

Transport Liberalization and Competition Concerns in ASEAN*

Deunden Nikomborirak**

1. TRANSPORT LIBERALIZATION IN ASEAN

The Association of Southeast Asian Nations (ASEAN), established in 1967 by five countries — Indonesia, Malaysia, the Philippines, Singapore and Thailand, is one of the most successful regional groupings to date. The founding members of the Association were later joined by five more countries, namely, Brunei Darussalam (1984), Vietnam (1995) Lao People's Democratic Republic (Lao PDR) and Myanmar (1997) and Cambodia (1999).

The ASEAN region is home to a population of 537 million, half of which live on islands where the mode of transport is limited to air and sea. The Philippines and Indonesia are archipelagoes of more than 7,000 and 17,000 islands respectively. Brunei is also an island State. The remaining seven member countries are located on the Indochina Peninsula. Lao PDR is the only landlocked country in ASEAN.

ASEAN has made great efforts in liberalizing trade within the region under the ASEAN Free Trade Agreement (AFTA). In January 2003, tariffs between member countries were reduced to 0-5 percent for all products, except a few on the general exception and sensitive list of each member country. Unlike trade, however, regional liberalization in the service sector, including transport, has not been as forthcoming. This is because most member countries still maintain protectionist sentiments when it comes to the service sector. Also, less developed member countries are not prepared to open their service markets to more economically advanced member countries.¹ For example, a regional open-sky policy is likely to benefit major regional airlines with an extensive global network, such as Singapore Airlines and Thai Airways. On the other hand, more developed member countries are afraid of opening up the haulage industry to lower-wage neighboring countries for fear of price competition. For example, to import goods from Lao PDR into Thailand, Thai trucks are required to load the cargo from Laotian trucks at the border for transport to Bangkok. Laotian trucks cannot operate beyond the border with Thailand. On the contrary, goods

from or in transit through Vietnam to Lao PDR and vice versa can be transported by vehicles of either country.²

As a result, unlike AFTA, the ASEAN Free Trade Agreement on Services (AFAS) has made very little progress thus far. This is reflected in the fact that member countries' commitments made in AFAS are marginal to those made in the General Agreement on Trade in Services (GATS). In fact, commitments made in certain service sub-sectors are even fewer than those made in GATS.³

The lack of progress in the regional forum has prompted member countries to take their own initiatives in liberalizing their service sector according to their own preference. Singapore has made several open-sky agreements with many countries, including the United States. Cambodia, Lao PDR, Myanmar and Vietnam (referred to as CLMV countries), i.e., the more recent members of ASEAN, decided to have an air service agreement just among themselves. Indonesia and the Philippines' liberal policy toward foreign carriers in the early 1990s⁴ or Thailand's liberalization of domestic air transport in Thailand in 2002⁵—can be attributed mainly to unilateral policies rather than regional efforts.

Recognizing the limitations of regional service liberalization, ASEAN has chosen to focus instead on establishing frameworks for cooperation and coordination in transport-related rules and regulations in order to facilitate intra-regional trade. This is because cumbersome border procedures and incompatible regulatory standards have proven costly to regional trade. The three framework agreements in transport therefore are targeted specifically at removing such regulatory hurdles.

- The ASEAN Framework Agreement on the Facilitation of Goods in Transit
- The ASEAN Framework Agreement on Multimodal Transport
- ASEAN Agreement on the Recognition of Commercial Vehicle Inspection Certificates for Goods Vehicles and Public Service Vehicles Issued by ASEAN Member Countries.

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** Dr. Deunden is Research Director for Economic Governance, Sectoral Economics Program, TDRI.

The Framework Agreement on the Facilitation of Goods in Transit is aimed at facilitating goods in transit across member countries by simplifying and harmonizing transport and customs regulations. Only 5 out of 10 members have signed that Framework Agreement and none has ratified it in full.

The Framework Agreement on Multimodal Transport will make possible door-to-door delivery of goods in the member countries under a single document. The agreement specifies rules regarding the carriage of goods by ASEAN multimodal transport operators (MTOs), including the minimum qualifications to register as an ASEAN MTO. The framework agreement also specifies liability limits for MTO operators consistent with the United Nations Conference on Trade and Development/International Chamber of Commerce (UNCTAD/ICC) Rules for Multinational Transport and the United Nations Convention on Multimodal Transport 1980.⁶ To date, nine members have agreed to the latest draft of the Framework Agreement and are in the process of seeking domestic clearance to sign.

