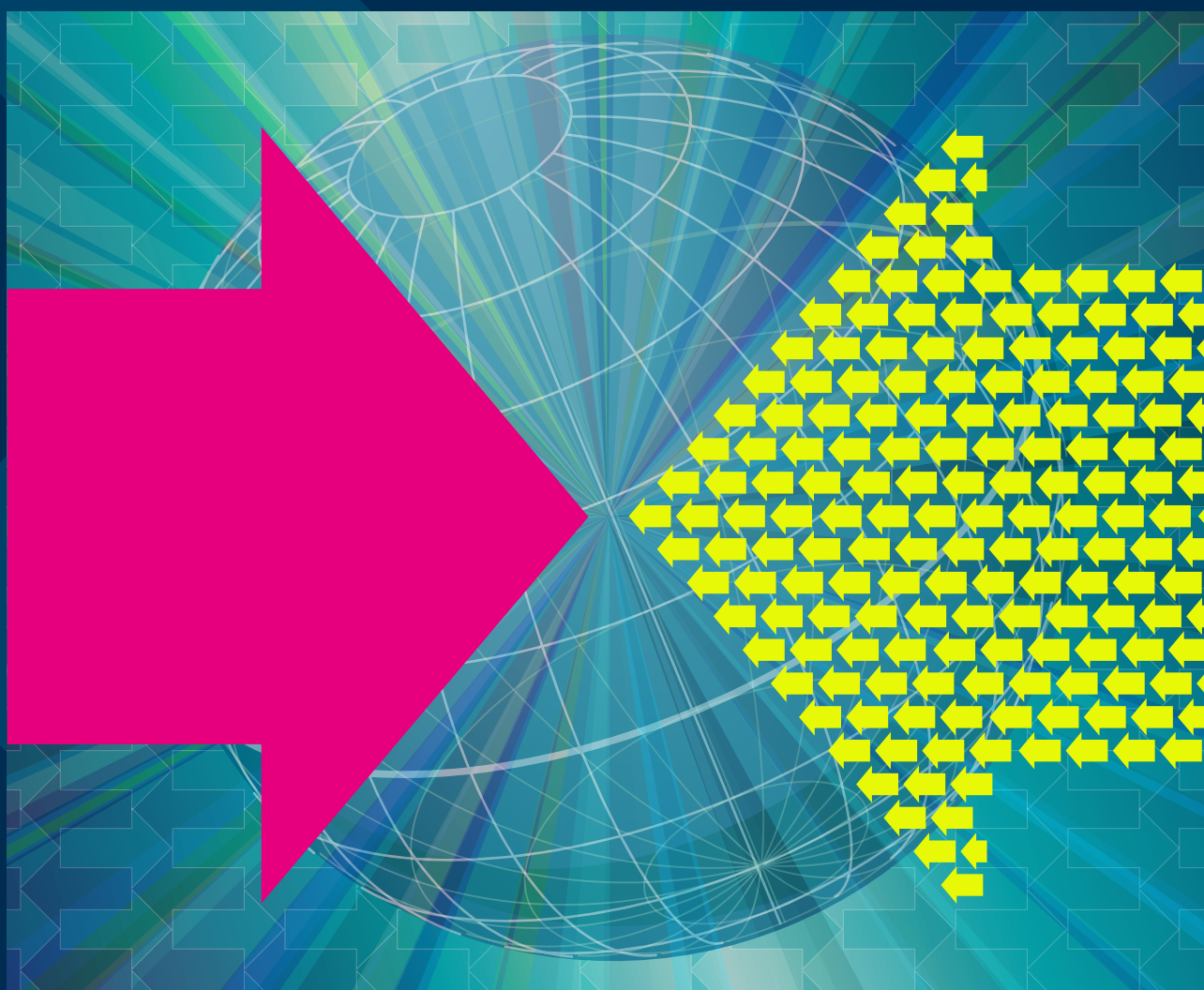


# Combating Anti-competitive Practices

A Guide for Developing Economy Exporters



International  
Trade  
Centre

EXPORT IMPACT FOR GOOD

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# COMBATING ANTI-COMPETITIVE PRACTICES

A GUIDE FOR DEVELOPING ECONOMY  
EXPORTERS

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Study dealing with anti-competitive practices and the measures that can be taken to address them – focuses on State monopolies and abuses in infrastructure markets, the anti-competitive practices in the international distribution and retail sector, and international cartels; discusses how such practices can harm developing country businesses, and provides examples of the impact of anti-competitive practices on developing country suppliers; considers the role of businesses and business associations in responding to the practices in question, and the scope for enhanced international cooperation in addressing them; includes bibliographical references.

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## FOREWORD

Exports can be an important route to business success for developing and transition economy-based firms, including small and medium-sized enterprises (SMEs). SMEs already account for some 30% of global exports, according to the Organization for Economic Cooperation and Development (OECD). Their share will continue to rise, as advances in transport and telecommunications technology erase distances and international trade pacts reduce the official barriers to doing business across frontiers.

But export-oriented businesses in developing and transition economies can be harmed by private barriers to trade, in the form of anti-competitive practices and market structures. As this book makes clear, these export-oriented companies can face serious challenges. They may not have access to efficient, competitive infrastructure for transportation, energy and telecommunications. Overseas buyers may wield too much power in international distribution chains. Cartels of foreign-based firms can inflate the input costs of businesses.

Anti-competitive practices can occur locally, nationally or internationally. These practices undermine consumer and business welfare. However, certain kinds of practices – infrastructure monopolies, undue buyer power in distribution chains and international cartels – particularly affect businesses aspiring to international success. These practices, and the measures that can be taken to address them, are the focus of this book.

There is no 'one cap fits all' answer for how best to combat anti-competitive practices. Except in the case of flagrant abuses, such as international price-fixing cartels, allegations of anti-competitive conduct need to be evaluated on a case-by-case basis. Countries need to carry out reforms to generate greater competition within domestic service industries as well as implement competition (antitrust) laws. Often these rules stretch beyond national frontiers, with their effective implementation requiring countries to cooperate, at least regionally.

Developing and transition-economy-based businesses and their associations play a crucial role in creating a fairer competitive environment. Businesses can help build political support for reform and provide input to the design of restructuring initiatives, ensuring that reforms take into account their most pressing needs. They can also be whistleblowers when it comes to identifying transnational anti-competitive practices that affect their operations.

Information is a powerful weapon and that is what this important book provides. Armed with the examples it sets out and the advice it extends, businesses will be better placed to help devise solutions that are appropriate to their needs. In this respect, the book speaks to the very heart of ITC's mission, which is to strengthen the international competitiveness of enterprises in developing countries and transition economies, and to help them address the barriers that can limit their success.



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## CONTENTS

Foreword	iii
Acknowledgements	iv
Abbreviations	ix

### CHAPTER 1

<b>HOW ANTI-COMPETITIVE PRACTICES HURT DEVELOPING COUNTRY BUSINESSES</b>	<b>1</b>
EXPORTERS STRUGGLE	2
COMPETITION POLICY ADDRESSES CONCERNS	3
THE ROLE OF COMPETITION AGENCIES	4
BUSINESSES, ASSOCIATIONS AND CONSUMERS	4
ARE ANTI-COMPETITIVE PRACTICES TRULY AN ISSUE OF CONCERN FOR POOR COUNTRIES?	4
WHAT ABOUT ECONOMIC CRISES?	5
WHAT THIS BOOK IS NOT ABOUT	5

### CHAPTER 2

<b>FITTING INFRASTRUCTURE FOR EXPORTERS</b>	<b>9</b>
INTRODUCTION TO THE ISSUES	10
Privatization trap	10
Transportation, energy and telecommunications	11
RESTRUCTURING STATE MONOPOLIES	12
Separating competitive, non-competitive components	12
OECD recommendations	13
Qualifications about 'vertical' separation	14
COMPETITIVE ACCESS REGIMES	15
Competition law needs enforcing	15
Business organizations and associations	16
THE TRANSPORTATION SECTOR	16
Ports	16
Railways	19
Air transport	21
Road transport	23
THE ENERGY SECTOR	26
THE TELECOMMUNICATIONS SECTOR	29
CONCLUSION	33

<b>CHAPTER 3</b>	
<b>ANTI-COMPETITIVE PRACTICES IN DISTRIBUTION</b>	<b>39</b>
INTRODUCTION TO THE ISSUES	40
MONOPSONY (BUYER) POWER	40
How exporters can suffer	41
Agro-food sector examples	41
IS VERTICAL COOPERATION ANTI-COMPETITIVE?	42
CONSOLIDATION VERSUS COMPETITION	44
POLICY AND OTHER RESPONSES	48
LESSONS TO BE LEARNED	49
A NEED FOR SOMETHING MORE?	50
<b>CHAPTER 4</b>	
<b>HOW CARTELS CAN HURT</b>	<b>53</b>
INTRODUCTION	54
INTERNATIONAL CARTELS: HOW THEY OPERATE	55
Higher prices: market division schemes	56
Impact on input costs	57
Are there benefits to cartels?	58
COMPETITION BLOCKING STRATEGIES	58
Price wars	59
Restricting access to technical information	59
Mergers and acquisitions	60
Transfer of market power	60
Tariffs and anti-dumping duties	60
COMBATING CARTELS	61
National cartel laws	61
Insufficient deterrent	62
THE CHALLENGE OF EXPORT CARTELS	62
TOUGHER LAWS, ENHANCED COOPERATION	63
CONCLUSION	65
<b>CHAPTER 5</b>	
<b>CONCLUSIONS</b>	<b>69</b>
TREATING INFRASTRUCTURE MONOPOLIES	70
ADDRESSING BUYER POWER IN INTERNATIONAL DISTRIBUTION SYSTEMS	71
THE BENEFITS AND LIMITS OF NATIONAL COMPETITION AGENCIES	71
TACKLING CARTELS	71
INTERNATIONAL COOPERATION	71
A ROLE FOR BUSINESSES AND THEIR ASSOCIATIONS	72



## TABLES

Table 1	How anti-competitive practices affect developing country producers	3
Table 2	Non-competitive and competitive components of key infrastructure industries	13

## BOXES

Box 1:	OECD recommendation on separating competitive and natural monopoly functions	14
Box 2:	Argentina: monitoring competition in restructured ports	17
Box 3:	Indonesia: using competition law for restructuring ports	17
Box 4:	Jamaica: stopping abuse of dominance in port management	18
Box 5:	Zambia: abuse of dominance in port management led to tariff increases	19
Box 6:	Railway competition through franchises	20
Box 7:	Mexico: encouraging competition – the spatial separation model	20
Box 8:	Sweden: encouraging competition – the vertical separation model	21
Box 9:	United States: lessons from airline deregulation for competition	22
Box 10:	Air cargo cartel fined by European Commission for price fixing	23
Box 11:	Deregulation examples in freight transport	24
Box 12:	Efficiency gains from the resolution of the United States-Mexico trucking dispute	25
Box 13:	Price fixing in bus services from Singapore to Malaysia and southern Thailand	25
Box 14:	Reform of the EU's electricity sector	27
Box 15:	China: reform of the energy sector	28
Box 16:	Russian Federation: abuse of dominance in the power transmission market	28
Box 17:	Pakistan: cartelization in liquefied petroleum gas market	29
Box 18:	Forms of market entry – the United States Telecommunications Act of 1996	30
Box 19:	Peru: abuse and transfer of monopolistic power	31
Box 20:	Chinese Taipei: abuse and transfer of monopolistic power	31
Box 21:	Latvia: abuse of dominance	32
Box 22:	Mexico: competition-related elements of the WTO Panel Report	33
Box 23:	Share of agricultural exports across countries in 2009	42
Box 24:	High food prices may not help producers	42
Box 25:	Simplified agribusiness value-chain diagram	43
Box 26:	'French' beans from Madagascar	44
Box 27:	Raspberry Farming in Chile	45
Box 28:	United Kingdom and United States: competition authorities scrutinize agro-food mergers	46
Box 29:	South Africa: agro-food merger scrutiny	47
Box 30:	Farm goods markets with high downstream concentration	47

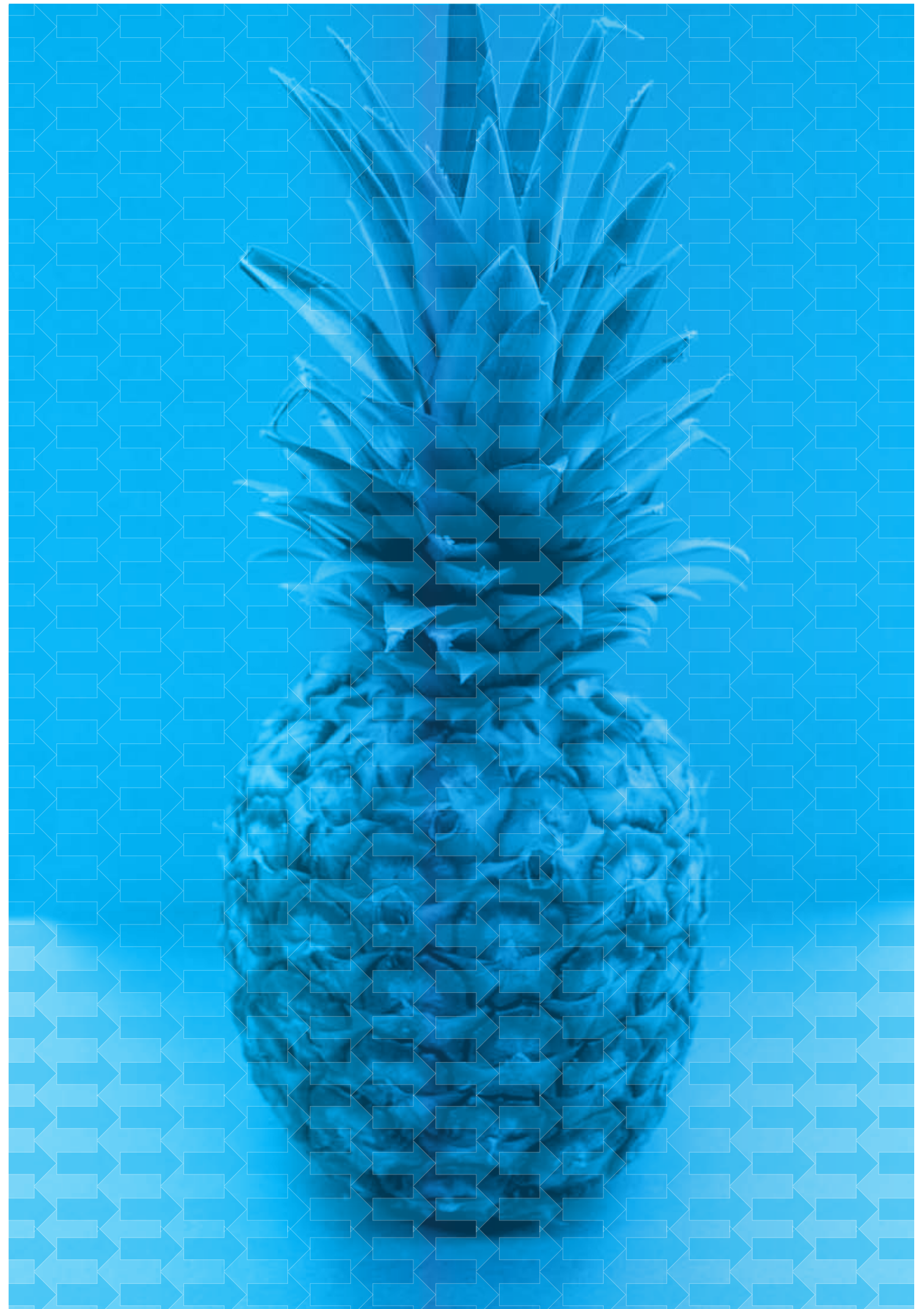
Box 31:	South Africa: anti-competitive practices in agro-food chains	48
Box 32:	United States: workshops on agriculture and antitrust enforcement; United Kingdom: inquiry into groceries retailing	48
Box 33:	Some products and sectors subject to international cartels affecting developing country businesses	55
Box 34:	Some market division schemes of international cartels	56
Box 35:	The global graphite electrodes cartel	57
Box 36:	The global lysine cartel	57
Box 37:	The global vitamins cartel	58
Box 38:	International cartel strategies to curb competition	59
Box 39:	Barriers to entry from the laminated plastic tubes cartel	60
Box 40:	Citric acid cartel attempts to misuse anti-dumping laws	60
Box 41:	Recommendation to deter hard core cartels	61
Box 42:	Challenges in deterring cartels	62
Box 43:	Recommendation on international cooperation to prohibit cartels	64

## ABBREVIATIONS

Unless otherwise specified, all references to dollars (\$) are to United States dollars, and all references to tons are to metric tons.

The following abbreviations are used:

CUTS	Consumer Unity and Trust Society
EC	European Commission
EU	European Union
FAO	Food and Agriculture Organization
GDP	Gross domestic product
ITC	International Trade Centre
OECD	Organisation for Economic Co-operation and Development
SMEs	Small and medium-sized enterprises
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organization
WTO	World Trade Organization



## CHAPTER 1

# HOW ANTI-COMPETITIVE PRACTICES HURT DEVELOPING COUNTRY BUSINESSES

EXPORTERS STRUGGLE .....	2
COMPETITION POLICY ADDRESSES CONCERNS .....	3
THE ROLE OF COMPETITION AGENCIES.....	4
BUSINESSES, ASSOCIATIONS AND CONSUMERS .....	4
ARE ANTI-COMPETITIVE PRACTICES TRULY AN ISSUE OF CONCERN FOR POOR COUNTRIES? ....	4
WHAT ABOUT ECONOMIC CRISES? .....	5
WHAT THIS BOOK IS NOT ABOUT .....	5

# HOW ANTI-COMPETITIVE PRACTICES HURT DEVELOPING COUNTRY BUSINESSES

Much attention has been given to the potential for achieving enhanced prosperity through further expansion of exports of goods and services from developing and transition economies. Increasingly, developing and transition economy businesses aim to achieve growth through exports, whether to other developing economies (South-South trade) or to developed country markets (South-North trade). In many cases, exporters have achieved considerable success. This is certainly true in the emerging economies of East and South Asia; in Latin America; in parts of Africa; and some key transition economies of Eastern Europe and Central Asia.

Developing country exporters can be thwarted by government policies that limit access to overseas markets or otherwise raise exporters' costs or undermine their ability to compete. The relevant measures may include traditional tariffs and quotas, agricultural subsidies, government-administered food and other safety standards, regulatory regimes in service sectors, occupational licensing requirements and many other measures. Significant progress has been made in limiting the potential adverse impact of such measures.

What is less well appreciated is the extent to which exporters are undermined by anti-competitive practices and market structures that limit access to markets and weaken the productive capacities on which they depend. Such practices and structures – including infrastructure monopolies, distribution restraints and international cartels (secret price-fixing arrangements between firms) – are a real factor in limiting the success of developing country exporters in penetrating foreign markets.

## EXPORTERS STRUGGLE

In many developing countries, exporters struggle with inadequate public infrastructure, such as transportation, or with the high prices that can be charged for access to it. Such problems may be due, in part, to a lack of public investment and/or to industry or regulatory structures that deter entry by new competitors. But they can also reflect the existence of inefficient and unnecessary monopolies, or even cartels. Many examples of such practices, drawn from a wide range of transition and developing economies, are set out in chapter 2 of this book.

As seen in chapter 4, powerful international cartels that raise the price of developing country imports exist in sectors such as: graphite electrodes (an essential input to steel mini-mill production); bromine (a flame retardant and fumigant); citric acid (an industrial food additive); lysine (an agricultural feed additive); seamless steel pipes (an input to oil production), and vitamins. An alleged cartel in the international potash sector (producing potassium carbonate, used as plant and crop nutrient) raises questions about a link between cartels and food crises (McCorriston 2011). Connor (2010) found that international cartels overcharged their customers, on average, by about 31% and were about 65% more effective in raising prices than domestic cartels. He pointed out that fines imposed in such cases often are too low to be an adequate deterrent, especially for international cartels, though the level of fines imposed has increased substantially in the past decade.

In many such cases, the cartels are known to have operated extensively throughout the developing world (Levenstein and Suslow 2003a and 2003b; Evenett et al. 2001; Jenny 2003). These practices are, in effect, a hidden tax on developing country exporters. Rather than being used to support public infrastructure investment or other legitimate government activities, the revenues from the 'tax' flow back to the shareholders of multinational enterprises (see Anderson and Jenny 2005, and references cited therein).

The power of international distribution chains to depress prices or limit the opportunities for developing country exporters to benefit from overseas trade is another example of the potential impact of anti-competitive practices.<sup>1</sup> There are indications that this is a concern particularly in the agro-food sector (see Sexton, Sheldon, McCorriston and Wang 2007). This is the focus of chapter 3.

<sup>1</sup> Technically, this is known as the exercise of "monopsony" power – the equivalent of monopoly power but on the buyers' side of the market.

In sum, anti-competitive practices – whether in local infrastructure markets, international markets for particular input goods or on the buyers' side of international markets – can impose substantial costs on developing country exporters and thereby undermine their ability to compete in international markets. The proliferation of these practices necessitates the adoption and enforcement of common sense competition rules to ensure that costs and marketing opportunities are not distorted or foreclosed to developing country businesses. A main aim of this book is to illustrate the extent of these concerns with concrete examples, and suggest how they can best be addressed.

## COMPETITION POLICY ADDRESSES CONCERNS

What is competition policy? Why is it important?

The term 'competition policy' refers to the measures that governments take to suppress or deter anti-competitive practices and promote the efficient and competitive operation of markets. One vital component of such policy is an effective competition law. The latter refers to legislation that prohibits or otherwise deals with specific anti-competitive practices, such as cartels, abuse of a dominant market position, monopolization, and mergers that create a dominant position or otherwise stifle competition.

**Table 1** How anti-competitive practices affect developing country producers

Practice	Definition	Potential adverse impact on developing country suppliers
<b>Cartels</b>	Price-fixing or market allocation arrangements between competing suppliers in a market	Raise prices or reduce availability of industrial inputs or infrastructure services needed to market a product
<b>Abuses of a dominant position</b>	Practices by a dominant firm in a market that extract excess profits from users and/or exclude potential competitors	As above. Can also prevent new entrepreneurs from entering a market dominated by an entrenched supplier
<b>Anti-competitive mergers</b>	Combining of two firms (usually when one purchases the other) to create a monopoly or dominant position	Can reduce supply, raise the prices of necessary goods and/or make abuse of a dominant position more likely
<b>Anti-competitive vertical market restraints</b>	Contractual or similar arrangements between firms at different levels of a production chain that limit competition or entry by new suppliers	As above. In particular, such arrangements can form a direct barrier to export market penetration by developing economy businesses.

To be sure, there are variations on these four main categories of anti-competitive conduct. For example, cartel arrangements involving public tendering processes (e.g. construction or road-paving) often involve the coordination of individual suppliers' bids ('bid-rigging' or 'collusive tendering'). They may, therefore, be referred to as 'bidding rings'. These are a classic form of cartel (see, Anderson, Kovacic and Müller 2011). Developing country firms also face a variety of anti-competitive practices associated with intellectual property rights. Such practices, while sometimes analyzed as a separate category of anti-competitive conduct, often are best understood as special cases of abuse of a dominant position or of vertical market restraints.

Each of the four main types of anti-competitive practices referred to in table 1 can occur at a local, national or international level. For example, a cartel may involve the bread makers or milk suppliers in one individual city (local market effect). It may also link all suppliers of a particular product – such as cement or industrial pipes – in a particular country (national market effect). Finally, it may be international in scope: a large number of cartels uncovered in developing country markets during the past decade have, in fact, been global in nature and have often involved developed country-based suppliers extracting additional profits at the expense of developing country producers ('transnational effects').

