Abuse of Dominance in Developing Economies

A Focus on the Issues in Cambodia, Laos and Vietnam

#0604

CUTS International

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CUTS Centre for Competition, Investment & Economic Regulation
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Introduction

Recently, there has been considerable debate regarding competition law and policy in developing economies; both with respect to (i) the importance of competition law in the light of other legal, social, and economic issues and (ii) the implementability of such a law and policy in the developing country context. One author, for example, while examining the desirability of Cambodia, a small developing country in Southeast Asia, adopting a competition law, has written, "One has to create functioning private markets before being overly concerned about their domination and abuse". (Hammer, 2003, p.8)

While the difficulty in demonstrating a direct evidentiary link between competition law and economic development has been noted, a consensus has arisen among various circles that measures to promote competition, such as appropriate competition law and policy, is an essential ingredient in maintaining and developing competitiveness in an economy and economic growth.[1] Classic economic theory holds that competition creates incentives for firms to reduce costs and innovate while simultaneously leading to lower prices and wider selection of goods for consumers. In addition, the enactment of a competition law may be necessary for the economic self-defence of developing economies against anti-competitive conduct of foreign-based firms, and their local subsidiaries.[2] As mentioned by Cernat and Holmes (2004, p.1-2), having a well-designed competition law may be beneficial to developing economies in many aspects:

"The gains from competition are thus not simply that prices will be kept as low as possible for consumers, important as that is in developing countries; they also include the creation of opportunities for new firms, including small businesses, to enter markets and to grow, and the pressure on existing firms to innovate…. However, the potential benefits of a shift towards a more market-oriented economy will not be realised unless […] firms are prevented from imposing restrictions on competition".

It is in recognition of such benefits that, in the past few decades till now, there has been a great proliferation of competition policy and law among the transitional and developing economies the world over. However, the implementation records remain very poor with the substantive laws and the young competition authorities of these newcomers being quite ill-equipped to deal with the increasing complexity of firm behaviours and market realities. One such area where antitrust enforcement has been very weak in developing economies is the handling of 'abuse of dominance' cases, or in other words, monopolisation.

Provisions dealing with abuses of dominant positions (or in another word, monopolisation) constitute a common feature in the competition laws of many jurisdictions. While it can sometimes be difficult to establish whether a firm[3] (or group of firms in the case of joint abuse) is dominant, let alone whether impugned conduct is anti-competitive in nature or effect, the importance of regulating the activities of dominant firms and protecting economies from their attempts to gain or preserve market power through inappropriate means is generally not disputed. As suggested by the authors cited above, regulating this conduct in developing economies may be particularly important in developing economies.

This paper supports the proposition that developing economies should adopt and implement competition laws and, in particular, should regulate abuse of dominance effectively. It will provide a general overview of issues relating to abuses of dominant positions with an emphasis on issues arising in developing economies. It will also review specific issues related to Cambodia, Laos, and Vietnam, three small developing countries situated on the Indochina peninsula in Southeast Asia, and identify some guidelines that may assist developing economies in implementing their competition regimes and controlling abuse of market power. Throughout this paper, specific examples will be drawn from Cambodia, Laos, and Vietnam.

Overview of Abuse of Dominant Positions

In general, the first step in analysing whether given conduct constitutes an abuse of dominance is to establish whether the firm[4] engaging in the conduct is dominant, *i.e.* whether it possesses market power.

There are various definitions of what constitutes dominance or market power. One view is that it refers to the ability of a firm to maintain anti-competitive effects such as the ability to effectively exclude competitors. Another view considers market power as the ability of a firm to act independently of its competitors (often demonstrated by the ability to maintain prices above a competitive level). However, regardless of how market power is defined, the determination of whether a firm holds a dominant position typically requires reference to a defined relevant market within which the impugned conduct has occurred. Some competition laws also address efforts to gain or exercise market power, for example through leveraging, in one market by firms who are dominant in another market.[5] However, this does not alleviate the need to define the allegedly dominant firm's market power in relation to a distinct, relevant market.

Relevant Market Definition

A relevant market has both product and geographic dimensions. These are generally defined or identified in relation to substitutability of the goods or services offered by the allegedly dominant firm within a defined geographic territory. In other words, it is an exercise to check whether competitive alternatives exist, which would prevent a firm from possessing or exercising market power. The analytical test, often used to determine the scope of the product and geographic markets, is the identification of the options available in response to a small but significant non-transitory increase in price (the 'SSNIP' or hypothetical monopolist test). This test is applied by considering whether a hypothetical monopolist providing the relevant product or service

Box 1: Illustration of the SSNIP Test

In a simple example, one might attempt to determine if Oranges are in the same product market as Apples. One begins by assuming that a hypothetical monopolist existed who controlled Apple sales. The SSNIP test essentially asks what consumers would do if the monopolist attempted to impose a price increase of approximately 5-10 percent.

In this scenario, one looks to see if this Apple price increase leads to any changes in the consumption patterns of both the fruits. If, in response to the price increase, the consumers switch a sufficient volume of Apple purchases to Oranges, so as to make the increase unprofitable for the monopolist, then Oranges would be considered to be within the same product market as Apples. A similar analysis is conducted with respect to geographic markets.