Finally, the Agreement on the Recognition of Commercial Vehicle Inspection Certificates aims at establishing mutual recognition of the certificates issued by member countries in order to facilitate cross-border hauling services.

While ASEAN may be comfortable with the pace and approach taken to foster greater regional cooperation and coordination in transport rules and regulations, many members face external pressures to liberalize their domestic transport markets. In the near future, ASEAN countries are likely to be placed under great pressures to liberalize their transport markets through bilateral free trade agreements, in particular, those with large developed trading partners, namely, the United States, Japan and the European Union (EU). Vietnam also has a bilateral trade agreement with the United States, while Singapore has a more comprehensive bilateral free trade agreement (FTA) with the United States that covers many issues other than trade in goods and services. Thailand is negotiating one with both the United States and Japan. The race to sign FTAs shows that ASEAN countries do not want to be left out in the race to secure market access

to their major trading partners in light of a stalled multilateral forum.

2. TRANSPORT SECTOR LIBERALIZATION AND COMPETITION CONCERNS

While liberalization in the transport sector will no doubt foster greater competition in the usually highly protected industry, there are several competition concerns that may arise. Competition concerns may arise out of government policies or measures, such as State subsidies, discriminatory State procurement or distorted price regulations. Alternatively, competition concerns may also result from private practices—both foreign and local—such as predatory pricing, vertical restraints, and denial of access to essential facilities.

Specifically, foreign investors may be concerned about the lack of access to essential facilities, dominant incumbent's anti-competitive practices and State rules or policies that favor local or State-owned enterprises. Domestic service providers, on the other hand, are often concerned about restrictive or unfair trade practices that may be carried out by large multinationals with extensive financial resources. They are also cautious about subsidies that foreign service providers may receive from their governments, either directly or indirectly. Consumers are concerned about the possibility of market monopolization or collusive practices in an oligopolistic market.

The author believes that competition concerns are likely to be more pressing where State enterprises are present in the market. Many transport sub-sectors in ASEAN are still dominated by State enterprises, as can be seen in Table 1.

State ownership of airlines is common globally, although this is less true now in many developed countries. It is interesting to note that the only two attempts to privatize national airlines in both Malaysia and the Philippines were unsuccessful. The privatized airlines eventually faced bankruptcy, with the result that re-nationalization of the airline was necessary. Other ASEAN countries such as Thailand and Singapore prefer to privatize only a minority share in the State enterprises.

Table 1 State-owned Airlines and Shipping Companies

Country	State-owned Enterprise	
	Aviation *	Maritime **
Indonesia	• Garuda Indonesia	• Djarkata Lloyd Ltd.
Malaysia	• Malaysian Airlines	• Malaysian International Shipping Corporation
Philippines	• Philippine Airlines (PAL)	• Galleon Shipping
Singapore	• Singapore Airlines • Silk Air	• Neptune Orient Line
Thailand	• Thai Airways International	• Thai Maritime Navigation Co., Ltd.

Sources: * Forsyth et al. (forthcoming).

** Meyrick and Associates (2001).

ASEAN countries also got on the bandwagon in the late 1960s when developing countries established national shipping lines in fear of their growing dependence on powerful Western shipping lines that colluded in order to maintain high freight rates. However, as national shipping lines proved too costly to maintain, many developing countries decided to relinquish the State's ownership in maritime services. Against the global trend in privatization of State-owned shipping lines since the late 1980s, ASEAN governments have continued to hold on to their ownership in national shipping companies. As a result, most major airlines and shipping lines in ASEAN countries remain State-owned to date.

The fact that a large portion of the region's transportation sector remains in the hands of State enterprises does not bode well for competition for several reasons.

