

[Slide 1 – Introductory Slide]

[Slide 2]

ELEANOR FOX: Hello, and welcome to this video in the ICN curriculum project. My name is Eleanor Fox from New York University School of Law.

This video is on developing countries and competition. Let me tell you a little bit about what you are going to see and hear. In this video, we do two things. One is called the kaleidoscope and the second we present certain problems and dilemmas.

For the kaleidoscope, we have gotten together some very inspiring individuals, most of whom have been heads of competition in developing countries. We have very short clips of these individuals who will tell you their particular challenges as leaders of the competition agencies in the developing countries and, later, particular opportunities and solutions.

Secondly, the problems. We have presented two problems, one with the project leader of South Africa, will be about a big global merger takeover, where problems of public interest arise.

The second, which is led by Mexico's Competition Commission, is a problem of abuse of dominance, where there are problems of privileges to the state-owned enterprise.

In each case, you will see a little play. And then you will be asked to put your video on pause and discuss the problem and the dilemmas with your colleagues and consider what you would do in these circumstances.

And when you come back, you will see two experts giving you their solutions and considerations in handling the problems. Through these problems, we hope that you will hone your skills in thinking about the range of options in dealing with some very difficult policy matters.

And then we will close with another segment of the kaleidoscope, which has some little portraits of courage.

Now, I would like to introduce you to my colleague, Bert Foer, who is the president of the American Antitrust Institute, and Bert will take you through this video.

[Slide 3]

BERT FOER: Thank you, Eleanor. We begin our kaleidoscope with David Lewis, the former chair of the South African Competition Tribunal. David, what is unique about competition policy in developing countries?

DAVID LEWIS: I think that all countries, developing and developed, have to craft their competition laws and the enforcement practices in relation to the historical and contemporary circumstances of their own countries. But I do think that developing countries have particular issues that inform the way in which they need to implement competition laws.

And in middle-income developing countries like South Africa, one of those special issues often is a very strong past of state ownership of key enterprises. And so, it's not a coincidence that many of the abuse of dominance cases in South Africa have been directed at what were formerly state-owned enterprises. And there are competition problems with current state-owned enterprises as well.

And so, abuse of dominance looms often much larger in developing countries than it does in developed countries.

[Slide 4]

BERT FOER: For a second African perspective, we turn to Thula Kaira, CEO of the Botswana Competition Authority.

THULA KAIRA: In terms of the major challenges that a competition authority in a developing country such as Botswana finds itself in, is faced with, is firstly the problem of attracting and sustaining political support for the implementation of competition law and policy. Competition law and policy are things that have just been introduced into the economy and the process of trying to make them -- these two themes or this theme -- to be part of the mainstream public policy-making process is something that squarely lies on the competition authority to ensure that our implementation process does, in and of itself, take into account the developmental objectives and goals of the government.

The second one is trying to balance the economic and non-economic objectives of the law. The Competition Act in Botswana does have certain provisions which require the competition authority to, for instance, ensure that a citizen economic empowerment in some of the decisions that we are making. And that process sometimes may conflict with the traditional aspects of competition law.

The third challenge is trying to achieve what the law says we should achieve. When the law says we should remove barriers to entry, when the law says we should create business opportunities for our interventions, when the law says we should both mold competition and also ensure that we do not create dominant firms that, in the long run, abuse their market power, to what extent are our decisions actually realizing those particular objectives?

[Slide 5]

BERT FOER: Now we turn to Zambia and we ask Chilufya Sampa: what are the problems of a young competition authority in a small economy?

CHILUFYA SAMPA: There's a lot to watch out for. Most likely, there's going to be a need to source for some funding. You are not likely to have a lot of funding as a young agency.

The second thing is that you won't have human resource, the type of human resource that you need. People are knowledgeable and understand what competition law is all about. And most likely, you won't have the funding or the budget to pay them and that would result in high staff turnover.

The third thing would be lack of a competition culture within your market. You need stakeholders to believe in what you are doing, and if you do not have the stakeholders, it becomes a bit more difficult to enforce your law.

[Slide 6]

BERT FOER: A number of small developing countries have formed regional competition authorities in order to take advantage of economies of scale in enforcement. One of these is CARICOM. We next hear from Kusha Haraksingh, Chairman of the CARICOM Competition Commission.

KUSHA HARAKSINGH: CARICOM is the acronym for the Caribbean community, a grouping of 15 independent sovereign states in the Caribbean region.

We are one of the few regional commissions in the world, and so, we have peculiar challenges. We have challenges stemming from the fact of our small size, from the fact of our dispersed national entities, from the fact that some are very small islands and some are continental states. Most of us are at a similar level of development, though Haiti is supposedly one of the poorest countries in the world.

So, we have challenges that are also related to consumer welfare, to maximizing consumer welfare, as well as to the eradication of poverty. And in this regard, therefore, our main task, our main challenge is to try to achieve a jurisprudence of competition law that is relevant to our peculiar circumstances.

Basically, the maximum idea is to try to increase the development potential of our countries and to do so by increasing consumer welfare, as well, of course, as to ensure that it is a fair playing field for business activity.

We are entirely concerned with the idea of poverty eradication, as well as with improving consumer welfare.

[Slide 7]

BERT FOER: A leading consultant to Caribbean economies is Taimoon Stewart.

Taimoon, What do you see as the most important enforcement challenges?

TAIMOON STEWART: In my view, the most important enforcement challenge that CARICOM countries face is the lack of rule of law. More specifically, there is a security crisis in this region linked to organized crime, mainly drug trafficking.

Citizens, security and justice and security institutions are in crisis.

Whistleblowers in this environment will not survive very long and, therefore, I question the utility of the leniency program in that context. Most witnesses in criminal cases are actually afraid to testify for fear of being eliminated. In addition, our societies are small with concentrated capital in the hands of an elite few who intermarry, socialize together and are family and they would, therefore, be reluctant to testify or whistle blow on each other. And in that context, one can see that rooting out cartels in this region would be very difficult.

[Slide 8]

BERT FOER: Let's go south now to Brazil, and our spokesman is Carlos Ragazzo, of CADE.

CARLOS RAGAZZO: There is a problem that we have in Brazil, that competition is not a value which is very important to society. So, we do have to bear in mind that in our jobs, we do have to explain to the business community and to consumers the value of competition.

The stereotype that we have for the judiciary, I think it would be more like a situation in which they don't have knowledge, specific knowledge on competition.

