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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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Global Forum on Competition

ABUSE OF DOMINANCE IN REGULATED SECTORS

Case submitted by Zambia

-- Session III --

This case is submitted by Zambia in view of its discussion in Sub-Session 1 on Friday 18 February 2005 (from 9.30 am).

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MPULUNGU HARBOUR AND PORT: A SUMMARY OF COMPETITION ISSUES

1. Zambia is a landlocked country and therefore does not have an elaborate port system. The only significant port is Mpulungu Port, which is located on Lake Tanganyika (northern Zambia). Mpulungu Port offers easy and ready access by water to the western part of Tanzania, eastern part of Congo DR as well as Burundi and Rwanda (all these, including Uganda and Kenya are collectively referred to as the “Great Lakes Region.”) The Port is regulated through the Ministry of Communication and Transport, while the Zambia Competition Commission retains responsibility for applying the competition law.

2. The Mpulungu Harbour and Port provides the easiest and cheapest route to those countries exporting goods into the markets in the Great Lakes Region. Also, given the type and nature of the terrain between these exporting countries and the market in the Great Lakes Region, it would be very costly to most, if not all, of the exporting countries to construct roads or a railway system into the market. Mpulungu is therefore a strategic and principal exit for Zambia’s exports to the Great Lakes Region for products such as cement, maize and other agricultural produce. Zambia is part of the Common Market for Eastern and Southern Africa as well as of the Southern African Development Community, both of which promote *inter alia* trade in this region.

1. The Port

3. The average cargo through the Port per year is about 60 000 metric tonnes per year. However, it has the potential to handle up to 80 000 or even 120 000 metric tonnes per year.

4. The Port has two quays and an oil jetty. A quay is used for loading and off-loading vessels; one quay can only accommodate one vessel at a time. Currently, the oil jetty is also used for loading and off-loading cargo. Therefore, the Port can handle only three vessels at any one time.

5. The Port has three cranes, two forklifts and assorted other equipment to move loads around the port. However, the Port Operator has decided that all loading of vessels is to be done manually using labour, and off-loading is to be done by cranes. The Port Operator’s justification is maintenance cost reduction.

6. The Port has four storage facilities, each with a capacity of 1000 metric tonnes. This storage could be expanded. However, according to the Concession Agreement, the Government and Port Operator must jointly fund any rehabilitation or upgrading at the Harbour and Port. The Government does not have the funds; indeed, in the past, it has used European Union funding for such projects.

2. Competitors, i.e., Port users

7. Currently, seven competitors use the Mpulungu Harbour and Port:

	Port User	Cargo (MT)	Approximate Market Share
1.	Agro-Fuel Investments	29, 535.82	50.1%
2	Cacitex (Z) Limited	21, 256.65	36.1%
3	Tanganyika C. Service	5, 335.80	9.1%
4	SDV (Z) Limited	1, 305.09	2.2%
5	Kaimbi C. Masters	1, 336.48	2.2%
6.	Powermack Freight	110.00	0.2%
7	Fedrol C. Masters	62.00	0.1%
	Total	58, 941.84	100.00%

3. The Concession

8. In line with the privatisation programme in Zambia, the Government decided to concession the Mpulungu Harbour and Port for the purpose of increasing the productivity and efficiency of the harbour, port, freight, transportation and associated services. The port had been managed by the Government through Mpulungu Harbour Corporation Limited (MHCL).

9. Mpulungu Harbour Corporation Limited is a Government parastatal that was managing Mpulungu Harbour Estate, Harbour and Port Operations and Assets prior to the Harbour and Port and the Assets being concessioned to Mpulungu Harbour Management Limited (MHML). Today, Mpulungu Harbour Corporation Limited's role is not that of Port Regulator but represents Government shareholding and interest and serves as the link between the Port Operator and the Government. In the year 2000, Mpulungu Harbour Estate, Harbour and Port Operations and Assets were concessioned to Mpulungu Harbour Management Limited by the Zambia Privatisation Agency (ZPA) after a competitive bidding process. That is, Mpulungu Harbour Management Limited became the Port Operator, responsible for operating and maintaining Mpulungu Harbour Estate and Assets and for providing harbour and port operations and harbour services.

10. The Concession Agreement provides that, "*The Concessionaire shall have the freedom to set and revise, in its contracts with customers, the conditions of cargo handling and the rates charged to customers for the handling of such cargo and passengers.*" (Article 19.3)

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

12. The Term “*Arms Length*” is defined in the preamble of the Concession Agreement as follows:

“Arms Length Terms shall mean: a transaction where

- The parties in negotiating the transaction have sought to promote their own best interests in accordance with fair and honest business methods;
- The consideration expressed in the agreement for the transaction entered into is the only consideration for the transaction;
- The price and other terms of the transaction have not been affected by, nor determined as a consequence of, any other agreement or any direct or indirect relationship (other than the relationship created by the transaction agreement) between the selling party or MHCL of the selling party, or a company in which the selling party is MHCL, and the buying party or MHCL of the buying party, or a company in which the buying party is MHCL; and
- Neither the selling party, nor any person or company connected with it through shareholding or otherwise, has any direct or indirect interest in the subsequent disposal, if applicable, by the buying party of any of the products or services obtained pursuant to the transaction agreement”.

