their conception, fixing interest rates was a technical matter that should be regulated by laws on banking and thus not a matter related to competition. The oil cartel is a more severe case. The meetings were arranged and the price was fixed under the direct supervision of the Ministries' representatives and the then Minister. Hence, the context of Vietnam's oil cartel was quite similar to that of Japan's oil cartels in the 1970s which indirectly involved the former Ministry of International Trade and Industry ("MITI") in Japan. However, the outcomes were completely different. While in Japan, the JFTC successfully prosecuted several companies and individuals who participated in the cartels, in Vietnam the VCAD kept silent and did nothing. The fundamental difference between the VCAD and its Japan's counterpart, the JFTC, was the latter's independence from the government. The JFTC had an independent status, which meant that it could wisely take advantage of the public outcry following the revelations of the cartels to initiate investigations against cartelists who were backed by MITI and win their case against them. But in the case of Vietnam, due to the administrative hierarchy, the VCAD could not act against its superiors. In turn the independent status granted to the VCC therefore became meaningless because it could not itself initiate a

⁵² OECD(2005), at 5-6

hearing without the VCAD first investigating.

These cases are, however, only two examples amongst many other similar incidents that have happened in other important industries, such as automobiles, telecommunications, and construction. They all show us that one of the most difficult tasks for the VCL is to deal with political priorities in dealing with competition.

B. Abuse of Dominant Position

The latest dispute regarding the abuse of monopoly position is between Pacific Airline ("PA"), a State owned air carrier operating mainly domestic flights, and the Vietnam Air Petrol Company ("VINAPCO"), a State owned monopoly supplying aircraft fuel in Vietnam. Currently, there are four air carriers allowed to operate domestic flights, namely Vietnam Airline ("VNA"), PA, VISCO and Vietjet. Among them VNA is the biggest, and PA is the second biggest, occupying dominant market positions. They are also main competitors. Vietjet is the only private joint stock company but has not yet started operating domestic flights. VINAPCO owned by VNA however is an independent legal entity operating independently from VNA.

VNAPCO is the sole supplier of aircraft fuel for about 28 airlines using fuel charging services in Vietnam, including both VNA and PA. Due to the fluctuation of petroleum prices in the international market, PA and VINAPCO signed a fuel supply contract on Dec. 2007 which required any increase in the contracted price to be negotiated and approved by both parties. The same fuel supplying contract exists between VINAPCO and VNA as well. Given the steady increase in the price of petroleum, in March 2008 VINAPCO requested PA to renegotiate a new contract price for aircraft fuel. However, the two parties could not reach an agreement on the price since PA claimed that VINAPCO's proposed price was higher than the price VINAPCO sold to VNA. On April 1, VINAPCO stopped pumping fuel to PA's aircrafts. As a result

30 PA domestic flights were delayed for 2 to 3 hours. In order to solve the problem quickly, PA sent an official letter requesting help from the Government, the joint ministries of Transportation and Finance, and the Civil Aviation Administration of Vietnam (CAAV). Eventually through pressure from the Minister of Transportation, VINAPCO agreed to supply fuel to PA's aircraft that morning. However, VINAPCO did not stop supplying fuel to VNA's aircraft, even though VNA also refused to accept VINAPCO's new proposed price. A representative of VINAPCO explained that its action was a self-defense measure to avoid bankruptcy. However, it did not do the same to VNA because VNA was its biggest client for a long time.

The delays affected about 5,100 PA customers and caused serious damage to PA's reputation. However, in an interview with a Vietnamese newspaper, the current General Director of PA said that it had no intention of suing VINAPCO because, as he explained, it was not a "positive resolution" and it wanted to build a sustainable relationship with VINAPCO as its second biggest customer. Instead, PA requested that the Ministry of Finance reconcile its differences with VINAPCO and chair negotiations to set a new price. Nevertheless, the incident provoked vigorous criticism from customer protection groups and the mass media. On the following day, as public pressure increased, the VCAD finally raised its voice as a watchdog for competition activities in the market by sending a request to VINAPCO for an explanation of its conduct. In the mean time Mr. Tran Anh Son, the Deputy Director of the VCAD, said that the VCAD directed its representative office in the South to collect the necessary evidence for a preliminary investigation should VINAPCO's explanation not satisfy VCAD.

