

Study on Unfair Trade Practices in Select ASEAN Countries

Genesis

The conceptualisation of this project studying Unfair Trade Practices in select ASEAN countries was inspired by the history of CUTS – the Matchbox scam.

What's in a Matchbox?

The “matchbox scam” was simply the fact that a matchbox which was purported to hold 50 matches only held about 35 to 40. Of these, several of them were of such poor quality that they either would not strike, due to a lack of the striking material, or broke so easily that they would not withstand being dragged across the striking or any other surface to be ignited. This essentially rendered approximately one-third of the already-short count of matches unusable.

The efforts of the founders of CUTS to report this to authorities was met with extreme indifference. However, instead of just ignoring the problem, the CUTS founders decided to provide an institutional voice to consumer grievances by forming a society. It is thus possible to say that CUTS International today has its genesis in an Unfair Trade Practice by Indian matchbox producers reported 27 years ago.

Unfair Trade Practices (UTPs)

UTPs encompass a broad array of torts, all of which involve economic injury brought on by deceptive or wrongful conduct. The legal theories that can be asserted include claims such as trade secret misappropriation, unfair competition, false advertising, palming-off, dilution and disparagement. UTPs can arise in any line of business and frequently appear in connection with the more traditional intellectual property claims of patent, trademark and copyright infringement. Specific types of UTPs prohibited in domestic law depend on the law of a particular country.

UTPs not only harm the consumers, but also victimise other market players in the process, especially the smaller enterprises, and more importantly, they may cause damage to the market as a whole as well. For this reason, there has been a

fair amount of uncertainty across countries regarding how to deal with them, in theory as well as in practice. In some countries, UTPs fall within the purview of the competition statutes, in some others, that of the consumer protection one, and in some other cases, they are dealt with by a separate law/act.

In the Association of Southeast Asian Nations (ASEAN), UTPs have remained a low key for a multitude of reasons. Therefore, this project was launched by CUTS HRC, receiving support from the International Development Research Centre (IDRC – Canada), to be implemented from December 2010 till March 2013 in collaboration with project partners in five ASEAN countries, including Indonesia, Malaysia, the Philippines, Thailand, and Vietnam.

The Project

The Project aims at strengthening the body of knowledge on issues related to UTPs in ASEAN countries and generate substantive public policy debate leading to the development of appropriate regulatory frameworks. The specific objectives of the Project are:

- To undertake empirical research on the prevalence, nature and adverse effects of UTPs on competition, entrepreneurship and business development, and consumer welfare in selected ASEAN countries;
- To assess the regulatory framework dealing with UTPs through dealing with understanding the perceptions and expectations of relevant stakeholder groups, notably consumers and small enterprises;
- To promote public policy debate on UTPs, facilitate common understanding and networking between relevant stakeholder groups (including policymakers, the research community, small enterprises and consumers), and generate ASEAN-wide

discussion on the need for appropriate regulatory frameworks; and

- To strengthen policy dialogue and build capacity amongst members of the ASEAN Experts Group on Competition (AEGC) on issues related to UTPs and the improvement of regulatory frameworks.

The most important activity of the project is the research process undertaken at the national level in each project country. This **country-specific research** process entailed an institutional and legal mapping (which maps all the laws, regulations and institutional structures currently existing in these countries concerning UTPs), an empirical research exercise (looking into industries and sectors which are prone to UTPs such as FMCGs, advertising, etc or which are characterized by the presence of monopolies and dominant business entities; and collecting information and data on relevant cases, examples or observable incidences of UTPs) and a perception survey (which gauges the perceptions and expectations of relevant stakeholder groups such as the government, the business and the consumer; serving the dual purpose of providing inputs to the research and policy dialogue process, and raising the awareness of the general public on UTPs and facilitating networking amongst interested parties). The end product of this process was a **Country Report** which was made available to all stakeholders and interested parties **in electronic format**. Two important by-products of the process included, for each project country, one (01) **Policy Brief** on the prevalence and nature of UTPs in that country, as well as the appropriate policy measures needed to deal with them, and one (01) **Policy Brief** on the perceptions and expectations of relevant stakeholders on UTPs and the development and enforcement of the regulatory frameworks dealing with UTPs. These policy briefs, short and concise, in reader-friendly format, were **in print** for widespread distribution.

Simultaneously, a **Project Webpage** was developed and maintained at <<http://utp.cuts-hrc.org/>> as a hub of electronic data and information on UTPs in ASEAN member countries with free access for all users. All the project outputs, including research reports, policy briefs, news items, presentations made during project events are freely available on this web-page till date. Given the geographical restraints, networking of relevant stakeholders, researchers, and activists involved during the field research process, or those working on the issues in

general, was undertaken mainly in the form of an **e-Discussion Forum** facilitated by CUTS HRC.