First, State-owned enterprises do not operate on a commercial basis. Their mandate is often linked to employment and expansion of the service network. Sappington and Sidak (2003) demonstrate—by means of mathematical proofs—that State-owned enterprises that are concerned less about maximizing profit and more about maximizing revenue⁷ than private enterprises have stronger incentives to pursue activities that disadvantage competitors. These include pricing below costs, misstating costs and choosing inefficient technologies to circumvent restrictions on predatory pricing, i.e., technologies that require large fixed costs and small variable costs. It should be noted that the conventional “predatory pricing” test, which gives importance to the likelihood that the alleged violator would raise prices after the exit of the competitor, is not applicable to State enterprises whose objective is not to maximize profit at any point in time.

Second, a State-owned enterprise is likely to carry social service obligations. Cross-subsidization is the most common source of financing for service obligations in countries where financial allocation from the general budget is not market so that rents generated from the particular market can be used to subsidize social service obligations. This may give rise to competition problems if the latter is a competitive one. Cross-subsidization may lead effectively to predatory pricing in the “non-reserve” market, posing a barrier to entry.

Third, in cases where the State enterprise does not practice cross-subsidization, State subsidy, rather than predatory pricing, is a cause of concern. Subsidies may come in different forms such as direct operational subsidy, interest-free loans, loan guarantees or tax exemptions. State-owned enterprises also carry certain “special privileges” that are not linked to a subsidy. Such privileges may include exclusive rights to serve the government market (government procurement), exclusive rights to provide certain services, or even exemptions from certain State laws or regulations. Subsidies and special privileges both contribute to an unequal playing field between State and private operators. Where State enterprises are absent from the market, government subsidy schemes are likely

to be more transparent and non-discriminating as the government has no justification for favoring one private transport operator over another.

Fourth, the incumbent State enterprise—privatized or not—is likely to inherit a dominant position in the market from its monopoly days. Market liberalization in many cases is not preceded by a well-planned market restructuring that would help curb the market power of the incumbent. New competitors are thus likely to face abuse of dominance practices as the incumbent undoubtedly struggles for its market share. Where competition rules are effective, investors may expect prompt protection from the competition authority. Unfortunately, regulatory and competition regimes in markets dominated by State enterprises are likely to be relatively undeveloped.

Governments often regulate their State enterprises through the representation of their officials on boards of directors. Important business decisions such as pricing of public transport services or large-scale investment may require ministerial or cabinet approval, which can render the decision a political rather than economic one. Worse, in many cases, the State enterprise acts as both the ad hoc regulator and operator. They often derive their regulatory power from laws that were enacted way back when the State was the sole service provider in the market. Alternatively, in cases where State enterprises are empowered to hand out private concessions, they may secure their regulatory power through concession contracts.⁸

While new foreign entrants may be concerned about unfair State rules and regulations and restrictive practices of local incumbents, in particular State-owned ones, local incumbents also have their share of worries. Certain transport services, in particular logistic services such as trucking, cargo agency and freight forwarding, display economies of network and economies of scope. Small local service providers find it difficult to compete with large shipping lines or large logistic service providers with a global network. There are thus concerns about price transfer and unfair cross subsidization between different legs of the transport service. Local firms are also apprehensive about subsidies that foreign competitors may receive from their governments, directly or indirectly. In the absence of a capable and effective sector-specific regulatory authority or the general competition authority, there is very little protection that a domestic service supplier may seek.

The following section will examine in detail these competition concerns in the ASEAN countries.

3. COMPETITION PROBLEMS IN THE TRANSPORT SECTOR IN ASEAN

3.1 State Subsidies

In the World Trade Organization, trade in goods is protected against subsidies in the General Agreement on Tariffs and Trade (GATT), but trade in services does not enjoy the same protection under GATS, unless the service

concerned is linked to an exported good. However, work is currently under way to collect information on types of service subsidies implemented in member countries so as to be able to categorize subsidies into those that are prohibited, not-prohibited but subject to retaliation, or allowed, similar to the agreement on countervailing duties in GATT.

In the absence of a multilateral discipline on service subsidies, most regional and bilateral trade agreements, too, do not include subsidies in the cross-border services chapter, be they North American Free Trade Agreement (NAFTA) or United States free trade agreements signed with Singapore and Chile in 2003. This implies that foreign versus domestic, or State versus private, service providers in the same market may not be competing on a level playing field where a State subsidy is present.