The same goes for mergers, abuses of a dominant position and vertical market restraints. A particularly large bread supplier that requires the restaurants that it sells to not to purchase bread from competing bakers might (depending on the circumstances) be characterized as a dominant supplier abusing its market position. An international supplier of software and related products that forces customers to purchase an unnecessarily broad basket of products to prevent competing suppliers from establishing a toe-hold in the market might be viewed as abusing a dominant position in a global market. National competition authorities

can usually deal by themselves with business arrangements that are local or national in scope (though information from other jurisdictions regarding the treatment of similar arrangements can still be very helpful). In contrast, international assistance may well be essential in addressing anti-competitive conduct that is transnational in scope.

Apart from competition law, the term competition policy also includes broader measures that can be taken by governments to strengthen competition in markets, such as the reform of regulations that unnecessarily limit entry by new competitors.

## THE ROLE OF COMPETITION AGENCIES

Although private litigation by relevant individuals or firms (i.e. the victims of anti-competitive practices) can be used to enforce competition laws in many countries, most countries also find it appropriate to maintain one or more public bodies (i.e. government agencies) with the core responsibility for administering the law. Such agencies investigate complaints regarding specific instances of anti-competitive practices, bring prosecutions when this is appropriate, monitor the effectiveness of the competition law and, if necessary, propose improvements.

Apart from their responsibility for enforcement, competition agencies attach much importance to what is known as their 'competition advocacy' activities. Such activities may include public education, research to document the need for market-opening measures, appearances before legislative committees or other government bodies in public proceedings, or behind-the-scenes lobbying of government. Many competition officials believe that these can be among the most useful activities that they undertake. A number of examples of such activities are discussed in the book, particularly in the chapter dealing with public infrastructure issues.

## BUSINESSES, ASSOCIATIONS AND CONSUMERS

Local businesses and their relevant associations can help bring about a fairer competitive environment in at least three ways:

- First, at a broad level, they can play a crucial role in **building political support for restructuring initiatives** and reforms.
- Second, they can provide essential **input to the design of such initiatives** because a key reason for this is that the appropriate design of relevant reforms (to be discussed at length in chapter 2) typically is very situation-specific. For example, whether to separate the ownership of railroad tracks and train operators to help export-oriented businesses will depend on the size and geography of a particular country and on the alternatives (e.g. low-cost trucking services or air freight). This is, by definition, information that user businesses and their associations are best suited to provide.
- Third, user **businesses and their associations can refer complaints to the appropriate authorities** regarding apparent competition law violations by infrastructure service providers and other input suppliers. To be sure, however, businesses and their associations are not the only bodies able to make valuable contributions to issues concerning the implementation of competition-oriented structural reforms and related rules. It is, indeed, very important that consumer and wider public interest-oriented bodies play a role.

## ARE ANTI-COMPETITIVE PRACTICES TRULY AN ISSUE OF CONCERN FOR POOR COUNTRIES?

Competition law and policy are important to protect consumers and industrial users from anti-competitive abuse. This is no less true in developing countries than in developed ones. In fact, less mature markets tend to be more vulnerable to anti-competitive practices. The reasons include high 'natural' entry barriers due



to inadequate business infrastructure, including distribution channels and (sometimes) intrusive regulatory regimes, asymmetries of information in both product and credit markets, and a greater proportion of local (non-tradable) markets (see Dutz 2002; and Anderson and Jenny 2005).

It is sometimes argued that competition policy is irrelevant in the face of the extreme poverty that exists in some developing countries. This is a fallacy. Where money is scarce, it is even more important that the purchasing power of consumers not be further diminished through anti-competitive practices. There is growing evidence that such practices are particularly prevalent when there are limited substitutes available in developing country markets; for example for foodstuffs. This has obvious implications for well-being. Similarly, preventing bid rigging is an issue of particular concern where, as in many developing countries, governments are subject to severe fiscal constraints.

Business owners in developing countries sometimes worry that a competition regime will be turned against them. Competition rules will come in the way of their normal practices, or enforcement authorities will target local businesses first. However, developing country businesses are more likely to be helped than hurt by sensible competition rules administered by local authorities sensitive to their countries' needs, particularly where enforcement practices and policies are shaped through input from local business associations. This is because the clear majority of anti-competitive practices in developing countries are directed against other businesses rather than against final consumers.<sup>2</sup>

In calling for rules that will help them reduce their input costs and avoid falling victim to monopolies or cartels, businesses should themselves be prepared to work by these rules. Indeed, if local firms are involved in price-fixing cartels or similar arrangements, they may well have to change their marketing and business methods in favour of a more independent and competitive regime. This may, in turn, help them to improve their productivity and competitiveness.

## WHAT ABOUT ECONOMIC CRISES?

It is often asked whether competition rules can be counter-productive in times of economic crisis. The history of international economic crises – notably the Depression of the 1930s – shows clearly the importance of maintaining and promoting competition as a means to underpin recovery and future prosperity. In the aftermath of World War I, the two countries that at the time had significant competition law enforcement programmes – the United States of America and Canada – largely desisted from these efforts. US legislation passed in the 1930s effectively foreclosed competition. The National Industrial Recovery Act, which created the National Recovery Administration, enabled industries to establish 'codes of fair competition', which entailed the setting of industries' prices and wages, production quotas and restrictions on entry. The avowed purpose of the codes was to create 'stability' by fostering coordinated action. In the view of most scholars who have studied that era, the result was not recovery but restricted output, continuing high unemployment, higher prices and reduced consumer purchasing power (Varney 2009).

## WHAT THIS BOOK IS NOT ABOUT

The purpose of this book is to provide sufficient information and explanation to show the importance of the issues considered for the competitiveness of developing and transition economy businesses. The book encourages businesses, their associations and other relevant bodies, such as consumer and public interest organizations, to provide appropriate input to solutions.

This book provides numerous examples of the impact of anti-competitive practices on developing country suppliers. It shows the impact of state monopolies and abuses of dominant positions in infrastructure markets, the impact of anti-competitive practices in the international distribution and retail sector, and the

<sup>2</sup> An early estimate by the World Bank was that 85% of cases of anti-competitive practices in developing countries concern the manipulation of prices charged for industrial goods and other inputs to further processing and distribution of developing countries' own products. See WTO Working Group on the Interaction between Trade and Competition Policy (1998).

effect of international cartels. In each case, the text outlines how these practices and arrangements can best be addressed, the role of businesses and business associations in responding to the practices in question, and the scope for enhanced international cooperation to address them.

The book does not, however, aim to be a technical manual or textbook for legal, economic or judicial experts developing particular cases before competition authorities or adjudicatory bodies. Authorities contemplating action in particular cases need to weigh carefully both the potential benefits and the costs of intervention, and to ensure that interventions serve well-formulated economic rationales. They will also need to pay attention to technical issues that are beyond the scope of this book.<sup>3</sup>

One further limitation should be noted. This book does not address the practice of ‘dumping’ (i.e. selling a product in a developing country or other export market at a price below production cost or below the normal price at which the product is sold in the home market). This is not because it is deemed unimportant or may not have serious effects on local competitors. It is because dumping is dealt with by other ITC publications. Furthermore, the issue is usually handled at the national level under a separate statutory regime – i.e. the national anti-dumping regime.

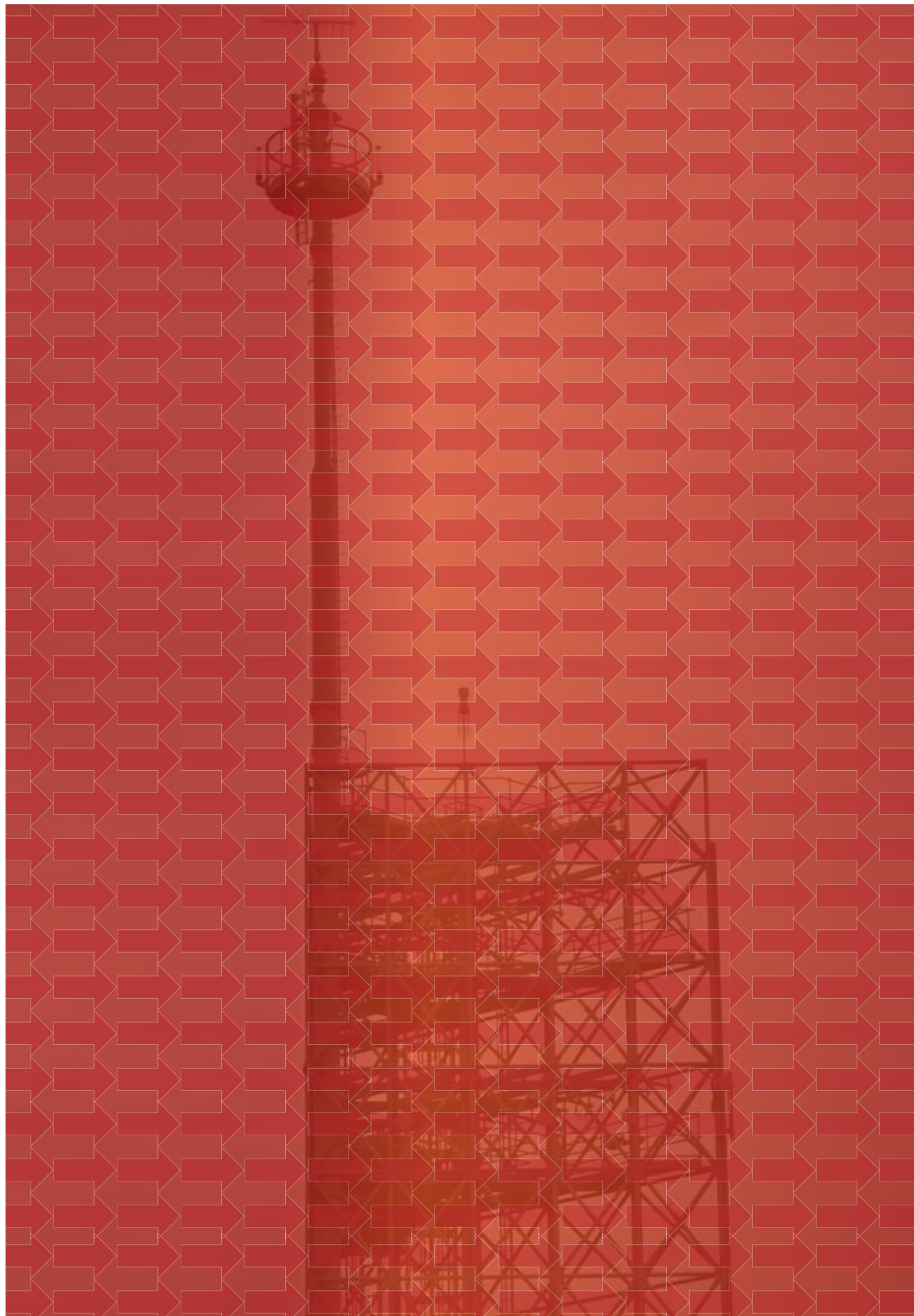
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<sup>3</sup> A more formal treatment of aspects of these issues is available in World Bank and OECD (1999). See also Dhall (2007).

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CHAPTER 2

# FITTING INFRASTRUCTURE FOR EXPORTERS

INTRODUCTION TO THE ISSUES ..... 10

RESTRUCTURING STATE MONOPOLIES ..... 12

COMPETITIVE ACCESS REGIMES ..... 15

THE TRANSPORTATION SECTOR..... 16

THE ENERGY SECTOR ..... 26

THE TELECOMMUNICATIONS SECTOR ..... 29

CONCLUSION ..... 33

# FITTING INFRASTRUCTURE FOR EXPORTERS

## INTRODUCTION TO THE ISSUES

Infrastructure services,<sup>1</sup> including transportation, energy and telecommunications, account for much of the costs of export-oriented and other developing and transition economy businesses. The efficient organization and conduct of these services is vital to the export competitiveness and success of such businesses. For this reason, infrastructure investment is increasingly seen as a key vehicle for enhancing the development prospects of low- and middle-income countries, and the provision of infrastructure services has rightly emerged as a primary focus of development assistance. Infrastructure now accounts for about 40% of the World Bank Group's commitments.<sup>2</sup> Overall, there is no doubt that sound infrastructure investments can make a big difference to countries' growth: for example, in recent years, enhanced public investment in infrastructure has been a key factor underpinning rapid growth and a decrease in trade costs in the emerging economies of Asia (Brooks and Hummels 2009).

The efficient provision of infrastructure services involves many challenges. Since infrastructure is often provided through public investment and expenditure, the adequacy of public finances and the efficiency of their allocation is one factor. Frequently, access to private financing – including foreign direct investment (FDI) – as a supplement or alternative to public funds is also a concern. An important related factor is the efficiency and competitiveness of public procurement methods and institutions (see Anderson, Kovacic and Müller 2011). Access to the best available technology, whether sourced from home or abroad and whether financed by public or private capital, is another crucial element.

These considerations, important as they are, are not the focus of this chapter. Rather, this chapter focuses on the competitive structure and behaviour of enterprises (firms) involved in the delivery of public and business infrastructure services. We will consider the role of public initiatives to enhance competition through appropriate restructuring and the application of related rules. Business associations and individual businesses also play a role in guiding policy innovation and implementation.

Historically, monopolies often provided key infrastructure services in both developed and developing economies. While they occasionally emerged through the predatory behaviour of the firms themselves, these monopolies have most often been established through legislation or by government grant. The combination of monopoly power and (where present), public ownership has resulted in less-than-satisfactory performance, with non-competitive rates and inadequate service offerings, or a lack of innovation or readiness to adopt improvements in technology as they become available. This, in turn, has directly undermined the competitiveness of developing country users. In response, developing and transition economies have turned to 'de-monopolizing' public and business infrastructure services in a bid to make them more efficient and to ensure fair competition (see Beato and Laffont 2002; Kessides 2004; François 2007; and the various case examples set out in this chapter).

## PRIVATIZATION TRAP

Addressing sub-optimal performance in infrastructure sectors due to a lack of competition can require a variety of remedial measures. In many cases, governments' first recourse – particularly in the transition economies of Central and Eastern Europe, but also in developing economies in Africa, Asia and Latin America – has been privatization. The aim is to invigorate and infuse the relevant entities with the dynamism often associated

1 Infrastructure has been defined as 'the basic physical and organizational structures and facilities (e.g. buildings, roads, power supplies) needed for the operation of a society or enterprise' (Online Compact Oxford English Dictionary, [http://www.askoxford.com/concise\\_oed/infrastructure](http://www.askoxford.com/concise_oed/infrastructure)).

2 See, for further information on the World Bank's infrastructure-related activities: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSDNET/0,,contentMDK:22493665~menuPK:6395187~pagePK:64885161~piPK:64884432~theSitePK:5929282,00.html>.

with private ownership. Experience has shown, though, that this can be a trap. Privatization of state-owned monopolies typically will not yield improved performance if measures are not taken to expose them to competitive market forces (Beato and Laffont 2002; Kessides 2004; Anderson and Jenny 2005). Experts increasingly believe that exposing infrastructure service providers to competition is at least as important in improving performance as the injection of private capital financing, and should, where possible, precede rather than follow privatization (see, Kessides 2004).<sup>3</sup>

Where privatization has already occurred, measures to introduce competition remain important and should be pursued. However, they may be more difficult to implement as the private monopoly will have a clear interest in lobbying the government to delay or avoid anything that may jeopardize its market position.

A competition (or anti-trust) statute is essential to prevent and/or remedy common anti-competitive practices in public infrastructure sectors. Competition laws can be used to impose necessary restructuring typically through their provisions regarding abuses of a dominant position. They also help establish competitive access regimes (see below), which are rules for the pricing of access by competitive segments of an industry to monopoly facilities, such as power grids or rail track (see Kovacic 1999; Anderson and Heimler 2007A).

However, the remedies available through competition law may not always be sufficient. Other measures may be needed to address monopoly issues in infrastructure industries. Such measures may include the repeal or reform of statutes or regulations that limit entry to particular markets. New legislation may be needed to restructure (i.e. break up) monopoly enterprises and permit competition, for example, by establishing industry-specific competitive access regimes. Such measures may be adopted either as an alternative to, in conjunction with, or even as a follow-up to competition law enforcement proceedings.<sup>4</sup>

While measures to inject competition into moribund infrastructure monopolies have mostly been implemented at the national level, there is often also an interface with international trade agreements and cooperation. For example, in Africa, common regional markets may be necessary for competition in parts of the transportation sector with insufficient demand to support multiple service providers in some countries (see Teravaninthorn and Raballand 2009). Similarly, regional cooperation can be a key factor in facilitating competition in energy markets. Trade commitments, including in the 1997 World Trade Organization (WTO) negotiations on Basic Telecommunications Services, have played an important role in reinforcing pro-competitive reforms in the telecommunications sector.

## TRANSPORTATION, ENERGY AND TELECOMMUNICATIONS

This chapter provides many examples of abuse of a dominant position (whether by private or publicly-owned companies). Their impact is to raise the input costs of developing country businesses, making it more difficult for them to participate in export markets. It also explains and provides examples of how to restructure inefficient monopolies and apply competition rules to revitalize and enhance the performance of infrastructure sectors. To do so, it will examine three specific sectors:

- Transportation, including port facilities, railways and air and road transport;
- Energy, including electricity and natural gas;
- Telecommunications.

The chapter also provides background for competitive restructuring and competitive access to monopolies that cut across the various sectors. A key related point is the need for input from developing country businesses and their associations in both the overall design and the application of relevant policies and initiatives.

<sup>3</sup> Of course, it is easy to make such a recommendation; it is harder to follow it in practice. Even in developed economies reforms have tended to proceed in an incremental fashion, seeking practical solutions to particular problems and with much 'learning by doing', rather than following an overall 'rational plan' (see Anderson et al. 1998; and Anderson and Heimler 2007A).

<sup>4</sup> The far-reaching reform of telecommunication services that took place in the United States was to a remarkable extent put in motion by the 1982 consent settlement in an antitrust case, U.S. v. AT&T; nevertheless, extensive legislative action was required to complete the process. See sub-section on telecommunications. A complementary relationship between competition law enforcement actions and legislative reforms in the reform of public infrastructure sectors has also been evident in the European Union (see Anderson and Heimler 2007B). Canada's experience in regard to these issues is discussed in Anderson et al. 1998.

Finally, a word on the relationship between competitive infrastructure and 'trade policy'. For the most part, the measures and initiatives discussed here are not mandated by trade agreements.<sup>5</sup> They are measures that countries can take in order to ensure that their participation in trade-liberalizing agreements and arrangements is legally compliant and successful in generating benefits for citizens.

As Osakwe (2001) emphasized, where trade liberalization has not generated sustained development and growth, this can in many cases be traced to a failure to introduce complementary domestic policy reforms. Countries (and their businesses) will not be well poised to take advantage of trade liberalization unless they reduce costs and enhance efficiency of infrastructure such as telecommunications, energy and transportation. They also need to promote flexibility by eliminating artificial restrictions on entry, exit and pricing in manufacturing and other industries, and to establish and strengthen incentives for investment, innovation, the creation of efficient management structures and productivity improvement (see also Anderson and Jenny 2005).

## RESTRUCTURING STATE MONOPOLIES

Mere privatization will not necessarily yield improved performance if measures are not also taken to expose former monopolies to competitive market forces (Kessides 2004, and Anderson and Jenny 2005). The effect can simply be to substitute private monopolies for public ones, with no improvement or even a worsening of performance from the standpoint of users.

Competition law helps prevent anti-competitive practices in public infrastructure, as in other sectors. (Arguably, even more so, since excessive prices or poor quality service in infrastructure sectors will be felt throughout the economy.) However, further measures may also be needed. These could include the comprehensive restructuring of monopoly enterprises/dominant firms and/or the enactment of competitive access regimes. The latter could involve, for example, authorizing competing electricity suppliers to connect to a power grid, enabling trains from different operators to run on the same track, or granting competing transportation service providers equal access to port or airport facilities. Repeal of any legislation limiting entry to markets or granting legal monopoly status may also need to be considered (Anderson and Jenny 2005).

This section outlines three approaches:

- Competitive restructuring, particularly the forced separation of monopoly and competitive business segments in a particular sector (for example, railway lines and the trains that run on them, or electrical power grids and generating companies).
- Access pricing (costs for competitive suppliers to use monopoly facilities that may remain following restructuring); and the continuing need for enforcement of general provisions of competition law.
- The important role of businesses and associations (e.g. consumer associations and public interest groups) in reinforcing the case for user-friendly reforms and the application of relevant rules in ways that benefit export-oriented businesses.

## SEPARATING COMPETITIVE, NON-COMPETITIVE COMPONENTS

Over the past two or three decades, governments in developed and developing countries alike have progressively implemented extensive reforms aimed at improving public infrastructure performance. A common strategy has been to introduce private sector participation in formerly state-owned infrastructure sectors. However, in order for private sector participation to improve performance, it is essential to create competition.

Pro-competition reforms are based on the realization that most infrastructure sectors, even if they have some monopoly elements, normally are not 'monolithic natural monopolies' (Kessides 2004; the core insights go

<sup>5</sup> There are some exceptions. For example, as discussed below, the maintenance of 'competitive safeguards' in relation to basic telecommunications services is a requirement of the Reference Paper on regulatory principles that has been adopted by most but not all WTO members. More generally, it should be borne in mind that sometimes the most effective tool to enhance competition – whether in infrastructure or other sectors – can be trade liberalization i.e. the removal of legal or other barriers to participation in goods or services markets by 'foreign' firms.



back at least to Kahn 1988).<sup>6</sup> Rather, such sectors comprise distinct activities, some of which may have natural monopoly characteristics but others of which may be perfectly capable of supporting competition. To take one highly pertinent example: the electricity sector was once widely assumed to be a natural monopoly; it is now recognized that a single firm may build and operate power transmission facilities most efficiently, but there is no technical barrier preventing power supply by multiple generating companies.<sup>7</sup> Another example: decades ago, it was believed that the telephone industry was best served by a single, vertically-integrated enterprise supplying most or all related services; nowadays, most segments of the industry have been exposed to competition between multiple service providers.<sup>8</sup>

Table 2 summarizes competition possibilities in five specific infrastructure sectors. These are just possibilities – albeit ones that, if implemented successfully, can generate major savings for businesses and other users. The challenge for policymakers is to decide, on the basis of the best available information, which of these possibilities for competition can be realized in the context of their respective geographic, institutional and practical constraints. This challenge calls for substantial input from business users, with their practical experience and knowledge ‘on the ground’, public interest organizations and advisory bodies with specialized knowledge.<sup>9</sup>

**Table 2 Non-competitive and competitive components of key infrastructure industries**

Industry	Activities that are usually not competitive	Activities that can be competitive
Electricity	High-voltage transmission and local distribution	Generation and supply to final customers
Gas	High-pressure transmission and local distribution	Production, supply to final customers and storage
Telecommunications	Local residential telephony or local loop	Long-distance, mobile, and value added services
Railways	Short-haul track and signalling infrastructure	Train operations and maintenance facilities
Air transport services	Airport facilities	Aircraft operations, maintenance facilities and commercial activities

Source: Adapted from Kessides (2004), Table 1.2.; see also Gönenç, Maher and Nicoletti (2001).

## OECD RECOMMENDATIONS

In 2001 the Organisation for Economic Co-operation and Development (OECD) Council adopted a ‘Recommendation concerning Structural Separation in Regulated Industries’ (see box 1).<sup>10</sup> The recommendation recognized the usefulness of both structural reforms and behavioural measures. Structural reforms include the separation of potentially competitive segments of a particular sector (e.g. train operation or power generation) from others that constitute genuine ‘natural monopolies’ (e.g. railroad track facilities or power transmission lines). Behavioural measures include regulation. Both are tools to stimulate competition by controlling costs, promoting innovation and enhancing service quality to the benefit of users. But the OECD recognized that neither regulation nor structural reforms were without attendant costs. Therefore, rather than recommending a ‘blanket’ approach to such reforms across countries, it urged a careful ‘case-by-case’ approach weighing potential benefits and costs.