At this time we still do not know whether the VCAD will carry out the preliminary investigation on VINAPCO or not. However, the implication of this incident was the credibility of the competition authorities in the business community. As a matter of principle, in order to gain social acceptance and compliance with

law, the competition enforcement agencies must acquire a high standing and good reputation among businesses and consumers. As long as competition agencies are considered to be credible and are respected, both the consumer and businesses will bring actions before them whenever their legitimate interests are infringed.

Despite the fact that VINAPCO's conduct most likely constituted an abuse of its monopoly position which is prohibited by Articles 13 and 14 of the VCL and the fact that the VCAD clearly expressed its opinion in favor of PA's position were it to plead for the VCAD to take action, the PA chose to rely on administrative authorities rather than the VCAD to solve its dispute with VINAPCO. There are two reasons that can be used to explain PA's reaction. First, PA wanted to stop the trouble as quick as possible to minimize the potential damage and following competition authorities procedures would not have met this requirement. Secondly, PA did not have the incentive to bring VINAPCO before the competition authorities because the current competition law does not provide any awards for private claimants similar to treble-damage liability in the United States. Therefore clearly PA did not want to ruin its business relationship with the monopolist thereby minimizing the risk of facing more trouble in the future. In essence, the indifference of PA to competition pleading also meant that the VCAD had not yet created a high level credibility within business communities, or at the least with PA.

The low reputation within the business community can cause more difficulties for the VCAD in detecting VCL violations, because, given its limited number of personnel, the VCAD cannot itself detect indications of VCL violation all the time. Information and evidence provided by corporate claimants and customer are thus very important for the VCAD to enhance efficiency and reduce workload. The only way to solve this problem is for the VCAD to create a good reputation and gain social respect by taking on large numbers of incumbent market participants. The VCL should also introduce incentives, such as treble-damage awards, for claimants to

bring actions before the competition authorities.

C. Economic Concentration

The recent hot debate in Vietnam concerning the establishment of an electricity trading company is another example that can be used to illustrate the application of VCL provisions regarding economic concentration. A proposal for establishing a joint venture enterprise to sell and purchase electricity ("JVE") was submitted to the Prime Minister last year by the Electricity of Vietnam (EVN). According to the proposal JVE would be established under the form of a shareholding company, in which the seven giant SOEs, including PetroVietnam, Vietnam Coal and Minerals Group, Song Da Construction Corp., VNPT, Vietnam Cement Corp., Vietnam Steel Corp., and Vietnam Machinery Installation Corp, would own a 49% shareholding and EVN would hold the rest. If it was established, JVE would be a monopoly for selling and purchasing on the electricity market and would be expected to create interbrand competition amongst EVN's affiliations. However, the World Bank and its advocates completely opposed this plan. They argued that selling and purchasing electricity should not be considered as a state monopoly sector and asked for it to be opened up to competition. This led to heated debate between the two sides for several months. Finally, in middle of September last year, the Prime Minister ended the controversy by requesting that EVN and other participants cancel their proposal.

From a competition law perspective, this economic concentration is prohibited under Article 18 of the VCL. Its proposal should thus have been lodged at the VCAD for preview and then submitted to the Prime Minister to determine whether or not to grant an exemption. However, in this case, again the incumbents ignored the VCL and made the proposal directly to the Prime Minister. This fact tells us that businesses or at least the SOEs are somewhat not ready for adapting the concept of competition law. However, one of the significant points in this case is the role of the World Bank.

The World Bank's protest against the EVN proposal, which would otherwise have created a monopoly, actually managed to attract public attention and public support was one of the decisive factors in the World Bank's victory in the end.

The implication from this case is the importance of public advocacy in promulgating competition law. The concept of competition law should be informed by an understanding of interest groups, development policy, and Vietnam's integration into the international economic community. Furthermore, since the ultimate aim of a competition law is to promote a fair and free competitive environment for businesses, in cases where the competition law is immutable, other methods can be employed to help maintain free competition. In the fight against VCL violations, particularly those of powerful SOEs, the VCAD thus should not stand alone but take advantage of support from the public, business groups, and especially foreign organizations that are familiar with the competition concept in developed countries.