A product or geographic market is defined by the smallest range of products or geographic areas in which the hypothetical monopolist could profitably impose the price increase.

would be able to profitably implement a price increase of five to ten percent. The relevant market is then defined as the smallest set of products or geographic area in which the increase could be profitably implemented. It is important to realise that the SSNIP test is not a precise econometric tool, but a conceptual framework within which to detect evidence of competition. Given concerns with available data, particularly in abuse of dominance investigations, it should be purposively and flexibly applied.

The Cellophane Fallacy

The application of the SSNIP test is complicated where market power has already been exercised by a dominant firm, or, where other anti-competitive distortions have already occurred. These distortions lead to what is commonly referred to as the Cellophane Fallacy,[6] since the supra-competitive price levels caused by the distortion increase the range of products, which are considered substitutable. The difficulty is that these additional products do not actually discipline the hypothetical monopolist, as they would generally not be considered substitutes if the prevailing price was the competitive market price. Instead, it is the pre-existing supra-competitive price that leads consumers to consider the other products as competitive alternatives.

A similar effect can be observed with respect to increased geographic areas in which competition may be observed at the pre-existing supra-competitive price

Box 2: Illustration of the Cellophane Fallacy

An underlying assumption in the application of the SSNIP test is that the price of the product being considered prior to the assumed increase was the competitive market price. The Cellophane Fallacy occurs when that assumption proves not to be true, such as when the price already reflects that a dominant firm has already exploited its market power to increase prices above competitive market levels.

In our hypothetical example, consumers might turn to Oranges in response to an attempted price increase by a hypothetical Apple monopolist. But Peaches, due to their higher price, may not normally be considered a viable substitute. However, if the price of Apples was already supra-competitive, consumers might consider Peaches as a realistic alternative in the face of an additional Apple price increase.

In this situation, the SSNIP test would indicate that Peaches discipline any further price increase and should be included in the relevant product market. Since, Peaches would not provide such discipline if Apples were selling at the competitive market price, this would result in an over-inclusively defined product market.

levels. In either case, where market power has already been exercised, the SSNIP test can lead to relevant markets being defined in an over-inclusive manner. Alternatively, the Cellophane Fallacy may prevent regulators from discerning between different plausible market definitions, as it may not be possible to properly validate them against available market data.

One means of addressing this problem is to determine what the competitive price levels would be in the absence of the initial exercise of market power and utilise that price information when conducting a SSNIP analysis. This exercise, however, can be highly speculative, without detailed historical market data or comparative data from substantially similar markets where competitive distortions have not occurred. Where such market data is not available, relevant markets may be defined, and the Cellophane Fallacy potentially addressed; by reliance to a greater degree on other indices of market definition such as physical properties, end uses, trade views, switching costs and behaviours, transportation costs, etc. Given the likelihood that the market data available in developing economies may not be sufficient for the application of the SSNIP test, these other indices may take on greater relevancy in investigations of potential abuses of dominant positions in these economies.

Establishing Dominance

Once the relevant market has been defined, it can still be quite difficult to establish whether a firm is dominant. High market share is generally considered a necessity, but not a sufficient condition to establish market power. Besides, as debate exists on what metric best reflects potential market power, even the measurement of market share is subject to controversy. For example, market share can be measured by current sales, historic sales or even capacity. Current sales may not provide a meaningful reflection of market share or influence, where a product's sales are very low or fluctuate significantly over time. Similarly, measuring market share by capacity can be complicated by factors such as capacity that is subject to long term contracts, capacity of vertically integrated competitors or capacity currently being utilised for sales outside of the market.

Some jurisdictions have established *de facto* or *de jure* benchmark market shares above or below which market power is presumed to exist or not exist.[7] Yet, it is not clear that there is an economic justification for pre-determining the existence of market power at any given market share. Alternatively, administrative efficiency concerns sometimes justify market share 'safe harbours' below which market power is deemed not to exist.

Important factors that must be considered in establishing market dominance other than market share include:

- Number and market shares of competitors;
- Nature of the relevant product;
- Countervailing power of other market participants;
- Market characteristics such as regulatory environment, rate of technical change, existence of potential or poised competitors; and, perhaps most importantly,
- Barriers to entry and expansion.

In markets with low barriers to entry and expansion, any attempt by a firm (even an apparent monopolist) to exercise market power will theoretically be disciplined by the entry of potential competitors, or expansion of existing competitors in response to the increased price levels. This entry or expansion presumptively draws sufficient customers from the firm attempting to exercise market power to make the price increase unprofitable. Frequently observed barriers to entry and expansion include the nature of the product, market characteristics such as access to distribution networks, regulatory, and statutory barriers, sunk costs, and strategic behaviour of incumbent firms.