Lately, this is something that we have been worried about. We are seeking allies and we have performed an agreement with the consumer protection agency and trying to explain to them the benefits of competition and to build a common agenda with them.

INTERVIEWER: What role does advocacy play for CADE as opposed to investigations and bringing cases?

CARLOS RAGAZZO: Well, first of all, I think that it's almost impossible for you to have good advocacy efforts if you're not a good enforcement agency. So, this is what we're focusing on now. We have to be a good enforcement agency, merger-wise, cartel enforcement-wise, in order for the advocacy works to be, to a certain extent, heeded by society. And a way of doing that, the advocacy, is also to explain to business community, to consumers, not only the benefits of competition, but also the efforts that are being, to a certain extent, performed by the agency.

[Slide 9]

BERT FOER: So, we now have a flavor of some of the challenges that affect competition policy in developing countries – for example, inadequate resources both human and financial, absence of a competition culture, corruption, political interference, small markets, a mixed mission that includes public interest as well as strictly competition issues.

But now we introduce the first of our two scenarios. This has been composed and acted by the staff of the South African Competition Authority. Please pay attention to the introduction and background as it is presented by Trudi Makhaya. At the end of the scenario, you will be asked to discuss what strategy you would recommend to the imaginary competition authority.

[Slide 10]

TRUDI MAKHAYA: This scenario deals with an acquisition of a local retailer by a multi-national firm. Global Retail Express, to be known as Global, a multi-national with a small presence in a country, Bukoni, has filed a merger notification with the competition authority. It seeks to acquire another generalist retailer in the country called Bukoni Retail.

[Slide 11]

TRUDI MAKHAYA: Bukoni Retail is the most well known retail brand in Bukoni. The merging parties have argued that the merger will yield efficiencies, as it will allow Bukoni Retail to benefit from Global's know-how, innovations and operational expertise. The cost of imports at the merged entity are also expected to fall, as Bukoni Retail will be plugged into Global's centralized global procurement unit.

The ministries of industrial policy and finance have written to the chief executive of the competition authority stating their objections to the merger. The case team is aware of the submissions by the ministries and also by a labor union. An active debate on the imminent transaction has also emerged on talk shows and newspaper columns, with public sentiment leaning towards an outright prohibition by the authorities.

The case team meets to provide its final recommendation, including any potential conditions it might seek to impose on the transaction.

[Slide 12]

Scene I: Protesters – Interview with Trade Unionist

REPORTER: Global Retail Express has announced its intention to merge with Bukoni Retail. The competition authorities are looking into this deal. Most experts we've spoken to have said that the deal will probably go through, yet you have some concerns.

TRADE UNIONIST: Yes, sir, we are very concerned about this transaction because everybody knows that Global is a very predatory multinational which treats its employees brutally. We are concerned that when it gets control of Bukoni, it's going to get rid of the so-called redundant employees, you know.

And, on the other hand, everyone knows that it squeezes its suppliers, you know, and forces them to accept unreasonable demands, which if they don't do, they're going to be squeezed out of the market.

Now, the other thing we are concerned about is that Global can lower its prices to such an extent that its local competitors will not be able to compete with it. And this is very detrimental to our economy. Those are our concerns.

Scene II: Investigation Team Deliberations

LEAD INVESTIGATOR: Okay, thank you guys for coming to the meeting at such short notice. This is turning out to be a very difficult merger, so what we need to do is we need to give the executive as much time as possible to make an informed decision on the merger. So, the sooner we can table a report to them, the better.

INVESTIGATOR 2: Yes, you are right. While there's been much public debate on this issue, different government departments have expressed their views on this issue and civil society is up in arms. This was a really exhaustive investigation.

LEAD INVESTIGATOR: But the analysis is pretty straightforward. It's just that people don't understand the role of merger control, like this trade unionist who was on TV who thinks we can save the economy. The retail market is very competitive as is.

INVESTIGATOR 3: Okay. But, really, I think there's so much we have to highlight to our presentation for the executive.

LEAD INVESTIGATOR: But come on, the merged entity's market share would only be about 25 percent post-merger. And besides, they'll face a lot of competition from local retailers if they try to increase their prices or reduce their quality. In fact, I'm led to believe that it's likely that the merger will lead to lower prices in the market. Unfortunately, this might mean that a few middlemen might be let go.

We also know that Global employs very aggressive promotions and this means that their efficiencies will be passed on to consumers in the market. I think the merger will also allow Global to get sites into shopping centers where they've previously been foreclosed. Bukoni has a strong footprint in the country so they'll be able to take advantage of this going into the market.

Okay. With this footprint and Bukoni's context in the property development market, it's likely that they will be able to expand more and hire more workers. Of course, this might mean they might have to fire a few people in places where there's overstaffing, but then the overall outcome is more likely to be an expansion.

INVESTIGATOR 2: I disagree. It was innovative and I think with time it would have captured market shares from other local retailers. It's basically Bukoni. Now, with this merger

and using Bukoni's brand, it will be able to increase its market power. It will lose its incentives to host aggressive promotions in the market and, as a result, it might increase its prices.

On the other hand, there's a clear harm that will emerge from this measure from the public interest perspective. This will set off negative spillover effects across the supply chain and it might result in massive job losses. Given our high employment rate, we cannot afford to lose any job. This is clearly set out in the letter from the Minister of Industrial Policy objecting to this transaction.

Our local suppliers must be protected, the same way other developing economies protect their own local suppliers.

Lastly, this transaction will result in the delisting of our local champion from the stock exchange. Our capital market is already too small as it is. To remove such a stock will be to deprive our local investor community a viable asset to invest in, and the local investors won't be able to share in the growth of Bukoni unless they have means to invest in Global in the United States.

LEAD INVESTIGATOR: But on the subject of imports, if you note that Bukoni already imports household and electronic goods from China and besides, as a supermarket, they have to procure food locally.

INVESTIGATOR 2: But, still, I think we have to recommend to the executives that this transaction be prohibited.

LEAD INVESTIGATOR: But to the contrary, I don't see how we could possibly support anything other than an approval without conditions. Maybe your supply chain arguments might be persuasive, but those might call for a condition, maybe to say the merger entity should support the local markets for a period of time after the merger.

INVESTIGATOR 3: I think if we have to think about conditions, I would suggest that authorities place a cap on the merged entities' import labels and also interchangements.

