# SHOULD DEVELOPING COUNTRIES WORRY ABOUT ABUSE OF DOMINANT POWER?

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This Paper suggests that in developing countries, especially where small and poor markets prevail, abuse of dominant power—or monopolization, as it is known in the United States—can be much more damaging to the economy than in developed countries. It pays special attention to the abuses that state-owned firms and recently privatized monopolies can inflict on developing economies and suggests that collusion between the state and dominant enterprises can seriously hamper the economy and stifle development. This Paper analyzes the main concerns of developing countries in this respect and provides a list of examples of concrete cases of abuse of dominance affecting developing-country economies. This Paper recommends that far from challenging only price-fixing cartels, as is sometimes advocated by representatives from developed countries, competition authorities in developing countries should devote increased attention to abuse of dominance, and their powers in this respect should be strengthened when they must challenge abuses by dominant firms, which are sometimes protected by their own government.

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## INTRODUCTION

Since the fall of the Berlin Wall, a rapidly rising number of countries have realized the importance of deterring and punishing price-fixing cartels and abuses of dominance, the latter term being typically referred to as *monopolization* in U.S. antitrust law. While antitrust laws were first introduced in Canada and the United States in the late nineteenth century, subsequently so-called fair-trade laws—later renamed competition laws—were adopted in many jurisdictions. Today, all of the members of the Organisation for Economic Co-operation and Development (OECD) have enacted such legislation.[1] More developing countries have adopted such laws, and, most recently, in September 2007, China enacted a new antitrust statute.[2] According to the International Competition Network (ICN) and other sources, at present more than one hundred national jurisdictions from all over the world have enacted some form of competition law.[3] Many countries seek to actively enforce such laws to improve associated knowledge and implementation capacities and to exchange views in many different fora, ranging from the OECD to the United Nations Conference on Trade and Development (UNCTAD) and including ICN and numerous regional and subregional meetings of experts. In addition, many countries have established sectoral regulators to investigate, punish, and deter firms with market power operating in the network industries that supply numerous essential services to consumers, producers, and the government.[4]

1. *See* OECD, OECD ANNUAL REPORT (2007), *available at* http://www.oecd.org/dataoecd/34/33/38528123.pdf; OECD.org, OECD Country Web Sites, http://www.oecd.org/infobycountry (last visited Mar. 18, 2008).

2. The Anti-Monopoly Law of the People's Republic of China was passed by National People's Congress on August 31, 2007, and comes into effect on August 1, 2008. Antimonopolychina.com, Anti-Monopoly Law of the People's Republic of China Has Passed!!!, http://www.antimonopolychina.com (last visited Mar. 18, 2008).

3. *See* InternationalCompetitionNetwork.org, Members, http://www.internationalcompetitionnetwork.org/index.php/en/members (last visited Mar. 18, 2008); *see also* UNCTD, DIRECTORY OF COMPETITION AUTHORITIES (2007), *available at* http://www.unctad.org/en/docs/c2clpd56_en.pdf.

4. *See* SIMON J. EVENETT & MICHAL S. GAL, A REPORT ON THE THIRD ANNUAL CONFERENCE OF THE INTERNATIONAL COMPETITION NETWORK (2004) 16–22 (Antitrust Enforcement in Regulated Sectors Working Group), *available at* http://

While competition laws are far from being all alike, they typically have provisions prohibiting price fixing and other forms of cartels, as well as measures to tackle abuses of market power by so-called dominant enterprises or attempts by firms to monopolize markets. In recent years, partly as a result of frequent discussions and exchanges of experience by competition-law experts from around the world, a certain degree of consensus has emerged concerning the enforcement priorities of nascent competition authorities, which are mainly found in the developing world. Much advice from industrialized-country experts recommends giving preference to action against cartels and so-called competition advocacy over measures to tackle monopolization or abuses of dominance.[5] Moreover, some scholars, in particular from the Chicago school of thought,[6] consider the abuse of a dominant position as transitory.[7] On this view, such dominance rewards technological and product innovation, and measures to constrain dominance are unnecessary so long as incentives to enter profitable lines of business are not unduly diminished.[8] Other experts draw attention to the fact that some famous antitrust cases against alleged abuses of a dominant position, such as the European Commission's enforcement action against Microsoft, took so long to be decided that, by the time the ultimate decision was rendered, technological developments had made many of the circumstances of the initial alleged violations of competition law irrelevant to the future of interfirm rivalry in the sector concerned.[9] On both conceptual and practical grounds, then, there are doubts about the wisdom of enforcement actions against abuses of a dominant position.

The purpose of this Paper is to revisit the question, should governments and proponents of competition law in developing countries

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www.internationalcompetitionnetwork.org/media/library/conference_3rd_seoul_2004/seoul_icn_final.pdf.

5. *Id.* at 9–11, 18–21.

6. *See, e.g.*, Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

7. *See*, *e.g.*, Michael S. Jacobs, *Introduction: Hail or Farewell? The Aspen Case 20 Years Later*, 73 ANTITRUST L.J. 59, 67, 70–72 (2005) (discussing some scholars' views of dominant corporations and antitrust interventions).

8. *Id.* at 67.

9. Michael Yeh, Senior Att'y, Microsoft Corp., Characteristics of a Sound Competition Law—A Global Perspective, Presentation at Third Asian Competition Law Conference at Hong Kong Polytechnic University (Dec. 10, 2007), *available at* http://64.233.167.104/search?q=cache:hkcTpXvVLHwJ:www.asiancompetitionforum.org/3rd%2520ACF%2520Conference%25202007/3rd%2520ACF%2520Conference%25202007%2520Schedule%2520(Website%2520Purpose).doc+Ningrum+Sirait+Indonesia+Retail+in+Indonesia&hl=en&ct=clnk&cd=1&gl=us&client=firefox-a (follow hyperlink).

seek to tackle abuses of dominant position by public and private firms in their respective economies? To that end, the available evidence and its implications for the design of competition law and for postenactment enforcement priorities are considered.

In the effort to formulate a substantial response to this question, a review of recently compiled statistics on alleged anticompetitive practices collected by Professor Simon Evenett, Professor Frédéric Jenny, and their research collaborators in sub-Saharan Africa and Latin America was undertaken. Such evidence, which is reported in the following Part, suggests that it is unwise to dismiss out-of-hand concerns about abuses of a dominant position in many developing countries (in these two regions, at the very least). The fraction of allegations concerning such practices, including dominance-creating mergers and acquisitions, reaches close to half of the total allegations and sometimes exceeds the total number of accusations concerning cartels and bid rigging. Subsequent Parts give further attention to the characteristics of developing countries that tend to make them more susceptible to harm caused by abuses of a dominant position by firms and to a number of cases that highlight the deleterious effects of such abuses. The Paper concludes with a summary of the main findings and their practical implications for policy makers and others concerned with tackling abuses of a dominant position in developing countries.