13. The concession period is 25 years, and subject to review every five years. The review focuses on operational matters. The Government may terminate the concession only if the Concessionaire defaults on its material obligations or ceases activity for 120 days. In particular, there is no specific competition provision in the Concession Agreement beyond that of Article 62.1.

4. Abuse of dominant position by Mpulungu Harbour Management Ltd

14. The Zambian Competition Commission believes that, whilst the concession agreement recognises the need for competition, Mpulungu Harbour Management Limited has violated the ‘Arms Length’ requirement specified in Article 62.1 by continuing to carry out anticompetitive practices to the detriment of the other competitors. Through its subsidiary, Agro-Fuel Investments Limited (Agro-Fuel), Mpulungu Harbour Management Ltd has played the role of Port Operator, Port User and Manager, contrary to the desired competition and concession principles.

15. Furthermore, the “Arms Length” provision, requiring fairness in dealing with other port users, implies that Mpulungu Harbour and Port is an “Essential Facility”. It is an essential facility because:

- The position of the Harbour and Port cannot be replicated or acquired by other competitors (The geography of the Lake is not favourable to putting up several ports and none of the competitors has the financial capacity to put up a different port.)
- The Operator’s competitors need access to the Harbour and Port in order to offer competitive service. Denial of access to this facility will mean failure on the part of the Port Operator’s competitors to provide effective competition.
- The Port has the potential and capacity to handle both the Port Operator’s (i.e. MHML’s), services and the competitors’ services without affecting the Port Operators’ business (Current capacity utilisation is low due to problems ranging from security risks arising from the civil wars in the Democratic Republic of Congo and the Great Lakes Region to inadequate and inefficient operating facilities i.e. loading and off-loading equipment. Furthermore, the port is

in fact shared: Since the implementation of the Concession Agreement in July 2000, the Port Operator has on average been exporting 20 000 to 30 000 metric tonnes per year, with the immediate market challenger transporting 15 000 to 25 000 metric tonnes, leaving the rest to the smaller competitors.)

- It is controlled by a dominant player i.e. the Port Operator, which is vertically integrated. He is both a Port Operator and Port User. (The Port Operator's market share in the relevant market is above 50%. According to the Competition and Fair Trading Act, the threshold for a monopoly undertaking is 50% market share.)

5. Instances of abuse by Mpulungu Harbour Management Limited

16. Investigations carried out by the Zambia Competition Commission revealed that Mpulungu Harbour Management Limited was abusing his position as Port Operator and Port User by availing himself more usage of all the Port facilities and access to business opportunities. This is a contravention of competition rules and the spirit of the Concession Agreement. Investigations revealed the following:

5.1 Allocation of shipping space

17. The allocation of shipping space is totally unfair and is generally aimed at giving Agro-Fuel an unfair advantage over other Port Users. Shipping space is limited to the three vessels and three barges that transport cargo between the Port and the Great Lakes Region. The vessels are owned by the Batralac Shipping Company, travel as a group, and make a roundtrip once per month. The barges, also, travel as a group and make one trip per month. The Port Operator holds information on the departure of the ships (i.e. vessels and barges) for the Mpulungu Port and this information is not made available either to all Port Users or to the general public. The Port Operator then uses this information to privately and secretly allocate shipping space, with more space to himself and the remainder to the other Port Users. The existing "First In First Out" (FIFO) rule is not strictly followed and is manipulated by the Port Operator to his advantage.

5.2 The chartering of vessels

18. The frequency of chartering is higher for the Port Operator than the other Port Users. For instance, from December 2001 to August 2002, there were a total of 12 incidents of chartering vessels, out of which Agro-Fuel Investments Limited had 7 and 5 were for the rest of the competitors. In principle, the Port Users are required to discuss with the Port Operator prior to going into chartering arrangements with the shipping company. The Port Operator reserves the right to accept or refuse. The Port Operator may refuse on grounds that there is a shortage of vessels or barges and yet when it suits him, he can charter a vessel or a barge.

5.3 Choice of cargo to be loaded

19. Mpulungu Harbour Management Limited dictates the type of cargo to be loaded by the other Port Users so that he can load cargo that is marketable. In principle, the Port Operator must leave the choice of cargo to be loaded to be the prerogative of each port user since he or she knows the demands of his or her customers better. By dictating the type of cargo to be loaded, the Port Operator is abusing his position as Port Operator. This discrimination affects competition in that it actually aims at eliminating competition in the lucrative markets dealing with products in high demand. What has actually happened is that this has made some competitors run into liquidity problems and others subsequently collapsed.

5.4 Port storage

20. The Port Operator has kept this for his exclusive use. In response to repeated complaints, the Port Operator has made provisions to accommodate the competitors' cargo. This is entirely dependent on his discretion and there is no fixed system in place. Sometimes, other Port Users are forced to keep their cargo on trucks until it can be loaded onto the vessels. This incurs demurrage charges. In some cases, they have to consult the Port Operator before bringing cargo into the Port. This disadvantages them in that they cannot meet their customer demands and hence the risk of losing business is very high.