Direct Evidence of Market Power

The factors discussed above are considered 'indirect evidence' of market power, in that they represent circumstantial evidence of a firm's ability to exercise market power. This is in contrast to situations where the existence of supra-competitive price or profit levels or other alleged market abuses is held out as 'direct evidence' of market power. In some cases, private litigators or regulators alleging an abuse of dominant position may consider elements of the analytical framework described in the preceding paragraphs, such as defining the relevant market – an unnecessary rumination where 'direct evidence' of the exercise of market power is alleged to exist. This reliance on 'direct evidence' has been observed in jurisdictions such as Canada[8] and the US.[9]

However, great care should be taken before adopting this approach. One problem is how to determine what price or profit level should be considered 'supra-competitive'. For example, high profits may not reflect possession or abuse of market power, but may simply reflect a given market's reasonable return on investment, or, if firm-specific, may reflect greater efficiency, a competitive edge, or a particularly effective sales promotion.[10] NERA (2001, p.20) expresses concern in relation to eliminating identification of the relevant market from consideration of alleged abuses of dominance as follows:

> "Without any coherent framework in which to conduct the analysis, there is a real danger that the analysis could degenerate to the level of 'I know abuse when I see it' in which there are no identifiable benchmarks against which to discriminate between 'competitive behaviour' and 'anti-competitive behaviour'".

Addressing Abuse of Dominance

Being dominant is not, by itself, anti-competitive and may simply result from a firm being the most efficient competitor in a market. Care, therefore, must be taken to avoid punishing firms merely for possessing high market shares or even dominant market positions. Instead, competition regimes should more properly focus on the conduct of dominant firms, which is abusive of the competitive process (*e.g.* conduct which improperly maintains a firm's market power), or illegal.

Conduct may be identified as abusive through specifically enumerated lists of deemed abusive conduct or may be determined to be abusive based on an analysis of its effects. For example, conduct, which is predatory, exclusionary or disciplinary may be found to be abusive due to its interference with the competitive process. Such conduct may include refusals to deal, raising rivals' costs, vertical restraints and predatory pricing. CIEM (forthcoming), for example, mentioned an example of such conduct in Vietnam. In 1998, the local producers of Coca-Cola and Pepsi in Vietnam controlled approximately 70-80 percent of the relevant beverage market. These producers drove all competing producers out of business with substantial price reductions. Once all competitors had been eliminated, prices were increased substantially – in one case to over 150 percent.

It is also important to consider the goals and objectives of the competition law in question, when determining what conduct should be defined as abusive. For example, if an objective of the law is efficiency, then welfare-reducing actions might be considered abusive. If an objective is promoting fair trade, then taking advantage of a better bargaining position may be considered abusive. (Van Siclen, 1996, p.9)

Box 3: Learning How to Compete Fairly in the Mobile Telecommunications Sector

New competitors providing mobile telephone services in Cambodia and Vietnam faced exclusionary conduct by large incumbent providers. The incumbent service providers met the competitive threat of the new service providers by refusing to allow their customers to send SMS messages to numbers provided by these competitors, or between various mobile phone networks used by the new competitors.

The incumbent service providers in Vietnam argued that this was due to technical difficulties, but these do not appear to have been insurmountable. By taking this action, the incumbents reduced the network value of the competitors' products to potential subscribers. In order to handle such situations, a competition law should clearly establish that refusals to deal are not a valid means of competition for dominant enterprises and might therefore force dominant incumbent firms, such as these mobile service providers, to find other means of competing.

Source: EIC (forthcoming) & CIEM (forthcoming)

The means, by which a competition regime analyses alleged abuses, may also vary according to its underlying purposes and available resources. However, as stated by Winslow (2004,p.13), "there are no simple 'rules of thumb', applicable under all circumstances, that state that a particular action is always anti-competitive or never anti-competitive". A number of factors can complicate an investigation into the competitive implications of an allegedly abusive conduct. One such potential complication arises when a dominant firm's allegedly abusive conduct has multiple purposes and effects – some of which may be competitively neutral or even promote the goals of the competition regime, for instance, increasing efficiency. Another complication that may in all likelihood arise in developing economies is that a significant portion of the available evidence may be anecdotal. Further, the sources of this evidence are likely to have vested interests in the investigation. This suggests that, despite its greater analytical requirements, a 'rule of reason' analysis of alleged abuses of dominance may be preferable to a '*per se*' approach that does not balance pro-competitive and anti-competitive factors.

Finally, one must consider potential remedies in situations where an abuse of dominance has been demonstrated. A preliminary matter is the purpose of the remedy being imposed. If compensation of victims of abusive conduct is desired, the remedy may involve private litigation. Alternatively, if the primary concern is to ensure the dominant firm does not profit from its behaviour, some form of disgorgement or other financial penalty may be required. Another potential remedial goal may be to eliminate the anti-competitive effects of the abusive conduct; in this case, behavioural or structural remedies may be appropriate including voiding contractual terms, changes to regulatory environments, prohibition orders, mandatory licensing, and other forms of mandatory orders or even 'de-mergers'.

Issues of Particular Concern in Developing Economies

A number of issues can be identified which, while not necessarily unique to developing economies, may be more likely to arise or have greater impact with respect to abuses of dominant positions in developing economies. For example, a lack of detailed market information (including information relating to activities that may occur in the informal economy) may cause significant difficulties in establishing whether a large firm is dominant as well as in determining the economic effects of its conduct. This concern has been raised in many sectors of the economies of Cambodia, Laos and Vietnam.