ASEAN countries have had their share of State subsidies in the aviation industry. Philippine Airlines (PAL), Garuda Indonesia and Malaysian Airlines (MAS) all have received large bailouts from the State in the past. In 1998, the Indonesian government provided the national airline with a US\$ 100 million loan guarantee and extended equity loans worth US\$ 400 million. In 2002, the government wiped out most of MAS's US\$ 2.4 billion debt after an unsuccessful privatization that led to renationalization of the national flag carrier. While the Philippine government had provided the privately owned national flag carrier with a large variety of subsidies including guarantees of all loans, debt write-offs, exclusive use of government-owned and -controlled airports, non payment of take-off and landing fees, and tax exemptions on all inputs and other operating expenses.

Indeed, airlines on the brink of bankruptcy worldwide also receive support from the State, including those in the United States and the EU. However, where there is free competition across borders, the issue becomes more sensitive as subsidies can put a national flag carrier ahead of that of other States. Hence, rules are required to ensure that State aid does not lead to distortions in competition. For example, the European Commission (EC) adopted a common guideline on State aid in the aviation sector. Aid for restructuring is allowed, but not for operations. It recommended that the aid should be:

- A one-off measure
- Linked to a restructuring plan, to be assessed and monitored by independent professionals appointed by the Commission
- Should not be used to buy new capacities.

It also recommended that the State needs to:

- Refrain from interfering in commercial decision-making by the airline
- Ensure that the interests of other carriers are not adversely affected.

Aldaba (2005) found that in the case of the Philippines, the dispensed State aid did not comply with

the EC guideline. Specifically, the debt write-off was undertaken in the absence of any conditionality with regard to firm restructuring such as capacity reduction, or future debt redemption. As a result, management was able to expend the cash at its own discretion. Moreover, the exclusive use of the new airport and the reduction in take-off and landing fees are clearly discriminatory and constitute a continual operational subsidy rather than a one-time restructuring subsidy. Many other transport services provided by State enterprises in ASEAN are also subject to State aid, in particular rail and public mass transportation.

Many ASEAN countries also provide subsidies relating to the construction and/or purchase of vessels, tax concessions for using domestically owned vessels and preferential tax treatment for seamen. The government of the Philippines offered preferential mortgage loans for financing construction, or for the acquisition or initial operation of vessels. Similarly, in 1979 Malaysia set up the Industrial Development Bank to provide low-interest loans to ship-owners, ship-builders and ship-repairers. In Singapore, ship-owners, regardless of nationality, have access to low-cost financing for the purchase of new vessels from Singaporean shipyards that match rates offered by other Asian countries. The scheme was designed to promote the development of Singaporean shipyards, rather than the expansion of the Singaporean fleet.

The Philippines, Singapore and Indonesia have schemes whereby shipowners/shippers using domestically owned vessels are given tax concessions, while Filipino and Thai seamen are exempted from the payment of income tax.⁹

To conclude briefly, in the absence of rules and guidelines governing State subsidies, ASEAN countries are likely to encounter competition problems in the liberalization of their transport industry, in particular the aviation and maritime segments, where State aid proliferates as each member country competes to promote its own industry's interests. Hence, a regional agreement to open up the transport industry will need to be complemented by preparatory work on laying rules and regulations governing State aid. Perhaps coordination and cooperation in containing the size or scope of competing subsidies catering to these services to prop up national providers ahead of others can better serve to save member states' money and, ultimately, benefit their economies as a whole.

3.2 Cross-subsidies

As mentioned previously, cross-subsidy constitutes the most convenient—albeit non-transparent—source of financing for social service provisions in developing countries. It is convenient because the government needs not allocate a budget to finance social services, but it is non-transparent because the actual cost of the subsidy required is not made explicit. In other words, as long as the operator, often State-owned, is financially

viable, the State need not be bothered about the size of the subsidy.

The presence of cross-subsidization has two implications. First, the new entrant market may face predatory pricing as a result of, or in disguise of, cross-subsidization undertaken by the incumbent. Second, competition may erode the availability of the subsidy required to maintain social or universal services. For example, the owner of PAL claimed that the airline's massive loss was a result of former President Fidel Ramos' decision to open up many international routes to foreign carriers. Singapore Airlines was even granted the fifth-freedom right to pick up passengers in Manila on the way to Seoul and Osaka. It claimed that these foreign carriers did not have to service unprofitable domestic routes.¹⁰ As a result, all loss-making routes were eventually abandoned. Similarly, inter-city bus service providers in Malaysia complained that, as a result of many new licenses issued by the State authority, it was not able to sustain the provision of subsidized routes (Lee 2004).

