

LLM (International Trade, Investment and Business law in Africa) 2014
Developing a regional competition regulatory framework in the Southern African
Development Community (SADC)

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8 May 2015

DECLARATION

I, SALOME CHAPEYAMA hereby declare that this dissertation is my original work, and other works cited or used are clearly acknowledged. This work has never been submitted to any University, College or other institution of learning for any academic or other award.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University supervisor.

Signed:

Pieter Koornhof

University of Western Cape

Date:



DEDICATION

To my parents, Mr Abraham Chapeyama and Mrs Dorothy Chapeyama; I am truly grateful for your undying love and support that motivated me throughout my research journey. God bless you!



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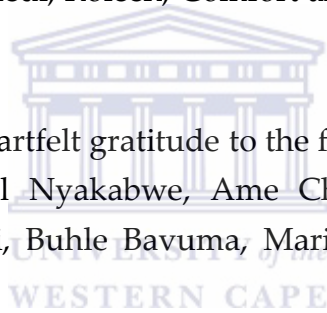
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LIST OF ABBREVIATIONS

CCC	COMESA Competition Commission
COMESA	Common Market for Eastern and Southern Africa
DRC	Democratic Republic of Congo
EAC	East African Community
ECN	European Consulting Network
ECSC	European Coal and Steel Community
EU	European Union
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICN	International Cooperation Network
IGE	Intergovernmental Group of Experts
ITAC	International Trade Administration Commission of South Africa
ITO	International Trade Organisation
MFN	Most Favoured Nation
NCA	National Competition Agency
OECD	Organisation for Economic Cooperation and Development
PAIA	Promotion of Access to Information Act
POPI	Protection of Personal Information Act
REC	Regional Economic Community
RICA	Regulation of Interception of Communications and Provision of Communication-related Information Act
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
SADC	Sothern African Development Community
SADCC	Southern African Development Coordination Conference
TFEU	Treaty on the Functioning of the European Union
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
WGTCPC	Working Group on the Interaction between Trade and Competition Policy
WTO	World Trade Organisation
ZCC	Zambian Competition Commission

TABLE OF CONTENTS

DECLARATION.....	ii
DEDICATION.....	iii
ACKNOWLEDGEMENT.....	iv
LIST OF ABBREVIATIONS.....	v
TABLE OF CONTENTS.....	vi
EXECUTIVE SUMMARY.....	ix

CHAPTER ONE: INTRODUCTION

1.1 Background.....	1
1.2 Problem statement.....	6
1.3 Research Hypothesis.....	7
1.4 Aim of research.....	7
1.5 Research questions.....	7
1.6 Scope of study.....	8
1.7 Research methodology.....	8
1.8 Significance of study.....	8
1.9 Sequencing of chapters.....	9
1.10 Conclusion.....	9

CHAPTER TWO: THE INTERACTION BETWEEN INTERNATIONAL TRADE AND COMPETITION LAW

2.1 Introduction.....	11
2.2 Understanding the concepts of competition law and policy.....	11
2.3 The interaction between International trade and Competition law.....	15
2.3.1 Convergences of trade and competition law.....	15
2.3.2 Divergence of trade and competition law.....	16
2.3.3 Analysis of the interaction between trade and competition law.....	17
2.4 Theories of competition regulation.....	20
2.4.1 Free competition.....	21
2.4.2 Competition regulation.....	24
2.4.3 Conclusion on theories of competition regulation.....	26
2.5 Levels of competition regulation.....	26
2.5.1 Unilateral framework.....	26
2.5.2 Bilateral framework.....	27
2.5.3 Plurilateral framework.....	28
2.5.4 Multilateral framework.....	29