5.5 Back-loads

21. Agro-Fuel Investments Limited through Mpulungu Harbour Management Limited has monopolised this business. In principle, cargo owners are supposed to decide and choose the transporter or haulier they want. Unfortunately, this is not the case because the Port Operator threatens the cargo owners with denying them access to port facilities like loading and off-loading using cranes and storage facilities, etc. There are mainly two parties to this transaction, the shipping companies and the truckers or hauliers. It is important to appreciate that the Port Operator is also a transporter with his trucks bringing cargo into the port. Therefore, by forcing cargo owners to clear and transport their cargo exclusively through Agro-Fuel Investments, the Port Operator is disadvantaging other hauliers and restricting the economic benefits from this traffic to Agro-Fuel Investments alone.

5.6 Tariff increase

22. Two weeks after taking over the Port, Mpulungu Harbour Management Limited increased the tariffs by 46% without consultations and without notice. If this continues, it can render the other Port Users uncompetitive. The Concession Agreement grants the Port Operator complete freedom to set rates and conditions.

6. Attempts at dispute resolution

23. On 28th November, 2001, Zambia Privatisation Agency wrote to the Port Operator regarding: "Operations at Mpulungu Harbour". Zambia Privatisation Agency informed the operator about the complaints raised by the Port Users regarding the way the port was being managed and persistent complaints regarding the issue of space allocation. The Port Operator did not address and resolve these problems and hence their recurrence. Unfortunately, again the Port Operator has refused to cooperate with the various wings of Government. The Concession Agreement cannot be nullified because the conditions under which it can be nullified have not been met. Further, the Concession Agreement empowered the Port Operator to set the operating procedures. However, the Port Operator did not put in place operating procedures. This resulted in the various complaints from the other Port users.

7. Determination of the case

24. The Zambia Competition Commission constituted a Port Review Committee in January 2003, composed of the Ministry of Commerce, Trade and Industry, Ministry of Finance and National Planning, Ministry of Communication and Transport, Zambia Privatisation Agency and Mpulungu Harbour Corporation Limited to come up with a proposal for a "Standard Operating Procedures" to create transparency in the utilisation of the Harbour and Port by both the Port Operator and the other users. To this effect, a Memorandum of Understanding was drafted to cover the procedure for bringing about transparency in the utilisation of the harbour and port. This was done on the realisation that the harbour and port was an 'essential facility' and for effective competition to take place all competitors needed to access and use the harbour and port on a fair and non-discriminatory basis. If the terms of the Memorandum of Understanding are complied with, the Port Operator would comply with Sections 7(1) of the Zambian

Competition Act, which is meant to stop business entities, persons or groups of persons from preventing, restricting or distorting competition to an appreciable extent in relevant markets in Zambia and 6(1), which gives the Commission powers to monitor, control and prohibit acts or behaviour that are likely to adversely affect Competition and Fair Trading in Zambia.

25. The issues requiring transparency in the proposed “Standard Operating Procedure” were:

- Allocation of shipping space;
- Chartering of vessels;
- Choice of cargo to be loaded;
- Port Storage;
- Back-loads; and
- Tariff increase.

26. Given the situation that the Mpulungu Harbour and Port is a monopoly asset and taking into account the various violations arising from failure by the Port Operator to operationalise the Concession Agreement, the Port Regulatory Review Committee decided to put in place a “Standard Operating Procedures document”, which would cover all the operating activities (indicated as issues requiring transparency), such that this would be a document governing the operations of the Port and would therefore be made available to all Port Users and stakeholders. In order to make it binding, all parties i.e. the Port Operator and the Port Users, were required to append their signatures to it. This was intended to be a self-checking mechanism that would eliminate secret decisions and actions. Consequently, it was expected that in this way, there would be free, fair and effective competition

27. The Port Users accepted the Memorandum of Understanding but the Port Operator refused on grounds that the Commission and the Port Regulatory Review had no powers under the Concession Agreement to direct him what to do and further that such actions were intended to take authority to run the Port from the Port Operator. The Port Operator further argued that the Commission was precluded from determining the matter by virtue of section 3(f) of the Competition and Fair Trading Act which exempts all matters of which the government is a party from the application of the law. In this case the government was party to the concession.

28. In this case, the Commission decided to implore on Government to attend to the anticompetitive practices. Consequently, the Commission recommended to the Ministry of Finance (a party representing Government in the Concession Agreement) to nullify and/or to review the provisions in the Concession Agreement that do and/or are likely to substantially lessen competition. The Government should remedy all the instances of abuse of dominant position by putting in place and implementing the said “Standard Operating Procedures Document.” Further, the Commission identified all the anticompetitive provisions in the Concession Agreement and recommended the desired amendments.

29. The Government, before it could consider the Commission’s recommendations, was stopped by the court proceedings against the Port Operator, the Commission and Government commenced in the High Court by the Port Users. However, it would appear the Government may consider the Commission’s recommendation when the concession comes for review in September 2005. In the meantime, the Commission has used the press to create a public awareness about the matter. The Government can no longer ignore the anticompetitive practices being perpetuated by the Port Operator.