V. CONCLUSION

In developing and transitional economies, such as Vietnam and other Southeast Asian countries that have only just introduced competition law in recent years, the biggest challenge is the adaptability of the new competition laws being introduced. The main reason for this is that the new competition concepts being adopted are mostly borrowed from foreign countries. This importation of competition concepts has sometimes made competition policies come into conflict with other policy objectives, particularly those related to industrial policy. For example, Thailand has had difficulties in adopting its competition law. In 1999, Thailand's Trade Competition Act was enacted for the first time following the requirements of the International Monetary Fund (IMF) after the Asian financial crisis. The premature adoption of new competition law lead to a range of mistakes and

implementation issues such as ambiguous substantive law, the poor institutional design of the Competition Commission and the weakness of criminal enforcement procedures. In a review of the Act by Mark Williams, he asserted that the Act has not been effective during the first five years of its operation.⁵³

However, Singapore, another Southeast Asian country, has drawn a contrastive picture in its transplantation of competition law. The Singapore's Competition Act ("SCA") 2004 was modeled largely after the Anglo-European model with a few modifications necessitated by tailoring competition law to the Singaporean economic situation. The key factors for the successful enforcement of competition law in Singapore are, among other things, (i) the determination by the Singapore Government to renovate the national economy;⁵⁴ and (ii) the drawing up of a reasonable and transparent agenda for implementation.⁵⁵ While the former helps surmounting some potential barriers for the new competition law regime, such as political interference,⁵⁶ the later both diminishes unnecessary workload for the enforcement agency and gives time for augmenting social acceptance and compliance with the competition law regime. These are the reasons why whereas it took the VCAD almost two and a half year to give its first official decision, only one year after the substantive provisions of the SCA took effect, the Competition Commission of Singapore ("CCS") has been able

⁵³ Mark Williams, *Competition law in Thailand seeds of success or Fated to Fail*, World competition 27(3), 2004, at 459-494.

⁵⁴ The passage of SCA was the result of both internal requirements, the commencement of business liberalization policies and the effort of reinventing national economy to face the challenges of the new millennium of the Singaporean government, and external requirements, particularly from the foreign partners of bilateral free-trade to which Singapore is a party. For detail discussion see Burton ONG, *The Origins, Objectives and Structure of Competition Law in Singapore*, World Competition 29(2), 2006, at 269-275.

⁵⁵ The implementation of the SCA was planned in three phases. The first started from January 1, 2005 with the establishment of the CCS, and the second took effect the provisions on restrictive agreement and abusive practices as well as procedures for enforcing and appealing the CCS decision. The last phase which introduced a new merger regime was completed in July, 2007. Visit the official website of SCC at <http://www.ccs.gov.sg>.

⁵⁶ CCS is placed under Ministry of Trade and Industry of Singapore

to do significant work to bring the SCA into business life, including the granting of one block exemption and two individual exemptions for restrictive agreements that were otherwise prohibited under Section 34 of the SCA, reviewing six proposed mergers and joint venture applications and recently fining six pest control operators for bid-rigging with the highest fine being up to US \$ 92,634.50.⁵⁷

Given the countries' close geographical location and shared determination to accelerate economic growth by pursuing pro-competition and pro-business policies,⁵⁸ Vietnam can benefit from the successful and failed experiences of transplanting of competition law regimes as shown in the cases of Singapore and Thailand. However, Vietnam has to face its own difficulties arising from its special model of political economy. As we have seen, the two common characteristics in the above cases are: (i) that they were all related to SOEs, and (ii) that they involved sectional administration authorities. In all cases, the VCAD seems to have been powerless in either policing or controlling the wrongdoers and thus the plaintiffs placed their trust in the Government instead of the competition authorities. These facts show that two of the biggest challenges that the Vietnam's competition authorities have to overcome are political interference in the name of "state economic management" and potential conflicts between competition policies and the industrial policies that are usually exercised through the direct control of the large SOEs.