## I. REVIEW OF ALLEGATIONS OF ABUSE OF DOMINANCE IN LATIN AMERICA AND SUB-SAHARAN AFRICA

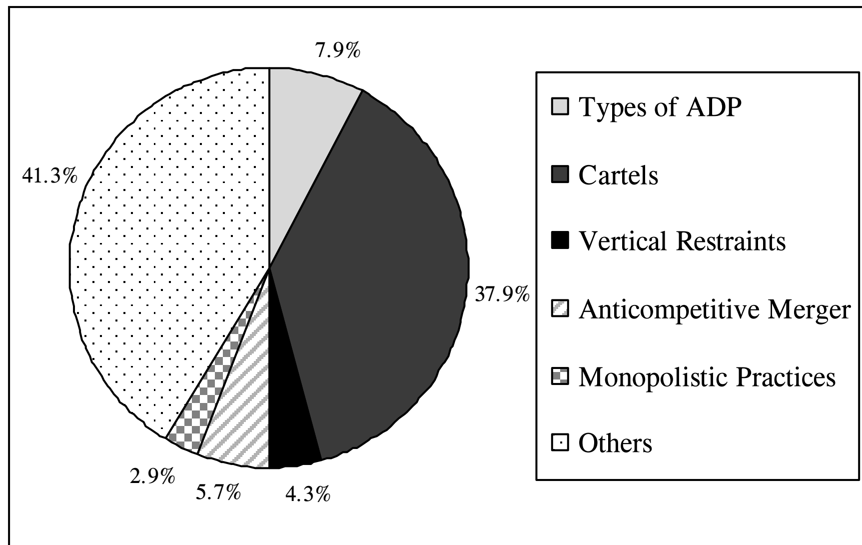
Eighteen different types of allegations concerning anticompetitive practices can be identified on the basis of statistics in newspaper articles collected by Julian Clarke, Simon Evenett, and Krista Lucenti that report allegations of anticompetitive behavior and information concerning the relationship between competition-related factors and the effects of market-liberalization reforms in Latin American and Caribbean countries.[10] A comparable exercise was conducted for sub-Saharan Africa in 2004 by Evenett and Jenny.[11] In the Latin American and Caribbean sample, 17 percent of the total number of allegations related to "monopolistic" practices, and another 11.7 percent of all the allegations concerned specific accusations of abuse of a dominant

10. Julian L. Clarke, Simon J. Evenett & Krista Lucenti, *Anti-competitive Practices and Liberalizing Markets in Latin America and the Caribbean*, 28 WORLD ECON. 1029 (2005).

11. Simon J. Evenett & Frédéric Jenny, *An Inventory of Allegations of Anti-competitive Practices in Sub-Saharan Africa* (Working Paper, Sept. 5, 2004), *available at* http://www.evenett.com/working/evenettjennycapetownsummary.pdf.

position.[12] Very few allegations were made of anticompetitive mergers or acquisitions.[13] However, monopolization and abuse-of-dominance allegations combined to yield 28.7 percent of all allegations, which compares with allegations of cartelization that accounted for approximately 40 percent of the total.[14] Such evidence is hard to reconcile with the view that monopolization and abuses of dominance do not happen in developing countries and, by implication, that these anticompetitive acts are clearly not an enforcement priority for competition authorities. Analysis of allegations of anticompetitive practices in sub-Saharan Africa yielded similar findings (see figure 1).[15] Although cartel allegations amounted to approximately 38 percent of the total number, alleged monopolistic practices accounted for 2.9 percent of the total and allegations of specific forms of abuse of a dominant position accounted for a further 7.9 percent of the total.

Figure 1
Distribution of alleged anticompetitive acts in sub-Saharan Africa.

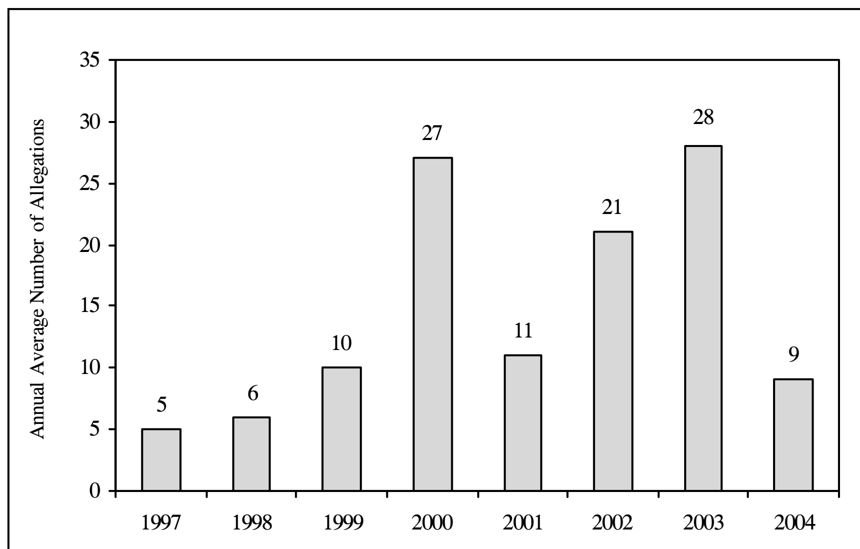



The African dataset also shows an increase in the first half of this decade in the average number of annual allegations of abuse of a dominant position (see figure 2).[16] While this is suggestive of abuses of a dominant position being more prevalent in sub-Saharan Africa during

12. Clarke, Evenett & Lucenti *supra* note 10, at 1040 tbl.4.
13. *Id.*
14. *Id.*
15. *Id.*
16. Evenett & Jenny, *supra* note 11, at 2 tbl.1. Note, the information is current through September 5, 2004.

this period, it may also be the result of more extensive reporting on these matters by the media. It may also be the result of an improved ability and willingness to identify and tackle anticompetitive practices in general, or abuses of a dominant position in particular, by national competition authorities, relevant sector regulators, and other elected or state officials. It should also be noted that sub-Saharan countries may differ in the degree to which national newspapers with significant coverage of commercial matters are available electronically and therefore accessible by researchers in other countries. Even so, the statistics presented in this Part suggest that it would be imprudent to automatically discount abuses of a dominant position as a priority for competition authorities in developing countries and associated government agencies.

Figure 2
Allegations of anticompetitive acts in sub-Saharan Africa.




## II. THE CHARACTERISTICS OF DEVELOPING COUNTRIES THAT MAKE THEM PRONE TO MONOPOLY AND ABUSE OF DOMINANCE

This Part identifies certain characteristics of developing economies that make them particularly susceptible to abuses of a dominant position. These arguments seek to counter the point of view that even if abuses of a dominant position happen in market economies, they are inherently self-defeating, perhaps because the entry of other firms is spurred on by large economic profits.

Most developing countries have transportation and communication infrastructures whose performance is far from best practice, and this

affects the degree of interfirm rivalry in national markets.[17] For a start, many poor countries are either island or landlocked countries, and efficient transportation infrastructures are a prerequisite for the inexpensive distribution of domestic- and foreign-produced goods and for fast exportation, both of which foster economic development. Examples of two representative African countries illustrate the effect of abuses of a dominant position and other anticompetitive practices on the performance of national transportation infrastructures.