Even where sufficient market data exist, prevailing market distortions, such as pre-existing abuses by dominant firms or cartels, may have already raised prices above competitive levels increasing the likelihood of Cellophane Fallacy issues. Additionally, rapid changes in regulatory environments or technology may result in existing market share information not reflecting even potential market power. This is more likely to arise in developing economies, as trade liberalisation and foreign investment are often being emphasised and existing production and distribution technologies and processes are more inclined to be below international standards.

Other factors that may complicate abuse of dominance analysis in developing economies include:

- The presence of large state-owned enterprises (SOEs), some of which may both regulate a market and compete in that market or in related markets;
- Creation of private monopolies through divestitures of SOEs and granting of concession, coupled with the lack of public policy safeguards on the conduct of these monopolists;
- General business culture that may not value fair market competition;
- Restrictions on markets created by local or national regulation, concessions and licensing policies;

- Lack of market information restricting effective availability of competitive alternatives;
- Underdeveloped or small-sized markets unable to support multiple efficient competitors; and
- Government practices that may discourage fair competition, such as informal taxation and other informal barriers to entry.

Box 4: Exclusionary Tactics of Dominant Beer Producers in Vietnam

Tran Qui Thanh, an executive of the Tan Hiep Phat Corp., appealed to relevant state agencies and government officials. He argued that Laser beer, his firm's new product, had been denied access to retail shops, distribution agencies and bars, etc. due to pressure from foreign beer brand-holders who were dominating beer sales in Vietnam. Thanh quoted beer brands like Tiger, Heineken, and Bivina as direct rivals of Laser.

Owners of retail shops, distribution agencies and bars said they 'dared not' sell or distribute Laser beer, or even have Laser advertisement boards hang at their places. The dominant beer producing firms reportedly forced distribution agencies, retail shops and bars to sign contracts, which included an exclusivity term preventing these sellers and distributors from selling, exhibiting, introducing, marketing, or even allowing marketing staff of any other beer brands, on their business sites.

The seeming consequence to the incumbent dominant competitors' joint exclusionary practice was that no restaurants or bar dared to sell Laser beer. This strategy enabled these beer brands to effectively prevent Laser's promotional campaigns anywhere in Vietnam, from metropolitan cities to provincial areas. While the contracts may have constituted a joint abuse of dominant position, Vietnam's competition law was not in force when one of these contracts was judicially reviewed.

Source: CIEM (forthcoming)

Competition policy may appear to conflict with other economic strategies of developing countries, such as the development of local resources or competitors or encouragement of trade or foreign direct investment. This can lead to a lack of government focus on promoting fair competition including preventing abuses of dominant positions. As discussed, this conflict is more apparent than real and can easily be addressed, but until a reasonable competition regime is implemented in a developing economy, this lack of regulatory focus may increase the likelihood of anti-competitive behaviour occurring.

In addition, unless the appearance of conflict between competition policy and other strategies is resolved, this apparent conflict may increase the likelihood of government intervention in any attempt to detect or remedy an attempted abuse of a dominant position. Relatively weak institutional infrastructures, powerful lobbying efforts by entrenched business interests and the potential, in some cases, of improper influence on decision makers may further complicate efforts to enforce a neutral and economically sound approach to controlling abuses of dominant behaviour. Cernat (2004, p.13), for example, note that in the case of Thailand, *de facto* and *de jure* exemptions from competition law without sound economic justification proved to be costly to the economy when effective regulatory regimes were not yet in place.

Ground Realities in Cambodia, Laos and Vietnam

This section examines the ground realities in each of the CLV countries, which may affect the likelihood of concerns arising *vis-à-vis* abuse of dominant positions. Further, certain relevant elements of the enacted or draft competition laws will be reviewed, in order to get a general overview of how each country is addressing this issue.

Lao PDR

Lao's current economic status reflects its slow transition from a centrally planned economy led by SOEs. While agricultural production represents almost half of Laos' GDP, with a large percentage reflecting family and subsistence farming, industry and trade have experienced significant growth since the implementation of the New Economic Mechanism – a reform programme started in 1986 by the government. In this transitional period, a number of factors and issues can be observed that may increase the likelihood of abuse of dominance concerns and lead to difficulty in addressing these concerns. Some of these include:

- small domestic markets and domestic production base leading to significant dependence on imports, of which a significant portion is informal;
- vast majority of businesses are SMEs;
- significant intervention by public officials with domestic and international trade;
- significant economic participation by SOEs with some exercising *de facto* or *de jure* monopoly or monopsony power or regulatory powers;
- poor infrastructure leading to fragmented internal markets and higher costs of distribution;
- very high concentration in the service sectors;
- lack of significant and accurate information related to markets, trade and competitors; and

- substantial concerns expressed with private anti-competitive practices in the private and informal sectors and by SOEs. (More information can be seen at NERI, forthcoming)

With respect to its legal regime, certain relevant provisions of the Prime Minister's Decree on Trade Competition No. 15/PMO Vientiane, dated 04/02/2004, Lao's latest piece of legislation regulating competition issues in the country, are provided below.