LEAD INVESTIGATOR: So, okay, to summarize, I think we began from two radically opposing ends, a prohibition and an approval, but I think there is some sort of agreement around the fact that there are problematic aspects in this merger, especially surrounding the public interest issues. As a developing country, our legislation mandates that we look at these public interest issues, although the problem is it doesn't exactly give us guidance as to how we should do it.

So, we're going to recommend to the executive that they approve the merger with conditions. Those could include maybe that the merged entities support local suppliers for a period of time or we could instead put a cap on imports.

Scene III: Executive Committee Deliberations

EXECUTIVE 1: I'm struggling with this merger report. I don't see a need to impose conditions on this transaction. It is obvious that low prices will benefit consumers and there'll be employment creation elsewhere. It is also curious that the Minister of Finance is raising concerns at this late stage of our investigation.

EXECUTIVE 2: We can't ignore our country's economic development imperatives, nor can we ignore the government's concerns regarding this transaction. We seem keen to want to adopt a narrow interpretation of our competition laws, whereas our public interest provisions allow us to adopt a more broader and developmental approach.

This is not to say that Global should be precluded from growing through acquisitions, but we cannot allow it to acquire our leading domestic retailer, a retailer that has been an effective

competitor against Global. With the high market share creation, the merged entity will have significant buyer power that can be used against our local manufacturers, as well as our fresh produce suppliers.

Given the scale and buying strategy of Global, we cannot discount the fact that we will be exposing our domestic manufacturers to more aggressive international players who are able to price down to unsustainably low levels.

EXECUTIVE 3: I see where you're coming from and the same argument could be raised for fresh food items, and I have to say that I do agree with you that this merger raises significant public interest concerns. And the remedy that the team has proposed has its own difficulties. I mean, how can we cap imports for the merging parties while we allow other retailers to import as much as they want?

Maybe what we need to consider is putting in measures or supply measures for the parties' suppliers. I mean, looking at this, the one issue I have is, how do we decide on what to impose? Or maybe what we need to really be doing is engaging with policymakers.

EXECUTIVE 1: I can hear all the points that you've made, but, first of all, we should separate competition issues from public interest issues. For me, so far, all that the team has said about competition issues is not convincing. From what I've read in this report, it really looks to me like some of the team members are trying to use these vague competition issues in order to bolster their position. I totally disagree. I think these are mainly public interest issues, which should not, you know, be confused with competition issues of this case.

The team members have made very little arguments to back up their claim that the merger is anti-competitive. We all know that low pricing as a result of low cost is not anti-competitive. Since when did it become anti-competitive? Even if less efficient retailers have to

leave the market, there is no threat that the merged company will push everyone out of the market and raise prices.

We have seen from all over the world that low pricing is Global's core business model and, besides, barriers to entry are fairly low, and given the level of competition in the market, it is very unlikely that the merged entity will be able to exercise market power.

The fact of the matter is this: Prices will go down post this transaction. There is no evidence presented by the team that this merger will be price-raising.

Our law is not specific on how we should deal with these issues. It seems to me that we have to look beyond the interest of consumers, but how do we begin to balance that against the interest of producers or even investors?

I don't think it is clear in our minds on how to do that and it will be difficult to engage external factors before we determine on how we deal with public interest issues.

However, what you all need to remember is that we are an independent institution and we should form an independent view. In my view, there are other instruments that can be used to address these issues. In this country, we have labor laws, which set standards on how employers should relate with unions and employees.

As a developing country with developmental challenges, we have to ask ourselves this question: Which instrument is best placed to deal with this issue?

EXECUTIVE 3: We'll have to devise ways that address these public interest issues in a pro-competitive manner. But at the same time, we have to realize that we are developing economy with policy objectives that are geared at our high unemployment issues.

For example, say we impose a condition that the merged entity should put together a supply development fund and we impose structures so that companies compete for funds and it doesn't become a blank check for inefficient producers.

EXECUTIVE 1: I'm concerned that we seem to be bowing to political pressure and public sentiments. We have to ask ourselves, does this transaction raise the kind of public interest issues that warrant a condition? I'm sensitive to the possibility that some workers might lose their jobs, but overall, there'll be net increase in employment as the merged entity may use Global's well-integrated global supplies chain.

We have submissions from Global that they will treat employees with dignity. If they do otherwise, we've got labor enforcers that can handle those cases. I am not denying that some middlemen may be put out of the chain, especially if their prices are higher or they cannot compete on quality. Actually, this merger may be good because it may force them to be more efficient.

The fact of the matter is this: These public interest issues should've been raised when Global was coming in. But because the country does not have a formal FDI policy, we have to carry the slack.

EXECUTIVE 2: I would argue that our country does have a formal FDI policy. Public pressure is just picking up on legitimate concerns about this transaction. The fact that we're picking up on the same concern does not mean that our independence is compromised.

EXECUTIVE 3: I don't think we can conclude on this matter as the report stands. As an emerging economy, we have a duty to ensure that we take public interest concerns seriously. However, we need to seek a legal opinion so as not to overstep the ambit of our Act.

Furthermore, the team needs to assess the extent to which Bukoni sources from local food producers and if it does or has ever sourced from local manufacturers.

This is a very complex matter and both arguments have merit. The entry of Global will have significant benefits for the local economy and competition in general. However, we can't ignore the likely jobs that may be lost as a result of this transaction.

[Slide 13]

TRUDI MAKHAYA: Now you have seen the presentation of a dilemma. What would you do? What should the competition authority do? Do you need more information? What kind of information would you need? Can you think of better options than were presented in the scenario? Take a break from the video, discuss it with your colleagues and see what strategy you would come up with. And after this, you're going to see the presentation by two experts on how they would approach this dilemma.

[Slide 14]

PAUSE THE VIDEO

[Slide 15]

BERT FOER: We met Thula Kaira earlier. He's going to give us his idea of what went on in the scenario you just watched and, we hope, you discussed. He will be followed by Frederic Jenny. Fred Jenny is the only economist who served on the Supreme Court of France and he is the chair of the OECD committee on competition.

[Slide 16]

THULA KAIRA: Considering this scenario of Retail Express, as well as Bukoni Retail merging to form a supermarket chain where the assessment, based on competition issues and

perhaps a dominance test, shows that there are no plausible competition concerns that should make this merger not to go through.