The first example involves a three-island country where deep-port infrastructure only exists on one island, which happened to be the native island of the president at the time the port was built. As a result of the cargo shipping lines controlling the freight routes to that port by fixing prices, the cost of shipping doubled between the deep-water port and the other, less-well-equipped islands. When not controlled by the shippers' price-fixing "conference," the remaining markets are divided among shipping lines, which have exclusive rights, and are free to abuse their market power since no other line has found it attractive to serve a route that has been awarded to one of the incumbent lines. In sum, then, small freight ports are served by a single shipping line, while the bigger ports are served by a few carriers who impose uniform freight charges and conditions. This, in turn, raises prices of shipped products and reduces the purchasing power of what is already a low-income country.[18]

The second all-too-typical example is that of a land-locked country in central Africa that relies for its imports and exports on a single port on the Atlantic Ocean that is located in a neighboring country. Transportation between the land-locked country and the port is controlled by truck-drivers' unions that fix prices on the merchandise that they transport. The foreign port is congested and requires excessive handling and storage tariffs for merchandise. The merchandise is often stranded at the docks for weeks, sometimes months, at excessive stevedoring charges. Moreover, the port authority enjoys a full monopoly and has a free hand to abuse its dominant position concerning traders from the landlocked neighboring country, significantly affecting both import prices for merchandise finding its way to that country and taking a toll on exports, in particular for time- and price-sensitive perishable farm products.[19] These problems were publicized a decade ago when the European Union fined shipping lines between Europe and

17. Bernard Hoekman & Aaditya Mattoo, *Services Trade and Growth* 18–20 (World Bank Policy Research Working Paper, Working Paper No. 4461, 2008).

18. Findings by Philippe Brusick in UNDP Country Study on competition (Confidential, unpublished).

19. *Id.*

Africa for excessive freight costs as a result of a price-fixing cartel agreement.[20]

More generally, inside many poor countries, the roads are often impassable for commerce-carrying trucks and are often seasonally blocked. In the case of the island countries, regular boat services between the islands may not exist either. Foodstuff produced on one island might not be distributed to the other islands, although their qualities and production capacities differ widely. As a result, markets are fragmented and small, often leading to all sorts of anticompetitive practices by a single or a few local operators.[21]

Difficulties in securing financial capital in poor countries typically result in some industries being characterized by a few large enterprises that enjoy a de facto monopolistic position.[22] Such firms can use their profits to amass financial resources that might deter entry by other firms. This effect reinforces any tendency toward natural monopolization that is found in certain sectors—utilities, for instance. Worse still, privatization programs, where they take place, often result in state-owned monopolies being sold to the highest bidder, so as to make the greatest contribution to national treasuries, a step that often transforms a public monopoly into a private one with little or no serious regulatory oversight.[23]

In the case of essential facilities, such as banking and financial services, it is interesting to note that many poor countries still depend on a small number of banks. The banks argue that the small size of the national market prevents the viable operation of many financial institutions. In one case examined, the decade-long existence of a banking monopoly had resulted in very limited banking services being offered, in addition to high costs. For example, long-term mortgages were unavailable, and clients had to get short-term loans both for housing and business and pay heavy penalties when they were unable to repay the loan upon maturity. In addition, it was found that the single bank acted in a discriminatory manner, refusing loans to certain traders and offering them to others, allegedly giving consideration to noncommercial considerations.[24]

In sum, there are a number of reasons why dominant firms arise in poorer countries with smaller economies and certain sectoral and

20. *See French West-African Shipowners' Committees*, 1992 O.J. (L134/1) 446 (Commission Decision Relating to a Proceeding Pursuant to Articles 85 and 86 of the EEC Treaty).

21. Brusick, *supra* note 18.

22. *Id.*

23. *Id.*

24. *Id.*

geographic characteristics. This is not to say that every poor country suffers from the same abuses of a dominant position or that these factors are only found in developing countries. Rather, it is a statement about the manner in which certain underlying characteristics of societies, especially poorer societies, affect the propensity for dominant firms to arise and to abuse their dominant positions. Such experience implies that it cannot be assumed that new firms will enter markets when incumbents exercise market power. Access to finance, distribution networks, information about customers, and the necessary approvals from state bodies often frustrate the extent to which dominant firms will be disciplined in this manner. The following Part contains further information about specific types of abuse of dominance that prevail in developing countries.

## III. COMMON TYPES OF ABUSE OF DOMINANCE IN DEVELOPING COUNTRIES

It is useful to distinguish between a number of different types of abuse of dominance found in developing countries, and the material in this Part is organized accordingly.

### *A. Abuse of Dominance by the State*

Given the importance of the state as an investor and regulator, it is necessary to examine in detail the conduct of the state in developing economies and trace out a number of fundamental ways in which state officials stifle economic development. First, the dominance of the state over infrastructure utilities such as telecommunications, public transportation, electricity, water supply, and the ever-bankrupt situation of the public budget, typically results in a situation in which the state never pays for the public services it utilizes.[25] A dominant state often receives electricity and water for free and consumes a large proportion of public services without contributing for them. As a result, these utilities are always undercapitalized and in a situation of near bankruptcy.[26] When such utilities are privatized, old habits often do not die: new incumbents find to their dismay that they are expected to continue serving the state for free, perpetuating unwritten rules.[27] There have been many cases of newly privatized utilities where the incumbent has broken the contract and left because it could not run the firm as

25. *Id.*
26. *Id.*
27. *Id.*

initially planned.[28] Sometimes, the state colludes politically with the informal sector, which also used to benefit from tolerated or illegal free service, to pressure the private incumbent firm to continue providing generous terms to the poor and the informal sector.[29]

The state also often intervenes heavily in the competitive process, distorting free competition for political or other more opaque reasons.[30] This may be in the selection process of bidding for public works or in the awarding of contracts. Moreover, in cases of awarded public-works contracts, the state often finds itself unable to pay its dues, and many contractors then find themselves with large arrears.[31] Cases have been reported of public-works contractors being obliged to pay taxes and thus being unable to compensate for overdue payments that the state was unable to pay.[32]

Two examples are provided by the Suharto administration in Indonesia and could easily be applied to other developing countries. The first example was reported by Emanuele Lobina and David Hall of the Public Services International Research Unit:

> In 1997, while the country was still under the control of President Suharto, Jakarta's water supply was privatized under the auspices of a World Bank program. One concession went to a consortium led by Thames Water and another to a consortium led by Lyonnaise des Eaux. Both consortia included partners which were owned by friends of the president. After Suharto's fall, these contracts were deemed to be corrupt and the two companies moved rapidly to negotiate new contracts with Jakarta City Council to run from February 1999. However, these contracts were also the subject of bitter criticism on the grounds that they were never properly advertised, that the prices involved were excessive, and that Suharto's son continued to hold a 5 percent equity stake in the new Thames Water venture. Court action was taken to have the contracts declared void, and a trade union of water workers demanded that the contracts be rescinded.[33]

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28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. EMANUELE LOBINA & DAVID HALL, PROBLEMS WITH PRIVATE WATER CONCESSIONS: A REVIEW OF EXPERIENCE 20 (2003), *available at* http://www.psiru.org/reports/2003-06-W-over.doc.