Box 5: The Lao Decree on Trade Competition

Article 2 Definitions

- 'Market dominance' means sales volume or market share of any goods or services of one or more business entities is above that prescribed by the Trade Competition Commission;
- 'Monopoly' means the dominance of the market individually or in collusion with other businesses;

Articles 6 Rights and Duties of the Commission

- Monitor and control business activities and order any business entity to solve, change, suspend or stop its behaviour that is unfair;
- Determine market share, and the total volume amount of a business which is found to be dominating the market;

Article 7 Promoting a Fair Trade Competition

The Government of the Lao PDR encourages business entities of all economic sectors to undertake businesses under competitive conditions with equality, fairness, and co-operation.

Article 8 Anti-monopoly

It is prohibited for a business person to perform any Act stipulated in Articles 9, 10, 11, and 12 of this Decree so as to monopolise any market of goods and services

While the Decree is an important step in promoting fair market competition in Lao, it raises significant issues and concerns. A preliminary issue is the political independence and neutrality of the Trade Competition Commission (TCC). One possible problem in this regard is that, the Minister of Trade is both Chairman of the Commission and appoints its members. Further, the Commission appears to be able to implement further regulations to enforce the Decree under its own power. Finally, the Commission is empowered to grant exemptions from Articles 8 through 12 for specific sectors or businesses for socio-economic or security reasons. The Decree provides no further guidance on the exercise of these powers or any review process for Commission decisions, regulations or appointments.

The Decree addresses abuse of dominant positions by focusing on anti-monopolisation. Given the present lack of accurate and available market data, this may be an efficient option for the competition regime; but its implementation raises additional concerns. For example, the definition of monopoly is related to dominance of a market. Article 2 defines dominance in accordance to trade volume or market share benchmarks prescribed by the Commission. Article 6 sets out the Commission's duty to determine these benchmarks, but it is not clear whether this is to be done on an individual market basis or whether the benchmarks are meant to be generally applicable across all sectors of the economy. Further, the Decree does not clarify how the Commission is to determine these benchmarks. For example, it is not clear whether other elements of market power analysis, such as evidence of high barriers to entry, are to be considered by the Commission.

The conduct prohibited under Article 8 includes certain mergers, elimination of other firms, collusions and arrangements involving unfair trade practices and cartels with foreign businesses. However, Article 8 states that the conduct referred to will be prohibited, only if it is performed "so as to monopolise". Given that monopolisation refers to specific share or volume benchmarks, it is not clear how this is to be applied. For example, does the Decree only apply if the purpose of the conduct is to monopolise, or does it create a *per se* effects standard.

In summary, the Decree may require additional clarification, and possibly, amendment, if it is to efficiently regulate abuses of dominant positions in Lao. One important point that should be clarified is whether Article 15, which penalises state officials and authorities for breaches of the Decree is meant to bring SOEs under the same regulatory framework as private firms, and how this might impact on potential regulatory conduct defences (to the extent that such defences will be permitted). Other issues that should be considered include:

- appeals from Commission decisions;
- separation of the investigative and judicial roles of the Commission;
- potential issues arising from the regulatory powers of the Commission;
- lack of guidance within the Decree regarding regular review of the legislation and enforcement regime; and,

- ensuring that decisions of the Commission are neutral, fair and based on economic analysis.

Cambodia

Cambodia's current economic status also reflects its slow transition from a centrally planned economy led by state-owned enterprises. While agricultural production represents a significant part of Cambodia's GDP, industrial production has been slowly increasing, while the service sector has remained relatively stable over the last few years.

While the transition to a market economy nominally began in the 1980's, the country's civil war in the subsequent period and the economic and social devastation left by the Khmer Rouge regime made significant economic development challenging, at best. However, it has been noted that Cambodia's investment policy, which largely treats domestic and foreign investors equally, has encouraged foreign investment and helped to promote market competition. A number of factors and issues can be observed in Cambodia that may increase the likelihood of abuses of dominance and may lead to difficulty in addressing this particular competition concern. Some of these include:

- small domestic markets, domestic production base and low level of investments leading to significant dependence on imports;
- vast majority of businesses are SMEs;
- considerable informal imports and trade as well as a significant portion of the domestic economy being conducted informally;
- significant intervention by public officials with domestic and international trade; corruption has been noted as a significant issue in Cambodia with implications on investments and domestic markets;
- poor infrastructure leading to fragmented internal markets, higher costs of distribution and facilitating market distortions at the provincial level;
- lack of significant and accurate information related to markets, trade and competitors in part due to the significant number of firms operating outside the formal economy; and
- large portion of domestic industrial production is focused in the garment trade which is subject to international quotas and competition. (More information can be obtained from EIC, forthcoming)

In realising the country's commitment in its accession to the WTO, a concept Sub-decree on Trade Competition is being recommended[11] in Cambodia.

The objective set by this concept bill is to "encourage fair and free economic competition by regulating the abuse of business operators with influence over markets, improper concerted acts and unfair business practices, both domestic and international, thereby stimulating creative business activities and protecting consumers".