However, on the other hand, there are public interest considerations, such as employment, as well as the support of the small and medium-scale businesses in terms of procuring the requirements of the merged entities from them and not from the Global supply network. The issue is neither here nor there because if a competition authority, especially in a developing country, is required to take into account public interest considerations in its determination process, then, of course, they have no option but to take into account those public interest considerations.

And, of course, the issue here lies in the weight. What weight is given to the public interest that is of concern in a particular transaction such as this? And I notice about two of them being employment and sourcing from the local supply network. Of course, making these kind of requirements also depends on looking at the practicalities of the particular situation. Are the products that this company intends to sell available locally on a sustainable basis? And in terms of employment, will the firm still be competitive and be able to offer sufficient competitive responses in relation to its competitors if it retains the number of employees that it has?

Of course, secondly, it's also important that the competition authority makes this decision soberly with a thorough assessment process of the public interest issues, vis-a-vis, the overriding effects on the competition issues and also perhaps, most importantly, that this decision be made independently despite the fact that the unions, the Minister of Finance and the Minister of Trade, and perhaps other relevant central government agencies, are pressing towards having this merger rejected or be encumbered with certain public interest undertakings that may not be feasible or

even sustainable in the context of making the merged entity achieve the competitiveness that it requires in the business after the merger has been effected.

So, it is neither here nor there, but again, I think there isn't enough reason not to approve the merger. Again, there hasn't been any demonstration that entry into the retail sector itself is insurmountable by any other firms that would want to establish themselves and compete against this merger of Bukoni Retail, as well as Retail Express.

So, it is important for the competition authority, again, granted that they have the statutory requirement in the law to consider the public interest issues, that indeed they do follow the process of looking at the public interest and if it's in their power to make the decision, my view is that they should make a recommendation for the relevant body, if not themselves, to approve the merger, subject to any undertakings that may be given that are practical, easily implementable and also are self-regulatory, so as not to encumber the competition authority again or any other institution within the competition enforcement system with the cost of monitoring the implementation of those particular undertakings.

[Slide 17]

FREDERIC JENNY: So, there are three comments I would like to make on this case. The first comment has to do with the fact that it is very important for the competition authority not to confuse the protection of competition and the protection of competitors. It seems from the elements that we are given that Global is a very efficient firm, procuring on the international market, and that, therefore, it is likely that it will be able to have lower prices at the retail level and also that it will be quite strong in the negotiation with the suppliers.

Now, it may mean that the suppliers and the competitors of Bukoni Retail are going to suffer, but that doesn't mean necessarily that competition will be hurt. If prices go down and if

quantity increases, consumer surplus will be developing and this is a good outcome from the point of view of competition.

So, what the competition authority has to look at is whether competition itself, as opposed to competitors, is going to suffer because of the transaction.

Now, there are “may be” scenarios. What we’re given as indicators doesn’t lead to believe that there’s a big competition problem, but it may be that Global -- Global’s closest competitor is Bukoni Retail and that, in some areas, those are the only two players. And it may be, therefore, if Global takes over Bukoni then there might be some local competition problems or that there may be some problems because Global and Bukoni Retail are the closest competitors.

But short of that, the market share is sufficiently -- after the merger, is sufficiently low that, in itself, it’s not a competition problem.

Second comment is on the public interest clause. A lot of legislations have a public interest clause that usually says that even if the merger is anti-competitive, but if it fulfills some public interest benefit, then it should be allowed. In this case, we’re not sure exactly what the clauses say -- what the provision says because it seems that even if the merger is not anti-competitive, but if the merger is against the public interest, then it should be disallowed, which is a further step, I would say.

Whatever the case is, competition authorities are not very well equipped to judge public interest. They’re well equipped to judge competition, but they’re not very well equipped to judge public interest. And it’s usually considered that if you have two goals, one of them is to protect competition, the other one to protect public interest, maybe you should have two different pieces of legislation rather than one that confuses the two issues.

The second issue with public interest clauses is: Is there a precise definition of what public interest is supposed to be? Now, we know that industrial development and protection of employment seem to be part of the public interest, which is in the provision of the competition law. What we don't know is whether fighting poverty, for example, through lower prices is also a public interest dimension because, in that case, the merger may have antagonistic or contradictory results in the sense that on the one hand it helps fight poverty; on the other hand, it may create unemployment and -- at least in the short run.

My third comment is on the remedies. If the competition authority thinks that the merger should be not allowed completely because either it restricts competition or it is against public interest, the question is how does one design the remedies in those cases?

Well, the remedies have to be designed in such a way that all the potential benefits of the transaction are still there for the consumers, in particular lower prices, but that the public interest issues are solved. For example, there is some incentive for the local manufacturing industry or the local retail industry to try to face to the new competition, such as differentiation of its activities or improvement in its operation.

How could we do this? Well, we could do this if -- rather than having a local content clause, without any limit, if the merging firms had to contribute to a fund that would help the local business, the local retail or the local suppliers to improve the condition, to face the new competition which is coming from the outside. So, that would have to be a limited remedy giving an incentive to firms to improve on their operations with the help of the merging firms and will allow for better organization of the industry in the future.

[Slide 18]

BERT FOER: Before we move on to our second scenario, let's continue with the kaleidoscope for a few minutes. I want to focus on the question of how a developing country should set its competition authority priorities. Allan Mlulla, what advice would you give to a relatively new agency?

[Slide 19]

ALLAN MLULLA: My advice to them is that they should not reinvent the wheel. They have cases where they could go then, and start with a bang. And there are cases that we've seen people have come late, but they're now picking up very well the work, like Namibia. They just started, but because they emulated the right things done by all the competition regimes, and they are doing very well.

The other thing that they need to do is that they need to coexist with the government and try to avoid that common arrogance of competition authorities that they need to be independent of the government because we need the government in terms of political support, in terms of budgets to run the competition agencies effectively.

And then, lastly, it would be ideal if they do not take broad mandates because the government will always want to run more than one mandate. So, if they can stick to a limited mandate and that mandate be competition.

[Slide 20]

BERT FOER: Francis Kariuki is Director General of the Kenya Competition Authority. How do you set priorities for your agency?

FRANCIS KARIUKI: We have prioritized the sectors which have the greatest impact to these poor people, especially the poor producers. And one of the sectors which is really -- which has really great effect on the poor people is the agriculture sector and specifically the pyrethrum

sector. The pyrethrum sector is a crop which is used to produce pesticides and also malaria tablets in a very environmental friendly manner. The crop is usually produced by small-scale producers. And, therefore, if at all we improve competition in this sector, we feel that these benefits will be cascaded down to these small producers and help alleviate the poverty in this country.