Different countries (both developed and developing) have employed a variety of approaches at different times and across different sectors (e.g. energy as opposed to transportation or telecommunications). This is an important factor highlighting the need for input from business and other advisory bodies to the implementation of particular solutions in particular cases.

<sup>6</sup> A ‘natural monopoly’ is an industry that is most efficiently served by a single firm (i.e. a monopoly), due to the cost structure of the industry.

<sup>7</sup> It is, nonetheless, recognized that the introduction of competition into previously monopolized electricity sectors is a complex and challenging process – see below.

<sup>8</sup> There are, nonetheless, continuing questions regarding issues such as the terms of access to common facilities (e.g. the ‘local loop’) that may still have natural monopoly characteristics.

<sup>9</sup> In some cases, authorities may wish to draw upon the services of consulting firms with specialized knowledge of issues and technical constraints in the relevant sectors.

<sup>10</sup> Recommendation of the OECD Council concerning Structural Separation in Regulated Industries, 26 April 2001 – C(2001)78. Available at: <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=194&InstrumentPID=190&Lang=en&Book=False>.

### Box 1: OECD recommendation on separating competitive and natural monopoly functions

The OECD Council identified two types of measures that may be taken to introduce or enhance competition in regulated sectors: (i) structural measures and (ii) behavioural measures. While structural measures ‘primarily address the incentives of the regulated firm (such as vertical ownership separation or club or joint ownership)’, behavioural measures ‘primarily address the ability of the regulated firm to deny access (such as access regulation)’.

The OECD recommends the careful consideration of the balance of benefits and of the different types of measures in choosing which should be implemented. The main part of the recommendation reads as follows:

“When faced with a situation in which a regulated firm is or may in the future be operating simultaneously in a non-competitive activity and a potentially competitive complementary activity, Member countries should carefully balance the benefits and costs of structural measures against the benefits and costs of behavioural measures.

The benefits and costs to be balanced include the effects on competition, effects on the quality and cost of regulation, the transition costs of structural modifications and the economic and public benefits of vertical integration, based on the economic characteristics of the industry in the country under review.

The benefits and costs to be balanced should be those recognised by the relevant agency(ies) including the competition authority, based on principles defined by the Member country. This balancing should occur especially in the context of privatisation, liberalisation or regulatory reform.”

**Source:** Recommendation of the OECD Council concerning Structural Separation in Regulated Industries, 26 April 2001 – C(2001)78. Available at: [acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=194&InstrumentPID=190&Lang=en&Book=False](http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=194&InstrumentPID=190&Lang=en&Book=False).

In 2006, the Recommendation underwent an extensive review (OECD 2006), which found that structural separation, as the stronger means of introducing competition, had important general advantages over behavioural measures. It was observed that:

- Separation limits the need for certain regulations that are difficult, costly and only partially effective;
- Separation may stimulate innovation and efficiency in the competitive services;
- Separation helps to reduce inefficient cross subsidization.

Nevertheless, the review also found that these advantages needed to be balanced against possible disadvantages, in particular:

- Separation [sometimes] forces a loss of economies of scope from integrated operation;
- Transaction costs for consumers [may] increase;
- The direct costs of separation can be high;
- System reliability may fall when investments are not made jointly;
- Accountability for interface problems may be difficult to assign.

Overall, the OECD study concluded that ‘costs and benefits differ from sector to sector and from country to country, so uniform recommendations are not possible.’

### QUALIFICATIONS ABOUT ‘VERTICAL’ SEPARATION

it may not be necessary to undertake a ‘vertical’ separation of functions if all components of the industry are potentially subject to competition. For example, rather than separating the ownership and management of track facilities and trains, some countries allow separate, integrated train networks to compete with each other (‘horizontal competition’). In other cases, the authorities may consider that the costs involved in either vertical or horizontal restructuring are excessive in relation to the benefits to be achieved (i.e. they may

decide to continue to allow the dominance of key infrastructure sectors by vertically integrated monopolies).<sup>11</sup> The context-specific nature of the choices to be made highlights the importance of input from end-users (businesses) in the development and implementation of solutions.

## COMPETITIVE ACCESS REGIMES

Competitive access is a closely-related issue. The setting of appropriate price levels for competitive access is by no means easy. As Kessides (2004) pointed out:

“A vexing task for regulators is designing terms and conditions of access to bottleneck infrastructure facilities by competing service providers. These facilities are essential inputs in the production or delivery of final products, and cannot be economically duplicated. Examples include the local loop (‘final mile’) in telecommunications, the transmission grid in electricity, the network of pipelines in natural gas, and the track in railroads. Access policy is the keystone of the contemporary response to the problem of residual monopoly in infrastructure. Indeed, it is at the fore of discussions of ways to facilitate competitive entry into activities that have traditionally been run by franchised monopolies. The access issue is especially difficult in situations where several firms compete in the sale of a final product, but one is the monopoly owner of an input that is indispensable in the supply of that product.”

The pricing of access to monopoly facilities is a technical issue and will not be the subject of a detailed discussion here. In brief, economic literature and competition law enforcement/regulatory experience offer two main approaches to the efficient pricing of essential input facilities. These are:

- The ‘efficient component pricing rule’;
- ‘Ramsey pricing’ (a form of price discrimination where different classes of users are charged different prices according to their respective demand elasticities).

Each attempt to specify prices for access that prevent monopolistic service providers from appropriating excessive rents, while properly reflecting the economic costs of access and maintaining incentives for efficient investment in common (monopoly) facilities. There are variations on these two main approaches as well as issues concerning ‘price caps’ (ceilings placed on particular prices or charges). Readers seeking a technical treatment of these issues are referred to OECD (2004); Armstrong (2002); and Laffont and Tirole (1996).

Access pricing is another matter on which user businesses, their associations and public interest organizations should provide appropriate input. Experience shows that active monitoring by users, and participation in regulatory proceedings by a broad range of public interest bodies, can help to prevent situations of ‘capture’ of (the exertion of excessive influence over) sectoral regulators by the industries for which the regulators are responsible. Consulting firms specializing in access issues can shed light on particular market conditions.

## COMPETITION LAW NEEDS ENFORCING

Competition laws are needed even after the introduction of restructuring measures and competitive access regimes. Such laws are important to deal with three main sets of business practices:

- Cartels;
- Mergers between competing firms;
- Abuses of a dominant position (sometimes referred to as monopolization).<sup>12</sup>

<sup>11</sup> Such a choice precludes, however, the achievement of the significant gains in efficiency that, experience has shown, can be achieved through the introduction of well-tailored, pro-competitive reforms.

<sup>12</sup> Formally speaking, the terms ‘abuse of dominant position’ and ‘monopolization’ are not identical (the former deals with abusive conduct by a firm already enjoying a dominant position in a market, whereas the latter concerns the process by which a dominant position or monopoly is established). However, in practice, the kinds of conduct covered by these two labels overlap (see Anderson and Heimler 2007A).

These practices have the potential to undermine or eliminate the gains from pro-competitive reforms, including structural separation. Suppose train-operating companies are split off from the ownership of railroad tracks in the hope of enabling effective competition, but then the train operators meet secretly to establish a rate-setting cartel. The gains for consumers generally, and export-oriented businesses in particular, may be lost.

## BUSINESS ORGANIZATIONS AND ASSOCIATIONS

Businesses and their associations can provide three important types of input on these issues. Firstly, they can play a crucial role in building political support for restructuring initiatives and reforms. Secondly, they can provide essential input to the design of specific initiatives (e.g. on whether to separate the ownership of railroad tracks and train operators). Thirdly, they can play a part in referring complaints to the appropriate authorities (i.e. national competition agencies) regarding apparent competition law violations by infrastructure service providers and other input suppliers.

## THE TRANSPORTATION SECTOR

Transportation is of paramount importance for the competitiveness and success of export-oriented businesses. For this reason, it has been an early and continuing target of competition-oriented structural reforms in both developed and developing countries. The following pages provide examples of reforms and related issues concerning the application of competition rules in ports, railways, airlines and bus/road transport services.

### PORTS

Ports are one of the most important infrastructure elements in international trade. Almost 85% of the world's trade distribution relies on sea transportation (Brooks and Hummels 2009), which is a clear indication that for a majority of goods, other methods of transportation like land and air are significantly less viable. Therefore, efficient port services and infrastructure are an important element determining the competitiveness of export-oriented businesses in developing countries.

Measures to introduce and safeguard competition in port services can play a vital role in creating efficient port-related services, thereby reducing costs for businesses exporting and distributing goods via sea transportation.

In general, port-related competition can be observed at two main levels:

- **Among ports.** To the extent that producers can reach several different ports at a comparable cost, there will be competition between those ports. Inter-port competition can, in some circumstances, be enhanced by improvement in inland freight transport, which means that customers can switch more easily from one port to another (Pittman 2009).
- **Within ports.** Competition between port service providers can also be created within a single port. One way of achieving this is to break down relevant concessions and create multiple terminal facilities with different operators for different terminals within the port.

Both forms of competition can improve efficiency and business competitiveness in a given country or region. The specific geographical, economic and overall situation will need to be taken into consideration in determining which measures yield the best results. An important task for business users is to reflect actively on their needs and establish channels of communication with the relevant regulatory authorities.

Even where basic inter- and/or intra-port competition exists, competition/anti-trust statutes, efficient monitoring and law enforcement by competition authorities are of crucial importance to ensure competition in ports. Pittman (2009) described two trends that counteract structural measures to enhance competition. The first trend is the appearance of few but large multinational firms operating terminals in ports worldwide. To the extent this leads to a consolidation of terminal operating firms, there are fewer potential bidders for particular concessions or privatizations in ports, thereby reducing competition. This development can harm local developing country businesses in two ways. Firstly, large multinationals may replace local port operating firms. Secondly, prices may rise due to reduced competition, making it more difficult for local businesses to compete in export markets.

The second trend identified by Pittman is in ocean shipping, where lines have been vertically integrating to include the ownership and operation of container terminals. Bulk producers of iron ore, coal and petroleum have done the same with the specialized bulk terminals for their products. This trend affects competitors. Other shipping lines or producers may be excluded from using the terminals, so competition issues may arise despite the enhanced economic efficiency of the vertically integrated firm.

The example in box 2 shows that vertical integration does not necessarily lead to violations of competition law and that close monitoring can be an effective deterrent. While monitoring is mainly the responsibility of competition authorities, the business community also needs to take an active role. Competitors as well as business users of port services can notify authorities of any indications of anti-competitive behaviour. This is in their interest as they are suffering the negative consequences of such behaviour.

### Box 2: Argentina: monitoring competition in restructured ports

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The Argentine Government, seeking to create intra-port competition in the port of Buenos Aires, its largest and busiest port, created a six-terminal authority within the port, Puerto Nuevo, and limited awards to only one terminal per company. One of the terminals was acquired by Maersk Sea Land, one of the world's largest ocean shipping companies. The company was closely monitored by the Argentine Comisión Nacional de Defensa de la Competencia to avoid possible vertical foreclosure – in other words, to ensure that Maersk Sea Land did not discriminate against its ocean shipping competitors by denying them access to its own terminals, or providing access under inferior terms.

**Source:** Pittman, R., 'Competition Issues in Restructuring Ports and Railways', Economic Analysis Group Discussion Paper 09-6, November 2009. Available at: [www.justice.gov/atr/public/eag/251856.htm](http://www.justice.gov/atr/public/eag/251856.htm).

Abuse of dominance, such as the imposition of the exclusive dealing requirements described in box 3, can have a direct impact on the competitiveness of businesses and on their ability to take economically beneficial business decisions.

### Box 3: Indonesia: using competition law for restructuring ports

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In Indonesia, the Commission for the Supervision of Business Competition found the public company controlling the ports of the provinces of Aceh, North Sumatra and Riau to be in violation of competition law. It had monopolized the market for palm kernel and copra exports from the major North Sumatran port of Belawan, and had sought to impose exclusive dealing requirements on seven major customers. (Decision, Case No. 01/KPPUL/2004)

**Source:** Ray, David, *Indonesian Port Sector Reform and the 2008 Shipping Law*, Jakarta: Indonesia Competitiveness Program, Report prepared for USAID, August 2008.

Box 4 is a good example of the role played by regulation and competition law when competitors are forced to rely on open access to essential facilities controlled by a dominant player. While it may not be necessary to impose full vertical separation – by preventing port operators from being active in ancillary markets such as stevedoring – open access regimes need to be actively monitored and enforced to counteract the strong economic incentive for the dominant players to exclude competitors from using essential facilities.

### Box 4: Jamaica: stopping abuse of dominance in port management

#### The facts

Port Kingston/Bustamante (hereafter referred to as Kingston Wharves) is a multi-purpose facility also used for stevedoring. Kingston Wharves (KW) is one of only two public ports in Jamaica located at a distance of 170 km of each other. Kingston Wharves Limited (KWL), a Jamaican company that owns KW and also operates a stevedoring company, issued a notice on 11 December 2001 that effectively denied independent stevedoring companies access to the port facilities they needed to carry out their commercial interest.

#### The law

Section 20(1) of the Jamaican Fair Competition Act (FCA) states, ‘an enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market’. Under Section 20(2)(a), ‘an enterprise shall not be treated as abusing a dominant position if it is shown, [inter alia], that (i) its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and (ii) consumers were allowed a fair share of the resulting benefit’.

#### Analysis

Given that KW handled all the non-containerized cargo in the Port of Kingston/Bustamante, and thus had a dominant position, KWL had the ability to engage in practices aimed at excluding competition in stevedoring and other ancillary markets. This was not necessary to ensure the operability of the port facilities and therefore could be identified as an attempt by KWL to engage in anti-competitive practices. KWL was found to be in violation of Jamaican competition laws.

#### Impact on local businesses and exporters

If not prevented from barring independent service providers from using its facilities by regulation, KWL could have extended its dominant position from providing the port facilities as sole owner to all related services by driving out its existing or potential competitors in ancillary markets, such as the stevedoring and towage markets. Furthermore, KWL would have been in a position to charge port users, such as shipping operators, exporters and importers, excessive prices for ancillary port-related services.

*Source:* OECD Global Forum on Competition, Abuse of Dominance in Regulated Sectors. Case submitted by Jamaica, Session III. (DAF/COMP/GF/WD(2005)15 of 14 January 2005)

The case described in box 5 provides an example of a subtler but also potentially detrimental abuse of dominance. Here, other businesses were not formally excluded from using the port. However, preferential treatment of a particular port user can, in the long run, have such serious consequences for the competitiveness of other users that they may go out of business.

### Box 5: Zambia: abuse of dominance in port management led to tariff increases

#### The facts

Zambia is a landlocked country. The only significant port is Mpulungu Port, located on Lake Tanganyika in northern Zambia. Mpulungu Port is vital for the export of goods to neighbouring countries grouped around the lake. It was formerly managed by the Zambian Government through a state-owned enterprise. To increase the productivity and efficiency of the harbour by privatization, Mpulungu Harbour Management Limited (MHML) received a concession for the management of Mpulungu Harbour Estate, Harbour and Port Operations and Assets in 2000 after a competitive bidding process.

However, MHML not only became the port's operator, but also acted as the holding company of Agro-Fuel Investments Limited (Agro-Fuel), a port user with a 50.1% market share. This led to MHML securing preferential shipping space for Agro-Fuel by passing on information exclusively available to the port operator, favouring Agro-Fuel to charter vessels and allocate profitable cargo. This practice created obstacles that made it impossible for other port users to store cargo, and forced cargo owners to clear and transport their cargo exclusively through Agro-Fuel. The final result was a 46% tariff increase for other port users.

#### The law

The Concession Agreement provided the following terms: 'The Concessionaire warrants and undertakes that it shall procure that Harbour and Port Services are available to the public and other commercial users on Arms Length Terms, provided however, that such use shall not unduly prejudice or interfere with the Concessionaire's operations hereunder, in doing so the Concessionaire shall procure that the public or other commercial users are not prejudiced.' (Article 62.1.)

#### Analysis

Despite privatization, efficiency gains could not be reaped due to vertical integration. MHML was able to transfer its position of dominance provided by the concession agreement to the market of its subsidiary, thereby abusing its position. Adequate access-regulating clauses in the Concession Agreement proved vital. MHML was found to be in violation of the Concession Agreement as Mpulungu Port had the potential and capacity to handle both the port operator's (i.e. MHML's), services and the competitors' services without affecting the port operators' business.

#### Impact on local businesses and exporters

Denial of access to this facility meant that other port users were unable to compete effectively. As a consequence of MHML's abuse of dominance, competitor port users ran into liquidity problems and some subsequently collapsed. This situation could only be remedied by virtue of the sound legal framework addressing potential competition concerns provided by the Concession Agreement.

*Source:* OECD Global Forum on Competition, Abuse of Dominance in Regulated Sectors. Case submitted by Zambia, Session III. (DAF/COMP/GF/WD(2005)21 of 14 January 2005)

## RAILWAYS

Commodities like grains and other agricultural products, minerals, fertilizers, coal, potash, sulphur, ores and concentrates, chemicals, forest and petroleum products are typically transported in bulk and over long distances. Where road transport is not a viable alternative, due to the size of shipments or the lack of a good road system, such commodity shipments are often captive to the railroad industries (Kessides 2004). The efficiency of rail transport, therefore, is an important factor in the competitiveness of developing country firms using such commodities.

Even countries with long-established railway networks have suffered from the poor performance of state-owned, monopolist railway companies. The introduction of competition was identified as a both necessary and adequate means of enhancing railway services and infrastructure markets generally, and at the end of the 20th century, many countries adopted even radical reforms in order to do so (Gómez-Ibáñez and de Rus 2006).

Investment in rail infrastructure is a high sunk cost that poses significant barriers to the market entry of new competitors, so competition in the form of a duplication of railway infrastructure cannot be expected even

after the privatization of a formerly state-owned company (Pittman 2009). Therefore, measures to reform railways have to integrate novel strategies to avoid the 'natural monopoly' created by railway infrastructure being owned and operated by a single railway company.

Several 'modes' of creating competition have been implemented by countries in reforming the railway sector. Gómez-Ibáñez and de Rus (2006), having assessed evidence from across countries and continents, concluded that 'no one approach has proven to be the best across a wide variety of circumstances.'

Often the status quo is a vertically integrated state-owned enterprise that owns and operates all railway facilities and vehicles (Kessides 2004). While this structure may allow maximum economy of scale and seamlessly integrate different sub-sectors of rail transport, it is not conducive to competition. There is no incentive to operate efficiently. As noted, even privatization may not lead to the desired benefits.

Some countries have therefore created railway systems where several private companies operate in different sectors of their territory (spatial separation) based on concessions or franchises. At the same time, vertical integration is maintained within each of the sectors, i.e. one company owns and operates all railway facilities and vehicles within the relevant sector. The basic idea is that the benefits of vertical integration are preserved to some extent (within each sector). Some competition occurs when concessions and/or franchises are tendered and where alternative routes to destinations through different sectors or common points are available to users. Box 6 provides examples of countries that have implemented a 'spatial separation model'.

### Box 6: Railway competition through franchises

Argentina, Brazil, Mexico, Peru and Bolivia (Plurinational State of) have divided their formerly monopolistic railway systems into separate railway enterprises, controlled by private companies under long-term franchise agreements, and competing with each other mostly at common points but occasionally over parallel routes as well.

*Source:* Pittman (2009); Kessides (2004).

Box 7 explains what conditions and regulatory choices can be conducive to effective competition in such a model, citing the example of Mexico. However, whether similar strategies can be deployed in other countries will depend on the particular circumstances prevailing there.

### Box 7: Mexico: encouraging competition – the spatial separation model

Mexico was able to create a spatial separation model conducive to direct competition in freight transport services among different privately-owned railways. Three different railways each serve a major port on the Pacific and the Caribbean. Two railroads serve industrial hubs such as Monterrey and Guadalajara and connect to different railways at the United States border. As a result, businesses have a choice between at least two competing railways when serving their main markets.

*Source:* Gómez-Ibáñez, J.A., G. de Rus, *Competition in the Railway Industry: An International Comparative Analysis*, Cheltenham, Edgar Elgar, 2006.

An alternative method of introducing competition in the railway sector is through competitive access (see earlier in this chapter). Competing railway companies have exclusive control over some track and exchange access rights with other companies. While this clearly is conducive to enhanced competition and preserves efficiency gains from vertical integration, close monitoring may be necessary to ensure that access rights are provided on a non-discriminatory basis, as different railway companies can be considered as having a 'dominant position' through control of essential facilities for 'their' tracks.



Finally, a third option consists of vertically separating different components of the railway sector, i.e. ownership and maintenance of the railway tracks from ownership of vehicles and provision of transport services. While this option may appear to create the most robust environment for high levels of competition, there is a price to pay. Vertical separation requires coordination between a multitude of different actors, which may prove difficult where economic interests are not aligned. Furthermore, efficiency gains from competition may be counteracted by a lack of economies of scale. Box 8 describes how Sweden successfully implemented a 'vertical separation model' and combined it with adequate oversight to ensure competition.

### Box 8: Sweden: encouraging competition – the vertical separation model

Sweden decided to vertically separate infrastructure and operations while maintaining public ownership of the infrastructure company and some operating companies. Rail operators are charged low short-run marginal costs for using the infrastructure; the taxpayer bears the remaining burden. Publicly-owned operating companies are subject to private-sector competition, especially in the freight sector, where there is open access. Other services are subject to competitive tenders.

The example of Sweden shows that continued oversight and competition legislation are needed despite regulatory measures to enhance competition. When a state-owned operator won back a contract over a private operator in 1993, it was found guilty of using predatory pricing methods: it used its dominant position to put in an unprofitable bid and was thus able to eliminate competition.

**Sources:** Gómez-Ibáñez, J. A., de Rus, G., *Competition in the Railway Industry: An International Comparative Analysis*, Cheltenham, Edgar Elgar, 2006. Alexandersson, G., S. Hultén, 'The problem of predatory bidding in competitive tenders – a Swedish case study,' *Thredbo papers*, 8, 24, 2003. Available at: [www.idei.fr/doc/conf/rai/papers\\_2003/alexandersson.pdf](http://www.idei.fr/doc/conf/rai/papers_2003/alexandersson.pdf)

## AIR TRANSPORT<sup>13</sup>

Air transport is also crucial to international trade and the competitive success of user businesses. This is separate from the role of air transport services in meeting consumer demand for tourism-related services. Numerous studies have highlighted the importance of air transport infrastructure, especially in developing countries, to harness the gains from broader trade liberalization arrangements (see WTO 2005 and references cited therein). These studies also highlight the important role of international civil aviation in contributing to the development process and its weight in commercial decisions. This importance has increased as a result of technological innovation, deregulation and enhanced market access for foreign companies, which have made air transport more accessible to a wider set of customers in a broader range of countries.

In the past two or three decades, far-reaching changes have occurred in government policy in the national and international air transport sectors. Diverse policies have been introduced to facilitate entry, increase foreign ownership and investment, liberalize access to markets and, importantly, alleviate restrictions on access to and utilization of airports. The success of these policies has varied and, here again, no unique formula exists to satisfy the sometime conflicting goals of adequate international air transport services and airline profitability. Nonetheless, a number of jurisdictions have found the following approaches to be useful and relevant:

- Removal of unnecessary restrictions on entry to, and pricing of, the provision of airline services ('deregulation'). The relaxation of regulation, which has received broad support, relates to these economic variables (entry and pricing) and not to safety or environmental issues;
- Relaxation of foreign ownership and investment restrictions;
- Promotion of competition in international routes through the negotiation of 'Open Skies' and similar agreements (WTO 2005 and Abeyratne 2001);
- Vigorous application of competition (anti-trust) laws to instances of collusive and predatory conduct and airline mergers that are likely to lessen competition.

<sup>13</sup> This section of the chapter draws on material in World Trade Organization (2005).