Box 6: Cambodia's Concept Bill on Trade Competition

Section 3

The purpose of this Sub-decree is to encourage fair and free economic competition by regulating the abuse of business operator with influence over market, improper concerted acts and unfair business practices, domestic and international, thereby stimulating creative business activities and protecting consumers.

Section 5

'Business operator with influence over market' means one or several business operators in any market of goods or services whose market share and total sales exceeding that fixed by the Trade Competition Committee with the approval of the Council of Ministers and published in the Official Notice. However, consideration on the condition of market competition shall also be taken into account.

Section 6

There shall be established a Trade Competition Committee comprising a Minister of Commerce as Chairman, Secretary of State, Ministry of Commerce as Deputy Chairman, and qualified persons who have knowledge and experience in Sub-decree, economic, commerce, business, or administration of a number not less than eight but not more than twelve as appointed by the Council of Ministers, as committee members.

Section 10

No business operator who has an influence over the market shall engage in any of the following:

- unreasonably fix, maintain, or alter the price of a good or service fees;
- unreasonably control the sale of goods or the rendering of services;
- unreasonably interfere in the activities of other business operators or in the entry of new competitors; and
- unreasonably compel, either directly or indirectly, other business operators who are his won customer to limit the sale or the purchase of goods, the rendering of services, or to restrict their opportunity in buying or selling goods, acquiring or rendering services.

The concept bill raises issues regarding the independence and neutrality of the Trade Commission Committee, both with respect to its membership as well as its powers and responsibilities. Its Section 16 leaves responsibility with the Committee to prescribe the basis and process for appeals from orders against firms who violate Section 10. This leaves the practical implications of the appeal process unclear.

Dealing with the abuse of dominance issues, Section 5 defines a 'business operator with influence over market' with respect to market share or sales volume thresholds established by the Committee. While it is not clear how these thresholds are to be determined, Section 5 indicates that the benchmark is to be approved by the Council of Ministers and published in the Official Notice, which may add some transparency to the process. Given the lack of available market data and expertise, explicit dominance benchmarks may be necessary at this stage in the development of the competition regime; however, it is worth noting that Section 5 also states that the actual state of competition on the market is to be considered.

Section 10 contains a prohibition against dominant firms engaging in what appears to be an exhaustive list of conduct. While some guidance will be required on what is 'unreasonable' within the context of Section 10, in broad terms, the prohibited conduct includes interfering in prices, interfering with availability of goods, with other firms (although it is not clear whether this term is to be interpreted only with respect to the relevant market), with the entry of new competitors and other means of directly interfering in a market. Section 10 also addresses the problem of dominant firms compelling customers to act in a manner that distorts the market. This conduct is defined broadly such that this section likely captures many, if not most, forms of potentially abusive conduct, but it may be useful to re-examine this provision after Cambodia gains more experience with its competition regime.

Another potential problem is the broad exemption granted to exercises of intellectual property rights under Section 15. While the interface of competition law and intellectual property can be quite complex, a blanket exemption may permit dominant firms, as well as other firms who might otherwise be considered to act in violation of the competition law, from easily structuring agreements and conduct to avoid the jurisdiction of the competition authority. For example, how would the proposed competition regime address a dominant firm granting IP licenses that contain what might be considered abusive terms (*e.g.* using licenses related to one market as a means of gaining dominance in a related market).[12]

In summary, while the concept bill of Cambodia appears to address some of the concerns identified above with respect to the Laotian Decree on Trade Competition, it may be worthwhile to re-examine, clarify, and re-draft some of the proposed provisions prior to any consequent consideration.

Vietnam

While Vietnam is still a relatively poor nation, its economy has experienced significant growth over the last 15 years. During this period, there has been significant growth in international trade and foreign investment. While the economy still retains significant central planning, there has been a transition to more competitive markets in some respects.

Developing Vietnam into a modern and internationally competitive economy is a priority of its government and is reflected in current economic plans. A number of factors and issues can be observed in Vietnam that may increase the likelihood of abusive conduct and lead to difficulty in addressing this type of behaviour. Some of these include:

- significant reliance on SOEs who receive preferential treatment in many respects despite the relative inefficiency of this sector;
- SOEs' persistent dominance in many key sectors, though efforts are underway to privatise and equitise many SOEs, which will remove any existing public policy safeguards on their behaviour;
- relatively small domestic markets and domestic production base;
- significant levels of foreign investment and trade;
- lack of domestic skills and resources to support local businesses;
- vast majority of businesses are SMEs;
- restrictions on many imports protecting certain domestic industries; and
- inconsistent market data. (More information can be obtained from CIEM, forthcoming)

Passed in December 2004 by the National Assembly of Vietnam, the Competition Law of Vietnam is a result of a four-year long drafting process, with reference to the statutes of nine nation-states and territories, and the model laws promoted by international institutions like UNCTAD and the World Bank – as well as enforcement practices and experiences of other countries. It has been effective from July 1, 2005 onwards.

The Law applies to all business enterprises and professional and trade associations in Vietnam; overseas enterprises and associations registered in Vietnam; public utilities and state monopoly enterprises; and State administrative bodies. It has supremacy over all other enacted laws of Vietnam regarding restrictive business practice and unfair trade practices.