And what we have done is that we have focused on a law which was governing this sector which had created a statutory monopoly to govern the manufacturing and the marketing of the pyrethrum sector. We have advised for the review of this law and this law has been taken to parliament. It is in the second reading. That is in the final stages of enactment. And we anticipate with enactment of this law is that we are going to see more private investors coming into this sector and obviously for the benefit of these small producers and that then the benefits will be to alleviate them from the -- from below the poverty line.

[Slide 21]

BERT FOER: The chairman of the Mexican Federal Competition Commission is Eduardo Perez Motta. Mr. Perez Motta is a chair of the ICN Steering Group, and he is about to tell us about a study that helped set Mexico's priorities.

EDUARDO PEREZ MOTTA: We made a study, and we found that basically one-third of the expenditure of the average Mexican is in sectors that lack competition in Mexico. And in those sectors, we are Mexicans, we are paying about as much as 40 percent more of what we would have to pay if there would be much more competition in those areas.

And what we also found is that the lack of competition is affecting greatly the poorest people, the people who have the lowest levels of income. And there are two pillars to promote competition. One has to do with enforcement; and the other has to do with regulatory framework.

And let me tell you that in the two areas, the Competition Authority of Mexico has been working very actively. First of all, in enforcement, we took a major decision to sanction a telecom company that was basically charging too high interconnection rates. Inter-connection rates decreased and in basically two months, the consumers in Mexico recouped all of what it would have been paid by the sanction of this company.

Another case is a set of opinions and ideas of the design of options and ideas in the Mexico's national health services that basically promoted more competition in buying services which generated a savings for the authority for Mexico's national health services of a little bit more than 3 million U.S. dollars. So that means savings for the Mexican taxpayers that we were basically using for the laboratories that were colluding and increasing prices and basically generating lack of resources of the National Health Services Company in Mexico. So those are just two examples of which competition policy or competition decisions basically create savings for consumers, more efficiency in markets and in the end they create a better distribution of income.

[Slide 22]

BERT FOER: The developing world certainly faces 27

challenges, but there are also opportunities. Thula Kaira.

THULA KAIRA: Despite these challenges that we may be facing, we also have -- and we have realized that there are great opportunities that lie ahead. Firstly, it's the small and medium-sized enterprises who are trying to penetrate business opportunities that exist in the economy, that these are one of the primary groups that we have to sell competition to, that through our intervention, we should be able to demonstrate that we have removed barriers to entry or we have created certain business opportunities that they did not actually access before the competition authority's intervention.

The second one, of course, is linking up with the stakeholders within the domestic economy, in particular, the other regulators. The competition authority is not a jack-of-all-trades. The competition authority is not qualified or trained to do things in banking, for instance, in insurance, in public procurement, anti-corruption or even matters to do with civil aviation, ICT and so forth. You have sector-specific regulators who have the competence to actually deal with those particular issues.

Of course, the last opportunity lies for a developing competition authority, such as ourselves, lies largely with the volume of work, the history, the experience, that is with those competition authorities that have been existing for more than 30, 40 years, even 100 years. There's a lot to learn from them. What is it that they have tried, what is it that has worked for them, what is it that is not working for them, and what are their views about what it is that has transpired behind them and where are they going?

So, it makes it very easy for a competition authority such as ourselves in Botswana to tap into that experience of advanced competition authorities and through, of course, institutions, such as the ICN.

[Slide 23]

BERT FOER: Brazil is also focused on opportunities. Here is Carlos Ragazzo.

CARLOS RAGAZZO: If I were to give one message and this message would be the main thing that we have in Brazil right now is that we went through a very, very -- a major transition and it doesn't seem like a very huge thing, but it was to us because we were facing a challenge for the pre-merger regime. And we received a lot of criticism from lawyers, international lawyers, the business community as a whole, and the way that we dealt with that was taking this transition as an opportunity.

And how do we do that? First of all, we took this as an opportunity to change the management. So, now we're reviewing mergers in a faster way. We're investigating more cartels with actually fewer people. If I am to give any sort of advice to any sort of jurisdiction, is that take the opportunity, even if you're understaffed, take this opportunity to improve your management and benchmark, see what other people are doing, and then take your time to adjust to your reality.

I think that most of the benchmarking that we did was on account of ICN. The contacts that we made, because of ICN, they made this possible and we were received -- so well received by all of the countries. It's not only the MLATs that we signed, but also the people that we meet, the kind of reunions that we have, the meetings in which we exchange views. It's not simplifying things, but I think that really, really I would say that the international corporation has built Brazil a better place, a better jurisdiction and we are a bigger institution because of that, a stronger institution because of that.

[Slide 24]

BERT FOER: Our next speaker brings us to Sub-Saharan Africa and he talks about challenges facing the West African Economic and Monetary Union. Amadou Dieng is Director of the Competition Authority of WAEMU.

AMADOU DIENG (ENGLISH SUMMARY OF REMARKS): At the beginning we thought that only cartels were the main threat to competition in the region. But we then realized that abuses of dominant positions from companies in highly concentrated sectors and public interventions such as state aid in its various forms, financial and non-financial but have the same effects on competition, are more common problems in the region. Our interventions are mainly focused on those areas.

The lack of resources is the biggest challenge that our regional and national competition authorities faces. With regard to human resources, expertise is limited in the region. Another challenge is our lack of financial resources. Because of this we have to be very selective in our work.

Member State bureaucrats usually move from job to job within the administration, so that few people specialize in competition law questions. To overcome this problem we ask our Member States to develop competition experts to keep them doing competition work.

In general we could improve the competitive environment by advocacy before the decision-makers.

[Slide 25]

BERT FOER: Now we are ready to begin our second scenario, which has been developed and acted by staff from the Mexican Federal Competition Commission. It will be introduced by Heidi Sada Correa. So we say, “Welcome to the land of Terranova.”

[Slide 26]

HEIDI SADA: In the late '90s, Terranova began an ambitious process of liberalization and privatization of industries in key sectors of its economy. One of these was air transport. The capital's airport and its services, as well as one of the two government-owned airlines, Capital Aero, which most people just call Aero, were privatized.

The other main airline, Air Terranova, which had long been considered the national carrier, continued to be state-owned.