Interestingly, the pursuit of these policies in many countries built initially upon the experience gained in one jurisdiction, the United States. So, it is of interest to consider some key findings from the United States experience as brought to light by economists and policy analysts (see box 9).

### Box 9: United States: lessons from airline deregulation for competition

Some lessons to emerge from analyses of the effects of deregulation in the United States:

- A key benefit of deregulation was to promote new entry into particular markets by existing and start-up carriers. From 1978-2003, 129 new carriers entered the industry.
- Enhanced freedom of entry and competition resulted in substantial improvements in performance, including an average 30%-33% reduction in fares for consumers in real (inflation-adjusted) terms
- Significant productivity gains were achieved, in part through new competitive strategies and operational adjustments made possible by the enhanced freedom of operations that deregulation provided.
- Although many individual large and small carriers have come and gone, deregulation has not led to significant reductions in service for small towns and rural communities. On the contrary, the number of scheduled departures available to such towns and communities has increased by 35%-40%.
- Deregulation has increased the need for the effective application of competition (antitrust) law in the airline sector, particularly with respect to mergers and strategic alliances. In a deregulated environment, mergers and alliances are a key means by which carriers can potentially preserve or enhance their market power. In cases where airline mergers were allowed to proceed, concentration in city-pair markets increased and consumer welfare was diminished.
- The mere elimination of regulatory barriers to entry has not generally proven sufficient to prevent higher than competitive pricing in the airline sector – actual competition in city-pair markets is required. This has called into question the so-called 'contestability hypothesis', which implies that the mere threat of entry is often sufficient.
- Contrary to fears expressed at the time, there is no evidence that deregulation has resulted in lower safety levels for consumers. Today, air travel is demonstrably safer than in the pre-deregulation period. While this may be due in part to extraneous developments such as improved technology, it clarifies that deregulation did not result in heightened risks for passengers. In making sense of this picture, it is important to note that deregulation in the United States did not involve any relaxation of legislated safety controls administered by the Department of Transportation and other authorities. Deregulation focused on the economic aspects of regulation – controls on entry, exit and pricing.

*Source:* 'International Trade in Air Transport: Recent Developments and Policy Issues', *World Trade Report 2005*, World Trade Organization, 2005. p. 225. Available at: [www.wto.org/english/res\\_e/publications\\_e/wtr05\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr05_e.htm).

In continental Europe, deregulation started later than in the United States and followed a slower pace. The 1992 Single Market Initiative played a key role in the implementation of greater freedom of entry and pricing. Subsequently, various regulations issued by the European Council, reinforced by relevant enforcement actions and policy advocacy by the European Commission (EC), further promoted freedom of pricing and operational flexibility across the Community. Since then extensive competition from low-cost carriers has triggered significant fare reductions for consumers in many intra-EC city-pair markets for passenger air services. Most recently, intra-EC deregulation has been complemented by major external market-opening initiatives.

The state of competition in the international air transport sector is a function of many variables, some of which have already been described. These include changing technology and demand conditions, the availability of necessary infrastructure and, most importantly, the conditions governing access to markets. For many years, the degree of competition in the international air transport sector has been limited by constraints on entry and, in some cases, pricing written into bilateral air service agreements. These, in turn, derive from the 'piecemeal bilateralism' approach to international regulation of this sector that was adopted at the Chicago Convention<sup>14</sup> in 1944.

<sup>14</sup> Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (Chicago Convention). Available at <http://www.icao.int/icaoenet/dcs/7300.html>.

Air transport competition also depends on company strategies, behaviour and related public policies in relation to them (i.e. on the application of competition law and policy). The following issues merit attention (McDonald 2007; WTO 2005; and references cited therein):

- **Mergers, joint ventures and strategic alliances** (including code-sharing arrangements) in the airline sector, their implications for competition and their treatment by competition authorities;
- The implications of **anti-trust immunity** for the International Air Transport Association (IATA) and individual code-sharing arrangements;
- Issues concerning the possibility of **inter-airline collusion** (cartelization or price-fixing), including through electronic tariff-publishing and related channels;
- The treatment of **predatory conduct** (i.e. practices through which firms may seek to exclude potential rivals from markets) in the airline sector; and
- The contribution of **competition advocacy** – i.e. interventions by national competition authorities and other parties with related interests in national and international policymaking processes in the sector.

Box 10 provides an example of a recent price-fixing cartel in the air cargo sector operating within the European Economic Area (EEA), which also affected airfreight prices on sales between the EEA and third countries. This example shows how competition law enforcement can ensure that the gains from market liberalization in service sectors are passed on to consumers – especially business users.

### Box 10: Air cargo cartel fined by European Commission for price fixing

#### The facts

Airlines providing airfreight services primarily offer the transport of cargo to freight forwarders, which act on behalf of individual shippers. In November 2010, the European Commission fined 11 air cargo carriers approximately 800 million euros for operating a worldwide cartel, setting prices for surcharges for fuel and security.

The cartel members coordinated elements of air cargo prices for over six years, from December 1999 to 14 February 2006. The cartel established numerous bilateral and multilateral contacts between airlines, covering flights from, to and within the European Economic Area (EEA).

The cartel members first agreed on a flat rate fuel surcharge per kilo for all airfreight shipments and then extended their cooperation to a security surcharge. To ensure surcharge levels would be applied in full and without exception, they eliminated any possibility to grant discounts to customers by refusing to pay a commission on surcharges to their freight forwarders.

#### Impact on users

This cartel in an infrastructure sector of vital importance to many exporters of high value products directly raised their costs and/or prevented them from negotiating significant discounts. Effective action by the European Commission was essential to protect user interests.

**Source:** 'Press Release No. IP/10/1487', European Commission, Brussels, 9 November 2010. Available at: [europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1487&format=HTML&aged=1&language=EN&guiLanguage=en](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1487&format=HTML&aged=1&language=EN&guiLanguage=en).

## ROAD TRANSPORT

Road transport represents more than 70% of the land freight service at origin and destination points, connecting businesses to world markets (Londoño-Kent 2009). Where trucking is a viable alternative to rail, water or air transport, a competitive road transport sector can lead to important welfare gains. However, there equally is a relationship of complementarity between road and other forms of transport: road transport provides connections to and between transport hubs, such as ports and airports.

While road infrastructure provided by the state is a basic requirement for well-working road transport systems, the behaviour of the private sector plays an important role. Unlike in rail transport, there are no generally recognized 'natural monopolies' in the trucking sector.

Teravaninthorn and Raballand (2009) pointed out that the prices charged for transport services and the quality of service depend to a large extent on the regulatory regimes and the degree of competitiveness in the trucking industry. International experience shows that strong competition is beneficial. Where competition in road transport is not kept artificially low by restrictive regulations, a strong level of competition can be expected. Many countries have, therefore, reformed trucking markets essentially by de-regulating the industry and have been successful in achieving significant reductions in transport prices (Teravaninthorn and Raballand 2009). Box 11 provides examples of such countries.

### Box 11: Deregulation examples in freight transport

**Mexico.** Abolishing a government monopoly on freight allocation led to a 23% drop in prices within five years, and trucking services improved in frequency, access and speed of delivery.

**Indonesia.** Deregulating road transport prices led to a significant increase in the number of truck operators, creating a competitive market.

**Czech Republic, Hungary and Poland.** Market entry of new competitors led to competitive pricing and better quality services. In particular, larger, internationally connected trucking companies developed innovative logistics solutions conducive to faster delivery and better protection of cargo against breakage or spoilage.

**Morocco:** Abolishing a public monopoly in freight allocation and transport price de-regulation led to dramatically decreased transport prices. However, this led to under-investment in new technology and training for drivers.

**Rwanda.** Deregulating international transport by abolishing a parastatal monopoly led to a decline in prices of almost 75% in real terms when taking into account a continued increase in input prices. Furthermore, the Rwandan fleet grew quickly, recovering from a collapse at the height of the civil war in 1994.

**Malawi.** Trucking deregulation led to increased competition, lower prices and better services.

*Source:* Teravaninthorn, S. and G. Raballand, Transport Prices and Costs in Africa: A review of the main international corridors, Washington, D.C., World Bank, 2009.

Most examples in this chapter outline situations in which the ability of developing/transition economy businesses to market their products can be enhanced by restructuring essential infrastructure sectors and/or applying competition rules. But sometimes the most effective tool to enhance competition can be trade liberalization, i.e. the removal of barriers to participation in goods or services markets by 'foreign' firms. The recent resolution of a United States-Mexico dispute regarding cross-border trucking services provides a case in point (see box 12).

As in all industries, the risk of cartels that erode the potential gains from market liberalization in road transportation cannot be excluded. Box 13 provides an example of cartelization in coach services from which lessons can be drawn for road transport services more generally.

### Box 12: Efficiency gains from the resolution of the United States-Mexico trucking dispute

Under the North American Free Trade Agreement (NAFTA), the United States and Mexico had agreed to phase-out restrictions on cross-border passenger and cargo services. However, in 1995, the United States announced it would not lift restrictions on Mexican trucks, resulting in a ban on Mexican trucks for most of its territory. In 2001, a NAFTA dispute settlement panel found the United States restrictions to be in breach of its NAFTA obligations and allowed Mexico to adopt retaliatory measures.

On 6 July 2011, the Governments of the United States and Mexico agreed to end the dispute. A formal agreement on a pilot cross-border trucking programme between Mexico and the United States was signed, based partly on findings of a study by the United States Department of Transport that found Mexican carriers had met all required safety mandates.

The previous requirements for cross-border transportation were costly and time-consuming, as goods had to be unloaded from Mexican trucks and reloaded onto United States trucks at the border. The crossing added an extra day to the journey, requiring three trucks and three drivers to transfer the cargo. According to estimates, this resulted in extra charges of \$150 per passage for about 4.5 million annual truck crossings, creating an additional \$675 million in annual fees to transport cargo across the United States-Mexico border.

**Sources:** United States Department of Commerce, International Trade Administration, Information on Foreign Retaliation. Available at: [www.trade.gov/mas/ian/tradedisputes-enforcement/retaliations/tg\\_ian\\_002094.asp](http://www.trade.gov/mas/ian/tradedisputes-enforcement/retaliations/tg_ian_002094.asp).

*'US, Mexico Agree to Settle Truck Feud'*, *Wall Street Journal*, 4 March 2011. Available at: [online.wsj.com/article/SB10001424052748703300904576178511087875924.html](http://online.wsj.com/article/SB10001424052748703300904576178511087875924.html).

*Centre for Strategic & International Studies, Washington, D.C., Simon Chair's Blog*, 10 March 2011. Available at: [csis.org/blog/united-states-mexico-trucking-dispute](http://csis.org/blog/united-states-mexico-trucking-dispute).

### Box 13: Price fixing in bus services from Singapore to Malaysia and southern Thailand

#### The facts

Investigations of the Competition Commission of Singapore (CCS) revealed that between 2006 and 2008, 16 coach operators together with the Express Bus Agencies Association (EBAA) had fixed prices by imposing:

- A minimum selling price for one-way express coach tickets between Singapore and six destinations in Malaysia, which created a price floor on ticket prices;
- A fuel and insurance charge levied on all tickets sold and used to mark up ticket prices.

The CCS imposed considerable financial penalties on the companies involved. Of the 16 coach operators and the EBAA that engaged in price fixing, six parties filed appeals. In its decisions of 24 March 2011, the Competition Appeal Board of Singapore (CAB) upheld CCS findings on liability on all counts. The total amount of financial penalties imposed on all 17 infringing parties is \$1,135,170.

#### The law

Section 34 of the Competition Act of Singapore prohibits agreements between competing organizations, decisions of associations of organizations, and concerted practices, which have as their object or effect the appreciable prevention, restriction or distortion of competition within Singapore, unless they are excluded or exempted.

#### Analysis

Price fixing is considered as a serious violation of competition rules. It has a direct impact on the users of the service and related business activity. In this case, the cartel targeted international bus transport services. This cross-border case shows that to effectively address competition concerns, the international dimension must be taken into account.

#### Impact on local businesses and exporters

There are two ways in which local businesses could have been affected by the bus cartel. First, businesses may have used the bus transport services in their commercial activities and paid overly high prices. Second, the fact that the price fixing cartel remained stable over a long period of time could indicate that 'outsiders', potential competitors, were prevented from entering the market and gaining customers by offering lower prices.

**Source:** 'Media Release of 24 March 2011', Competition Commission of Singapore. Available at: <http://www.ccs.gov.sg/content/ccs/en/Media-and-Publications/Media-Releases/CAB-decision-in-Appeals-against-CCS-ID-against-Price-Fixing-in-Express-Bus-Service.html>.

## THE ENERGY SECTOR

Energy – whether generated from non-renewable sources like coal, petroleum, natural gas and uranium, or renewable sources like biomass, hydro, wind, solar and geothermal power – is essential to the production of almost all goods and services. It is, therefore, vital to the interests of the business community and the public alike. An efficient and effective electricity network provides energy for industrial purposes while also permitting improvements in living standards.

This dual effect explains why energy is vital to development. Fast-industrializing developing countries must cope with extremely rapid growth in power demand, which can be twice as high as gross domestic product (GDP) growth (UNCTAD 2009).

The need for efficient, competitively priced energy supply might suggest that public authorities quickly focused on reforming the energy sector. However, for a long time, this was not the case. At least until the early 1980s, most electricity industries were vertically integrated monopolies controlled by state-owned companies at the national or regional levels (Kessides 2004).

While measures to restructure and privatize the electricity and energy sectors – or at least some reforms – have now been undertaken by a large number of countries, these reform processes have not proven to be easy. As reliability and security of energy supply are crucial, mistakes can be costly and lessons need to be learned as quickly as possible. Over the past decade and as a result of first experiences with reform in different countries, views have changed considerably on how the electricity and energy sectors should be structured (Kessides 2004).

Developing countries face difficult challenges: building and operating national electricity networks requires up-front financing, complex operating conditions and onerous cost-recovery situations (UNCTAD 2009). Rapid growth in demand is matched by equally fast growth in the need for further investment in generation, transmission and distribution of power. New technologies with the potential to alter dramatically the cost structure of electricity generation are now available but have to be implemented for countries to benefit from the efficiency gains.

The traditional governance structure in the sector can be ill-suited to react flexibly and adequately to dynamic developments, fast-changing investment and other needs. The crucial question is how to best to introduce competition into generation and supply markets. Experience in different countries has shown that while no one model is a perfect solution, three options are available to restructure monolithic monopolies, reflecting varying competition and customer choices:

- **Competition can be introduced at the generation level only.** A single privately or state-owned distribution enterprise buys electricity from different generators but maintains a monopoly over transmission and consumer supply. This model can be called a ‘single buyer’ model.
- **Some enhanced competition at the wholesale level can be introduced by spatially separating different services areas.** Different distribution enterprises purchase electricity from generators and use the transmission network on open access arrangements to transmit power to ‘their’ services area, where they maintain a monopoly on resale to the consumer. This model can be called a ‘wholesale competition’ model.
- **Full competition can be introduced at the generation, wholesale and retail levels.** In such a ‘retail competition’ model, the full transmission grid is subject to open access and consumers have a choice between different suppliers.

There is wide agreement on the basic architecture for electricity restructuring: generally, generation is separated from other operations and competition is introduced at the wholesale and/or retail levels (Kessides 2004). The role of the regulator is to set tariffs and regulate access to the transmission and distribution networks.

Box 14, describing the latest reform efforts within the European Union, provides an example of an ambitious attempt to maximize competition at all levels of the distribution chain.

## Box 14: Reform of the EU's electricity sector

### The issue

Despite a longstanding reform process of the electricity market in the European Union, the European Commission's enquiries revealed that the EU's internal market in electricity was still deficient, due to inadequate framing of existing rules and measures. The Commission deemed it important to amend the current rules to ensure fair competition and supply electricity at the lowest possible price to complete the internal market in energy.

### The reformed law

Directive 2009/72/EC of the European Parliament and the Council of 13 July 2009 was adopted. The Directive concerns common rules for the internal market in electricity and repealed Directive 2003/54/EC. The Directive introduces common rules for the generation, transmission, distribution and supply of electricity to develop a competitive, secure and environmentally sustainable market in electricity. The main benefits the Directive seeks to establish are:

- Ensuring that customers have the right to choose their electricity supplier and to change supplier easily;
- Ensuring that non-household customers may contract simultaneously with several suppliers;
- Ensuring that Member States implement an independent mechanism (energy ombudsman or consumer body) to manage complaints or disputes efficiently;
- Ensuring monitoring of security of supply by Member States;
- Unbundling transmission systems and transmission system operators (from March 2012) while ensuring stability and reliability of supply and services;
- Establishing a transparent system of third-party access to transmission and distribution systems;
- Unbundling and transparency of accounts – electricity undertakings are required to keep separate accounts for their transmission and distribution activities, which can be accessed by the competent authorities.

### Analysis

The variety of measures adopted shows that unbundling, regulatory activities, monitoring and strengthening of end-user rights are complementary measures to enhance competition. These measures must be adapted to specific situations and their effect must be monitored to achieve the desired results.

*Source:* Anderson, R.D., A. Heimler, 'What has Competition Done for Europe? An Interdisciplinary Answer', in *Aussenwirtschaft* (the Swiss Review of International Economic Relations), 62, No. IV, pp. 419-454, 2007.

The example of China, described in box 15, highlights growing electricity needs of a fast-developing country as well as reform measures to meet those needs.

As in other sectors, structural reforms need to be complemented by competition and anti-trust disciplines to provide checks and balances to possible abuses of remaining market power. Where some bottlenecks or monolithic/monopolistic structures remain, a sound legal framework is needed to regulate the behaviour of dominant players and allow competition in downstream markets. Box 16 illustrates this point.

Furthermore, the international dimension of energy markets and supply needs to be kept in mind. While liberalization of markets at the national level is a desirable first step, opening up supply to international competition can further reduce prices for businesses. Box 17 shows that competition authorities can play a vital role in ensuring that international competition is not prevented by cartelization in the energy sector.

### Box 15: China: reform of the energy sector

#### The issue

China's rapidly growing economy puts pressure on its energy sector. To attract private investment and ensure the efficient use of investments, the Chinese Government has undertaken a fundamental restructuring of the electricity sector, including strategic measures such as separating the assets and operations of generation from those of transmission and distribution.

#### Impact on local businesses and exporters

Lack of competition can be expected to slow economic growth for private businesses that depend on energy to produce goods and deliver services. However, the same effect can occur if free market competition leads to price volatility and unstable supply. As a result, key factors of reform to introduce competition include price stability and steady supply.

#### Measures taken

The incumbent monopoly generator, transmitter and distributor of electricity, the State Power Corporation (SPC), was broken up in late 2002. SPC's generation assets were divided into five generation companies: Huaneng Group, Huadian Power, Guodian Power, Datang Power Group and China Power Investment Company. Each of the generation companies was to control no more than 20% of the national generation capacity. The transmission grid was separated from generation operations and then further separated into two power grid operators, the State Power Grid Company and the South China Power Grid Company. Transmission and distribution continue to be regulated monopolies, with power supplied from a competitive generation sector.

*Source:* Pittman, R. and V. Yanhua Zhang, 'Electricity Restructuring in China: The Elusive Quest for Competition', Economic Analysis Group 08-5 April 2008. Available at: [www.justice.gov/atr/public/eag/232668.pdf](http://www.justice.gov/atr/public/eag/232668.pdf)

### Box 16: Russian Federation: abuse of dominance in the power transmission market

#### The facts

In 2001, RAO UES Russia, a company with more than 65% market share in the electric power generation and high voltage transmission markets, refused to sign an electric power transmission service contract with Rosenergoatom, an electric power producer. The latter had concluded electric power delivery contracts with companies serving the Georgian and Ukrainian markets and depended on RAO UES Russia to fulfil the contracts. RAO UES Russia's refusal to provide the necessary power transmission services was based on the company's assumption that Rosenergoatom needed to seek prior approval of electric power export contracts with third parties by RAO UES Russia. Therefore, RAO UES Russia required Rosenergoatom to fully disclose their power export contracts with third parties.

#### The law

RAO UES Russia is a natural monopoly according to Article 4 of the Federal Law on Natural Monopolies and is inscribed in the Register of Natural Monopolies. Due to its monopoly position, signing contracts on electric power transmission with power providers is obligatory for RAO UES Russia according to Article 10 of the Civil Code and Article 5 of the Federal Law On Competition and Restriction of Monopolistic Activity at Commodity Markets (further, Competition Law) and Article 8 of the Federal Law On Natural Monopolies.

#### Analysis

Nuclear plants belonging to Rosenergoatom produce electric power to deliver it to the market. But a power line is necessary to deliver from producer to consumer. RAO UES Russia is a monopolist that owns these power lines. By refusing to provide power transmission services to competitors in the power production market, RAO UES Russia attempted to establish additional control over the power production market.

#### Impact on local businesses and exporters

Due to the fact that RAO UES Russia refused to render electric power transmission services to producers, in this particular case to Rosenergoatom, the generating company had no access to electric power export markets. The refusal to open the power transmission network to competitors resulted in the competitor's inability to fulfil such contracts, thus preventing them from successfully operating in the export market.

*Source:* OECD Global Forum on Competition, Abuse of Dominance in Regulated Sectors. Case submitted by the Russian Federation, Session III. (DAF/COMP/GF/WD(2005)20 of 14 January 2005)



### Box 17: Pakistan: cartelization in liquefied petroleum gas market

#### The facts

National producers of liquefied petroleum gas (LPG) formed a cartel to keep producer prices for LPG low and prevent foreign importers from entering the market. Instead of charging a higher producer price when selling LPG on to marketing companies, they used their control over marketing companies to extract commission payments and other premiums.

This resulted in a high consumer price. Nevertheless, the official price that importers were bound to apply (due to government regulations) was kept low, as authorities determined the official price in relation to the local producer prices. Because importers were not able to sell to consumers directly and benefit from the high consumer price, importing LPG became unprofitable for them despite high consumer demand for additional quantities.

#### The law

Section 4 of the Competition Act of Pakistan prohibits price fixing agreements as well as agreements fixing or setting the quantity of production, distribution or sale of goods.

#### Analysis

LPG producers, by engaging in anti-competitive practices, were able to prevent competition from LPG importers that would have resulted in a lower consumer price. By circumventing the official consumer price regulations and control over the marketing companies, local LPG producers reaped high benefit margins despite artificially low producer prices.

#### Impact on local businesses and importers

Importers were prevented from engaging in business and local end users of LPG suffered from the artificially high consumer price.

*Source:* Inquiry Report 'Suo Moto Inquiry against JJVL and LPGAP', Competition Commission of Pakistan, March 2009. Available at: [www.cc.gov.pk](http://www.cc.gov.pk).

## THE TELECOMMUNICATIONS SECTOR

Information and communication technologies (ICT) and services are vital to effective participation in today's economy worldwide (Khalil, Dongier and Qiang 2009). These technologies and services are essential for development and for the competitiveness of developing economy businesses. Recent decades have seen an unprecedented growth in the availability of telecommunication services. On the one hand, this is directly linked to reforms introduced in the telecommunications sector. On the other hand, technological changes such as the expansion of mobile telecommunication services have changed the landscape of telecommunications.

Both developments have competition at their heart. Beginning in developed countries, reforms to break up monopolistic structures in the telecommunications sector and create competition have now been introduced in many countries. Former state-owned companies have been privatized and made subject to competition from other private telecommunications providers. The significance of competition policy for this process is shown by the central role of a path-breaking competition law case – the United States AT&T case, which was resolved by a negotiated consent decree in 1982. It provides an example of competitive restructuring that helped to inspire related reforms (in some cases even broader) across the world.<sup>15</sup>

Another building block for telecommunications reforms was the establishment of separate regulators in the majority of jurisdictions worldwide. More than 80% of countries across the globe have taken that step (International Telecommunication Union 2011). Typically, one of these regulators' primary roles is to create conditions for competition through regulation of access to telecommunications infrastructure and interconnectivity. Box 18 provides an overview of traditional reform measures by summarizing the patterns of market entry in local telephony services envisioned by the United States Telecommunications Act of 1996.