The Law provides for the establishment of two State authorities within the Ministry of Trade of Vietnam, the Competition Administration Department (with investigative powers) and the Competition Council (with adjudicative power), which is charged with the implementation.

Box 7: Vietnam Competition Law 2004 and its Provisions on Abuse of Dominance

***Article* 3**

3. Competition restriction acts mean acts performed by enterprises to reduce, distort and prevent competition on the market, including acts of competition restriction agreement, abusing the dominant position on the market, abusing the monopoly position and economic concentration.

***Article* 11**

Enterprises, groups of enterprises holding the dominant position on the market

1. Enterprises shall be considered to hold the dominant position on the market if they have market shares of 30 percent or more on the relevant market or are capable of restricting competition considerably.

***Article* 13**

Prohibited acts of abusing the dominant position on the market

Enterprises, groups of enterprises holding the dominant position on the market are prohibited from performing the following acts:

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

The Vietnam Competition Law is clearly very comprehensive. It deals with various aspects of the competition regime and provides detailed direction on many key issues. In addition, several implementation guidelines have been drafted and promulgated that provide further detailed guidance on issues including defining relevant markets and interpreting descriptions of the conduct prohibited in Article 13. These guidelines should prove very helpful in ensuring that economic principles underlie the application of the Competition Law. Guidelines of this nature can be expected to promote transparency and consistency in the application of the Competition Law.

Box 8: Competing State Interests

The fledging Viettel mobile phone service provider in Vietnam has been forced to call for government interference to break a deadlock over network connection with the Vietnam Posts and Telecommunications General Corporation (VNPT). The Ministry of Defence, Viettel's owner, filed an official letter recently to the Prime Minister, accusing the VNPT of limiting phone calls by Viettel customers to VNPT's mobile and landline subscribers. Under the current regulations, VNPT, as Vietnam's dominant mobile and landline telecommunication service provider must ensure that there is interconnection between the corporation and start-up companies.

While Viettel's mobile phone subscription rocketed in the past six months, VNPT provided less than 50 percent of the connection demand, triggering a wave of complaints by Viettel customers about service quality. After a meeting between the companies and the relevant Ministry, VNPT committed to help Viettel settle the deadlocks by allowing connections through some local switchboards, while in the long run, Viettel would have to build up its backbone transmission line.

Deputy Minister of Posts and Telematics Le Nam Thang, in a media interview, stated: "There must be a market-driven mechanism responsible for connections". The Competition Administration Department under the Ministry of Trade of Vietnam, the State agency designated to oversee competition issues, did not take any action or make any comment.

In this example, a dominant state-owned enterprise has apparently engaged in anti-competitive behaviour that has injured the competitiveness of another state-owned competitor. At least one relevant Ministry has been forced to intervene, but it appears that the competition authority has taken no action. Jurisdiction in scenarios such as this should be considered in the implementation of the competition regime.

Source: http://www.cuts-international.org/7up2/7up2E-newsV-full.htm

Given the scope of the Competition Law and the implementation guidelines, commentary on the general provisions of the statute is beyond the scope of this paper. However, some issues related specifically to the provisions dealing with abuse of dominant positions should be noted. With respect to the definition of a single firm holding a dominant position, the Competition Law uses a strict market share benchmark of 30 percent. This benchmark may be problematic, as it is not clear that firms with this market share are likely to have market power in any given market.[13]

A provision, similar to that found in the Cambodian concept bill on trade competition, permitting the Competition Administration Department to consider actual competition in the market in determining whether a firm is dominant might be beneficial. Alternatively, it may be helpful to re-examine this benchmark after more experience with the application of the Competition Law. In addition, at this stage it is not clear how 'capable of restricting competition considerably' will be interpreted.

With respect to the acts being prohibited under Article 13, experience may demonstrate that the enumerated list is overly restrictive and that some potentially abusive conduct is not encompassed by its language. Once again, this should be reviewed after some experience with the competition regime. Providing a general prohibition within Article 13 along the lines of the language contained in Article 3 (*i.e.* reduce, distort or prevent competition) and incorporating the current provision as a non-exhaustive list of examples of the general prohibition would permit the competition authority to consider a wider range of potentially abusive conduct.

Conclusion

The paper has identified some of the basic issues relating to abuse of dominant positions with an emphasis on issues relating to developing economies. While the scope of this paper does not permit an in-depth analysis of the subject, hopefully the overview provided demonstrates the importance of controlling abuse of dominant market positions for developing countries, such that Nobel Laureate Joseph Stiglitz (2001) highlighted:

> "One of the most important roles for government is creating the 'rules of the game', which enable a market economy to work. Among the most important rules of the game are those about competition…. Many developing and transition economies, indeed, were told: open up your economy to international trade and that will suffice to ensure competition. That advice was misguided…Strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies".