After the research phase was completed, two **Policy Dialogues** was organised, one in Ho Chi Minh City (Vietnam) in September 2012, and one in Jakarta (Indonesia) in December 2012, to disseminate the research findings and policy recommendations coming out of the project.

Major findings & recommendations

Each of the five project countries have its own distinctive features in terms of socio-economic and political situation, culture, legal system and traditions, market structures, etc. This means UTPs are defined (legally) and perceived (by stakeholders) quite differently across project countries. In some, UTPs or at least an identified subset of them are addressed within a more general Competition Law either through provisions addressing anticompetitive practices that may also be UTPs (such as an abuse of dominant position) or in specific provisions relating to fair competition or both (Vietnam's competition law is an example where both approaches are taken). However, UTPs may also or instead be addressed within consumer protection legislation or sector specific or other more narrowly focused legislation. This can lead to overlapping jurisdictions among regulators, uncertainty under which law a specific conduct should be dealt, geographic or definitional gaps in enforcement and issues of quality of enforcement (e.g. in the latter regard, it was reported that Thailand provided an interesting example wherein business who are acting as consumers do not get protection under the relevant unfair contract law).

Despite the differences, a number of general conceptual points relating to the definition of UTPs could be identified by this project to include:

- UTPs generally involve fraudulent, deceptive or dishonest practices between parties that may or may not be bargaining with each other in any normal sense.
- UTPs may be B2B (between competitors or between businesses at different levels of a supply or production chain) or B2C (referring to dealing between businesses as one party and consumers as the other party, which are covered under the consumer protection laws of all the project countries). In some cases, UTPs may even arise from government actions, as identified in Indonesia.

- UTPs may involve the breach or misuse of another statute or right in order to obtain an “unfair” competitive advantage – e.g. abuse of intellectual property rights.

Moreover, UTPs may or may not be identified as, or may even be confused with, anticompetitive practices (traditionally covered under antitrust/competition/anti-monopoly laws) which can lead to further confusion and divergence in how UTPs are perceived and dealt with among the relevant jurisdictions. This is especially the case in Indonesia, whereby the competition law is literally named as the law “concerning the ban of monopolistic practices and unfair business competition” (Law No. 5/1999) whereas this law mostly deals with anticompetitive practices, and not UTPs.

As a result, it is felt that some form of standard definition of UTPs needs to be developed so that future discussions can be more focused around core issues. While some variations of the definition of UTPs may be necessary in order to accommodate specific legislative or jurisdictional goals, some core standards or principles could be set forth that would be equally relevant across ASEAN Member States (AMSs). These core UTP principles would then be an important stepping stone towards more effective management of UTPs. Further, an understanding that the core principles were not exhaustive or restrictive would permit country- or even industry-specific issues to be dealt with separately at a national level, while permitting ASEAN member nations to develop common approaches to the core set of UTP issues.

A number of common concerns were also identified that appear relevant across ASEAN member nations investigated in the project in the development of more effective management of UTPs including, in addition to the formulation of a set of core principles/ guidelines:

- the need to foster a greater focus on free market competition in many jurisdictions;

- the similar nature of many UTPs across jurisdictions (e.g. misleading advertising to consumers);
- concern with need to better educate consumers and business about the nature of UTPs and their respective enforcement regimes;
- the need to more effectively use existing enforcement tools to address UTP concerns;
- concerns with a lack of political will and/or corruption issues that prevent comprehensive control of UTPs;
- the need to develop additional legislative and administrative resources to provide a more comprehensive scope of UTP management and fill in existing geographic and definitional gaps in respective legislative and enforcement frameworks; and
- concerns with encouraging cooperation amongst actual or potential victims of UTPs who might currently be concerned with the repercussions of reporting inappropriate conduct to regulators or proactively cooperating with investigations.

Specifically within the ASEAN context, further inquiry into this issue of UTPs would be highly relevant due to the following specific concerns:

- insufficient enforcement or lack of a developed commercial legal framework;
- corruption;
- lack of available relevant information for consumers and businesses;
- potential inability of small local businesses to defend against UTPs;
- legal harmonization vs. different economic development models and legal systems;
- concerns with coordination & information sharing across AMSs; and
- importance of effect of UTPs on SMEs specifically, e.g. loss of market/profits, business closure, as well as on economic development as a whole.