In order to ensure both fair competition in the market and a transparent and effective subsidy scheme, an overhaul of the subsidy regimes in the transport industry is a prerequisite for market liberalization. Cross-subsidization will have to be replaced by a more transparent subsidy scheme, such as auctioning the delivery of the targeted social service. At the minimum, State or private enterprises that carry social service obligations will have to allocate costs to services that are provided on a social rather than commercial basis. Otherwise, the task of proving "price predation" will be impossible.

Phasing out existing cross-subsidy schemes in transportation is likely to be a herculean task as State-owned enterprises in the region are unaccustomed to allocating costs to the different services that they provide. Worse, in most cases it is not even clear what constitutes a "social service." Usually, all loss-making services are conveniently defined as social services without a thorough examination of the costs and benefits of providing and maintaining such services.

3.3 Distorted Price Regulations

Pricing is one of the most important factors determining a firm's competitiveness as well as competition in the market. Since transportation is a regulated industry, certain transport services are subject to price control, in particular when there is no competition in the market. In transport, however, there is intermodal competition. For example, rail transport may be a substitute for trucking for a particular type of bulky product such as cement and agricultural products. Similarly, planes and buses can be a substitute mode for long-distance passenger travel. Hence, it is important that the pricing of these competing modes of transport services are congruent to ensure a level playing field across modes. The problem may arise in cases where a particular mode of transportation is liberalized, but not so the other competing modes.

For example, the trucking or haulage industry tends to be more easily liberalized as it is a relatively contestable market. Other modes of transport, such as rail, sea and air, on the other hand, are more difficult as they display significant economies of scale or economies of network. Hence, freight rates for air, sea and rail modes of transport may still be subject to tight price control regimes, while those in the haulage industry are determined by market forces. If the regulated price is too low, the competing trucking business may find it difficult to make a profit.

Inconsistent pricing across different competing modes of transportation may threaten the commercial survival of private transport service providers in the market. For example, in Bangkok there are three different modes of public transportation: bus, elevated train and subway. Both the "sky-train" as it is popularly known and the subway compete with buses, but not with each other as their routes hardly overlap. However, in the future, their growing networks may overlap.

The pricing for the Bangkok sky-train service is based on "full cost-recovery" since the private concessionaire financed all components of the project, i.e., civil and operational components, without any government subsidy. The Bangkok subway tariffs, on the other hand, are based on "partial cost-recovery" as the infrastructure, i.e., the tunnels and stations is financed by the State, while the private investors financed only the rolling stock. These price conditions are clearly stipulated in the contracts. Finally, bus fares are determined by cabinet decisions, which makes fares political. The Bangkok Metropolitan Bus Authority does not receive any operational subsidy from the government, but is allowed to accumulate a large amount of arrears in its payments owed to the State-owned petroleum company.

Under such circumstances, the sky-train operator no doubt faces a serious price constraint, as any price increase could cause users to switch to lower-cost alternatives that receive a State subsidy.¹¹ Hence, consistency in pricing scheme across substitutable transport services is vital to ensure fair competition across competing modes of transportation. This requires coherence not only at the regulatory level, but also at the project financing level.

Another common problem with price regulation in the region is the setting of "price ceilings" and "price floors" for regulated transport services. While maximum and minimum prices may in theory prevent a dominant player in the market from setting monopoly or predatory prices, in practice, they tend to have adverse consequences in markets where there is effective competition. A price ceiling provides a convenient "target price" for a cartel, while a price floor can restrain price competition. For example, following liberalization in 1997, Malaysia's haulage industry faced intense competition as the number of firms increased from five in 1997 to about 60 firms in 2003, and container haulage rates fell between 20 to 40 percent. In order to end the destructive price war, the Container Hauliers Association of Malaysia and the Association of Malaysian Hauliers decided to stop giving

rebates and charge the full regulated price instead. Such behavior, known as “parallel pricing” resulting from “tacit collusion,” does not constitute a violation of competition law in most countries.