2.5.5	Regional framework.....	29
2.6	Competition law in the WTO.....	30
2.7	Conclusion.....	33

CHAPTER THREE: CHALLENGES OF THE COOPERATION MODEL IN ADDRESSING CROSS-BORDER ANTI-COMPETITIVE PRACTICES IN SADC

3.1	Introduction.....	34
3.2	A brief overview of SADC.....	34
3.3	Understanding the concept of cooperation model.....	36
3.4	Modalities of cooperation in SADC.....	39
3.5	Cross-border anti-competitive practices affecting SADC.....	42
3.5.1	Cartel activity.....	42
3.5.2	Cross-border mergers.....	44
3.5.3	Vertical restraints.....	45
3.5.4	Abuse of dominant position.....	46
3.6	Challenges of the cooperation model in addressing cross-border anti-competitive practices in SADC.....	48
3.6.1	Absence of competition laws in some countries.....	48
3.6.2	Lack of capacity and resources.....	49
3.6.3	Different priorities and lack of coordination of competition agencies.....	50
3.6.4	Lack of harmonised laws.....	52
3.6.5	Constraints on the exchange of confidential information.....	53
3.6.6	Voluntary nature of cooperation.....	54
3.7	Conclusion.....	54

CHAPTER FOUR: PROSPECTIVE BENEFITS AND CHALLENGES OF DEVELOPING A REGIONAL COMPETITION REGULATORY FRAMEWORK IN SADC

4.1	Introduction.....	56
4.2	Prospective benefits of developing a regional competition Regulatory framework in SADC.....	57
4.2.1	Joint enforcement, resources and capacity.....	57
4.2.2	Increased transparency.....	58
4.2.3	Increased certainty, predictability and compatibility.....	58
4.2.4	Broaden enforcement jurisdiction.....	59
4.2.5	Secure and strengthen market integration.....	62
4.2.6	Formal cooperation system.....	63

4.3	Prospective challenges of developing a regional competition regulatory framework in SADC.....	63
4.3.1	Fear of loss of sovereignty.....	64
4.3.2	Lack of political will.....	65
4.3.3	Overlapping regional integration.....	65
4.3.4	Lack of respect for rule of law.....	67
4.3.5	Different levels of economic development.....	69
4.3.6	Poor record with regard to implementation of goals.....	70
4.4	Legal implications for developing a regional competition regulatory framework.....	71
4.4.1	Lessons from EU competition framework.....	72
4.4.2	Lessons from COMESA competition framework.....	75
4.4.3	Conclusion.....	77

CHAPTER FIVE: CONCLUSION AND RECOMMENDATION

5.1	Conclusion.....	78
5.2	Recommendation.....	79

BIBLIOGRAPHY.....	81
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EXECUTIVE SUMMARY

The Southern African Development Community (SADC), like many other regional trade agreements, has experienced anti-competitive practices in the form of cartels, vertical restraints, mergers and abuses of dominant positions which have adverse effects on trade. This paper argues that the absence of a regional competition regulatory framework in SADC, poses a great challenge in curbing these anti-competitive trade practices at a regional level. The informal cooperation model adopted in SADC is proving too weak to competently address cross-border anti-competitive practices due to lack of harmonised laws, constraints of the exchange confidential information and the voluntary and non-binding nature of cooperation, amongst others.

This paper proposes that SADC should develop a regional competition regulatory framework so as to pool its enforcement power, capacity and resources. A regional law would also benefit the region by providing legal certainty, broader jurisdiction and provide a formal cooperation system. Whilst benefits of developing a regional competition regulatory framework are anticipated, the paper also discusses the prospective challenges that can hinder the legal reform in SADC.

The core recommendation made is that SADC should establish a distinct substantive law for dealing with anticompetitive practices as they affect trade between the member states. In addition, a central authority should be empowered to conduct investigations, enforce actions and assess and levy penalties.

CHAPTER ONE

INTRODUCTION

1.1 Background

Competition law or anti-trust law (as it is referred to in the United States (US)) was born in an era where competition in the market place was regarded as a national culture.¹ In the words of Klaus Hopt: “*Wettbewerb ist eine staatliche Veranstaltung*” (competition is a state event).² Initially, competition law was purely a domestic issue that arose in advanced economy countries to monitor and control competition of private enterprises within the domestic market.³ However, in an increasingly globalised world driven by comprehensive trade liberalisation, regulatory reform, technological advancements and rapid transportation, competition is no longer a state event.⁴ Trade has become more internationalised, domestic economies are now highly interdependent; business conduct occurring in one state can (and does) have profound effects in other states.⁵ Inevitably, the globalisation of the market place brings with it the risk of globalisation of anti-competitive practices.⁶

In a world of little or no market walls, the need to protect the competitive process against private restraints is now widely acknowledged. At the turn of the nineteenth century, only a few countries had competition legislation.⁷ While the development of competition law stalled in Europe during the late 19th century, in 1889 Canada enacted what is considered the first competition statute of modern times.⁸ The Act for the

¹ Hopt KJ, Von Friedrich Kfibleer ed *Wettbewerbsbeschränkungen Und Verrechtlichung* (1985) in Weiss F ‘From World Trade Law to World Competition’ *Law (1999) 23 Fordham International Law Journal* S250.