Since then Aero became quite efficient. Its profits increased. And Air Terranova continued its old, inefficient ways and its profits declined. Fear spread that they might lose their national carrier, and with it, thousands of jobs.

[Slide 27]

HEIDI SADA: Air fuel services was one of the services privatized. FuelCo is the main jet fuel provider. FuelCo has about 70 percent share of the market. There are other competing aircraft fuel services companies, but FuelCo has the only underground refueling system. These smaller companies do not have access to it. They have to use fuel trucks. So, they can only supply smaller planes.

In Terranova, lack of transparency and accountability and corruption are common, and there are close ties between government officials and business leaders. This is true in the case of FuelCo's CEO. He is the major shareholder of the airport and he is also the brother-in-law of the president of Air and Surface Transport Regulatory Authority, which is called ASTRA.

[Slide 28]

HEIDI SADA: Capital Aero has complained to the competition authority that FuelCo keeps cutting off its fuel supply, forcing it to delay or cancel flights.

Also, Aero believes that FuelCo is charging it twice as much as it charges Air Terranova, trying to destroy Aero through higher fuel costs and by damaging Aero's reputation for reliability.

So, Aero filed a complaint with the competition authority for abuse of dominance and conspiracy to eliminate a competitor and with ASTRA for violating of regulations requiring non-discriminatory services and rules against abusive conduct.

[Slide 29]

EXECUTIVE DIRECTOR: I've looked at Aero's complaint and it seems quite serious. I suspect that we have a strong case of abuse of dominance and, perhaps, collusion.

However, ASTRA also has jurisdiction and has received a similar complaint. We're going to have to think about how our job will intersect with that of ASTRA.

One the one hand, we could simply act alone. We would need to get evidence of everything – even though it looks so clear. Market power, proof of the abusive conduct, harm to competition, etc. If we prove a violation we would normally impose penalties and require them to stop this conduct.

But we will face a lot of resistance. The President always wants to protect the national airline. Fuelco and Air Terranova might bring power to pressure us to stop us. And if we the Commission issue a decision, Fuelco and Air Terranova will try to find ways to defeat or delay the decision – through courts, maybe through trying to get Ministers to interfere – because time is on their side. We would probably win in the end, but if Aero is driven out of the market before the Commission can impose an order, what will we have accomplished? What airline would ever dare to challenge Air Terranova if they can't be sure of a supply of fuel?

And they will fight us in the media. They will say that this will cost a lot of jobs at Air Terranova – and it might, because there are thousands of people they’re doing the job of hundreds. While we are quite used to those kinds of complaints, we will not want to be cast as the agency that threw thousands of people out of work.

Or, we could leave it to ASTRA. Fuel distribution is a regulated market, and if ASTRA should find a violation it could impose a duty to supply and other remedies. But I am not so sure ASTRA will find a violation. There are very close ties between the president of ASTRA and FuelCo and Air Terranova, and I am not confident that anything will come of this.

A third scenario would be for us to cooperate with ASTRA. In this case, our role would be to make a declaration on whether the jet fuel supplier has substantial market power – in essence to conduct a market study for them. This could give the ASTRA commissioners something they can use to justify their decision. It might help the commissioners to overcome influence of their president and the pressure that Air Terranova and FuelCo will bring to bear. ASTRA’s president is not the only one with a vote, and if the others understand the real costs of what FuelCo and their friends are doing, they may feel strongly enough to do the right thing.

The worst option is that neither agency opens an investigation. So why are we here?

Please start to think about theories of harm and what our options might be. Once I have your ideas, I will set up a meeting with our Commissioners and we will decide on a course of action.

EXECUTIVE DIRECTOR: So, that would be the main elements of the case.

PRESIDENT: Thank you for your presentation. I think you have laid out the options pretty well. So, now we must decide what to do.

COMMISSIONER 1: Well, A healthy airline might be really important for our country -- both for consumers and for the economy alike. But I think we won't get anywhere protecting a weak airline like Air Terranova. It is better for the market to decide which airlines succeed.

I think we can have a good case if we were to begin a proceeding. But we have to take into account that right before our cases have taken us nowhere and we end up in endless appeals and meetings with Ministers. Besides, we don't have a lot of experience in this market and we could lose the case. Can we find a good way to get a result without a formal proceeding?

I was thinking this is a high media profile case. You know how scandalous the privatization process has been and that there are strong personal ties between ASTRA and Fuelco. So, probably the media would take the story and maybe would like the story, and maybe it's a good story, but it's not the story that gets us anywhere.

The story we need is one about how competition will reduce prices and improve service. We don't want our case to become a front-page news story about corruption and scandal -- despite the fact that I suspect corruption is precisely the main reason why Air Terranova is poorly operated and has had declining profits. People are cynical, and they will just shrug and turn to the football news. The story should be about how competition in the airline sector will lead to lower prices and better service. Maybe that would even force Air Terranova to become a stronger competitor.

So to me, the key to the problem is transparency. I suggest that we hold a public seminar that would allow us to expose the competition concerns and show how similar competition concerns were analyzed by other jurisdictions. We could bring in international experts to present

their countries' experiences. Let them see how the market improved in places like Brazil and Russia when airlines began to compete with the old flying dinosaurs. So, let the media then put the pressure on ASTRA.

COMMISSIONER 2: I'm going to express my opinion. I think that the seminar sounds like a good idea, a sensible idea but I would say that putting pressure alone will not accomplish anything. Probably, you will have the support of the media and the newspapers but the news are going to last just one week or something like that. And I think that for us it's better to go for the investigation, to start the investigation and, with that, we will have the media's support.

EXECUTIVE DIRECTOR: Our case is strong, but I share Rodrigo's concern about whether we can do this on our own or not.

If we decide to open the case, we're going to need a lot of data and we're going to have to analyze it properly. ASTRA has that data, and they understand what it means. Whatever we do, we will need to work with ASTRA to obtain and analyze the critical data that they collect. We will need to avoid conflicts with their investigation so it cannot be said that the right and left hand do not know what each other are doing, and in any case if we both impose remedies we'll have to cooperate to make sure our remedies aren't in conflict.

COMMISSIONER 2: I see your point. But I think we should build as many allies as we can, and mostly, the regulator. But we have to take into account as well the relationship between ASTRA and FuelCo. This relationship is going to be very problematic and we have to try to convince ASTRA to be as much transparent as possible.

PRESIDENT: The risks in this case are extremely high no matter what we do.