Technological changes have also led to competition within and between different forms of telecommunication. Hazlett et al. (2004) reported that mobile phone services were at first considered a natural monopoly by

<sup>15</sup> For a discussion of the long-run significance of the settlement see Yoo (2008).

### Box 18: Forms of market entry – the United States Telecommunications Act of 1996

The Telecommunications Act envisions three forms of market entry by competitors: facilities-based entry, resale and unbundling.

#### Facilities-based entry

This form of entry occurs where network infrastructure is duplicated so that direct competition among independent network operators occurs. While potentially high entry costs and a loss of economies of scale benefits may deter market entry, this form of competition requires the least regulatory intervention and provides for secure access to networks. Interconnectivity among networks, number portability and similar issues still require some oversight to ensure maximum competition.

#### Resale entry

Resale entry occurs where competitors are given the right to buy access to the incumbent's telecommunications infrastructure at wholesale prices (that is, at a discount when compared to the retail price). Unnecessary duplication of networks can therefore be avoided and/or entrants can use resale on a temporary basis until the installation of new infrastructure is completed. A main challenge regarding resale is access pricing.

#### Unbundling

Unbundling means that different telecommunications-related market segments are separated and sold to competing telecommunication service providers, i.e. access to local loops, switching, databases and signalling systems. Again, pricing is an important issue. Furthermore, transaction and interface compatibility costs may rise due to disaggregation.

*Source:* Laffont, J. and J. Tirole, *Competition in Telecommunications*, Cambridge, Massachusetts; London, United Kingdom; MIT Press, 2000.

regulators, but experience has shown that the mobile phone industry is well able to establish parallel network infrastructure in different countries and mobile telephony has become a competitive telecommunications market. At the same time, the number of mobile telephone users continues to increase rapidly in developing countries, where fixed-line services may not easily be available (e.g. in rural areas). This indicates that mobile telephony services to some extent act as a substitute for fixed-line services and therefore provide for competition in the sector.

Nevertheless, an increasing focus on availability of broadband Internet services through digital subscriber line (DSL), cable or other fixed-line networks shows that access to infrastructure is not an issue of the past. Even where duplication or multiplication of networks occurs (e.g. through the parallel use of cable, DSL and other networks for similar services), interconnectivity has to be ensured and some bottlenecks continue to exist, even though their location may change with changes in technology (Laffont and Tirole, 2000).

Furthermore, reform processes may not automatically have resulted in market entry and the desired levels of competition, for various reasons. The following examples show that even after taking steps to introduce competition, oversight from regulators and/or competition authorities is needed.

Box 19 is an example of market concentration through a merger that resulted in anti-competitive behaviour, while box 20 and box 21 illustrate how market power in one telecommunications sector can sometimes be 'leveraged' to another. Nevertheless, only under particular market conditions can a firm with a monopoly in one market extend its monopoly in another market through cross-subsidization. Most competition policy experts would agree that cross-subsidization should not be presumed to be harmful to competition in all cases. Harmful effects need to be investigated on a case-by-case or 'rule of reason' basis.

The World Trade Organization's (WTO) so-called 'Reference Paper on Regulatory Principles' in telecommunications provides an important example of the links between competition policy, economic regulation and international trade liberalization. It forms part of the commitments made by most WTO members in the context of the WTO Negotiations on Basic Telecommunications Services, conducted under the overall rubric of the General Agreement on Trade in Services (GATS) and concluded in February 1997. The Reference Paper is intended to address situations where public telecommunications network services constitute facilities, exclusively or predominantly provided by a single or limited number of suppliers, and for

### Box 19: Peru: abuse and transfer of monopolistic power

#### The facts

When mobile telephony arrived, the Peruvian Government gave concessions, distinguishing between mobile telecommunications services, in Lima and outside Lima. While Tele 2000 (A band) and CPT (B band) competed in Lima, only Entel (A band) obtained a concession for mobile telecommunications outside Lima. In 1993, Telefónica bought CPT and Entel, and in 1994 these two undertakings merged. In this scenario, Telefónica began to develop automatic national roaming services, allowing its customers to freely use their handsets both in and outside Lima.

To offer its clients the same service, Tele 2000 requested that Telefónica open the Entel network outside Lima for automatic roaming to Tele 2000 customers as well, but Telefónica refused.

#### The law

The Peruvian telecommunications law stipulated: 'Because of the neutrality principle the operator of a telecommunications service that is in support of others' telecommunications services, or who has a dominant position cannot use these situations to provide simultaneously other telecommunications services with major advantages and with detriment to his competitors, using practices restrictive of free and fair competition, such as limiting interconnection or damaging services' quality.'

#### Analysis

Telefónica used its dominant position in the market outside Lima to generate advantages in the Lima mobile telecommunications market. Therefore, Telefónica transferred market power. Tele 2000's clients were only provided access to manual roaming.

#### Impact on local businesses and exporters

Tele 2000 could not compete with Telefónica's Automatic National Roaming services, because Tele 2000 exerted monopoly power in the market outside Lima. This significant disadvantage provided obstacles for Tele 2000 to compete in Lima's mobile telecommunications market.

*Source:* OECD Global Forum on Competition, Abuse of Dominance in Regulated Sectors. Case submitted by Peru, Session III. (DAF/COMP/GF/WD(2005)16 of 14 January 2005)

### Box 20: Chinese Taipei: abuse and transfer of monopolistic power

#### The facts

Based on a 1996 Telecommunications Act, Chinese Taipei has gradually liberalized its telecommunications services sector in sequence: from paging, mobile phones, satellite phones and mobile data communications in 1997, to the fixed communications networks in 2001. In 1999, Chunghwa was still the only telecommunications company operating in the fixed line telecommunications market, but faced competition in the already liberalized mobile telecommunications sector. The prevailing rate for mobile phone users was at NT\$ 1.7 for five minutes for local calls to fixed lines and the rate of local calls to mobile phones was at NT\$ 6 per minute. Then, Chunghwa introduced the so-called '099' service at a uniform rate of NT\$ 3.6 per minute, by which calls to the 099 service could be transferred to mobile phones.

#### The law

The Telecommunications Act provided the Ministry of Transportation and Communications with the authority to prevent the setting of tariffs by facility-based carriers engaging in cross-subsidization, thereby preventing them from hindering fair competition.

#### Analysis

By using its market power due to its monopoly position in the fixed line telecommunications sector and the related infrastructure, Chunghwa cross-subsidized mobile phone communications by its users. At the same time, it controlled access by competitors to the fixed line infrastructure and could set prices in that regard.

#### Impact on local businesses and exporters

Because no competitor could benefit from a similar possibility to cross subsidize mobile phone communications due to a lack of access to an alternative fixed line infrastructure, they could not offer lower rates to their customers. Eventually, all competitors in the mobile telecommunications sector could have been driven out of business and the monopoly of Chunghwa would have been reinstated.

*Source:* OECD Global Forum on Competition, Abuse of Dominance in Regulated Sectors, Case submitted by Chinese Taipei, Session III. (DAF/COMP/GF/WD(2005)19 of 14 January 2005)

### Box 21: Latvia: abuse of dominance

#### The facts

In November 2002, Lattelekom, historically the monopolistic provider of fixed telecommunications in Latvia, started to provide a combined service, Komforta ISDN (K-ISDN), which was based on the lease of ISDN telephone lines and the rental of a digital bureau telephone exchange (BTC). A discount was applied to the subscription price for K-ISDN. The amount of this discount depended on the quantity of conversations over the public fixed-line telecommunications network. In the framework of the above-mentioned combined service, the lease payment for connection to an ISDN line was fixed at half the level of the lease payment for connection to a separate ISDN line, without any BTC rental.

#### The law

Article 13 of Latvian Competition Law prohibits the abuse of a dominant position.

#### Analysis

Until 1 January 2003, Lattelekom had legal monopoly rights to provide voice telephony services over the public fixed-line telecommunications network, lease of lines and taxophone services. During 2003, Lattelekom lost only approximately 3% of its market share in providing voice telephony services and preserved its monopoly position in the market of leased lines. Thus, Lattelekom had a dominant position in two regulated markets – in the market for voice telephony over the public fixed-line electronic communications network and the market for leased line service. By using its monopoly position in these two markets to provide discounted services in a third, separate market (BTC), it sought to extend its monopoly to that market.

#### Impact on local businesses and exporters

Other companies that wanted to enter the BTC rental services market, but that were neither providers of voice telephony services over public fixed-line telecommunications network nor providers of leased ISDN telephone lines, did not have the possibility to offer discounts to their clients and were unable to compete successfully with Lattelekom.

Thus, unequal competition conditions would have been created. By combining three services in one package, two of them provided by Lattelekom as the dominant undertaking, and by applying discounts that could not be offered by other market participants, Lattelekom practically closed the BTC rental services market, not allowing new market participants to enter.

**Source:** OECD Global Forum on Competition, Abuse of Dominance in Regulated Sectors. Case submitted by Latvia, Session III. (DAF/COMP/GF/WD(2005)17 of 14 January 2005)

which there are no feasible substitutes. Such a situation potentially constitutes an impediment to competition and market access for service suppliers. To address this, the paper sets out detailed rules to interconnect downstream service providers with major suppliers on non-discriminatory terms and prevent anti-competitive acts, including anti-competitive cross-subsidization and the making available of information needed for efficient interconnection. These rules draw importantly on concepts of anti-trust and regulatory policy, such as exclusionary practices and the 'essential facilities' doctrine (Anderson and Holmes 2002).

A recent World Bank report links the WTO commitments to domestic reform:

'Incorporation of the Reference Paper as an additional commitment in the GATS Schedule of Specific Commitments is a good example of using multilateral obligations to support domestic reform. The fact that the Reference Paper obligations are binding help propel the domestic reform agenda needed to fully implement the opening to competition.'

The Reference Paper is a good example of how international commitments can be used to carry forward national priorities to maintain and reinforce competition in appropriate settings.

Key elements of the Reference Paper and related provisions of Mexico's GATS commitments were considered in the 2007 WTO Panel Decision in the Mexico Telecoms case. In this case, which was brought against Mexico by the United States, the panel found that several features of Mexico's framework for the regulation of international telecommunications services were in violation of Mexico's commitments under the Reference

Paper (see box 22 for a summary of points relating to the competition dimension of this matter).<sup>16</sup> Rather than appealing the case to the WTO Appellate Body, Mexico chose to accept the panel's ruling. In the view of some observers, it did so precisely because this was in the best interests of Mexico's consumers and the long-run development of Mexico's telecommunications sector (see, e.g. Hufbauer and Stephenson 2007; and, for related commentary, Fox 2006).

### Box 22: Mexico: competition-related elements of the WTO Panel Report

Complainant: United States

Respondent: Mexico

Establishment of Panel 17 April 2002; Adoption of Panel Report 1 June 2004

#### Background

For many years, Telmex was the dominant supplier of telecommunications services in Mexico. According to the WTO Panel Report, the applicable regulations in Mexico conferred on Telmex, as the long-distance service licensee having the greatest percentage of outgoing long-distance market share for the relevant country in the previous six months, the power to negotiate the rate to be paid by foreign carriers – including United States carriers such as AT&T and MCI – for the interconnection of calls terminating in Mexico. In addition, Mexican law required all other licensed Mexican concessionaires to charge no less than the fee negotiated by Telmex for similar services.

#### Summary of competition-related findings of the Panel

The Panel ruled that Mexico violated its commitments under the Reference Paper and the GATS.

- Mexico failed to ensure interconnection at cost-oriented rates for the cross-border supply of facilities-based basic telecom services, contrary to Article 2.2(b) of its Reference Paper.
- Mexico failed to maintain appropriate measures to prevent anti-competitive practices by firms that are major telecom suppliers, contrary to Article 1.1 of its Reference Paper.
- Mexico failed to ensure reasonable and non-discriminatory access to and use of telecommunications networks, contrary to Article 5(a) and (b) of the GATS Annex on Telecommunications.

*Source:* *Ibid.* and WTO Dispute Settlement: One-Page Case Summaries, World Trade Organization, Geneva, 2006. Available at [www.wto.org/english/res\\_e/booksp\\_e/dispu\\_summary06\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/dispu_summary06_e.pdf).

## CONCLUSION

The measures and initiatives discussed in this chapter are not ones that, for the most part, are legally mandated by trade agreements.<sup>17</sup> Rather, with one or two exceptions, they are measures that countries may wish to take in order to ensure that their participation in trade-liberalizing agreements and arrangements generates benefits for citizens, including local and export-oriented businesses. Failures of trade liberalization to generate sustained development and growth can in many cases be traced to a failure to introduce complementary domestic policy reforms. Countries, and their businesses, will not be well poised to take advantage of trade liberalization unless they reduce costs and enhance the efficiency of infrastructure sectors such as telecommunications, energy and transportation. They also need to promote flexibility by eliminating artificial restrictions on entry, exit and pricing in manufacturing and other industries, and to establish and strengthen incentives for investment, innovation, the creation of efficient management structures and productivity improvement.

A number of insights emerge from this overview concerning the restructuring of public infrastructure sectors and the application of related rules:

<sup>16</sup> For a more complete summary also covering other aspects of the case, see [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds204\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds204_e.htm).

<sup>17</sup> There are some exceptions – for example, as discussed in the section on telecommunications, the maintenance of 'competitive safeguards' in relation to basic telecommunications services is a requirement of the Reference Paper on regulatory principles that has been adopted by most but not all WTO members.

- At the broadest level, measures to strengthen competition are an important complement to other reforms (e.g. privatization) aimed at improving performance in the provision of public infrastructure services. Successfully implemented, such measures offer substantial potential benefits for the users of such services, including (very much) export-oriented businesses.<sup>18</sup>
- Technological change and better understanding of issues concerning industrial structure enhance competition. This has occurred notably through measures such as the separation of potentially competitive segments (e.g. train operation or power generation) from other segments that constitute genuine natural monopolies (e.g. railroad track facilities or power transmission lines), the introduction of competitive access regimes, and related measures.
- While competition laws, typically through provisions regarding abuses of a dominant position, can sometimes impose necessary restructuring and establish competitive access regimes, in other cases the remedies may not be sufficient. Other measures may be needed to address monopoly issues in infrastructure industries: repeal or reform of statutes or regulations that unnecessarily limit entry to particular markets; and enactment of legislation to break up established monopoly enterprises and permit competition, for example by establishing industry-specific competitive access regimes. The continuing application of general competition laws is important to deal with harmful practices in public infrastructure, as cartels and mergers are likely to lessen competition or create a situation of market dominance, and abuses of a dominant position.
- A uniform or 'blanket' approach to the implementation of competition-oriented structural reforms across all sectors and countries is not recommended. Experts counsel a 'case-by-case' approach. User businesses and their associations, in addition to public interest and other advisory bodies, play a role in providing input to policy formulation. First, they can build political support for restructuring initiatives and reforms. Second, they can provide essential input to the design of specific restructuring initiatives. Third, user businesses and their associations play a part in referring complaints to the appropriate authorities for apparent competition law violations by infrastructure service providers and other input suppliers.
- While measures to inject competition into infrastructure monopolies are often implemented nationally, there is also an interface with international trade agreements and cooperation. As has been discussed with reference to the WTO Reference Paper on basic telecommunications, international commitments can be used to impose national priorities to reinforce competition. In many cases, the most effective tool to enhance competition – whether in infrastructure or other sectors – can be trade liberalization.

In summary, restructuring public infrastructure sectors such as transportation, telecommunications and energy, and the application of competition rules, offer a very significant tool to enhance the competitiveness and commercial success of developing and transition economy businesses. Such measures merit active consideration by all countries as a complement to participation in trade-liberalizing agreements and arrangements. The implementation of such measures involves, nonetheless, practical and conceptual challenges. Effective and informed input to the implementation of such measures by export-oriented businesses and their associations, in addition to other relevant bodies – building on the insights set out in this chapter – can facilitate wise choices in this area.

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<sup>18</sup> Most or all of the gains for export-oriented businesses that are discussed in this chapter are equally applicable to importing businesses.

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CHAPTER 3

# ANTI-COMPETITIVE PRACTICES IN DISTRIBUTION

INTRODUCTION TO THE ISSUES ..... 40

MONOPSONY (BUYER) POWER ..... 40

IS VERTICAL COOPERATION ANTI-COMPETITIVE? ..... 42

CONSOLIDATION VERSUS COMPETITION ..... 44

POLICY AND OTHER RESPONSES ..... 48

LESSONS TO BE LEARNED ..... 49

A NEED FOR SOMETHING MORE? ..... 50

# ANTI-COMPETITIVE PRACTICES IN DISTRIBUTION

## INTRODUCTION TO THE ISSUES

International trade holds the promise of significant revenue for developing country businesses. Prices in developed country markets are often higher than in developing-country domestic markets. This chapter explains how developing country businesses can be affected by anti-competitive practices and market structures in the distribution and retail sectors, and how sound competition policies can help address these issues. It also identifies possible gaps in the international regime for confronting these practices.

International marketing, retail and distribution channels are complex. Very often, small- and medium-sized businesses in developing countries must market their products through international distribution and retailing conglomerates. This can have major advantages in terms of brand recognition, economies of scale and scope. However, the gains reaped by developing country businesses, and the effect on their further development, largely depend on whether rents are distributed equitably between them and the international conglomerates. The reliance of developing country suppliers on large retail and distribution conglomerates can expose these (often smaller) businesses to the very significant bargaining power of the conglomerates, as well as to potentially anti-competitive practices. This can in turn result in an inequitable distribution of rents. Developing country businesses may well produce goods and services for consumption abroad, but the promise of comparatively higher revenues will only be fulfilled if there is sufficient competition between international retail and distribution firms to limit their bargaining power.

This chapter will examine the advantages of marketing through international distribution channels and potential concerns; provide examples of market structures that result in different outcomes for developing country businesses; and consider how developing country suppliers can confront related challenges. As the agro-food sector is a prime example of an internationally interlinked market in which the above considerations are relevant, that sector will be used to explain market structures conducive to monopsony power, the issues and possible solutions.

The text is not meant to suggest policies or firm rules that are necessarily applicable across the board. Rather, it provides basic information to stimulate reflection and debate. As market structures and other factors differ from country to country, and from product to product, one must assess the prevailing conditions in particular markets and weigh different policy options accordingly. While this chapter makes the link between competition policy and international trade, the possible measures discussed are not generally required or mandated by international trade agreements. The thoughts and suggestions set out here are offered with a view to enhancing the benefits to developing country exporters from trade which is, for the most part, already taking place within the framework of relevant agreements.

## MONOPSONY (BUYER) POWER

A monopsony is a market situation in which sellers face a single dominant buyer with substantial ability to influence prices and other dimensions of competition. It is an example of imperfect competition, similar to a monopoly, where one seller faces many buyers. As with many other concepts, in the real world there are not many examples of monopsonies in their pure form. However, some degree of monopsony or buyer power can be present where many sellers of goods or service providers face few, large buyers. For example, this can be the case in markets for intermediate goods bought as inputs by very large firms.

What is the effect of buyer power? As the only purchaser (or one of few purchasers) of a good or service, the 'monopsonist' can dictate terms to suppliers in the same way that a monopolist can dictate to buyers. This means that an intermediate good, for example, may fetch a relatively low price as compared to the price of

the end product. At the same time, the low prices for intermediate goods are not (necessarily) reflected in the price of the end product and thus not passed on to the consumers. In short, the monopsonist can extract rents from both producers of intermediate goods or services and consumers.

## HOW EXPORTERS CAN SUFFER

How and why can monopsony power be detrimental to international trade relations between developing and developed countries? Developing countries benefit from trade to the extent that they increase their revenues through enhanced economic activity, in addition to other advantages, such as improvements in production methods due to technology transfer. Often, however, developing country businesses are producers of intermediate goods or services that depend on a few, big international retail and distribution conglomerates to reach markets abroad.

Cooperation with these bigger firms can benefit the development and economic activities of developing country firms. In countries where financial markets are not sufficiently advanced, these bigger partners can offer credit lines, provide inputs and offer training in production techniques that yield lasting human capital development. Enhanced brand recognition and economies of scale can make the overall business sector more profitable. Such vertical cooperation between small producers and big processing, retail and distribution chains, therefore, can be desirable and can increase the participation of developing country businesses in international trade.

For this to happen, the benefits outlined above have to outweigh the potentially negative effects that can occur if there is limited competition between such processing, retail and distribution chains. If the structures prevailing in any particular market come close to a monopsony, the buyer can limit the beneficial inputs provided to producers to a minimum and depress prices so that the profit margins of developing country businesses are low. As a result, the benefits of the businesses' participation in international trade will be mainly reaped by the buyer, i.e. the processing, distribution and retail chains. In short, development through trade will not occur to its full potential.

Competition policy and laws, as well as sound business strategies, help avoid overly concentrated buyer power. Sound institutions, such as functioning financial markets and legal institutions, complement competition policy reforms, and help lessen the dependence of developing country businesses on strong buyers.

## AGRO-FOOD SECTOR EXAMPLES

The agro-food sector is an example of a business area where the above issues and considerations are of particular relevance. Agricultural commodities represent a critical share of many developing countries' exports, as box 23 shows.

Recent price increases in international commodity markets would suggest that participation in agricultural commodity trade should be increasingly attractive to developing country producers. But a price increase in international markets and/or developed countries does not necessarily translate into higher 'farm gate' prices. With reason, a study by the Food and Agriculture Organization (FAO) asked 'Why were high food prices not an opportunity for poor farmers?'<sup>1</sup>

McCorriston and Sheldon (2007) observed that exporters of coffee, for example, faced a significant decline in real prices over the years, while global buyers, roasters and retailers saw their profits increase. High profit margins were earned by downstream firms, i.e. firms at more advanced stages of the commodity chain, while both developing country producers and consumers worldwide were worse off. Therefore, the authors suggest, even though trade liberalization in agricultural commodities may be seen as having the potential to act as a powerful catalyst for poverty reduction, it will not bring about the desired results if market structures are such that the downstream distribution and retail capture the largest share of total value added.

1 FAO (2009), Part 2.

### Box 23: Share of agricultural exports across countries in 2009

Country	Share	Country	Share
1 Malawi	96.07 %	12 Uruguay	64.32 %
2 Burundi	94.14 %	13 Belize	57.91 %
3 Paraguay	86.06 %	14 Liberia	55.61 %
4 Guinea-Bissau	84.95 %	15 Kenya	55.53 %
5 Ethiopia	81.46 %	16 Sao Tome and Principe	55.15 %
6 Djibouti	81.32 %	17 New Zealand	52.57 %
7 Afghanistan	74.00 %	18 Vanuatu	48.89 %
8 Nicaragua	73.96 %	19 Côte d'Ivoire	48.58 %
9 Eritrea	67.80 %	20 Argentina	47.83 %
10 Comoros	64.91 %		
11 Saint Vincent and the Grenadines	64.89 %		

*Source:* <http://faostat.fao.org/>.

The following sections highlight two recent trends in the agro-food sector that affect the participation of developing country producers in agricultural commodity trade and the distribution of rents between such producers and global retail and distribution chains.

### Box 24: High food prices may not help producers

The 2009 FAO study, 'The State of Agricultural Commodity Markets' points out:

"Most developing country producers are far distanced from what happens on international markets, so increasing food prices there do not necessarily mean higher prices for poor producers. For this to be the case, those high international prices need to be transmitted across national borders and through marketing chains."

The study outlines several possible causes for the observed lack of transmission of benefits to poor farmers: rudimentary technology; lack of access to modern inputs and credit; poor marketing and transport infrastructure; and ineffective rural services and institutions. These all prevent poor farmers from adequately reacting to world market prices.

The findings also beg the question of whether competition constraints in the global value chain are preventing transmission of price increases through marketing chains.