Similarly, before the liberalization of the domestic air transport services, price regulations worked in favor of the incumbent national carrier, Thai Airways, since smaller competitors may not price below those of the dominant incumbent. Only when the price floor was removed did domestic air fares fall 30-40 percent. The regulatory authority decided to keep the price ceiling, however.

To conclude, in the face of changing market structure and competition, ASEAN countries need to review their price regulations for the entire transport sector. Otherwise, regulatory failure can pose a major obstacle to effective competition in the market.

3.4 State-owned Enterprise “Privileges”

Besides subsidies of various forms, loss-making State enterprises are usually granted the right to operate in markets where they may generate “rents” to subsidize their social service operations. Thus, State-owned enterprises’ exclusive rights to provide a particular service are often linked to the cross-subsidy scheme.

It is common for State-owned enterprises to be given the opportunity to exploit the right to operate cross-border services that has been negotiated by the State. For example, Thai Airways is entitled to provide services on all international routes that Thailand had negotiated under the bilateral air transport agreement with other countries. Similarly, as part of the 1993 agreement on the transport of goods in transit between Lao PDR and Thailand, the Thai government authorized five carriers to undertake the transport of goods through Thailand to Lao PDR. Two of the five companies were the Express Transport Organization and the State Railway of Thailand, the State road haulage and railway companies respectively.¹² Usually, State-owned enterprises may also be exempted from certain laws and regulations to which private enterprises are subject. For example, the competition law in Thailand provides a blanket exemption for State enterprises defined as all enterprises in which the State holds a direct majority equity share. Fortunately, competition laws in Indonesia and Singapore do not provide such an exemption.

The exclusivity reserved mostly for State enterprises precludes competition from the private sector. For this reason, the Singapore-US bilateral free trade agreement contains a provision that prohibits corporatized State enterprises from enjoying any special privileges that other private competitors do not enjoy.

3.5 Market Concentration and Abuse of Dominance

Certain transport service markets, in particular, air transport, are dominated by the incumbent that is often State-owned. This is often the case because the opening

up of the market to competition is made without proper market restructuring that would help dissolve the dominant market power of the incumbent service provider in order to ensure effective competition in the market. As a result, newcomers may face all sorts of restrictive practices carried out by the incumbent so as to protect its market share. The problem is—in the absence of effective competition oversight—that some of these cases went unnoticed or unrecorded. In other cases, State regulation serves as a convenient means to pursue restrictive practices. As previously mentioned, price regulation may restrict rather than promote competition. It is not surprising that the regulatory body is captured by the State enterprise as both often belong to the same Ministry. In very small countries such as Lao PDR or Cambodia, they may even share the same two-floor building.

The only recorded competition case in transport is the case of air transport in Indonesia. In 2003, KPPU (Komisi Pengawas Persaingan Usaha or Indonesia Competition Commission), the competition authority in Indonesia, found Garuda, the national airline, in breach of the national competition law by requiring travel agents to use only the Abacus reservation system to reserve tickets. The authority ordered Garuda to terminate its exclusive agreement with Abacus and to withdraw the mandatory requirement for travel agents to use Abacus to reserve tickets.¹³

In markets where there is no dominant State or private enterprise in the market, there are risks that smaller local service providers may face unfair competition from large multinational competitors. This fear is most real in the road haulage industry where the market is traditionally a relatively contestable one. However, since the dawn of the container age, major shipping lines have become involved in the development of integrated logistic systems, providing door-to-door multimodal services, which includes land-based services such as road haulage. Local service providers fear that large shipping companies will collude to lower the price of land-based services, and use rents from maritime services where they operate as a cartel, to cross-subsidize the activity. In effect, land-based service providers will be “squeezed out” of the market through the high cost of freight and low revenue.