I don't feel very optimistic about working with ASTRA. They might not give us the data that we need and they might not bring an independent case.

As we know, ASTRA's President is directly related to Fuelco's CEO. And in previous cases, they have done a lot to help their own acquaintances.

So, as a matter of fact, the risks in this case are very high, but they are high either way. If we decide to take action, and Terranova fails and jobs are lost, they will blame it on us. On the other hand, if we don't take action and Aero goes out of business, then Air Terranova will be holding a monopoly, and that will be bad as well. We must remember that only the last year, they dropped service in three more cities, and everybody is complaining about the quality of the service, the planes are dirty, they are always late, and they treat customers really bad. So I think that doing nothing is not an option, especially, if an accident happens, they will be asking where we were. So, we cannot just put our heads into the sand. I see the benefits of pushing ASTRA to the joint strategy, which it could then box it into taking action, especially if we can prove that FuelCo has market power, I think that they will do something.

On the other hand, I also like the idea of working with the media, pushing the idea that FuelCo has market power and that's the reason why prices are high and the quality of the services is low. That might also be very helpful for us.

On the other hand, I think I'd rather listen to more options.

[Slide 30]

HEIDI SADA: Now, you have seen the presentation of a dilemma. What would you do? Do you need more information? What else do you need to know? Take a break from the video, discuss the issues with your colleagues and decide what your strategy would be. When you return, you will hear how two experts think about these questions.

[Slide 31]

PAUSE THE VIDEO

[Slide 32]

BERT FOER: We hope you had a vigorous discussion of the air transport scenario. As our first expert commentator, here is Trudi Makhaya of the Competition Commission of South Africa. She will be followed by George Washington University Law School Professor William Kovacic, former Chairman of the US Federal Trade Commission. He's going to provide his observations on the scenario.

TRUDI MAKHAYA: This is a typical scenario where competition is being undermined in a recently liberalized market. Now in this case, you also have the issue of concurrent jurisdiction coming to the fore, because the competition agency would like to intervene in a sector which has a sector-specific regulator. Now in that instance, the authority could follow a very strict approach, and just focus on the competition issues. But in this instance, it seems like even if it did that, the regulatory authority, due to political interference, might have an incentive to undermine its findings. So the competition authority has to find a way to build its case a very transparent way in a rigorous way and in a way that that will survive any bias from the regulatory authority itself.

Now, there are also issues around the relative strength between the regulatory agency and the competition authority itself, and also the time it might just take for a very litigious process to play out. This might be a very expensive strategy for the competition authority to take, in terms of challenging the competition aspect of the case. However, one might find that, in terms of having a case that shines a spotlight on anticompetitive behavior, and also that might provide an opportunity for the competition authority to highlight all the competition policy risks and costs that arise from the behavior of Fuelco, it might actually be worth pursuing this case.

For instance, in South Africa we have had a case in the telecommunication sector which has taken over a decade; we've recently had a finding. But in doing so, we have been able to highlight the issues in this sector, we've been able to get a penalty even though after a long time. But in the ruling, the Tribunal also took the opportunity to advocate on competition policy. So various outcomes were achieved in sticking with the case. So in some instances it might be difficult, it might be expensive and unpopular, but it might be worth it to stick with the case.

Where political interference is going to be severe to the point that litigation isn't very feasible, then a market study might be a way to look at an industry holistically, in a non-adversarial way, but also in a way that brings matters to the fore, brings evidence to the fore, and also makes sure that the public are informed about issues, in aviation in this case.

The authority could well use airlines that would be able to counterbalance the political influence that's brought to bear by Fuelco and the incumbent airline. For instance, emerging customers, from the emerging middle class, might be important allies to mobilize in building the case around anticompetitive behavior in aviation. Corporates with significant travel budgets might also be brought to bear to bring pressure to build on the regulator and on the political principles. The tourism ministry might also be an important source of pressure, because they will also come from a political point of view, but see the cost of high aviation fuel tariffs and how that impacts on the market.

Finally, the authority might also think about allies that would help to compensate losers from competition in the short run. For instance, the Department of Labor can be brought to bear to think of ways to reskill and retrain employees that might lose their jobs if Fuelco is actually more competitive and if Fuelco was able to provide service in a way that might prejudice the incumbent and might bring more competition into the market. So compensation mechanisms,

especially in developing countries where employment is at issue, are worth considering, even by the competition agency.

[Slide 33]

WILLIAM KOVACIC: Aero's dispute with Air Terranova and FuelCo is as much a problem of political science as it is competition law. If we ask whether there is some element of politics in the implementation of a competition law, that's like asking if there is oxygen in the air. There is. It's usually all around us. The question here is how the competition agency is going to deal with difficult political circumstances that complicate the decision about how to proceed with this exclusionary scenario.

I think the essential starting point for the competition agency in building its case is to develop a narrative that shows what the jurisdiction of Terranova will lose if no action is taken.

The incumbent firms -- the dominant incumbent firms have made a case based on employment and they have used employment arguments to justify the continued support for the dominant incumbent enterprise, Air Terranova, and its alliance with FuelCo.

The important thing for the competition agency is to develop a counter-narrative to show what will be lost if these positions are left in place. What might the losses be?

In any economy, an effective transport sector is vital to the development of jobs in many related parts of the economy. A good air transport sector affects tourism. It affects business development. It affects the movement of air cargo in and out of the jurisdiction at a lower cost and with better reliability.

A crucial part of the case here is going to be to show that many other economic possibilities will be sacrificed if the status quo is left undisturbed. Air Terranova might say that some given number of jobs will be lost if the entrant, Aero, is allowed to expand.

The vital counter-argument is to identify that many other jobs that we cannot see now will be sacrificed if the improvements brought about by entry and expansion by the new carrier do not take place. And this involves going, sector by sector, to show what will happen if the new carrier cannot expand service, cannot improve quality and cannot increase the effectiveness of the transport sector in Terranova.

These arguments provide the vital factual foundation for going after the entrenched interests represented either in the private sector or inside government ministries that will oppose change. And it also provides the necessary foundation for building coalitions. This is the second crucial element in building the case.

We know very well who might be the opponents. But who might be potential allies? Are there forces inside the tourism ministry that will be taken favorably by the argument that improvements in air transport bring more visitors into the jurisdiction, visitors who will spend money and whose expenditures will create jobs inside of Terranova?