² Weiss F ‘From World Trade Law to World Competition’ *Law (1999) 23 Fordham International Law Journal* S250.

³ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell.

⁴ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell.

⁵ Sweeney B ‘International Competition Law and Policy: A Work in Progress’ 200910 *MelbJIL* 58.

⁶ Sweeney B ‘International Competition Law and Policy: A Work in Progress’ 200910 *MelbJIL* 58.

⁷ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell.

⁸ Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge University Press: Cambridge.

Prevention and Suppression of Combinations formed in restraint of Trade was passed one year before the US enacted the most famous legal statute on competition law, the Sherman Act of 1890.⁹ In the late 1980s, only 20 jurisdictions had a system of competition law.¹⁰ Today, the number of countries adopting a competition law regime has expanded significantly. More than one hundred nations have a competition law regime in place, among them many developing and former communist and socialist countries.¹¹

The expansion of the market place beyond traditional domestic borders has revealed important shortcomings in what has historically been a national approach to competition law and policy. It is important to note at the outset that competition law and competition policy are not synonymous. Competition law refers to law that promotes or seeks to maintain market competition by regulating anti-competitive conduct by companies.¹² In contrast, competition policy is a much broader concept than competition law. In its broadest sense, competition policy encompasses a set of policies and laws that protects, enhances and extends competition.¹³ Thus competition law is a sub-set of competition policy.

Historically, competition law and policy were matters that were regarded as sovereign, with each national state determining according to the preferences of the nation's citizens.¹⁴ However, in today's world the national approach to competition law and policy has proved to be insufficient for regulating trans-border transactions. National governments develop distinctive approaches to the regulation of conduct that affects its country, often without consideration of the effect of that regulation on other nations.¹⁵

⁹ Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge University Press: Cambridge.

¹⁰ Sweeney B 'International Competition Law and Policy: A Work in Progress' 200910 *MelbJIL* 58.

¹¹ Baetge D 'Competition Law and Perspectives for Harmonisation' (2004) 9 *Unif LR* 501.

¹² Taylor MD *International Competition Law: a new dimension for the WTO?* (2006) Cambridge: Cambridge University Press p.1

¹³ Evenett SJ 'What is the Relationship between Competition Law and Policy and Economic Development?' (2005) *University of Oxford* available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=https%3A%2F%2Fwww.alexandria.unisg.ch%2Fexport%2FDL%2F22316.pdf&ei=i6pSVNT1HMzeOK2gfgJ&usq=AFQjCNFC52UzUpGlc8HRRX1y7TviLCKz5g&sig2=Vq1FOGgaB4pDIHKv3KS15g> accessed on (19 February 2015).

¹⁴ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

¹⁵ Kelly DA 'Should the WTO have a Role to Play in the Internationalisation of Competition Law?' (2007) 7 *Hibernian LJ* 17.

Consequently, although the World Trade Organisation (WTO) has made tremendous progress in eradicating tariff barriers, trading nations have found alternative ways to protect their markets and favour their national champion enterprises using competition laws.¹⁶ Indeed, concern has been expressed that government/public restraints on trade might be replaced by restraints by private firms.¹⁷ Additional problem associated with the national approach includes the deficiency of a well-functioning enforcement mechanism.¹⁸ Therefore, in the era of an interdependent world economy, international or regional competition co-operation is necessary to achieve the economic goals of nation states.

At this point, developing a multilateral competition framework seems ideal. It is after all universally acknowledged that anti-competitive practices within the international arena can adversely affect trade flows, and consequently undermine the benefits of trade liberalisation.¹⁹ However, it should be admitted that the implementation of the idea to develop a multilateral competition framework is currently farfetched, at least for the time being. Competition law and policy has been on the WTO agenda since 1996 but progress has been very slow. Currently the developing states are not prepared to accept a multilateral competition agreement.²⁰ Therefore competition law and policy remains outside the realm of the international legal system and predominantly consists of a patch-work system of national laws.