This fear is well founded. In 1998, the EC found that the Trans Atlantic Conference Agreement (TACA) had fixed prices for land transport, restricted the availability of individual service contracts between shipping lines and their customers and fixed freight forwarders’ commissions. The EC ruled that TACA had abused its dominant position since such practices did not fall within the ambit of the block exemption provided for liner conferences nor qualified for individual exemptions. As a result, TACA had agreed to adopt a “not-below-cost” rule, whereby land-based services would be priced not less than the direct out-of-pocket expense of the carrier. Similar practices were carried out by the North Atlantic Conference Agreement, but were abandoned once the EC and the US Federal Maritime Commission had begun inquiries.¹⁴

Another common concern of local small and medium-size road haulage operators is access to exclusive ports. As mentioned previously, shipping companies have invested extensively in ports in order to develop an integrated transport service. While private ports can be efficient and save the government resources, they may not be accessible to non-vessel operators. As a result, the government needs to ensure port accessibility to independent operators either by requiring exclusive private ports to share the facilities, or to operate a public port. A more efficient alternative would be to have the construction and operation of the port undertaken by parties that do not hold business interests in the shipping industry.¹⁵

In countries with strong regulatory and competition regimes, such restrictive or collusive practices will be restrained. Hence, smaller service providers or new entrants can take comfort in State protection against abusive business practices. The regulatory and competition regimes in most ASEAN countries are not yet well developed enough to deal with such regulatory complexities. The next section will discuss the capacity of the competition and regulatory regimes in the region.

4. COMPETITION AND REGULATORY REGIMES IN ASEAN

As previously mentioned, markets that have traditionally been dominated by State enterprises are likely to have a relatively undeveloped regulatory regime. This is because the State is not accustomed to regulating private companies whose business information is protected by law. Long-standing reliance on State-owned enterprise non-proprietary business data and technical information for the purpose of regulation has rendered State authorities particularly weak when it comes to dealing with private businesses.

In ASEAN, the authority to regulate often rests with a ministerial body that oversees both policy and regulation. Independent and specialized regulatory bodies are an exception rather than the norm in ASEAN. Also, as mentioned previously, in some cases, State-owned enterprises are vested with the regulatory power, either *de jure* or *de facto*. For example, the regulation of air transport in ASEAN rests mostly within the purview of a ministerial authority such as the Department of Air Transport in the case of Thailand, the Civil Aviation Authority of Singapore, the Department of Civil Aviation in Cambodia, Myanmar and Brunei, the Ministry of Transport in the case of Malaysia and the Civil Aviation Administration of Vietnam. The Philippines is the only country that has a full-fledged regulatory authority known as the Civil Aeronautics Board, as can be seen in Table 2.

With respect to competition rules, only three ASEAN countries have a full-fledged competition law that contains all major substantive provisions regarding restrictive practices, namely, abuse of dominance, collusive practices and mergers: Thailand, Indonesia and Singapore. Thailand has a law only on paper; its implementation has been obstructed by the lobbying of big businesses and political intervention. Singapore's law was passed in late 2004 and became effective only at the beginning of 2005. Vietnam's law was passed in November 2004 and became effective in July 2005. Indonesia is the only country that has produced a few competition cases. The Philippines relies on the penal and civil codes to deal with anti-competitive practices. Work is under way to draft a competition law. Lao PDR's Decree on Competition came into effect in August 2004. While the Decree contains sections addressing issues of monopolies, collusive practices and mergers, the provisions are extremely brief with the result that it is unclear how the law will be implemented. Vietnam has not yet promulgated a competition law, but has been revising several versions of a draft law; the latest version is the eighth draft.

Table 2 Regulation of the Air Transport Industry in ASEAN

Country	Air Transport Regulatory Body	Competition Law and Authority
Brunei	Department of Civil Aviation	No competition law
Cambodia	Department of Civil Aviation	No competition law
Indonesia	Directorate of Air Transport	Competition law available
Lao PDR	Lao Transport Authority	Decree on Competition (effective August 2004)
Malaysia	Ministry of Transport	No competition law
Myanmar	Department of Civil Aviation	No competition law
Philippines	Civil Aeronautics Board (independent)	Article 186 of the Revised Penal Code, Civil Code RA 386, RA 186 (Act to Prohibit Monopolies and Combination in Restraint of Trade)
Singapore	Civil Aviation Authority of Singapore	Competition law available
Thailand	Department of Air Transport	Competition law available (but a block exemption is provided for State-owned enterprises and major provisions are not yet enforceable)
Vietnam	Civil Aviation Administration	Competition law available

Source: Data collected by author.

The remaining ASEAN countries do not yet have a competition law.