Another example from Indonesia is provided by a Consumers International report. Indonesia only recently enacted the Prohibition of Monopoly and Unfair Business Competition Practices legislation of 2000 and the Consumer Protection Law after a long period of heavy government intervention and restricted opportunities for foreign investment. The Consumers International Report notes,

> These government measures included marketing controls, pricing regulations, industrial licensing requirements, dominance of state-owned enterprises (SOEs) in certain sectors, officially sanctioned cartels, ad hoc measures in certain industries (for example, the preferential tax privileges accorded to the "national car" firm), and controls and "taxes" on intracountry trade.[34]

The report adds that enforcing laws is as important as enacting them. Honest and effective investigators and courts are necessary if competition laws are to work. Corruption in the civil service is commonplace in many developing countries, often simply because poorly paid officials feel they need to supplement their earnings. Therefore, in addition to adopting a law, senior leaders in government have to find it in their interest to fight corruption and to provide the resources necessary to ensure compliance.[35]

It should be noted that in many developing countries effective independence of the competition authority from the executive political powers may not exist.[36] And even if the competition law provides for a certain degree of independence for the competition officials, there can be a de facto dependence on the wishes of politicians who might want to favor certain enterprises including state firms, firms owned by relatives, or foreign multinationals with strong links to the political elite.[37]

Another important matter is the flawed interpretation of competition laws by judges who are not specialized in such matters, and this runs the risk of using the large discretion given by such laws in a counterproductive or definitely anticompetitive manner. Judicial

34. CONSUMERS INTERNATIONAL, CONSUMERS AND COMPETITION 17 (2001), *available at* http://www.consumersinternational.org/Shared_ASP_Files/UploadedFiles/31EA343D-63B6-4221-8A75-49326FD47AA8_Doc319.pdf.

35. *Id.* at 18.

36. Deunden Nikomborirak, *Thailand*, *in* COMPETITION POLICY AND DEVELOPMENT IN ASIA 243 (Douglas H. Brooks & Simon J. Evenett eds., 2005).

37. For a discussion on the facets and importance of regulatory agencies, see GESNER OLIVERIA ET AL., ASPECTS OF THE INDEPENDENCE OF REGULATORY AGENCIES AND COMPETITION ADVOCACY (2005).

mistakes are more frequent in delicate decisions relating to abuse of dominance, where laws might attribute a too-strict meaning to the market share as a criterion to determine the existence of dominance.[38]

It is interesting to note in this respect that the West African Economic and Monetary Union (WAEMU) rules on competition[39] cover "anti-competitive practices by member States, to avoid distortions to competition resulting from action of member State governments protecting or subsidizing their 'national champions' to the detriment of other firms from other WAEMU member States."[40] Centralizing competition policy in the hands of regional organizations might be a way to resolve the difficulties listed above, provided, of course, that the regional authority is afforded the necessary powers and expertise.

Finally, abuses of dominance have been frequently alleged against large state-infrastructure-providing firms, such as those in the energy, telecommunications, banking, and transportation sectors.[41] It is not difficult to appreciate that abuses of dominance in such sectors result in higher prices and lower quality, negatively affecting the efficiency of producers and exporters downstream and hence acting as a break to development. The solution to this concern, however, is not merely to privatize the large state enterprise, as the examples in the following Section make clear.

### *B. Abuse of Dominance by Privatized Monopolies*

Abuses of dominance may be triggered or exacerbated when state-owned utilities are privatized. At first, it can be expected that privatization should bring with it much-needed capital investment and modern technology, improving the quality of the service and having a favorable impact on development. However, if privatization has been accorded on the basis of granting a long-term monopoly to the acquiring or concession-obtaining firm, as was often the case in the 1990s,[42] then it is likely that prices and conditions of sale are not going

38. *See* CAPACITY BLDG. & COMPETITION POLICY IMPLEMENTATION WORKING GROUP, ICN, COMPETITION ADVOCACY IN REGULATED SECTORS: EXAMPLES OF SUCCESS (2004).

39. *See* U.N. CONF. ON TRADE AND DEV., VOLUNTARY PEER REVIEW OF COMPETITION POLICIES OF WAEMU, BENIN AND SENEGAL (2008), *available at* http://www.unctad.org/en/docs/ditcclp20071_en.pdf.

40. *Id.*

41. *See generally* CUTS Institute for Regulation and Competition, http://www.circ.in/ (last visited Mar. 18, 2008).

42. *See, e.g.*, DAVID HALL & EMANUELE LOBINA, WATER PRIVATIZATION IN LATIN AMERICA, 2002 (2002), *available at* http://www.psiru.org/reports/2002-06-W-Latam.doc; Andrew Nickson, *The Córdoba Water Concession in Argentina* (DFID Knowledge and Research Project, Working Paper No. 442 05, 2001).

to be competitive for long, if at all. In order to remedy such a problem, the state often regulates the privatized natural-monopoly sectors,[43] creating a regulatory authority with powers to oversee that the privatized utility functions competitively. In short, the state requires that the privatized utility refrain from abusing its dominant power on customers downstream. Unfortunately, one of the main problems of regulators around the world, and indeed in developing countries, is that they become captive to the utility they are expected to control.[44] This captivity occurs either because the regulators were previous civil servants working in the utility before privatization or because they do not accord necessary priority to competition issues over other pressing concerns of the utility, such as maintaining high-employment aims and profit objectives.

### 1. ABUSE IN PRIVATIZED INFRASTRUCTURE

Zambia provides an example of abuse of dominance in privatized infrastructure. As part of a privatization program there, "the Government decided to concession the Mpulungu Harbor and Port for the purpose of increasing the productivity and efficiency of the harbor, freight, transportation, and associated services."[45] In 2000, the Zambia Privatization Agency awarded a twenty-five-year concession for the port management to Mpulungu Harbor Management Ltd. (MHML) after a competitive-bidding process. The concession was subject to review every five years. Following complaints by port customers against MHML, the Zambian Competition Commission investigated the case and found that MHML was abusing its dominant position as port operator because of its discrimination in favor of its subsidiary, Agro-Fuel Investments Ltd., making MHML port user, port operator, and port manager. Hence, it gave Agro-Fuel an unfair advantage over other port users in its management of shipping space, especially with respect to limited cargo facilities operating between Mpulungu and the Great Lakes region. MHML was also found to abuse its position by chartering vessels and choosing the type of cargo to be loaded in a way that its subsidiary Agro-Fuel would get the largest share of the most

43. *See, e.g.*, COMPETITION POLICY IMPLEMENTATION WORKING GROUP, ICN, COMPETITION ADVOCACY IN REGULATED SECTORS (2005), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Competition_Advocacy_Review.pdf.