*Source:* FAO (2009).

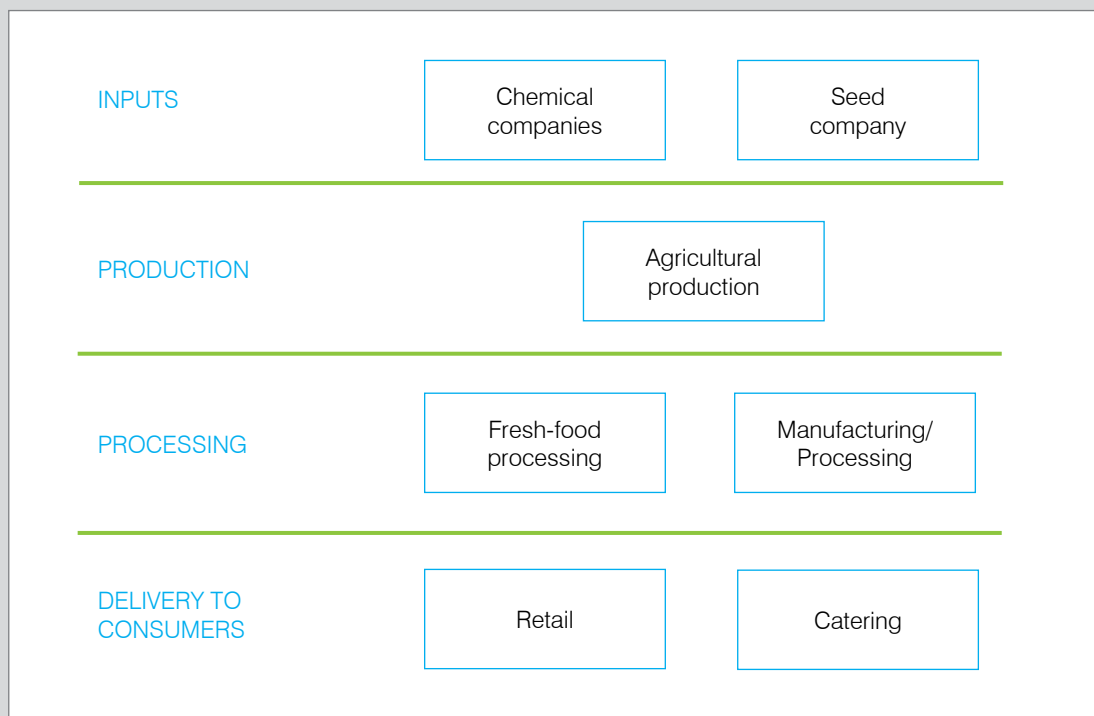
## IS VERTICAL COOPERATION ANTI-COMPETITIVE?

A trend in the agro-food sector is a rise in vertical integration and/or vertical cooperation between different actors. What implications does it have for developing country exporters?

Raw commodities are inputs into a vertical commodity chain that extends from production of the raw commodity, via processing to retail and distribution. Often, raw commodities only provide for small shares of

the total value or price of the finished product, even where the commodity involved does not require much processing. For example, in the banana sector, plantations only receive 10% of the final price of the product, whereas international trading companies and retailers each add 30%-40% to the final price (McCorrison and Sheldon 2007). A simplified agribusiness value-chain diagram is shown below in box 25.

### Box 25: Simplified agribusiness value-chain diagram



*Source:* Reprinted from UNIDO (2006), p. 31.

Vertical integration or cooperation occurs where different large firms pertaining to different stages of the chain merge or engage in contractual relationships to form a fully or partially integrated economic actor. Such mergers can result in economic efficiency gains, as coordination between stages of the commodity chain is facilitated and can be optimized. Under certain conditions, however, vertical integration may alter the incentives of parties and thereby facilitate the exercise of market power (see United States Department of Justice 2009a). This can occur if vertical integration opens up the possibility to exclude competitors from certain markets and significantly reduces competition and transparency. For example, if intermediate suppliers, such as food processing companies located in developing countries, merge with international distribution companies, the profits or the value-added resulting from the processing stage may well go to the parent company instead of staying in the developing country. At the same time, the food processor may be required to deal exclusively with its holding company, thereby lessening competition in the sector.

Of particular relevance to small producers of agricultural commodities in developing countries are individual contracts designed to enhance vertical cooperation between them and the big buyers of their agricultural products. Such contracts often 'tie' producers to one of the few processing, retail and/or distribution conglomerates, thereby increasing the conglomerate's bargaining power. In return, the conglomerate often offers supplier support measures as part of the package: credit, inputs (such as seeds, fertilizer), prompt payments, transportation and quality control are the most commonly offered measures (Swinen and Maertens 2007). Other forms of supplier support, depending on the relevant sectors, include transfer of new technologies, veterinary services, etc. An example of such a support programme is set out in box 26.

Such programmes have been shown to have positive effects for developing country farmers and businesses as they can help raise efficiency, lower production and marketing costs, and thereby increase the profitability

### Box 26: 'French' beans from Madagascar

Vertical cooperation between a local food processing consortium, Lecofruit, and rural farmers has helped establish Madagascar as an exporter of high quality 'French' beans to Europe.

Lecofruit buys vegetables from more than 9,000 small farmers based on contracts. It distributes seeds, fertilizer and pesticides as part of the contract. The value of those inputs is later paid back in kind by farmers upon harvest, and therefore pre-financed by Lecofruit. Furthermore, Lecofruit teaches farmers how to make compost, with beneficial spill over effects to other crops.

In order to ensure farmer compliance with contracts, the company put in place a hierarchical system of monitoring, with lower levels of monitoring carried out by rural villagers themselves.

Farmers viewed the contracts as useful because they helped reduce periods without income caused by the seasonality of crops. The chance to learn new technologies was cited as a further reason to sign.

However, higher income was mentioned by a relatively low number of contractors, and almost half the farmers were willing to adhere to the contract even if prices offered were half of the price observed on the local market, meaning that there was little potential for farmers to negotiate prices with Lecofruit.

*Source:* Minten, Randrianarison and Swinnen (2006).

of participating farms. They shift risk away from farmers by providing for guaranteed sales at guaranteed prices and secured access to capital. From a long-term development perspective, technology transfer and learning can create long-lasting spill over effects, including for other crops. Therefore, the overall efficiency gains from vertical cooperation seem to indicate that such cooperation is indeed desirable.

Does this mean that concerns regarding monopsony power and competition can be disregarded entirely? This does not seem to be the case. The key question is who benefits from the efficiency gains described above, and to what extent. Small developing country producers benefit most from supplier support if there is competition between the different, larger firms targeting them, i.e. where there is less dependence on a particular buyer. Competition between such firms leads to both more extensive support, i.e. better services provided by the buyer, and a more equal rent sharing, i.e. higher prices for the agricultural commodities produced.

Swinnen and Maertens (2007) also observed that:

"If competition becomes too vigorous in the interlinked input and credit market, coordination may break down. Farmers may undermine their own long-run productivity through strategic defaulting in the short run. ... [I]nput programmes remained sustainable under competition as a result of special institutional arrangements like frequent monitoring, buyer coordination or local information networks."

Therefore, one can conclude that vertical coordination is beneficial for developing country producers where supplier support makes up for a general lack of institutions, including contract compliance mechanisms and infrastructure in the country or region concerned (at the price of rather low negotiating power of small producers). Where such institutions and infrastructure are provided through other means, enhanced competition lessens buyer power and leads to more equitable rent sharing between developing country producers and downstream conglomerates.

## CONSOLIDATION VERSUS COMPETITION

A second trend observed in the agro-food sector is horizontal concentration, or consolidation, at all stages of the value chain. This means that different companies at the same stage of the value chain, e.g. processing, retail, or distribution companies, have merged and/or formed consolidated economic entities.

Why is consolidation in the agro-food sector a concern from a competition policy standpoint? Consolidation means that firms previously competing in a given market act as a single unit. Depending on the market



### Box 27: Raspberry Farming in Chile

Challies and Murray (2011) described the success story of Chilean raspberry farming for export markets in North America and Western Europe.

The smallholder grower households in Yerbos Buenas, which dominate the production of this commodity in Chile, have gained from integration into international trade. The local market structure has several characteristics 'tipping the scale' in favour of small farmers, despite the presence of large buyers:

- Grower households have a high degree of household income diversification, making them less dependent on proceeds from raspberry farming.
- The quality of the soil is more decisive than plot sizes in terms of profitability.
- Seedlings can be sourced from neighbours, friends and family rather than from nursery plants.

Technical assistance and advice are provided by consultants contracted by a government institute (Instituto de Desarrollo Agropecuario).

As a result, most smallholders can, and prefer, to sell directly at the farm gate at spot prices, or deliver their fruit to market centres, rather than enter into contracts with export companies in advance because of the lower prices offered by such contracts.

**Source:** Challies and Murray (2011).

structure, and the number of competitors remaining, mergers can significantly lessen competition. What is more, if consolidation occurs in a downstream sector, it enhances the potential for monopsony power being exerted vis-à-vis upstream sellers. Where this happens within a country, competition agencies generally use their merger control functions and powers either to prevent the merger or to limit its impact on competition by making it subject to conditions. Examples of mergers in the agro-food sector that attracted the attention of competition authorities in the United States and the United Kingdom are set out in box 28.

Some developing country competition commissions also actively monitor consolidation and anti-competitive practices among national companies in the agro-food sector. The example of the Competition Commission of South Africa is described in box 29.

At the international level, Herger, Kotsogiannis and McCorrison (2008) observed a marked increase in the value of cross-border acquisitions in the food sector between 1997 and 2000, particularly in food processing. Cross-border acquisitions in the agro-food sector followed regional patterns: the United States, the Netherlands, France and the United Kingdom accounted for more than 63% of international acquisitions within the sample analyzed in the above-mentioned study, while there was a low percentage of cross-border acquisitions involving developing countries.

Developing country producers selling their crops to processing firms on the international market are more and more likely to face conglomerates of developed country processing firms. Some examples of markets with high concentration rates are summarized in box 30.

These concentration rates increase the potential monopsony power of food-processing conglomerates, leading to low prices for unprocessed produce. For example, a study of cocoa markets in West Africa (Wilcox and Abbott 2004) strongly suggested the exercise of market power along the cocoa supply chain in Côte d'Ivoire. Box 31 below sets out anti-competitive behaviour in agro-food chains dealt with by the Competition Commission of South Africa.

### Box 28: United Kingdom and United States: competition authorities scrutinize agro-food mergers

On 12 July 2011, the United Kingdom Office of Fair Trading (OFT) referred the completed acquisition of the frozen ready meals (FRM) business of Headland Foods Limited (Headland) by Kerry Foods Limited (Kerry) to the United Kingdom Competition Commission for investigation and report. The companies had both been major producers of FRM and direct competitors. After the merger, an attempt was made to raise prices for customers. However, the Competition Commission found that customers had been able to find alternative suppliers and obtain prices at pre-merger levels. Therefore, no further action was taken. In the summary of preliminary findings, no reference is made to effects of the merger on upstream suppliers of inputs for FRM.

*Source:* United Kingdom Competition Commission (2011).

The United States Antitrust Division evaluated a series of mergers in the agriculture industry to remedy identified anti-competitive concerns.

- In the market for cottonseeds, for example, the Antitrust Division required Monsanto and Delta & Pine Land to divest a significant seed company, multiple cottonseed lines and other valuable assets before allowing them to proceed with their merger. Also, because DPL had a license allowing it to stack a rival's trait with a Monsanto trait, Monsanto was required to amend certain terms in its trait license agreements with other cottonseed companies to allow them, without penalty, to stack non-Monsanto traits with Monsanto traits. As a result, producers of genetically modified traits were able to work more freely with these seed companies.
- With regard to pork, the Division evaluated and declined to challenge Smithfield's acquisition of Premium Standard in 2007. In so doing, the Division investigated its impact on the prices of pork products to consumers, the competitive consequences related to the purchase of hogs from farmers, and the merger's likely effects on the purchase of services from farmers who raise hogs. Ultimately, the Division concluded that the merger would not undermine competition in the marketplace, but emphasized it would maintain a watchful eye.
- With regard to beef, the Division filed a complaint in federal court in Illinois in October 2008 that opposed the proposed merger of JBS, the largest animal protein processing company in the world, and the National Beef Packing Company. The Division opposed the merger because it found that by eliminating one of only four competitively significant packers, the merger would place more than 80% of domestic packing capacity for high quality beef in the hands of the remaining three firms and enable them to exercise market power against producers and sellers of livestock. Consequently, the Division concluded, the consummation of this merger would have resulted in lower prices paid to cattle suppliers and higher beef prices for consumers. After several months of litigation, the parties abandoned the deal.

*Source:* United States Department of Justice (2009b).

### Box 29: South Africa: agro-food merger scrutiny

The Competition Commission of South Africa describes its merger review of the agriculture and agro-processing sector as follows:

[D]eregulation, with the closing of the marketing boards (the former control boards) coupled with the conversion of most of the cooperatives into private and listed companies, has underpinned high levels of merger activity. Many of the firms that held dominant positions in the regulated market have, over the past decade, extended their control over the vertical and horizontal channels through which they produce and market.

For example, the former Ost-Transvaal Ko-operasie (OTK) has become Afgri Operations. Afgri Operations has extended horizontally through acquiring other former cooperatives together with their fixed infrastructure, such as grain silos. Afgri Operations has also extended its range of services offered to farmers on the input side as well as on the output side as a buyer, trader and processor of agricultural products.

In the poultry industry, Astral's acquisition of National Chicks in 2001 (approved with conditions) and Earlybird Farms 2004 increased Astral's total broiler production to just below that of Rainbow Chickens. Rainbow Chickens expanded its operations through the acquisition of Vector Logistics in 2004, which resulted in the firm becoming even more vertically integrated in the poultry supply chain.

The merger between Afgri Operations and Daybreak Farms, approved in 2006, resulted in the creation of another vertically integrated player in the poultry industry, by merging a feed manufacturer with a producer of broilers.

An example of a prohibited merger in the food sector is the proposed Tongaat-Hulett Group/Transvaal Suiker Beperk merger in 2000. This was a large, horizontal merger that was prohibited by the Tribunal in a food market that is highly concentrated. The merger would have resulted in the acquisition of the third largest sugar producer (Transvaal Suiker Beperk, controlled by Rembrandt) by the Tongaat-Hulett Group, a subsidiary of the Anglo American Corporation.

*Source:* Competition Commission of South Africa (2009).

### Box 30: Farm goods markets with high downstream concentration

CUTS International, in a 2005 policy brief on competition issues in the market for farm goods, reported the following incidences of market concentration:

- Cotton growers in Zambia reportedly faced a market in which two trading companies, Dunavant and Clark Cotton (which held 66% and 24% of the domestic merchant market, respectively), accounted for 74% of the total ginning capacity.
- Similarly, two companies, Limbe Leaf and Dimon-StanCom, held around 95% of the buyer market for tobacco in Malawi.
- Archer Daniels Midland (ADM), Barry Callebaut and Cargill dominated Côte d'Ivoire's cocoa processing industry, with a three-firm concentration ratio of 95%.
- Four companies, viz. Cargill, ADM, Barry Callebaut, and Hosta, controlled 40% of world cocoa grinding, while in soybean and livestock, the first three have the biggest share of crushing and feed production along the entire chain from South Africa to Europe.
- In the global coffee market, 45% of roasting was controlled by four big companies. This led to a large divergence between the export earnings of coffee producing countries and global retail sales.
- One-third of global grocery sales was accounted for by the top 30 companies in the sector (Vorley, 2003).

*Source:* CUTS International (2005) and sources indicated above.

### Box 31: South Africa: anti-competitive practices in agro-food chains

The Competition Commission of South Africa has reviewed several food and agro-processing cases.

One of the Commission's first cases contained complex issues of alleged vertical and exclusionary restraints by South African Dried Fruit Holdings Ltd. Exclusive supply arrangements effectively foreclosed the market to new entrants, such as South African Raisins, the complainant in this case.

Similarly, in 2000, an Eastern Cape citrus farmer brought an interim relief application against citrus packing and distribution company, Patensie Sitrus, claiming that certain provisions of the company's articles of association contravened the Competition Act. They locked farmers, who were shareholders in the company, into an exclusive supply arrangement with Patensie Sitrus, thus excluding potential competitors from the market for packing and distributing citrus fruit in the Gamtoos River Valley.

In 2005, the Commission investigated a complaint against a major tea supplier that had entered into exclusive supply arrangements with the major local packers of rooibos tea. According to the finding of the Commission, these supply agreements prevented rivals and new entrants from supplying processed rooibos to domestic packers, which amounted to the foreclosure of 91% of the processing of raw and bulk-supplied rooibos to the domestic market.

*Source:* Competition Commission of South Africa (2009).

## POLICY AND OTHER RESPONSES

Especially in developed countries, competition authorities have begun to deepen their understanding of the effects of concentration in the agro-food sector on both consumer welfare and producer businesses, thereby preparing the ground for competition law measures to be taken. Examples of such initiatives by national competition authorities are set out below in box 32.

### Box 32: United States: workshops on agriculture and antitrust enforcement; United Kingdom: inquiry into groceries retailing

In 2010, the United States Department of Justice, Antitrust Division, and the United States Department of Agriculture (USDA) held five joint public workshops to explore competition issues affecting the agricultural sector and the role for antitrust and regulatory enforcement.

*Source:* <http://www.justice.gov/atr/public/workshops/ag2010/index.html>.

In the United Kingdom, the Competition Commission carried out an inquiry into groceries retailing, which finished in 2008 and concluded that measures were needed to address its concerns about relationships between retailers and their suppliers. As a result the Groceries Supply Code of Practice came into force in February 2010 and replaced the former Supermarkets Code of Practice. The aim was to ensure that suppliers do not have costs imposed on them unexpectedly or unfairly by retailers.

The GSCOP ensures that:

- The provisions of the GSCOP are included in every contract between grocery retailers and their suppliers;
- All retailers with groceries' turnover in excess of £1 billion per year are included within its scope;
- An overarching fair dealing provision is included;
- Retailers are prohibited from making retrospective adjustments to terms and conditions of supply;
- Retailers are prohibited from entering into arrangements with suppliers that result in suppliers being held liable for losses due to shrinkage;
- Retailers are required to enter into binding arbitration to resolve any dispute with a supplier;
- Retailers are required to keep written records of all agreements with suppliers on terms and conditions of supply.

It also establishes an Ombudsman to arbitrate on disputes between grocery retailers and suppliers and investigate complaints under the new Groceries Supply Code of Practice.

*Source:* United Kingdom Competition Commission, Press Release (2011) and sources referenced therein.

The examples make clear that leading competition agencies are aware of the issues and have taken useful initiatives. Nonetheless, due to their jurisdictional limitations, national competition laws may not capture adequately the international dimension of the global commodity chain. A lessening of concentration through competition law measures in developed countries may have trickle-down effects in developing countries. But national competition laws may not adequately address cases in which market power is established in developed countries but affects mainly developing country producers.

This situation raises the question of how to improve the position of developing country producers in practice. In the absence of an international competition policy, several strategies are possible. These include moves to increase cooperation and consolidation on the producer side to counterbalance monopsony power in downstream sectors. Such cooperation or consolidation can result in economies of scale for producers, product innovation through technology exchange, international production networks and overall countervailing power in global markets (UNIDO 2006). Such strategies may present solutions for developing country producers in the medium- to short-term. Nevertheless, consolidation in the production sector may engender a circle of further consolidation at all stages of the agro-food chain, which will ultimately hurt consumers in both developed and developing countries. Furthermore, small producers currently dependent on agriculture for their livelihoods may be left behind.

Therefore, strengthened cooperation in competition policy between countries, accompanied by infrastructure improvements for developing country producers, may be needed to market their products without the help of multinational conglomerates (see UNIDO 2006, chapter 6).

## LESSONS TO BE LEARNED

The agro-food sector is a prime example of developing country producers being prevented from reaping the benefits of trade due to monopsony power in downstream markets. This is caused by market structures characterized by complex value chains, with developing country firms involved in the initial stages of production facing consolidated buyer markets downstream. But are these issues also relevant to producers of other, non-food goods and producers of non-agriculture related services?

In this context, a further trend in international trade relations comes to mind – international production networks. Ernst (1997) observed that:

“As competition cuts across national and sectoral boundaries and becomes increasingly global, firms everywhere are forced to shift from exports to international production. Today, dominance in a domestic market – even one as large as the United States – is no longer enough. Mutual raiding of established customer and supply bases has become an established business practice, with the result that firms are now forced to compete simultaneously in all major markets, notably in Europe, North America and Asia.

This has led to a rapid expansion of international production: new production sites have been added at a breath-taking speed outside the industrial heartlands of Europe, North America and Japan. Since the mid-1980s, international production has grown considerably faster than international trade.

[...]

Companies break down the value chain into discrete functions, and locate them wherever they can be carried out most effectively and where they are needed to facilitate the penetration of important growth markets.”

What does this mean for competition? International production chains equally carry out the initial stages of production in developing countries, with downstream functions in the value chain controlled by global conglomerates. They are increasingly present in agricultural and other markets. This has resulted in developing countries playing an important part in international production and trade, and will continue to do so. However, trends towards vertical integration of developing country businesses with the global conglomerates, and consolidation in upstream markets, have to be monitored. Close watch must be kept on whether the distribution of rents develops in an equitable fashion, or whether international holding firms use trade to establish monopsony power, so hurting developing country producers of intermediary inputs.

## A NEED FOR SOMETHING MORE?

National competition laws and monitoring carried out by national competition agencies represent an important part of the solution. They may not be sufficient to address the full range of issues confronted by developing country exporters.

These laws and related enforcement policies are, first and foremost, concerned with practices or market structures that impact adversely on a country's own consumers. Where the effect of anti-competitive behaviour manifests itself principally abroad (as in the case of practices or market structures in a developed country market that impact adversely on developing country exporters), national competition authorities may not have sufficient cause for action. At the same time, the national competition agencies of the countries affected (e.g. the developing country exporters' countries) may be unable to influence structures and behaviour in offshore markets.

This raises the question of what, if any, additional policy responses are needed to assist developing country exporters to realize their full share of benefits from international trade as their products move up the global value chain. The answers are not entirely obvious. Further reflection on these issues may be needed at the international level.