To conclude, regulatory and competition regimes in many ASEAN countries are ill-prepared to safeguard fair and effective competition in the market, both legally and institutionally. Dealing with competition issues, in particular those relating to pricing, can be extremely complex, both conceptually and practically. Determining costs of a private company, in particular a multinational one, will be much more difficult than that of a State-owned enterprise where the government has free access to all cost data.

5. CONCLUSION

ASEAN countries need to be cautious about opening up their domestic transport markets to international competition. Much preparatory work is required to ensure that liberalization will bring forth fair and effective competition in the market that will benefit their economies as a whole. ASEAN governments need to undertake the following major tasks before making market-opening commitments:

- Reform the accounting system of State-owned enterprises to ensure that costs are properly allocated for each service provided by the enterprise. Sappington and Sidak (2003) show that a State-owned enterprise that values revenue will have stronger incentives than a profit-maximizing firm to understate the marginal cost of production in order to relax a binding prohibition against pricing below cost. The same study also demonstrates that to dodge pricing regulations, State-owned enterprises are also more ready to adopt excessively capital-intensive technology to lower marginal or variable costs, while raising fixed costs. Hence, the regulatory burden is much more complex in the presence of a State-owned enterprise.
- Overhaul existing subsidy schemes to disentangle the complex web of ad hoc subsidies and to establish a transparent scheme that will guarantee efficient and fair allocation of State aid among different players in the market; any cross-subsidization between monopoly and competitive markets must be eliminated.
- Once cross-subsidy schemes are eliminated, State-owned enterprises are then no longer necessary and should therefore be eliminated as well.
- Undertake market restructuring before market opening in cases where the State-owned enterprise holds a dominant market share. The more contestable a market is, the less the regulatory burden will fall on the nascent regulatory or competition authority.

- Establish a comprehensive transport regulatory agency staffed with skilled personnel in the field. Price regulation of all modes of transport needs to be revised. The agency will also need to develop clear rules before making market-opening commitments, particularly in bilateral free trade agreements that provide for private-State arbitration. Non-transparent and unclear regulatory rules can be easily accused of being discriminatory or inconsistent with the minimum standard of treatment required by customary law. Hence, a host country government may face an endless series of expensive lawsuits if it is ill-prepared for the complexities of international competition.
- Promulgate a comprehensive competition law and ensure effective implementation to protect local small and medium-size land-based transport service providers.

In the event that ASEAN countries decide to liberalize their transport markets either through a regional agreement under AFAS or through bilateral agreements with large trading partners such as the United States and Japan, to ensure fair competition, the agreement should certainly contain provisions on State subsidies and mandatory cooperation between authorities in partner countries in cross-border competition issues such as those related to liner shipping.

ENDNOTES

- ¹ The level of economic development of member countries in the region is very diverse. In the year 2003, Singapore's GDP was US\$ 21,230, while that of Lao PDR was US\$ 10.
- ² However, the administrative procedures for releasing transit goods can be cumbersome.
- ³ Stephensen and Deunden (2002).
- ⁴ According to Leinbach (2004), the foreign carrier with the widest access to Indonesia is a Silk Air, which is Singaporean.
- ⁵ Thailand now boasts of having at least seven domestic carriers.
- ⁶ Liability is a major issue since many ASEAN members are not signatories to international conventions that stipulate carriers' liabilities under different transport modes.
- ⁷ A proxy for employment and scale of service.
- ⁸ For example, the State-owned Bus Company Ltd. in Thailand derives its authority to set service and safety standards and regulate inter-provincial bus schedules from the terms and conditions stipulated in the concessions

(or franchise) it hands out to private operators. Since private operators are not allowed to operate the reserved routes, giving the State-owned enterprises exclusivity, they have no choice but to submit to the terms and conditions stipulated in the contracts.

- ⁹ Meyrick and Associates Pty., Ltd. (2001).
- ¹⁰ Aldaba (2005).
- ¹¹ The private concessionaire expected to generate greater gains from property development. However, when the property bubble in Thailand burst in 1997, the operation faced a chronic operational loss that has continued to date.
- ¹² Cabanius (2001).
- ¹³ The Asia Pacific Anti-trust Review 2004. Available at http://www.globalcompetitionreview.com/apar/indo_overview.cfm
- ¹⁴ EC Competition Newsletter (1999).
- ¹⁵ This may also exclude investors that are foreign governments whose national port may be in competition with domestic ports.

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