44. *Id.*

45. ORG. FOR ECON. CO-OPERATION AND DEV., GLOBAL FORUM ON COMPETITION: ABUSE OF DOMINANCE IN REGULATED SECTORS, MPULUNGU HARBOUR AND PORT: A SUMMARY OF COMPETITION ISSUES 3 (2005), *available at* http://www.oecd.org/dataoecd/50/9/34285468.pdf.

lucrative markets. Moreover, it was forcing customers to transport their cargo exclusively through Agro-Fuel truckers or haulers. Finally, only two weeks after having taken over the port management, MHML unilaterally increased its tariffs by 46 percent. Hence, the Zambia Competition Commission constituted a Port Regulatory Review Committee in January 2003, composed of various national ministries and the Zambia Privatization Agency in order to remedy the situation. A Memorandum of Understanding was drafted, realizing that the port was an essential facility requiring all its customers to be able to use its facilities in a fully transparent and nondiscriminatory manner. MHML nevertheless rejected the Memorandum of Understanding, arguing that section 3(f) of the Competition and Fair Trading Act of Zambia exempts all matters of which the government is a party from the application of the law. In this case, the Government was a party to the concession. Hence, the case was postponed until the first five-year review of the concession, due in 2005.[46]

This example shows how major anticompetitive practices can result from the privatization process of essential facilities, the extent to which abuses of dominance by the holder of a concession can affect competition and harm the economy of a poor country as well as its neighbors, and the difficulties in remedying the situation when government-related acts are exempted from the competition law.

Also in relation to port facilities, a Latin American study conducted by the Economic Commission for Latin America and the Caribbean (ECLAC) notes that "[t]he liberalization of Maritime Transport is one important element to increase the export competitiveness of a country."[47] For some countries, the effective rate of protection by the cost of transportation is much higher than that of tariffs.[48] The study noted that one of the most relevant elements of the cost of maritime transport concerns the degree of efficiency in the management of ports.[49] The study adds that one of the most important conditions for port regulation is the existence of competition or potential competition among port operators.[50]

46. *Id.* at 3–7.

47. JOSÉ CARLOS S. MATTOS & MARÍA JOSÉ ACOSTA, MARITIME TRANSPORT LIBERALIZATION AND THE CHALLENGES TO FURTHER ITS IMPLEMENTATION IN CHILE 5 (2003), *available at* http://www.eclac.org/publicaciones/xml/4/14814/lcl2051i.pdf.

48. *Id.* at 10.

49. *Id.* at 13.

50. *Id.* at 15.

2. ABUSE BY FOREIGN-OWNED MONOPOLIES

In Peru, Telefónica of Spain was granted a monopoly in fixed telephony when it was awarded the public concession in 1993. In addition, Telefónica obtained the concession to operate the mobile-telephony net in Lima when it took over CPT and in the rest of the country when it acquired ENTEL. CPT had one competitor, TELE 2000, in the Lima area of mobile telephony, and ENTEL was the sole provider of mobile telephony outside Lima. After Telefónica bought CPT and ENTEL, it decided to merge them in 1994, and, by 1995, it developed an automatic-national-roaming system (ANR).[51]

Hence, with Telefónica's ANR, its clients were able to communicate everywhere in Peru while TELE 2000 was unable to offer the same facility since it was limited to the Lima area. When TELE 2000, which benefited from a manual-national-roaming facility agreement with ENTEL, requested Telefónica to offer it the same facility, Telefónica refused.[52]

TELE 2000 sued Telefónica arguing that the ANR was a telecommunications public service that should be made available to the general public for a nondiscriminatory fee. TELE 2000 also stated that Telefónica dominated the market for mobile telephony outside Lima because it was the sole operator and that its refusal to share network and service interconnection amounted to an abuse of a dominant position. Accordingly, it requested that the Organismo Supervisor de la Inversión Privada en Telecomunicaciones (OSIPTEL), Peru's telecommunications regulator, which is in charge of competition issues in the telecommunications sector, order Telefónica to grant access to its ANR services for TELE 2000's clients.[53]

Telefónica argued that ANR was not a public service and that TELE 2000 was really aiming to indirectly enlarge its concession rights and gain indirect benefits. As it had been awarded the concession for mobile telephony outside Lima and no other concession had been granted in this case, Telefónica could not therefore be considered to be abusing its dominant position in that market. While OSIPTEL found that Telefónica did not have a dominant position in the Lima market, which it considered as the relevant market, OSIPTEL considered that Telefónica did have a dominant position in the market outside Lima and

51. ORG. FOR ECON. CO–OPERATION AND DEV., GLOBAL FORUM ON COMPETITION: ABUSE OF DOMINANCE IN REGULATED SECTORS, TELE 2000 VS. TELEFONICA DEL PERU 2 (2005), *available at* http://www.oecd.org/dataoecd/49/57/34286241.pdf.

52. *Id.*

53. *Id.* at 3.

used that power to generate advantages in the Lima market. As a result, OSIPTEL ordered Telefónica to give TELE 2000 clients access to the ANR under the following conditions: First, both companies were given a period of seven days to negotiate the terms of access to ANR for TELE 2000's clients. Second, the compensation to use Telefónica's net would be established taking into account the magnitude of ANR coverage, installation costs, traffic, and additional investment Telefónica had to make to enable TELE 2000's clients to use the ANR. Finally, OSIPTEL indicated it would impose mandatory terms and conditions should the two firms not find an agreement after the seven-day delay had lapsed.[54]

Similar cases of incumbent telecommunications firms refusing to allow competitors to use essential facilities or imposing excessive fares for such services are commonplace in both developed and developing countries.[55] As such, it often becomes necessary for such countries to enforce competition legislation, either by the central competition authority or, such as the case in Peru, through the sector regulator's powers to enforce competition rules. In the latter system, the regulator might be too willing to support the views of the incumbent ex–state monopoly and to disregard competition rules.

### 3. ABUSE BY OTHER PRIVATE-SECTOR FIRMS, INCLUDING MULTINATIONAL FIRMS

Even when foreign firms are not monopolies, they may easily become dominant players in developing countries simply as a result of their large turnover and deep pockets compared to domestic competitors. And having power means it is very tempting to abuse such power in order to quash competition. Many types of complaints have been made in developing countries in this respect. These include, for example, local dairy- and farm-products suppliers to large multinational retail chains, such as Carrefour and Tesco, that were accused of abusing their dominant power to impose excessively restrictive conditions on local suppliers.[56] Alerted by this situation, competition authorities in these countries have often been unable to take any decisive action to remedy such concerns.[57] When authorities have tried

54. *Id.* at 3–4.

55. ORG. FOR ECON. CO-OPERATION AND DEV., COMPETITION AND REGULATION ISSUES IN TELECOMMUNICATIONS 8 (2001).

56. *See, e.g.*, *New Code Won't Break British Chains' Armlock on Farmers*, HOMETOWN ADVANTAGE, Mar. 2, 2002, http://www.newrules.org/retail/news_archive.php?browseby=slug&slugid=102.