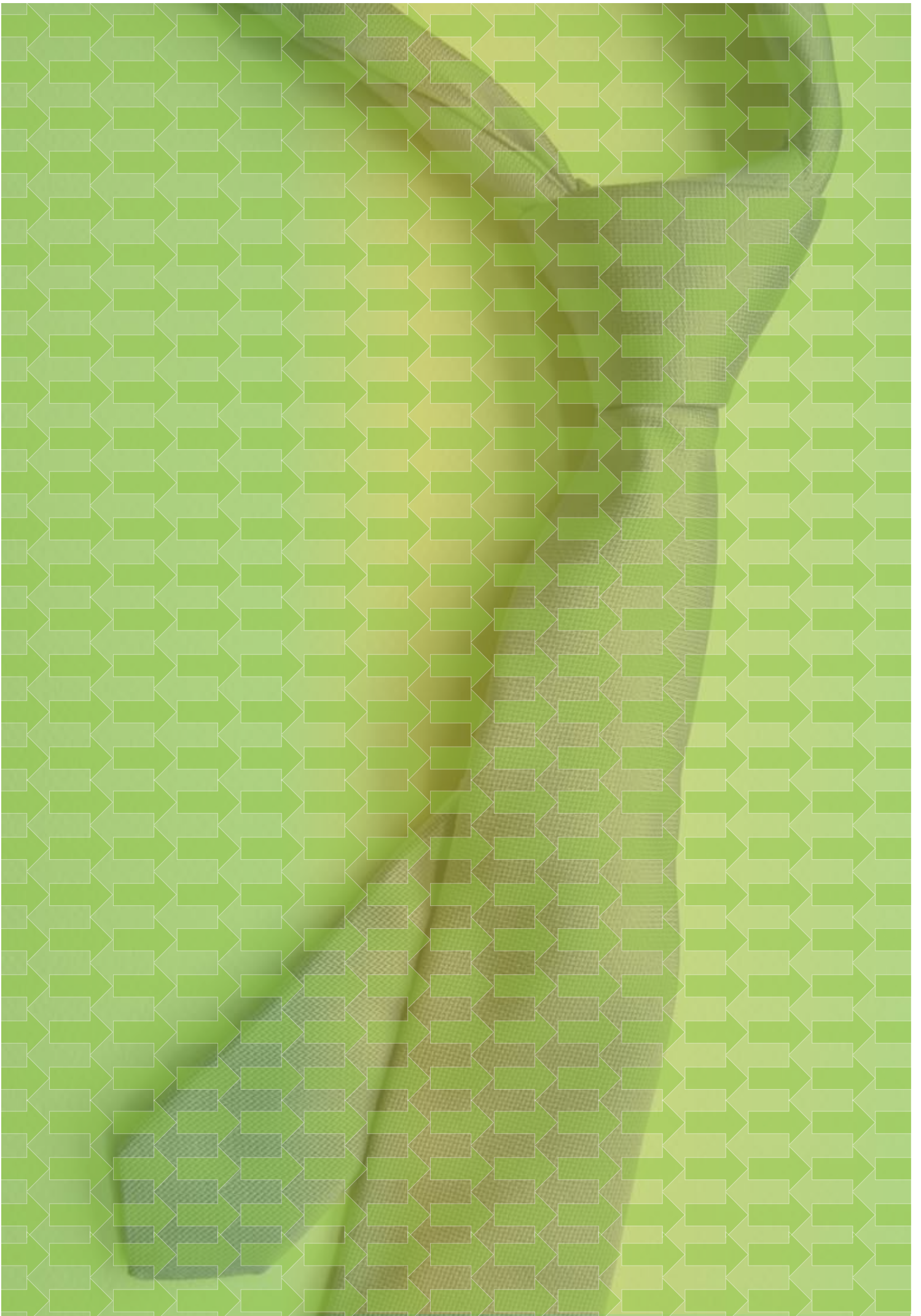
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CHAPTER 4

HOW CARTELS CAN HURT

INTRODUCTION..... 54

INTERNATIONAL CARTELS: HOW THEY OPERATE ..... 55

COMPETITION BLOCKING STRATEGIES..... 58

COMBATING CARTELS ..... 61

THE CHALLENGE OF EXPORT CARTELS ..... 62

TOUGHER LAWS, ENHANCED COOPERATION ..... 63

CONCLUSION ..... 65

# HOW CARTELS CAN HURT

## INTRODUCTION

Measures to address anti-competitive practices and market structures affect the ability of developing country exporters to take part in and benefit from international trade. Chapter 2 discussed the potential to enhance exporters' competitiveness through competition measures in infrastructure sectors needed to produce and market goods and services. Chapter 3 addressed the need to facilitate their participation in trade by countering monopsony power in international distribution systems.

This chapter complements the foregoing analysis by looking at the impact of international cartels on developing country businesses, on how this is already being (partially) addressed, and on how it might be addressed more effectively. Cartels have an impact on the input costs of developing country businesses, and on deterring entry into markets dominated by cartels. Issues concerning export cartels are also addressed.

## DEFINITIONS AND DISTINCTIONS

A cartel is an association of firms that aims to fix prices or limit output in a relevant market for the purpose of extracting additional profits. Cartels may be domestic or international in their scope. A purely domestic cartel fixes prices in the domestic market of the participating firms. Such cartels, like international ones, certainly pose concerns from a developmental point of view, in that they, too, raise costs and reduce the welfare of their customers. As pointed out in the chapter on infrastructure-related issues, cartels operating in the domestic transportation sector increase the costs of business users and can also lead to lower quality service and a lack of innovation. Cartels operating in the local bread-making sector raise the price of a foodstuff that is vital to the welfare of most or all consumers.

Nonetheless, the focus of this chapter is on international cartels – i.e. those that aim to fix prices and/or limit output across multiple national markets. The focus on international cartels reflects two main considerations. First, in general, domestic cartels can be dealt with effectively at the domestic level – i.e. by national competition law enforcement authorities. This is not to deny that grappling with such arrangements poses significant challenges, or that developing countries deserve help in meeting these challenges. However, the investigation and prosecution of domestic cartels is usually less problematic for developing countries than dealing effectively with international price-fixing or market-restricting arrangements that may involve large multinational firms.

Second, while the harm caused by domestic cartels is generally well understood and is rightly a top enforcement priority for competition agencies, the same is not necessarily true of international cartels, particularly in a developing economy context. This is despite the extensive research and the many successful prosecutions that have been carried out in relation to such arrangements, particularly in major developed jurisdictions (Yu 2003; see also European Commission 2001 and United States Department of Justice 1999). Despite an impressive record of successful prosecutions of international cartels in large developed jurisdictions over the past decade, the impact of such arrangements on developing economies, and on export-oriented businesses, is still not being adequately addressed. Their impact should be an important concern in strengthening the competitiveness and export market performance.

A further distinction is between international cartels (which typically fix prices or limit competition in the home markets of the participating firms in addition to overseas markets) and 'export cartels'. The latter focus, at least in principle, on raising prices and extracting additional profits only in the firms' export markets (in order to avoid prosecution in the home market). Export cartels also raise important issues for developing countries, recognized in past international debates on trade and competition policy (e.g. Bhattacharjea 2004 and 2006). However, they involve jurisdictional and other challenges that are, at least to some extent, different from those posed by traditional international cartels. They will, therefore, be dealt with in a separate section of this chapter.

## INTERNATIONAL CARTELS: HOW THEY OPERATE

To understand the operation and implications of international cartels, one must consider the structure of the markets within which they operate. Over the past decades, most countries, including developing countries, have extensively liberalized their trade regimes and have opened up their markets to foreign trade. This market liberalization has occurred with the expectation of increasing welfare through enhanced competition in two ways. Firstly, consumers and users of imported products expect to benefit from lower prices and the enhanced quality and product diversity resulting from international competition. Secondly, export-oriented businesses expect increased sales in new export markets.

International cartels directly undermine both these positive effects in countries that import products exported/sold by the cartel members. First of all, participants in international cartels seek to extract rents through fixing higher than competitive market prices. Very often this substantially raises the prices that developing country businesses pay for the inputs they need to produce and market their goods and services. Secondly, in order to achieve this, cartels often seek to restrict competition from new entrants to the relevant market, including entrants from developing countries. Indeed, trade liberalization makes it necessary for cartels to shield their prices against erosion by imports from international competitors. Levenstein and Suslow (2008) pointed out that, due to the lowering of trade barriers, an increasing number of products are now exposed to international price-fixing. This trend is confirmed by research showing that since 1990 a high number of international cartels have been found to exist in a broad range of sectors (Levenstein and Suslow 2011, Connor and Helmers 2006). Box 33 sets out information on products and sectors in which international cartels have been found to operate.

### Box 33: Some products and sectors subject to international cartels affecting developing country businesses

Acrylic glass	Hydrogen peroxide and perborate	Polyester staple
Aluminium phosphide	Industrial and medical gases	Raw tobacco
Beer	Industrial bags	Rubber chemicals
Bromine	Industrial diamonds	Rubber, chloroprene, nitrile butadiene and synthetic
Cable-stayed bridges	Industrial thread	Sodium erythorbate
Carbon cathode block	Isostatic graphite	Sodium gluconate
Carbonless paper	Laminated plastic tubes	Sorbates
Cartonboard	Lysine	Stainless steel
Cement	Maltol	Steel beams
Citric acid	Marine construction	Steel pipes
Copper fittings	Methionine	Steel tubes
Copper tubes, industrial and plumbing	Methylglucamine	Sugar
Dynamic Access Random Memory	Monochloroacetic acid	Tampico fibre
Explosives	Nucleotides	Thermal fax paper
Ferrosilicon	Organic peroxides	Vitamins
Fine Art	Plastic dinnerware	Wastewater construction
Food flavour enhancers	Parcel tanker shipping	Zinc phosphate
Graphite electrodes	Plasterboard	
	Polyester polyols	

**Source:** Levenstein and Suslow (2004).

From the analysis by Levenstein and Suslow of 81 international cartels convicted of colluding in the United States or the European Union since 1990, it emerged that most international cartels involve intermediate manufactured goods and services, with a strong presence in the chemical sector, especially food additives. Other cartels focus on sectors relevant to industrial manufacturing inputs, such as steel, carbon and graphite products, plastics and paper. Most remarkably, final consumer goods are not found in the sample analyzed, despite the fact that in many countries competition policy has been driven by a perceived need to protect

consumers, rather than businesses. Since most of the sectors identified provide inputs for developing country businesses, it is apparent that cartels are in a strong position to raise the costs of developing country exporters, directly undermining their competitiveness in both export and home markets.

The findings of Levenstein and Suslow were corroborated by those presented by Connor and Helmers (2006), who observed that more than 200 of the 283 international cartels they analyzed occupied various branches of the manufacturing sector, with 38% involved in chemical intermediates and 11% in non-metallic minerals.

## HIGHER PRICES: MARKET DIVISION SCHEMES

But how do cartels achieve higher prices? To raise prices (and thereby profits), cartels limit output to restrict supply and allocate sales to cartel participants through agreed market share quotas and/or the geographical allocation of markets. In the case of international cartels, the bargaining process within the cartel often establishes 'traditional' market divisions, such as geographic or political borders that international trade liberalization seeks to diminish or abolish. Where this is not possible, global volume quotas that seek to lock in market shares are used. However, geographic allocation rules are used much more frequently than production quotas (Levenstein and Suslow 2004). It has also been observed that cartels allocate the largest customers to particular producers. This makes it possible to engage in price discrimination (i.e. the relevant cartel member can offer rebates to the relevant customer) without undermining collusion (because the overall price level remains untouched). As indicated above, output reductions are often a necessary complement to price-fixing in order to maintain the agreed-upon price levels.

Export cartels, in contrast, are often outside the scope of the competition laws of the countries in which they originate, as will be discussed below. They therefore can engage in relatively open forms of cooperation with the aim of fixing export prices and volumes.

Once a cartel is formed, outside competition needs to be excluded from markets in order to avoid competitors selling below the cartel price. On the one hand this means that existing producers need to be prevented from expanding their production, on the other, new entry into the industry needs to be restricted. Cartels can use a variety of measures to achieve these harmful results. These include:

- Buying up competitor firms (reducing competition through consolidation);
- Driving competitors out of the market or weakening the economic viability of their businesses by temporarily engaging in 'price wars', i.e. lowering prices to a level that does not let non-cartel members compete;
- Raising the price of inputs or refusing to supply them in order to prevent downstream competition;
- Misusing legal frameworks, such as anti-dumping laws, or government intervention mechanisms.

Often these measures impact directly on the ability of developing country businesses to enter new markets, or compete effectively once they have entered. The next sections of this chapter examine these effects in greater detail, providing relevant examples.

### Box 34: Some market division schemes of international cartels

- The vitamins cartel used existing market shares to set future global sales quotas.
- The carbon product cartel assigned large customers to specific cartel participants instead of fixing uniform prices for large customers.
- Similarly, in the copper plumbing tubes case, implementation was ensured through a market leader arrangement for European territories and key customers.
- The methylglucamine cartel achieved market sharing exclusively through customer allocation.
- In the lysine case, the cartel cut back output in a coordinated manner in order to maintain the desired price.

**Source:** Levenstein and Suslow (2008).

## IMPACT ON INPUT COSTS

Developing country businesses are affected first of all when they are subject to price increases as importers of goods and services subject to cartelization. But are developing countries really importing such goods and services? Do they need them for their business activities?

Research has shown that this is definitely the case. In the early stages of industrialization, and given a sometimes narrow domestic industrial base, developing countries have to rely extensively on imports of products not available from domestic sources (Jenny 2001 and Anderson and Jenny 2005). Attempts have been made to quantify the imports potentially affected by cartelization and the resulting cartel overcharges paid by developing country importers.

Levenstein and Suslow (2004) were able to analyse 19 products affected by international cartels between 1990 and 1997 based on 4-digit level trade data taken from Robert Feenstra's World Trade Flows 1980-1997 database (see Feenstra 1999). Under the Standard International Trade Classification system, more digits means more precision. Levenstein and Suslow estimated that the total value of potentially 'cartel-affected' imports to developing countries was \$51.1 billion in 1997, representing 3.7% of all imports to developing countries and 0.79% of their combined GDP. If less reliable 3-digit trade data are taken into account, so enlarging the range of products affected by cartels included in the analysis, the total estimated value of potentially affected trade rises to \$114.7 billion, or 8.4% of imports and 1.7% of GDP of developing countries in 1997.

As to the resulting overcharges paid by developing country importers, Connor and Helmers (2006) found that median overcharge rates for globally operating cartels were 29% of sales between 1990 and 2005. In other words, these cartels raised the prices paid by developing country businesses for the relevant products by 29% on average. Again they found that the vast majority of cartels (30 out of the 34 analyzed) dealt with industrial intermediates. Boxes 35, 36 and 37 provide examples.

Most alarmingly, there is evidence that international cartels are more harmful than domestic cartels, as they achieve higher overcharges. Connor and Bolotova (2005) found that international cartels, on average, overcharge by 14.35 percentage points more than domestic cartels. Furthermore, cartels are more likely to engage in cross-border anti-competitive behaviour and reap higher profits when targeting jurisdictions with weak anti-cartel enforcement (Anderson and Jenny 2005; Connor 2004). Therefore, businesses in developing countries with no domestic competition law, or weak enforcement, are 'prime targets' for trans-national, anti-competitive practices.

### Box 35: The global graphite electrodes cartel

Nearly every major worldwide producer of graphite electrodes has pleaded guilty to participating in a 5-year cartel (1992-1997) that fixed prices globally.

It is estimated to have affected \$5 billion-\$7 billion in sales worldwide. As a result of the cartel, prices increased from roughly \$2,000 per metric ton to \$3,200-\$3,500 in various markets.

*Source:* OECD (2000).

### Box 36: The global lysine cartel

The lysine cartel doubled the world price of lysine at its peak of effectiveness. The cartel included five of the world's most significant lysine producers from France, Hungary, Indonesia, Italy, Japan, the Republic of Korea, Mexico, Thailand and the United States.

Over the life of the conspiracy, the cartel raised prices on over \$1.4 billion in global sales, which implies overcharges of an estimated \$140 million.

*Source:* OECD (2000); Connor (2003).

### Box 37: The global vitamins cartel

Large, sophisticated firms fixed prices and allocated market shares for the sale of certain vitamins for a decade. Fines in the United States case against this cartel have exceeded \$1 billion. Since the maximum fine in the United States is twice the illegal profit or twice the harm to victims, this cartel may have produced \$500 million in overcharges in the United States alone.

Furthermore, aggregated overcharges in 90 other countries, including a majority of developing countries, have been estimated to amount to \$2.71 billion. Importantly, Clarke and Evenett found that there was evidence that the cartel inflicted greater harm in economies without active anti-cartel enforcement regimes.

CUTS International has calculated the following estimated losses in six developing countries due to the vitamins cartel:

India: \$25.71 million  
 Pakistan: \$36.82 million  
 Kenya: \$179,000  
 South Africa: \$99.93 million  
 United Republic of Tanzania: \$160,000  
 Zambia: \$60,000

*Source:* OECD (2000), Clarke and Evenett (2003) and CUTS (2003).

These findings confirm that developing countries are likely to import products affected by international cartelization to a significant extent. A large part of these imports are vital inputs to the economic activity of developing country businesses. Overall, it is evident that international cartels have successfully imposed very significant overcharges on developing country businesses and have been a major factor in constraining the economic viability and export competitiveness of such businesses.

### ARE THERE BENEFITS TO CARTELS?

Developing countries may believe that they can benefit in some cases from the existence of an international cartel. In theory, developing country producers that are excluded from the cartel may be able to sell under a cartel price umbrella without being restricted by production quotas set by the cartel. In other words, there is a possibility for a free ride on the cartel agreement.

However, it is unlikely that the above 'price-umbrella' scenario will be the reality that developing country producers face when competing with a successful international cartel. It is of vital interest to the cartel to prevent 'outside' producers from entering markets controlled by the cartel, as competitors could undercut prices and upset production quotas and/or market allocations.

At the same time, developing country producers without pre-established ties with cartel participants cannot generally expect to be readily 'invited' to participate in cartels. For example, shipping cartels have been found to accommodate entry of firms they deemed they could trust due to similar social status, but other entrants more often met a predatory response (Levenstein and Suslow 2008).

### COMPETITION BLOCKING STRATEGIES

For a cartel to remain stable, members create significant barriers to entry for outside producers. As a consequence, developing country producers competing with a cartel can expect to be subject to cartel activity to block or slow their entry and/or economic development and success in lucrative markets at home and abroad (see also Levenstein and Suslow 2004). Box 38 illustrates some of the strategies that international cartels have used to curb outside competition, according to the authors.

### Box 38: International cartel strategies to curb competition

- Citric acid producers tried to curb competition from Chinese suppliers through a concerted and targeted price war.
- Graphite electrode producers were accused of excessively lowering sales' prices in India in order to prevent India's graphite electrode production sector from developing fully.
- There is evidence that both the steel beam and the graphite electrode cartels restricted outside competitors' access to technical information and to manufacturing technology.
- A sorbates cartel used its control over information on the production of sorbic acid to raise prices, thereby also preventing competition in the production of potassium sorbates from producers that relied on purchasing sorbic acid as an input for the potassium sorbate production process.
- Quality standards allowed a pre-insulated pipe cartel to prevent competitors from entering the market with new technology.
- Participants in the organic peroxide cartel agreed to 'swallow' competitors through acquisition of new competitor companies.
- Predatory pricing in combination with subsequent acquisition was also used in the oil sector.
- Members of the carbon cartel refused to supply graphite to a new producer and systematically undercut its prices.
- Allegedly, ferrosilicon producers filed anti-dumping complaints against non-cartel members and succeeded in convincing the United States government to impose anti-dumping duties against five countries.

*Source:* Levenstein and Suslow (2008).

The following examines in greater detail various strategies and tactics that cartels have employed to block competition from non-members of the cartel.

## PRICE WARS

Price wars are one of the tools cartels can use to drive competitors out of business or to make them easy targets for takeovers and acquisitions. Cartel members can temporarily lower prices in relevant markets to such an extent that sales become unprofitable for competitors. While the affected sales may equally be unprofitable for cartel members, they can use overcharges in other geographical markets to make up for any losses. In contrast, non-cartel members with more moderate profit levels are likely to have to give up markets affected by price wars. Businesses in developing countries that strive to compete internationally, despite potentially difficult conditions at home, may be particularly vulnerable to this kind of practice (see also Jenny 2002).

## RESTRICTING ACCESS TO TECHNICAL INFORMATION

Another strategy that can be employed by cartels consists of restricting competitors' access to technical or other information needed to compete successfully. It may be a legitimate business strategy to keep know-how secret and limit out-licensing of patented or otherwise protected technology. But this may become anti-competitive if used in combination with price-fixing and other typical elements of cartel agreements, or if the technology withheld is an 'essential facility' to meet international standards. Whether or not the relevant behaviour results in a violation of competition laws will depend on careful, case-by-case analysis. However, developing country businesses may be particularly dependant on transfer of technology and information-sharing to integrate themselves successfully in export markets. Therefore, they are again particularly vulnerable to barriers created by means of cartel strategies (Levenstein and Suslow 2004).

### Box 39: Barriers to entry from the laminated plastic tubes cartel

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The laminated plastic tubes cartel operated from 1987 to 1996. Barriers to entry in that market are relatively high, as new entrants must acquire expensive laminated tube-making equipment and essential related patented and unpatented technology.

In this environment, the two cartel participants, American National Can (United States) and KMK Maschinen AG (Switzerland) entered into a formal licensing agreement whereby KMK licensed ANC to use its technology and granted it the exclusive right to buy its tube-making equipment. ANC agreed to exit the market for tube-making equipment in the rest of the world, while KMK agreed to exit the North American market.

The cartel, therefore, succeeded in establishing geographical market allocation while keeping competitors out of markets.

*Source:* Levenstein and Suslow (2004).

## MERGERS AND ACQUISITIONS

Cartels cannot enlarge the circle of members indefinitely and need to establish relationships of trust for the cartel to remain stable over time. To achieve this, one of the strategies employed is to consolidate markets through mergers and acquisitions. Cartel members can use overcharge profits to take over emerging competitors, thereby integrating them into their companies. Emerging producers from developing countries may face a heightened risk of being the target of such takeovers. For example, exchange rate fluctuations may help enhance cartel members' 'purchasing power' or predatory pricing methods may be used to make developing country businesses more vulnerable and lower their value.

## TRANSFER OF MARKET POWER

Where cartels control upstream markets, e.g. inputs needed for production, or distribution channels, they can create 'bottlenecks' preventing competitors from accessing ancillary or downstream markets. Competitors may simply be cut off from the supplies or offered inputs at prices that will hurt their competitiveness. Alternatively, distribution channels will be blocked to prevent access to markets. For developing countries, which may have to build up their industries step-by-step rather than immediately integrating the entire supply chain, this may seriously hamper the ability of businesses to grow organically.

## TARIFFS AND ANTI-DUMPING DUTIES

Finally, where trade liberalization is not complete, 'traditional' trade barriers can facilitate cartel activity by preventing competitors from entering markets. Cartels may even attempt to misuse government intervention – intended only to counter unfair competition – to prevent legitimate competition occurring in their home markets. For example, according to some academic writers, cartels have attempted to misuse anti-dumping

### Box 40: Citric acid cartel attempts to misuse anti-dumping laws

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The citric acid cartel operated successfully from 1991 to 1995 and involved major producers from the United States, Germany and Switzerland. United States participants tried to use government intervention to shield the cartel from competition from Chinese importers. They lobbied the United States Government to impose anti-dumping duties of 350% on Chinese imports to avoid the lower prices offered by these producers from taking hold in the domestic market. However, the United States Government dismissed the case as the cartel had been detected in the meantime.

*Source:* Levenstein and Suslow (2004).



laws. If a government is persuaded to levy anti-dumping tariffs against producers in developing countries on the basis of misleading evidence submitted by cartels, this can hamper the ability of particularly competitive sectors to develop and benefit from export markets.

## COMBATING CARTELS

Cartels, especially international ones, are deeply harmful to developing country businesses which take part in international trade. What can be done to address their harmful effects?

### NATIONAL CARTEL LAWS

Competition laws have been implemented and anti-cartel enforcement measures taken mostly or entirely at the national level. This has reduced the adverse effects of cartels in countries having well-established competition regimes. In contrast, countries that lack the legal framework and institutional capacity to adopt and enforce competition laws are more likely to face cross-border, anti-competitive behaviour and suffer from disproportionately higher cartel overcharges.

Therefore, developing country businesses can be expected to benefit significantly if the necessary public investment in competition law enforcement and related institutions is made. For the vitamins cartel, Clarke and Evenett (2003) compared the likely additional overcharges – in the absence of active cartel enforcement regimes – with the cost of running such regimes. They found that in seven out of nine cases, the reduction in overcharges from this one international cartel alone came to more than a quarter of what governments spent on their entire competition policy enforcement regimes (Clarke and Evenett 2003).

The 1998 OECD Recommendation of the Council Concerning Effective Action Against Hard Core Cartels addressed the need to adopt competition laws that effectively halt and deter hard core cartels, as set out in box 41.

#### Box 41: Recommendation to deter hard core cartels

The 1998 OECD Recommendation – Convergence and Effectiveness of Laws Prohibiting Hard Core Cartels states:

1. Member countries should ensure that their competition laws effectively halt and deter hard core cartels. In particular, their laws should provide for:
  - (a) Effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and
  - (b) Enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance.