On a positive note, some countries recognising that in the era of a globalised economy, restrictive business practices by private firms can pose as impediments to trade have devised regional competition law regimes to address these barriers. Moreover, considering the WTO's stalled discussion on developing a multilateral competition regulatory framework, Regional Trade Agreements (RTA) constitute an interesting testing ground to conceptualise international provisions on competition.²¹ Ideally, the progress made at a regional level may eventually bloom to a multilateral framework.

¹⁶ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

¹⁷ Kelly DA 'Should the WTO have a Role to Play in the Internationalisation of Competition Law?' (2007) 7 *Hibernian LJ* 17.

¹⁸ Baetge D 'Competition Law and Perspectives for Harmonisation' (2004) 9 *Unif LR* 501.

¹⁹ Kelly DA 'Should the WTO have a Role to Play in the Internationalisation of Competition Law?' (2007) 7 *Hibernian LJ* 17.

²⁰ Sweeney B Globalisation of Competition Law and Policy: Some Aspects of the Interface between Trade and Competition (2004) *MelbJIL* 375.

²¹ Hilpold P 'International competition law and Regional Trade Agreements' (2005) 2 *MJIEL* 82.

Regional competition regimes are usually results of free trade agreements, which are completed by rules to control anti-competitive practices in order not to compromise the gains of free trade in the region.²² Here 'regional' agreements contrary to what might be implied from a literal interpretation of this concept do not only include countries which are geographically neighbours.²³ In the WTO context, RTAs are defined as reciprocal trade agreements between two or more partners.²⁴ They include free trade agreements and customs unions.²⁵

To appreciate the concept of RTAs, the starting point is to understand the basic principle in WTO law; the Most Favoured Nation (MFN) clause. According to the MFN clause, any concession granted to one member has to be granted also to any other member.²⁶ The possibility to create RTAs constitutes the most important exception to the MFN principle: If the conditions set out in art XXIV of the General Agreement on Tariffs and Trade (GATT) are fulfilled concessions may be granted also among a restricted group of members.²⁷ The main conditions are the requirements that such an agreement shall comprise 'substantially all the trade' and that the 'duties and other regulations of commerce' in force after the creation of the RTA shall not be higher than those in force before.²⁸ If these conditions are fulfilled it is assumed that the respective RTA 'facilitates trade between the constituent territories and does not raise barriers.'²⁹

As would be expected, trade in a regional integration zone suffers potentially less from governmental business restrictions than from private ones.³⁰ Even where there are government restraints, GATT law applies. However there is little or no redress for private restraints since competition law has been spared out from the GATT law; art XXIV on RTAs says nothing about this issue. It is therefore not surprising that the most successful integration zone so far, the European Union (EU), has devoted so much importance to her competition policy which at present is said to be the most prominent

²² Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

²³ Hilpold P 'International competition law and Regional Trade Agreements' (2005) 2 *MJIEL* 82.

²⁴ WTO *Regional Trade Agreements and Preferential Trade Arrangements*, (2015) available at http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm accessed on (20 February, 2015).

²⁵ Article XXIV GATT.

²⁶ Article I GATT.

²⁷ Hilpold P 'International competition law and Regional Trade Agreements' (2005) 2 *MJIEL* 82.

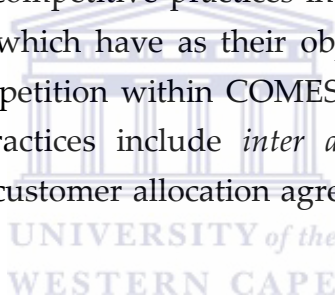
²⁸ Article XXIV para. 8 GATT.

²⁹ Article XXIV para. 4 GATT.

³⁰ Hilpold P 'International competition law and Regional Trade Agreements' (2005) 2 *MJIEL* 82.

and most efficient policies of this entity.³¹ According to art 101 of the Treaty on the Functioning of the European Union (TFEU), cartels, such as anticompetitive agreements are prohibited. Further, art 102 TFEU prohibits abuses of dominant positions.