57. They have resorted to other means than competition policy. *See infra* notes 79–80 and accompanying text.

to protect suppliers, such action has been frowned on by international experts arguing that "competition policy should be to protect competition—not competitors."[58]

Another major source of discontent in developing countries is the excessive prices imposed by large pharmaceutical firms on essential medicines. Patent owners can usually prohibit to one country imports of its products that are sold abroad. Patent owners can fix different prices according to their interest, keeping higher prices, for example, in small markets or higher-income countries, whereas their prices could be lower in lower-income markets or larger markets where competition may be stronger. Usually, the patent holders, pharmaceutical firms, or other beneficiaries of intellectual-property rights such as patents or trademarks can invoke their property rights to foreclose the market from parallel imports. Parallel importers would purchase the goods where they are sold at lower prices to import them in the higher-priced country. The question that arises, then, is whether the importing country recognizes international or only national exhaustion of property rights. Most countries only accept national exhaustion of rights. In other words, if the goods have been purchased on the national market, the owner can sell them without any restriction; while if the goods are bought abroad and imported, the owner still cannot resell them without authorization from the patent (or trademark) owner.[59]

In developing countries, and in some developed countries, the question of limiting excessive prices when identical goods are sold at consistently lower prices can lead to the adoption of international exhaustion and authorization of parallel imports. The issue took a highly political turn in South Africa with respect to HIV medicines and other drugs that could be imported from generic-medicine-producing countries, such as India, at considerably lower prices, enabling the government's social security to save many more lives.[60] In the end, the antiretroviral-drug-producing laboratories agreed to offer substantial rebates before the South African Supreme Court's ruling, which might

58. Gerald F. Masoudi, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Justice, Promoting Economic Development through Sound Competition Policy, Presentation at TAIWAN 2006 International Conference on Competition Policies/Laws (June 20, 2006), *available at* http://149.101.1.32/atr/public/speeches/217616.pdf.

59. *The Concept of Exhaustion of Rights for Industrial Property*, IPR HELPDESK (IPR Helpdesk, Univ. Alicante, Alicante, Spain), *available at* http://www.ipr-helpdesk.org/documentos/docsPublicacion/pdf_xml/8_ES_ExhaustionIP%5B0000006554_00%5D.booklet.pdf.

60. *See, e.g.*, John Donnelly, *Deal Paves Way for Generic HIV Drugs*, BOSTON GLOBE, Dec. 11, 2003, at A8.

have authorized parallel imports of essential medicines.[61] In the pharmaceutical sector, similar situations may also arise, especially in times of emergency. When faced with the prospect of saving lives, governments often agree to authorize parallel imports. This was the case recently in Thailand, where imports of low-cost generics were authorized.[62]

Another type of abuse, which is found in developed countries but affects poor countries most often, is the practice of pharmaceutical companies using repackaging or nonessential formula changes to extend their patents and to increase prices at the same time.[63]

Obviously, some of these developments are reflected in the waiver to the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement of the World Trade Organization (WTO), decided on August 30, 2003. According to the WTO,

> That waiver made it easier for poorer countries to obtain cheaper generic versions of patented medicines by setting aside a provision of the TRIPS Agreement that could hinder exports of pharmaceuticals manufactured under compulsory licenses to countries that are unable to produce them.[64]

## IV. MERGERS AND TAKEOVERS RESULTING IN CONCENTRATION OF MARKET POWER

Although not abuses of dominant power as such, mergers and acquisitions that may lead to the creation of monopolies or dominant firms are closely monitored in most countries having competition legislation because of the potential for abuse that such concentrations of market power carry with them. Some developing countries, however,

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61. *See, e.g.*, Desa Sri Hartamas, *Thailand to Import Plavix Generics from India*, THIRD WORLD NETWORK, http://www.twnside.org.sg/title2/intellectual_property/info.service/twn.ipr.info.080701.htm.

62. *See, e.g.*, Nicholas Zamiska, *Thai Move to Trim Drug Costs Highlights Growing Patent Rift*, WALL ST. J., Jan. 30, 2007, at A8.

63. *See, e.g.*, Press Release, Cong. Comm. on Oversight & Gov't Reform, Medical Drug Price Manipulation (Feb. 16, 2000), *available at* http://oversight.house.gov/story.asp?ID=573; Andrew Pollack, *New Drug, New Price, Old Results*, INT'L HERALD TRIB., June 30, 2006, at 15.

64. Press Release, World Trade Org., Members OK Amendment to Make Health Flexibility Permanent (Dec. 6, 2005), *available at* http://www.wto.org/english/news_e/pres05_e/pr426_e.htm. On December 6, 2005, the WTO members decided to make permanent the waiver to the TRIPS Agreement on patents and public health for poorer countries originally adopted in 2003. *Id.* So far, however, the 2005 decision, which depends on a two-thirds ratification, has not been implemented, which means that the 2003 temporary waiver is still in force. *Id.*

have refrained from adopting merger-control provisions when adopting competition legislation. This is the case, for example, in Jamaica, which was followed by a series of developing countries that decided to adopt competition or antitrust legislation but stopped short of granting oversight agencies the powers to address anticompetitive mergers and takeovers. The alleged reasoning for this omission was often that small markets of developing countries necessitated large companies in order to perform economies of scale and that dominant firms might be necessary in order for national firms to compete with foreign giants.[65] This reasoning, however, does not take into account the need to counter practices by dominant foreign companies that are willing to acquire local firms in order to expand their control of the domestic market until they achieve a monopolistic position, or until they are in a position to abuse their power to the detriment of the domestic market.

Among the developing countries that have competition laws that include merger-control power, Zambia has been able to successfully monitor a foreign takeover in the telecommunications sector. On June 15, 2005, the Zambian Competition Commission (ZCC) received a formal notification from the MTN Group Limited of South Africa that it was purchasing 100 percent of the capital of Telcel Zambia Limited. The Board of Commissioners considered that the acquisition was more likely to bring procompetitive benefits to the Zambian mobile-telecommunications sector by increasing investment and employment and by upgrading technology. As a result, the Board granted final authorization for the takeover, subject to the following conditions: First, 10 percent of the capital of Telcel Zambia Limited must be blocked in a Special Purpose Vehicle (SPV) for Zambian public ownership, to be released to the public within fifteen to eighteen months, with the establishment of an effective mechanism to this effect by MTN. Second, "MTN shall, within six months after taking over, identify a senior management official to be a Trade Practices Compliance Officer . . . in constant touch with the [ZCC] as regards implementation of the undertakings and compliance with the Competition and Fair Trading Act . . . of Zambia."[66] By so doing, the Zambia Competition Commission ensured that the competitive process would be protected in the telecommunications sector, which is an essential infrastructure sector for the country's economic development.

65. For a detailed account and assessment of related arguments, see Simon J. Evenett, *The Return of Industrial Policy—A Threat to Competition Law?*, *in* COMPETITION LAW TODAY: CONCEPTS, ISSUES, AND THE LAW IN PRACTICE (Vinod Dhall ed., 2007).