*Source:* OECD (1998).

Since 1998 a growing number of countries, including many developing countries, have adopted competition laws and taken a first step towards curbing the power of cartels, including international cartels. However, in practice, capacity to investigate international cartels effectively and enforce laws may be lacking in developing countries.

Even though many developing countries prohibit cartels, participating firms have been found to sell their products there extensively. Nevertheless, prosecutions and civil litigation in developing countries have been rare (Levenstein and Suslow 2004). Those international cartels that have been found to exist and prosecuted have predominantly been detected and fined by competition authorities in the developed world, such as the United States and the European Union. Connor and Helmers (2006) reported that cartels in Europe accounted for 22% of the fines imposed, North American cartels for 17% and the rest of the world only about

### Box 42: Challenges in deterring cartels

Developing countries face problems in setting up effective enforcement mechanisms.

The 7-UP Project by CUTS was initiated in order to better understand and analyse the problems of competition regimes in seven developing countries (Kenya, United Republic of Tanzania, Zambia, South Africa, Sri Lanka, Pakistan and India). The project resulted in the following findings:

- Institution building is hampered by budgetary constraints and the difficulty of attracting and retaining competent and qualified staff (especially lawyers) due to low salaries and lack of systematic recruitment and training.
- Enforcement and case handling is rendered difficult by inadequacy or lack of legal clarity in dealing with cases. The lack of research and investigative capacity makes it very difficult for the authorities to deal with cases judiciously.

While the project dates from 2003 and concerned a limited range of jurisdictions, similar problems may exist in other developing countries.

*Source:* CUTS (2003).

5%. Private damages suits in North America extracted at least 43% of the total penalties on international cartels. There is, therefore, a major gap between the degree to which developing countries are affected by international cartels and the number of prosecutions of international cartels in these countries.

### INSUFFICIENT DETERRENT

One could argue that it does not matter where international cartels are prosecuted: effective action taken by developed country competition authorities, leading to a breaking up of the international cartel, will also have beneficial spill-over effects in developing countries. In particular the possibility for foreign companies harmed by international cartels to sue in United States courts, which have the power to award treble damages, can be attractive and constitute a powerful deterrent (see for detailed analysis Schmidt 2006).

There are, however, reasons why developed country action is insufficient to protect the interests of developing country producers. First and foremost, national competition laws generally cover international cartels if, and only to the extent that, they have anti-competitive effects within the relevant country (see, for a discussion of United States law and jurisprudence, Haas 2003 and Schmidt 2006). This means that developing countries cannot rely on developed country anti-cartel enforcement efforts if the cartel does not also harm consumers in the developed country economy.

Even where the risk exists of being prosecuted in developed economies, it may not create a deterrent strong enough to discourage international cartels from engaging in anti-competitive behaviour in developing country markets. This is due to the fact that fines and other sanctions imposed on cartel participants on the basis of national enforcement action are often too low. Due to the fact that international cartels can extract overcharges worldwide, Connor (2007) found that even the maximum United States legal sanctions of eight times the overcharges in the United States are insufficient to deter global cartels, even though they can deter purely domestic ones. Clearly developed country measures against international cartels do not suffice alone to protect developing country producers. In order to complement fines imposed by developed country governments, it is important that developing countries also prosecute international cartels that harm them.

### THE CHALLENGE OF EXPORT CARTELS

Export cartels, which focus on raising prices and extracting additional profits only in export markets (in order to avoid prosecution in the home market), raise important issues for developing countries. They involve jurisdictional and practical challenges that are, to some extent, different from those posed by traditional international cartels.

In many cases, export cartels operate under the umbrella of statutory exemptions in the home countries of the participating firms. The logic of such exemptions is that the conduct involved does not hurt consumers in the home market; consequently, it is not of concern (or, at least, primary concern) to the home country's competition authority. This approach, however, may raise concerns for consumers in the export markets, especially those of developing countries, which may lack the resources or know-how to address the harmful consequences of such conduct, particularly where the firms involved are located abroad.

Jenny and Mehta (2012) summarize the impact of such arrangements and the reasons why they typically avoid prosecution:

“Export cartels have a significant influence on prices in general and on the swing of prices of primary products in particular. Competition authorities in the countries of origin of the export cartels do not act against them because export cartels do not affect the domestic markets of the cartelists.

Competition authorities in the victimised countries do not have powers to act against the export cartels, which they suffer from for a variety of reasons. They may lack extra-territorial jurisdiction (as the litigation in India against the US-based soda ash cartel under the now repealed [Indian] Monopolies and Restrictive Trade Practices Act, 1969, showed); the sovereign compulsion doctrine may prevent them from prosecuting state-sponsored export cartels; they may not have the means to gather the evidence they would need to convict the perpetrators even if they have jurisdiction, or they can be under pressure from their government not to act against them so as not to expose the country to retaliations endangering its own economy and state-supported export cartels.”

While there have been strong calls to eliminate exemptions for export cartels from national competition laws, the debate is on-going and, in practice, has not resulted in a radical policy change to date (see, for discussion, Bhattacharjea 2004, Levenstein and Suslow 2005, Fröberg (undated), Sweeney 2007, and Hoekman and Saggi 2007). As a result, developing countries presently cannot simply ‘outsource’ anti-cartel enforcement in relation to export cartels to developed countries.

Some argue that cooperation among developing country producers may indeed have positive effects on their ability to participate in international trade. However, it should be borne in mind that the empirical literature is largely inconclusive on the overall efficiency benefits of export cartels. Examples of some cartels/other cooperation arrangements show that they have the potential to impact negatively on developing country producers (see Jenny 2012). The potential positive and negative effects of export cartels will therefore have to be weighed carefully depending on the particular circumstances of each case.

## EXPORT CARTELS VS JOINT VENTURES

Another important distinction that should be noted is between true export cartels and joint ventures. True export cartels are concerned only with manipulating prices and outputs to increase profits for the participating firms. They normally do not involve socially useful cooperation between the participating firms, for example in the form of joint research or marketing arrangements. Joint ventures, however, may involve such cooperation and should, in general, be judged under a different standard.

As Fröberg (undated) and Sweeney (2007) pointed out, where true and harmful export cartels occur, they are more likely to be able to extract supracompetitive benefits or overcharges in importing developing countries, as they often face limited domestic competition there. Therefore, the lack of enforcement action against such cartels can be expected to affect developing country businesses disproportionately. As a result, developing countries require adequate means to assess export cartel effects on international markets, and to combat them when and where necessary to enhance export competitiveness. Due to the limitations of national competition laws, international cooperation may hold some of the answers to find adequate solutions.

## TOUGHER LAWS, ENHANCED COOPERATION

International cooperation between competition authorities can help developing countries to enforce national cartel laws effectively by enhancing their ability to detect and investigate international cartels. The 1998 OECD ‘Recommendation of the Council Concerning Effective Action Against Hard Core Cartels’ recognized the

### Box 43: Recommendation on international cooperation to prohibit cartels

The 1998 OECD Recommendation on International Cooperation and Comity in Enforcing Laws Prohibiting Hard Core Cartels states:

1. Member countries have a common interest in preventing hard core cartels and should cooperate with each other in enforcing their laws against such cartels. In this connection, they should seek ways in which cooperation might be improved by positive comity principles applicable to requests that another country remedy anti-competitive conduct that adversely affects both countries, and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries' important interests.
2. Cooperation between or among member countries in dealing with hard core cartels should take into account the following principles:
  - (a) The common interest in preventing hard core cartels generally warrants cooperation to the extent that such cooperation would be consistent with a requested country's laws, regulations, and important interests;
  - (b) To the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, member countries' mutual interest in preventing hard core cartels warrants cooperation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process;
  - (c) A member country may decline to comply with a request for assistance, or limit or condition its cooperation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests or on any other grounds, including its competition authority's resource constraints or the absence of a mutual interest in the investigation or proceeding in question;
  - (d) Member countries should agree to engage in consultations over issues relating to cooperation.

In order to establish a framework for their cooperation in dealing with hard core cartels, member countries are encouraged to consider entering into bilateral or multilateral agreements or other instruments consistent with these principles.
3. Member countries are encouraged to review all obstacles to their effective cooperation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

*Source:* OECD (1998).

common interest countries have in enforcing their laws against such cartels and recommended international cooperation, as set out in box 43. Moreover, the International Competition Network, which brings together competition agencies from a large number of countries, both developed and developing, has played an important role in promoting effective anti-cartel enforcement (see [www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)).

The second and third reports on the implementation of these recommendations observed that since 1998 international cooperation in discovering, investigating, and prosecuting cartels has reached unprecedented levels. New investigative strategies have been used successfully, such as coordinated and simultaneous surprise inspections in several jurisdictions. Confidentiality waivers in cases of simultaneous leniency applications have created more opportunities for multi-jurisdictional cooperation.

More countries than ever cooperate by exchanging know-how and expertise in cartel enforcement, in particular in the field of investigative techniques. The number of bilateral cooperation agreements has substantially increased (OECD 2005).

### SIGNIFICANT LIMITATIONS

Despite the progress made, significant limitations persist in tracking international cartels. For example, there is a lack of coordination of national leniency programmes, i.e. programmes designed to encourage individual

cartel members to ‘defect’ and report the cartel to the authorities in exchange for impunity or reduced fines. This limits the ability of competition authorities to pass on confidential information to their counterparts in other jurisdictions, particularly in the absence of formal cooperation mechanisms (OECD 2002 and OECD 2005). More generally, while strong cooperation mechanisms may exist between countries with already strong enforcement structures, this is much less true in the case of developing country competition authorities. The latter may need assistance but are unable to offer information or investigative capacity in return (Jenny 2002, Lee 2005). Jenny (2002) pointed out in this regard:

“... competition authorities from major developed countries may fear that entering a cooperation agreement with the competition authority of a small or a developing country will merely expose them to numerous requests for assistance whereas they will have little use for the agreement themselves.”

Furthermore, these efforts only relate to international cartels and do not apply to export cartels described above. Therefore, some authors ask what, if any, additional cooperation mechanisms and/or efforts to overcome barriers to policy convergence and potential harmonization of competition law are desirable (see, Bhattacharjea 2006, Sokol 2009 and Anderson 2011).

Jenny (2002) suggests that two major factors call for the development of heightened levels of international cooperation: the rapid globalization of a number of markets, and the proliferation of countries adopting anti-trust laws. The issues arising from these two elements are not adequately addressed by bilateral or regional cooperation agreements. Such pacts are concluded mostly between the authorities of developed countries and prove to be increasingly cumbersome and inadequate to meet fully the challenges of globalization.

Some authorities believe that further international discussions at a multilateral level could open a path to enhanced common understanding and consensus on the substantive issues involved. Such discussions could, for example, consider the need for deeper forms of cooperation, supplemented by the convergence of substantive standards over time, and drawing on work in various fora, such as the OECD and UNCTAD.

With regard to export cartels, there are jurisdictional and practical factors that limit the ability of countries to grapple with their (potentially) harmful effects. In this context, Jenny and Metha (2012) suggest that:

“The time has come for [the WTO] to undertake a serious and dispassionate study of the effects and the appropriate legal regime to regulate export cartels. Such a study would need to distinguish between the export cartels that may actually enhance the export opportunities of small countries, which would not otherwise be able to access export markets, from the export cartels that have no such redeeming values and are limited to rent-seeking and reducing competition rather than enhancing it.”

For developing countries and their business communities, it will be important to have a strong voice in any such discussions in order to shape the future of competition policy at the international level. A possible goal would be a multilateral framework for cooperation on competition that would provide for transparent, fair and effective mechanisms to ensure optimal enforcement of national competition policies while respecting the sovereignty of all participants.

## CONCLUSION

This chapter has discussed international cartels, their effect on developing country businesses and the question of whether or not current policy responses are enough to deal with them appropriately. The main findings can be stated as follows: international cartels employ strategies that can nullify, to a large extent, the benefits that countries expect to enjoy from trade liberalization in the sectors concerned. From a developing country business perspective, these benefits consist of lower prices for needed inputs and new export opportunities through the opening of foreign markets. International cartels directly undermine these benefits by raising developing country producers’ input costs, thereby lowering their competitiveness, and by keeping non-cartel members out of markets.

These negative effects are not negligible. At the same time, enforcement action against international cartels has mostly taken place in developed economies – if and to the extent this was in developed countries’ interest because their markets were affected. Several factors indicate that developing countries cannot and

should not rely exclusively on developed country action to combat anti-competitive practices of concern to their businesses. First of all, interests may not be aligned in all cases, as demonstrated by widespread export cartel exemptions. Even where they are fully aligned, developing countries have an interest in contributing to the deterrence of international cartels by adopting and enforcing competition laws themselves. They are likely to be less affected and subject to lower overcharges, and the additional enforcement action will help discourage international cartels that can reap overcharges globally from engaging in anti-competitive practices.

While national competition laws are the first important step towards effective action against international cartels, international cooperation and coordination is needed in order to counter cartels with global operations and to find appropriate answers to international market distortions caused by export cartels. This need is increasingly recognized and a number of positive developments can be noted. However, enhanced cooperation will be required in order to devise transparent, fair and effective mechanisms that effectively deter the operation of cartels in developing countries while respecting national sovereignty.

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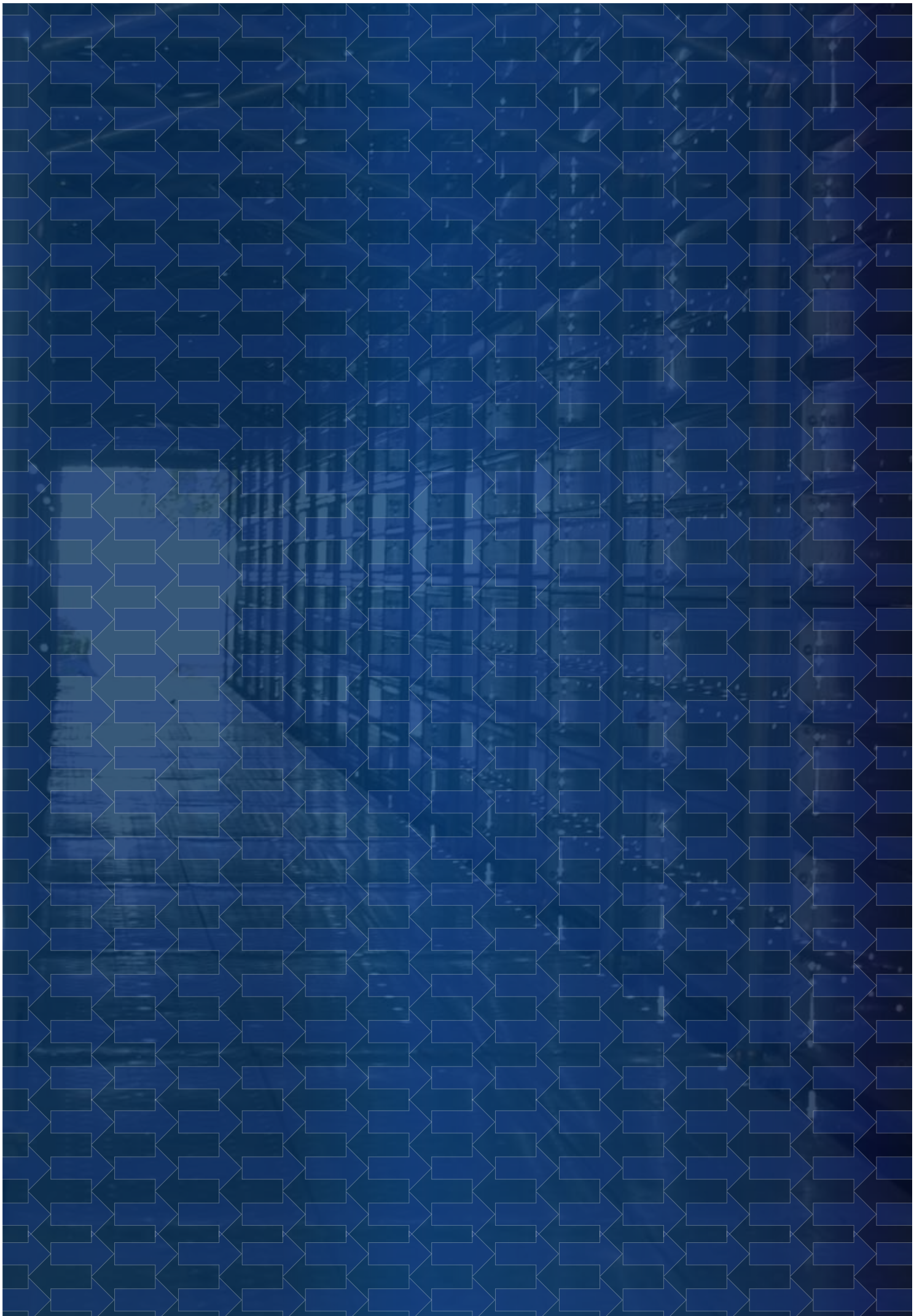
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CHAPTER 5

# CONCLUSIONS

# CONCLUSIONS

This book has explored the ways in which anti-competitive practices and market structures can undermine the prospects and prosperity of developing and transition economy exporters, limiting their access to markets and weakening their productive capacities. Three main categories of anti-competitive practices have been discussed:

- Monopolies and cartels that can take root in vital infrastructure sectors (transportation, telecommunications and energy) on which export-oriented businesses depend;
- Anti-competitive practices and market structures in the international distribution and retail sectors, which may make it more difficult for developing country producers to gain a toehold in lucrative developed country markets;
- International cartels (secret price-fixing arrangements between multinational firms) that raise the input costs of developing country exporters and/or limit the technologies and input goods to which they have access.

The book provides examples of relevant practices, drawing on the work of international organizations such as UNCTAD and the OECD, national competition authorities in developing economies, non-governmental organizations such as CUTS and academic literature. Measures to counter these practices include the adoption and enforcement of effective national competition laws, and fundamental structural reforms, such as separating competitive and non-competitive components of infrastructure sectors, where feasible. The book has also touched upon scope for enhanced international cooperation to address anti-competitive practices.

Insights have emerged from the discussion of case examples and enforcement principles. While aspects of these insights have been highlighted in the individual chapters, it is worth recalling and expanding upon key themes.

## TREATING INFRASTRUCTURE MONOPOLIES

For the treatment of infrastructure monopolies and related issues, three overall lessons have emerged:

- **Approach relevant reforms broadly, as a dimension of national economic policy and not only of competition law enforcement.** Measures to strengthen competition will be an important complement to other reforms (e.g. privatization) aimed at improving performance in public infrastructure services. Successfully implemented, such measures offer substantial potential benefits for users, including (very much) export-oriented businesses.
- **Use technological change and improved understanding of issues concerning industrial structure to enhance competition in infrastructure services.** Measures that foster competition include the separation of potentially competitive segments (e.g. train operation or power generation) from segments that constitute genuine natural monopolies (e.g. railroad track facilities or power transmission lines), together with the introduction of competitive access regimes and related measures.
- **Avoid a uniform or ‘blanket’ approach to the implementation of competition-oriented structural reforms across all sectors and countries.** Evidence and expert opinion counsels a ‘case-by-case’ approach, weighing potential benefits and costs of particular reforms/restructuring measures. With this important caveat, the evidence suggests that competition-enhancing reforms of the types discussed in this book can contribute very importantly to economic dynamism and the success and competitiveness of developing country exporters.

## ADDRESSING BUYER POWER IN INTERNATIONAL DISTRIBUTION SYSTEMS

To address ‘monopsony’ issues (buyer power) in international distribution systems do not take a sweeping approach. Vertical linkages between producers and marketing or distribution services often serve legitimate, efficiency-enhancing purposes. Rather, monitor trends towards consolidation in upstream markets and the proliferation of vertical linkages to ensure that they do not exclude new competitors from developing countries, and that the rent distribution develops in an equitable fashion.

## THE BENEFITS AND LIMITS OF NATIONAL COMPETITION AGENCIES

National competition laws and monitoring carried out by national competition agencies represent an important part of the solution, as shown in the review of cases in the agro-food sector. Yet, these may not be sufficient to address the full range of issues confronted by developing country exporters in these sectors. A crucial underlying consideration is that, typically, national competition laws and related enforcement policies in major developed jurisdictions are, first and foremost, concerned with practices or market structures that impact adversely on the jurisdiction’s own consumers. Where the effect of anti-competitive behaviour manifests itself principally abroad (as in the case of practices or market structures in a developed country that impact adversely on developing country exporters), competition authorities in developed markets may have insufficient cause for action. At the same time, the national competition agencies of the developing country may be unable to influence structures and behaviour in offshore markets. This poses the question of what, if any, additional policy responses are needed to assist developing country exporters to realize the full benefits from international trade as their products move up the global value chain.

## TACKLING CARTELS

A related set of issues surrounds the harm inflicted by international cartels on consumers in developing countries, in particular businesses seeking success in export markets. The numerous examples recounted in chapter 4 make clear that this problem is far from being hypothetical. International cartels have caused and continue to cause significant welfare losses to developing countries, including by raising the input costs of their suppliers and, thereby, undermining their competitiveness. To protect their profits, cartel members often also engage in practices that can thwart entry into lucrative cartel-controlled markets by enterprising developing country-based exporters.

To be sure, developing countries have enjoyed important collateral benefits from the successful prosecution of international cartels by the United States, the European Union and other developed countries. However, there are important reasons why developing countries cannot and should not rely exclusively on developed country enforcement actions. It is clearly in their own interest to develop their own capacity to investigate and prosecute anti-competitive practices.<sup>1</sup>

## INTERNATIONAL COOPERATION

This book has also raised, for debate, the question of whether stronger forms of international cooperation may be needed to address the harm caused by anti-competitive arrangements, such as international cartels. The precise form of such mechanisms continues to be debated and is beyond the scope of this book. As noted in chapter 4, some authorities believe that further discussions at a multilateral level, in an appropriate

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<sup>1</sup> Assistance in developing such capacity is available from a number of international organizations in addition to some national competition authorities.

intergovernmental forum, could open a path to enhanced common understanding and consensus on the substantive issues involved. Such discussions could, for example, consider the need for deeper forms of cooperation in competition law enforcement, supplemented by the convergence of substantive standards over time (see, for related discussion, Anderson and Jenny 2005). On the specific matter of export cartels, Jenny and Mehta (2012) have suggested that ‘the time has come for [the WTO] to undertake a serious and dispassionate study of the effects and the appropriate legal regime to regulate [these arrangements]’. Without endorsing these views, it is fair to say that they merit study and reflection by both developing country policymakers and their business advisors (see, for related background, Bhattacharjea 2004).

## A ROLE FOR BUSINESSES AND THEIR ASSOCIATIONS

A unifying theme of this book has been the need for individual businesses and their relevant associations to inform themselves and partake in debates on the various practices. Businesses and their associations can help competition policymakers and competition authorities bring about a fairer competitive environment in at least three ways:

- At a broad level, they can play a crucial role in building political support for restructuring initiatives and reforms.
- They can provide essential input to the design of such initiatives. This is particularly important, for example, with respect to infrastructure reforms where the appropriate design of relevant measures typically is situation-specific.
- Finally, user businesses and their associations can perform a very important service in referring complaints to the appropriate authorities regarding apparent competition law violations; for example, price fixing by international or national cartels. Equipping user businesses and their associations to do all these things has been a key objective of this book.

To be sure, there is no ‘one cap fits all’ answer for how best to combat anti-competitive practices. This book does not favour such an approach. Rather, authorities contemplating action need to weigh carefully both the potential benefits and the costs of intervention, and to ensure that such interventions serve well-formulated economic rationales. Furthermore, choices and initiatives depend on factors such as the size, level of development and institutional capacity of particular countries. The objective of this book is not to obscure the need for these choices, but to inform the decisions that are taken and to enable export-oriented businesses and other citizens in developing countries to participate meaningfully in the debate.

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