The situation is unlikely to be changed in the near future because Vietnam is still in a transition process from being a centrally-planned economy to becoming a market economy. The state owned sectors will continue to dominate the economy and SOEs still play a crucial role as the mainstay of public ownership in the

⁵⁷ For detail, visit official website of the CCS, at <http://www.ccs.gov.sg> (last visit as of March 31, 2008)

⁵⁸ Singapore, Thailand and Vietnam are members of the Association of Southeast Asian Nations (ASEAN)

marketplace, ensuring the socialist orientation of the national economy. In this context, the aim of protecting a competitive market structure and thereby the customer's interests could never be achieved unless the competition authorities are powerful enough to take on large incumbent market players, especially the big SOEs. The success of the transplantation of competition law into Vietnam therefore depends very much on the effectiveness of the competition authorities. In order to enhance the capacity of the VCAD and the VCC, the following requirements should be ensured:

- (i) Being free from political pressure is the only way to help the competition authorities take on the SOEs. As mentioned above, the concept of "state monopoly sectors" is not clear, and so neither is the boundary of competition law and other administrative regulations. SOEs usually employ the loophole to justify their conduct which otherwise would violate the VCL by asserting that they are abiding by administrative orders. The VCAD and the VCC thus need to be granted an independent status from the government or at least an equal status with other ministries. It is also necessary to remove institutional constraints that limited the power of the VCAD and to allow the VCAD to implement its duties. For example, the VCAD should be granted the power to enact guidances and to grant exemptions, as well as to be responsible for post-decision enforcement, and so on. Otherwise the VCL would be no more than a shield to protect SOEs from their private rivals.
- (ii) The VCAD and the VCC must obtain a high credibility and gain the respect of market players and the consumer. The ministries apparently do not willingly give up their power to support the competition authorities. Therefore, while waiting for changes, the VCAD and the VCC have to help themselves by creating a good reputation first. This can involve among other things competition advocacy . Calling for support from interest groups, domestic and foreign organizations is important along with enhancing personnel capabilities. Along with those efforts, the VCAD must wisely take advantage of

public support to take on the giant SOEs. The cases that the VCAD pursues in the early stages of enforcement are very important as it cannot lose as its credibility is at stake. For this reason, some have suggested that the competition authorities should choose easy cases in which issues are easily understood by the public to win.⁵⁹ The VCAD should follow this suggestion. In the long run, the boundary of the competition law and administrative regulations of sectional industries must be clarified in order to ensure the transparency and supremacy of the competition law regime regarding competition matters.

- (iii) The VCAD should focus solely on enforcing competition law. One of the reasons why the VCAD did not make the most of its human resources is that the VCAD has to simultaneously perform too many duties. In order to reduce the workload and surmount the current inadequate manpower, the VCAD should solely enforce competition law. Other burdens such as antidumping, anti-subsidies, the application of self-protective measures and consumer protection should be handed over to other competence agencies.
- (iv) Further useful instruments of competition law such as criminal penalties and leniency programs should be introduced to sharpen the competition authorities' teeth in tackling the violators.

Finally, a strong determination for market reform and trade liberalization on the part of the Vietnamese Government is a critical factor for the success of transplanting competition law to Vietnam. The Competition Authorities can play a dynamic role in both realizing such goals and speeding up the adaption process. The VCAD's reaction to VINAPCO's explanation will be a measure of the VCAD's strength and determination in challenging the giant SOEs. VINAPCO is a natural monopolist, and enjoys a measure of

⁵⁹ Michal S. Gal, *The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries*, New York University Law and Economics Research Paper Series Working Paper No. 02-03, June 2004

political support from sectional ministries, such as the Ministry of Transportation, Ministry of Financial, and CAAV. However, VINAPCO cannot take full advantage of such support at this moment. Because the fuel supply interruption happened in the context of high inflation, and the economy is experiencing difficult times, it ruined the Government's effort in creating a positive image of being able to curb inflation. Moreover it affected a large number of customers, and hence provoked substantial criticism from customer protection groups. The violation was clear, and there cannot be a better chance for the VCAD to perform its first major demonstration of its power, thereby gaining respect. If the VCAD does not take any further action against VINAPCO, it will mean that the VCAD is not ready to fully enforce the competition law. And the VCL will continue to be mainly used as a tool allowing regulators and corporate claimants to challenge unfair competition practices at least for the time being.

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