66. U.N. CONF. ON TRADE & DEV., RECENT IMPORTANT CASES INVOLVING MORE THAN ONE COUNTRY 13 (2006), *available at* http://www.unctad.org/en/docs/tdrbpconf6d5rev1_en.pdf.

In a similar case in the petroleum sector, Malawi's Fair Trading Commission authorized a takeover in the petroleum sector of Mobil Malawi Limited by Total Malawi Limited. The mergers between the overseas parent companies, Total Outre-mer S.A. and Mobil Holdings (Europe and Africa), had already taken place, and the parties were seeking authorization for a similar merger of their subsidiaries in Malawi. The Malawi Fair Trading Commission, which is empowered by the Competition and Fair Trading Act to control concentrations, found that the combined final market share of the combined entities would be 32 percent. Before the merger, the petroleum market was considered to be highly concentrated, as the top three players in Malawi—Total, Mobil, and BP (39 percent)—controlled more than 70 percent of the relevant market, defined as the importation, supply, and distribution of petroleum products in Malawi. However, as there was no oil refinery in Malawi at the time (October 2005), all petroleum products were imported into the country, and neither the merged entity, Total-Mobil, nor the market leader, BP, had a market share that could be considered dominant. Moreover, market entry was free, as evidenced by the recent entry into the market of other operators, such as Niot, Injena, and Energem. Accordingly, the board of the Malawi Competition Commission authorized the merger on economic efficiency grounds, subject to certain conditions in accordance with section 39(2) of the Competition and Fair Trading Act of Malawi. Consequently, Malawi, which is a Least Developed Country, was able to monitor the effects on its territory of an international merger. This would have been impossible if the Competition Act did not exist or if it did not include powers to control mergers and takeovers.[67]

## V. EXAMPLES OF SPECIFIC ENFORCEMENT CASES IN DEVELOPING COUNTRIES

This Part uses specific enforcement cases to describe the challenges faced and the requirements for successful prosecution of abuses of a dominant position in developing countries.

### *A. Relationships with Suppliers*

Provisions of competition laws on abuses of dominance in developing countries often miss the point when, for the sake of legal certainty, they place too much or exclusive emphasis on market share as the only threshold to decide whether a company has a dominant position of market power. Moreover, in their application, competition

67. *Id.* at 15–16.

laws give much discretion to the decisions of the competition authority. Accordingly, in cases where the law is unclear or where the authority is not sufficiently trained, results can miss the point or simply be anticompetitive. The examples described below are illustrative of possible divergences of views in this respect.

In a case in India going back to 1975, Bata Shoes was alleged to have abused its dominant position by imposing tied-purchasing practices in its contracts with small-scale manufacturers. The agreement, which was passed with small firms, mostly poor cobblers and leather workmen engaged in the manufacture of leather and rubber canvas, imposed that the small manufacturers purchase their raw material and components exclusively from suppliers specifically approved by Bata. In addition, the small manufacturers were required to use molds sold or supplied by Bata for manufacturing footwear.[68]

This agreement was challenged and prohibited by the Monopolies and Restrictive Trade Practices Commission (MRTPC) of India,[69] as the Commission observed that the small manufacturers were "by and large impecunious and survived on leather footwear manufacture for their livelihood" and that the restrictive conditions contravened the provisions of the MRTP Act.[70]

The other case relates to the National Competition Commission of Senegal, which received a complaint from the Union of Senegalese Travel and Tourism Agents, alleging that Air France had unilaterally decided to reduce the commission it offered travel agents from 9 percent, as was the case for more than a decade for agents selling international tickets for the twenty-one carriers serving Senegal, to 7 percent, explaining that it was "adapting its distribution costs to new global economic realities."[71]

In their letter of complaint dated May 29, 2001, the travel agents alleged that the practice in question was likely to infringe Senegal's rules on competition, in particular Article 27 of Act 94-63 of August 22, 1994, as "various companies were believed to have consulted each

68. CONSUMER UNITY AND TRUST SOCIETY, INSTITUTE FOR REGULATION AND COMPETITION, COMPETITION AND REGULATION IN INDIA 104–05 (Pradeep S. Mehta ed., 2007).

69. The old MRTP Commission has now been replaced by a new Competition Commission, and the MRTP Act has been replaced by the new Competition Act of 2007. *See* The Competition Bill, No. 70 (2007) (India).

70. CONSUMER UNITY AND TRUST SOCIETY, *supra* note 68, at 104–05.

71. ORG. FOR ECON. CO-OPERATION & DEV., GLOBAL FORUM ON COMPETITION: ABUSE OF DOMINANCE IN REGULATED SECTORS, UNION OF SENEGALESE TRAVEL AND TOURISM AGENTS VS. AIR FRANCE 2 (2005), *available at* http://www.oecd.org/dataoecd/49/57/34286241.pdf.

other before Air France cleared the way as the most powerful company in the market, . . . which was flights between Senegal and France."[72]

In response to the complaint, the Commission set up an inquiry and entered investigations, including hearings of the parties, and ruled as follows: "Air France occupied a dominant position in the relevant market, not only because Air Afrique was no longer in business, but for other, psychological and historical, reasons."[73] France was the main destination for traffic from Senegal, and Air France enjoyed strong demand on this segment, having increased its flights from six to seven days per week. Also, "[t]he travel agencies were in a state of economic dependence on Air France, which accounted for 50.72% of their combined turnover and for between 54.79% and 86.98% of the turnover of five of the ten agencies covered by the investigation."[74] In addition, the travel agencies had no equivalent alternative, and Air France was found to have abused the state of economic dependence of the travel agents by unilaterally imposing a rate that the agents "would not have accepted if they had enjoyed full independence."[75]

In this case, the issue of abuse of dominance was considered through the lenses of the economic-dependence theory,[76] which is found in the competition laws of some countries, including France. Under this theory, the law protects not only the interests of consumers but also, to a certain extent, the interests of dependent firms, such as distributors, where competition is absent or insufficient to allow distributors to switch to other companies without incurring irremediable damages.

### *B. Large Distribution Chains*

The case of large supermarket chains, often multinational distribution chains abusing their dominant power to extract ever-lower prices from their domestic suppliers, including farmers and agricultural producers, has often been complained of in many parts of the world, developing and developed countries alike. While the prevailing consensus view in developed countries seems to be that competition laws seek to defend the interests of consumers and not to protect producers or competitors, complaints about such abuses, especially on impoverished farmers, are common in less developed countries. Complaints have emanated from Thailand, with the arrival of

72. *Id.*
73. *Id.* at 3.
74. *Id.*
75. *Id.*
76. See Part 3 (Analysis of Jurisprudence), Chapter IV (La Notion de Dependence Économique) of FRENCH COMPETITION COUNCIL, ANNUAL REPORT (2001).

international distribution chains such as Carrefour of France and Wal-Mart of the United States; from Peru, where agricultural producers are demanding measures to defend their income; and, perhaps most surprisingly, from French President Nicolas Sarkozy on French television TF1 on November 28, 2007, where he expressed alarm in defense of French farmers who are losing ever more purchasing power as a result of increasing pressure from distributors. Prices at the supply end of the chain are ever more compressed, he said, while consumer prices, at the other end of the distribution chain, are increasing constantly.