Developing economies may be most in need of the benefits of competition law as they transit towards more competitive markets, liberalise trade, and promote investment and growth. Consumers in these countries may also be most in need of the benefits of competition law as they may face shortages of even basic goods, relatively high prices, poor selection as well as inferior quality goods and services. Therefore, while not easy, developing countries must develop appropriate competition regimes. Competition regimes in nations with more developed economies may not be directly transferable to nations with less developed economies. A number of factors of particular importance to developing economies are noted below:

- The competition regime must have practical and realistic goals and be designed in a manner that reflects the concerns, policies and institutional infrastructures of the economy in which it will be applied. For example, while the political independence of competition authorities is generally considered to be important, there is some suggestion that having a strong political element may be necessary for proper enforcement of competition law in certain circumstances. (Gal, 2004, p.47)

- The competition regime should be regularly reviewed to ensure that it is functioning properly and to determine whether modifications are required to more efficiently fulfil its stated goals and/or to reflect additional legislative goals.
- Efforts must be made to ensure that the proper 'environmental conditions' are put in place to realise the full benefits of competition law. This may involve changes in other laws, education and training, measures to ensure the independence of regulators, development of economic expertise and protection of regulators from rent seekers and lobbying by entrenched economic interests.
- Some mechanism should be implemented for public participation in the competition regime. Such participation can involve the ability to commence private litigation or to merely initiate investigations through complaints to the competition authority.
- Competition law should establish and enforce a level playing field across an economy. Where exemptions are required to promote other economic policies, for example, to encourage investment in specific sectors, such exemptions should be clearly set out, temporary and subject to regular review to ensure that they are still necessary.
- Care must be taken to ensure that regulators do not penalise firms merely for the possession of market power, particularly where such power has been obtained through legitimate competitive efforts. Competition law should focus on abuses of market power that distort the competitive process, not on punishing successful firms.
- Where a SOE or other government agent has regulatory authority within a market and competes in that market or a related one, the regulatory and competitive functions should be split to reduce the likelihood of anti-competitive conduct.
- Administrative and adjudicative functions within the competition regime should be separated to protect the neutrality and impartiality of the investigative and enforcement process.
- Given concerns with the quality of available data and economic expertise, a flexible approach must be taken in the enforcement of the competition law. For example, data concerns may prevent reliance on the SSNIP test to determine relevant markets in developing economies. Concerns with available data may also make it difficult to establish market shares or other potential evidence relating to market power. In these circumstances, regulators in developing countries may need to focus on direct evidence of market power. If available resources do not

permit an assessment to determine whether market power exists, it may be appropriate to focus on improper attempts at monopolisation or rely upon market share benchmarks in determining dominance.

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Endnotes

1 See UNCTAD (2003) at 3, Cernat (2004) at 2, Brusick, Cernat and Alvarez (2004) at 328-9 and Lipimile (2004) at 173.

2 See UNCTAD (2003).

3 The term "firm" is used to represent a range of entities engaging in commercial activities such as corporations, partnerships, associations, etc.

4 At this point, the paper will consider unilateral conduct. A similar analysis is conducted when considering joint abuses of dominance.

5 See European Court of Justice decision in *Tetra Pak International SA v Commission* [1996] ECR I-5951.

6 This name derives from critiques of the market power analysis in the U.S. Supreme Court's decision in *United States v. E.I. DuPont DeNemours & Co.*, 351 U.S. 377 (1956). The critiques argue that the Court erred in defining the relevant market as including various flexible wrapping materials (such as cellophane, wax paper, pliofilm etc.,) rather than a cellophane only market. Commentators argue that the Court, when in considered the observed high cross price elasticities, failed to take into account DuPont exacting monopoly profits by raising the price of cellophane so high that substitution of less desirable wrapping materials finally occurred. For further discussion of this issue see Nelson and White (2003) at 15.

7 For example see Cameron and Glick (1996) addressing the US perspective. For an EU perspective, the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03) while technically applicable only to mergers is informative on the EU position on market share benchmarks. From a developing economy perspective, the enacted and draft competition laws reviewed in this paper all use market share or sales volume benchmarks to establish dominance or market power.

8 Memorandum of Argument in Reply of the Commissioner, dated August 10, 2004, The Commissioner of Competition v. Canada Pipe Company Ltd. Tuyauteries Canada Ltée. CT-2002-006 (para 79).

9 Briggs and Kress (2003) discuss this issue in the context of U.S. competition law.

10 For example, see concerns raised in *United States v. Denstply International, Inc.* 227 F. Supp 2d 387 (D. Del 2003) at 452 and Memorandum of Argument of Canada Pipe Company Ltd./Tuyauteries Canada Ltée. beginning at 248.

11 This concept bill, prepared with suggestion from the United Nations Conference on Trade and Development (UNCTAD), is not yet considered by the Government for submission to the Parliament.

12 For discussion on issues involving overlap of intellectual property and competition law, see, for example, the Antitrust Guidelines for the Licensing of Intellectual Property (1995) U.S. Department of Justice and Federal Trade Commission or Intellectual Property Enforcement Guidelines (2000) Canadian Competition Bureau.

13 In this light, the Canadian Competition Bureau's enforcement guidelines effectively set out a 'safe harbour' for single firms under the abuse of dominance provisions of the Competition Act where that firm's market share is less than 35 percent. To clarify, where a firm has a market share below this threshold, the Competition Bureau has indicated it will generally not be concerned that the firm's conduct would be problematic under the abuse of dominance provisions of the Competition Act.