Might there be someone in the finance industry who will be taken by the argument that improvements in air transport, for example, will reduce the cost of bringing needed inputs into the jurisdiction, inputs that other industries in the jurisdiction need to grow, to document for them what will be lost if the status quo remains in place and to highlight what could be gained? And it's not only a matter of underscoring this by reference to possibilities we know to exist inside of Terranova, but to use comparative work to show how other similarly situated jurisdictions have improved performance dramatically. And the underlying point, again, is that the fixation on the protection of jobs for the traditional state-owned enterprise -- and these are jobs we can see -- the fixation on protecting those jobs leads us to sacrifice possibilities for

growth. Why would we protect, for example, 1,000 jobs when doing so means that we lose 10,000 others that could grow in other parts of the economy?

The second -- a further important question to be considered here is the political risk to the agency. Most anything worth doing in this field involves political risks and the fact of political risk shouldn't scare off the agency. What's important is to place this matter in the portfolio of all matters that the agency has.

Every competition day in and day out is in the process of either accumulating or spending political capital. And deciding how to proceed here requires careful thought about how much positive political capital is in the account and how much we will have to spend to carry out this program effectively.

Once again, this does not mean that we back off simply because there are political risks, but it's important not to take on, I think, too many bet-your-agency cases at one time. These are the sorts of things I'd take into account in deciding how to go ahead on behalf of Aero and in the face of opposition by the SOE, Air Terranova, and FuelCo, the other key player in the problem.

[Slide 34]

BERT FOER: As we approach the conclusion of our video, we want to leave you with several comments about culture, politics, and individual courage. The next three speakers are Mona Yassine from Egypt, Rahat Hassan from Pakistan, and Emelio Archila from Colombia.

[Slide 35]

MONA YASSINE: I'll tell you, this is more related to the culture. For example, the word "cartel" doesn't exist in our Arabic vocabulary. It's a long sentence, all right? And cartel is not when people get together to decide on price. Usually, they claim that it is for the benefit of the consumer. And even the government sometimes when it saw some products going up in price,

they would bring in the people and tell them -- or the producers, and tell them, why are we increasing the price, let's agree on a price. And that was, you know, like doing the right thing.

The other part of the culture is market power. So, when they see a big industry, they automatically say that they are infringing the law. Although the law says there are certain actions that the holder of the market power should not do and even if we prove that they are not doing it, the whole newspapers write against us, that we are not doing the right thing and we are, you know, biased to the power in the market.

See, my belief and the belief of the people who work at the agency is that you are enforcing the law and enforcing the law should not stop at any time, all right, with any changes. You are doing the right thing, unless you don't believe you are doing the right thing. So, enforcing the law is always the right thing to do.

[Slide 36]

RAHAT KAUNAIN HASSAN: Importantly, there are three aspects that a competition agency must bear in mind: It has to be fearless, it has to be firm, and it has to be fair.

I believe that the team factor is so important and most important factor in the team effort is acknowledgment and contribution of your team members. Never to forget that.

Number two, in decision-making, you should not be focused all the time on consensus. You can have consultations, but you have to decide.

Three, action. Action must provide a sense of ownership to the team.

[Slide 37]

EMILIO ARCHILA: I was head of the SIC competition authority in Colombia throughout most of President Pastrana's government. That was 1998 'til 2003.

One of the cornerstones of the Colombian Constitution is competition. We have a very big trust in what competition can do. The Colombian agency, the SIC, is very relevant for all economic regulations. I do think that most of the development from the passing of our Constitution -- our new Constitution to nowadays has been grounded in the idea of competition.

I think that the time when I was in the SIC was the first time in which the law was vigorously enforced. We imposed high fines and we rejected some mergers. The country was not quite prepared to have such an active agency. Nowadays, it is different.

So, the opposition to my work was growing and it came at a time when a merger was proposed between Avianca and ACES, that were the number one and number two airlines -- commercial airlines in Colombia. One of them was owned by the group Santo Domingo. The group Santo Domingo, it's -- if not the most powerful, one of the most powerful economic groups in the country. And the other one was owned by the Coffee Growers Association, that not only because of their economic but also in Colombian hearts it's very powerful.

And we analyzed it and we concluded that it should be rejected. I-- not because it is mandatory by law. As the Superintendent is appointed by the president, I talked to the president, I told him what I was going to do, and the first time, at that instance, he agreed and we proceeded and we rejected the operation.

Then after, according to Colombian Law, that is subject to a reconsideration, the same Superintendent should consider new arguments. Those arguments were presented. While I was studying them, the President changed his mind and the President talked to me and he said, he would back me if I made any condition on it, please think of any condition that will enable this merger to go on. I did it, but I did not find any. I was convinced that it needed to be rejected.

Then, in a way that I could understand that it was done in agreement between the parties and the President or the government, they recused me because I had talked in the media about the decision and they said that by me having gone to the media, I was not neutral anymore. I understood that by accepting that I should be taken out of that case -- they did not have me out of office, but they took me out of that case. And I understood that that was a lack of support by the President and I resigned and I was out of office. And I do think that, looking it backwards, it's good because -- contrary to what one could think, it made the agency more powerful. It was the president who lacked some popularity and I think that most of the people agreed with what the SIC had decided and I had decided. So, in the long term, any time when a President has tried to go to the agency, they have been very careful because of that precedent.

The price went up for a very long period of time.

There were lots of articles in the Colombian media. It was highly discussed. The case is still used as a joke when someone is going to do something that should not be done. Else from that, every time that someone remembers me, they remember that case.

[Slide 38]

ELEANOR FOX: Now, you have seen and heard from these inspiring men and women who have led their competition agencies in fighting for open markets and against the vested interests. We hope also that you have honed your skills in thinking about strategies and options in dealing with those two very important problems, public interest and political pressure, that so often haunt, especially, but not only, developing countries.

We closed with a segment of our kaleidoscope, which are portraits in clarity, conviction and courage, which are very important qualities of the leaders of the competition agencies in developing countries among others.

And, now, as we close our video, we would like to thank the three agencies that did so much work in making this video possible. They are the South African Competition Commission with the project leader, Trudi Makhaya; the Mexican Competition Commission, project leader, Heidi Sada; and the United States Federal Trade Commission, project leader, Russ Damtoft. And also all of those individuals who played their roles in the scenarios and all of those who worked backstage to make this possible. Thank you.

[Slide 39 - Credits for the Scenarios]

[Slide 40 - Closing Slide]