It is important to note that this is a universal concern, which if stressed in industrialized countries such as France, is all the more damaging in developing countries, where agriculture counts for a much-higher proportion of GDP and employment and where the poor are mainly occupied in farming. A similar situation arose in Indonesia, where the competition authority, KPPU, dealt with a case in 2005 involving abuse of purchasing power by the French retailer Carrefour against wholesalers, producers, and suppliers.[77]

In another case involving Carrefour in Hong Kong, the French supermarket was allegedly blocked entry on the local market because the two dominant local retailers, which are owned by two large conglomerates that together control the real-estate market of the territory, refused to let Carrefour obtain prime locations for establishing its retail supermarkets.[78]

In Thailand, the cabinet is said to be considering a draft bill that would oblige foreign-owned retailers, such as Carrefour, Tesco, and others, to apply for prior authorization from the government before opening new outlets in the country.[79] In Indonesia, local-zoning laws and regulations of business hours are applied to limit entry and restrict the "undue" competition of retail chains in order to protect traditional local stores.[80]

77. Ningrum Sirait, Professor, Univ. N. Sumatra, Overview of Retail Business in Indonesia, Presentation at Third Asian Competition Law Conference at Hong Kong Polytechnic University (Dec. 10, 2007), *available at* http://64.233.167.104/search?q=cache:hkcTpXvVLHwJ:www.asiancompetitionforum.org/3rd%2520ACF%2520Conference%25202007/3rd%2520ACF%2520Conference%25202007%2520Schedule%2520(Website%2520Purpose).doc+Ningrum+Sirait+Indonesia+Retail+in+Indonesia&hl=en&ct=clnk&cd=1&gl=us&client=firefox-a (follow hyperlink).

78. Information received at the Third Competition Law Conference, H.K. Polytechnic Univ., Dec. 10–11, 2007.

79. *Thailand Approves "Stopgap" Limits on Retail Chain Expansion*, INT'L HERALD TRIB., May, 8, 2007.

80. *See* Sirait, *supra* note 77.

### *C. Computer Software Tie-in*

In 2000, Microsoft was accused of tying its Windows Media Services (WMS) to its personal-computer operating system in Korea. Additionally, the company combined its Windows Microsoft Network (MSN) Messenger service with other services. The Korean Fair Trade Commission (KFTC) found that Microsoft's tie-in sales were an abuse of dominant position and had the effect of driving competitors out of business by restricting competition in the relevant market. On December 7, 2005, KFTC imposed a series of corrective measures on Microsoft, including the following: (1) a fine of 33 billion Won ($31 million); (2) an order to drop the tie-in of WMS within 180 days; and (3) an order to provide two different versions of the personal-computer operating system, allowing customers to download competing products. In addition, KFTC established a supervisory board to monitor implementation of the conditions set, at the expense of the company.[81] This is an important case of abuse of dominance by a foreign multinational because it was settled by a developing-country authority after similar cases were brought against the same company in developed countries including the United States and Europe.

## CONCLUSION

This Paper examines the different forms and prevalence of abuse of dominant positions by commercial entities in developing countries, with an eye toward assessing the advice given to these jurisdictions concerning the priorities for their competition-law enforcement regimes. Both case-study evidence and statistics on the number of alleged anticompetitive practices were employed to advance the position that abuses of a dominant position ought not to be discounted as a priority for action by state bodies in developing countries. The available evidence pointed to important nuances as well. For example, tackling abuse of dominance is not merely a matter of targeting foreign multinationals as the state itself. State-owned firms or private firms with strong ties to—amounting in some cases to strong protection from—national policy makers are a significant source of abuse of dominance in developing countries. Mergers and acquisitions can also result in dominant positions that may be abused. A comprehensive view of the various forms and origins of abuse of dominance in poorer countries is recommended.

81. U.N. CONF. ON TRADE AND DEV., RECENT IMPORTANT COMPETITION CASES INVOLVING MORE THAN ONE COUNTRY 5–6 (2007), *available at* http://www.unctad.org/en/docs/c2clpd62_en.pdf.

Abuses of dominant market power by single firms are a significant type of anticompetitive practice that affects both industrialized and developing countries alike. Cases brought by nascent competition authorities in developing countries increasingly concern abuses of dominance. This fact alone calls for a reexamination of the widely held view that competition law in poorer countries should have priorities of cartel enforcement actions and competition advocacy.

While there is no doubt that cartels, including international cartels, can have a damaging impact on the trade and well being of developing countries' trade, this does not imply that there is little or no harm done by abuses of dominance in developing countries. The description given earlier of the relevant characteristics of poor countries, showing their vulnerability to various types of abuses of dominance by public and private firms, sheds light on the ultimate sources of this policy problem. No doubt, future research and enforcement experience could enrich and potentially qualify the findings and inferences presented here.

Many developing economies are dominated by the state, acting directly as the owner of state monopolies or indirectly through the close links it entertains with national champions, which the state often seeks to promote. The dominance of the state can be at the expense of other domestic or foreign firms and can result in heavy-handed anticompetitive practices, damaging the very economy that it purports to nurture and safeguard.

As a result of their size, relative financial power, and access to foreign markets, multinational corporations are naturally prone to be dominant in many markets in smaller economies and could abuse their dominant position if not deterred effectively by a competition authority. However, such corporations are not the only relevant firms in this regard, as the actions of local monopolies and dominant firms can inflict considerable harm on their host societies too.

As to enforcement capacity, all too often the difficulty facing poor countries is that their officials are often ill equipped for the difficult task of tackling abuses of dominance. This task is much more challenging if the abuse comes from the state. But even when private firms have to be challenged, any lack of credibility and relevant expertise of the competition authority risks erroneous enforcement decisions and underenforcement. Similarly, lack of familiarity with abuse of dominance among judges can frustrate effective enforcement action.

In sum, given the various forms of abuse of dominance in developing countries and the experiences of state bodies in attempting to tackle such abuses, particular attention needs to be given to the following technocratic matters: the types of business practices deemed

to be abuses in competition statutes, the inclusion of state-owned and privatized firms in the scope of application of the competition law, the resources (including expertise) and independence of the competition-law enforcement body, and the assistance and cooperation that can be provided by other competition authorities and relevant international agencies. Having said this, injecting the discipline of competition and limiting the exercise of market power into economies where vested interests have strong links to policy makers is unlikely to be easy in developing countries (and in industrialized countries for that matter). Like many other types of competition-law provisions, the effective enforcement of measures on abuses of a dominant position will redraw the boundaries within a jurisdiction between business, the state, and customers. Proponents of such measures ought to marshal a wide base of support within society and not solely focus on the important technocratic details that these measures entail.