In Africa, the Common Market of Eastern Southern Africa (COMESA) has recently adopted a regional competition regulatory framework- namely, the COMESA Competition Regulations. The regulations were promulgated in realisation that an efficient and integrated Common Market cannot thrive in an environment where firms engage in restrictive business practices which deter the efficient operation of the Common Market.³² Thus, the primary aim of the regulations is to ensure the efficient operation of the markets with the view to enhancing free and liberalised trade as a prerequisite to safeguarding the welfare of consumers.³³ The COMESA Competition Commission (CCC) is a body corporate that will be responsible for promoting fair competition and penalising uncompetitive practices in the region. All agreements and undertakings between parties which have as their objective or effect the prevention, restriction or distortion of competition within COMESA are generally prohibited and declared void.³⁴ Prohibited practices include *inter alia*, price fixing arrangements, collusive tendering, market or customer allocation agreements, and abuse of dominant positions.³⁵



The Southern African Development Community (SADC), as is the case with COMESA, is effectively a free trade area with a significant amount of market integration and cross border business activities.³⁶ As a result of the apparent overlap between competition law and trade, SADC adopted a Declaration on Regional Cooperation in Competition and Consumer Policies ('the SADC Declaration') in 2009. The SADC Declaration

³¹ Hilpold P 'International competition law and Regional Trade Agreements' (2005) 2 *MJIEL* 82.

³² COMESA Competition Commission *Background* available at http://www.comesacompetition.org/?page_id=375 accessed on (20 February, 2015).

³³ COMESA Competition Commission *Background* available at http://www.comesacompetition.org/?page_id=375 accessed on (20 February, 2015).

³⁴ COMESA Competition Commission *A Guide to Anti-Competitive Business Practices* available at http://www.comesacompetition.org/?page_id=498 accessed on (20 February, 2015).

³⁵ COMESA Competition Commission *A Guide to Anti-Competitive Business Practices* available at http://www.comesacompetition.org/?page_id=498 accessed on (20 February, 2015).

³⁶ Senona L, Letsike T, and Jiki C 'A SADC sheriff to police anti-competitive behaviour – is it the way to go, or not?' available at <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-4/SADC-Sheriff-Paper-Final-Draft-21-August-13.pdf> accessed on 24 October, 2014.

specifically deals with the issue of effective cooperation of competition agencies within the region.

Unlike COMESA or the EU, SADC does not have a supra-national competition authority. SADC deals with cross border competition issues through friendly consultation, information sharing and best endeavour clauses. Unfortunately, in the absence of supranational procedures for dispute settlement and enforcement, it is challenging to curb cross-border anti-competitive in SADC.

1.2 Problem statement

Fair competition among businesses is a cornerstone of free trade and is vital to the economic development of a region, playing an important role in promoting growth, efficiency, and the alleviation of poverty.³⁷ Anti-competitive trade practices have the effect of distorting this free trade between and among developing countries. However, considering that competition law is currently outside the realm of international law, regional trade agreements hold great potential for overcoming the major enforcement problems of developing jurisdictions.³⁸

In view of the adverse effects of anti-competitive practices on trade, SADC adopted the Declaration on regional cooperation in competition and consumer policies which provide for cooperation between member states in the area of competition law. The cooperation model however does not provide for supranational procedures to deal with dispute settlement on anti-competitive behaviour or enforcement.

The absence of a regional competition regulatory framework in SADC, poses a great challenge in curbing anti-competitive trade practices at a regional level. SADC economies are diverse and at different levels of development. On the one hand there is South Africa with a sophisticated economy and vibrant domestic competition authority,

³⁷ SADC 'Competition Policy' (2012) available at <http://www.sadc.int/themes/economic-development/trade/competition-policy/> accessed on (28 October 2014).

³⁸ Gal MS and Wassmer IF 'Regional Agreements of Developing Jurisdictions: Unleashing the Potential in *Competition Policy and Regional Integration in Developing Countries*', (2012) Bakhom M, Drexl J, Gal M, Gerber D, Fox E (eds) available at <http://ssrn.com/abstract=1920290> (accessed on 24th October, 2014).

well equipped to address any type of anti-competitive behaviour.³⁹ On the other hand there are relatively small to least developed economies such as Zambia, Lesotho and Namibia with less capacity to deal effectively with cross-border anti-competitive behaviour; let alone anti-competitive behaviour by foreign multinational firms.⁴⁰ Therefore, there may be need to develop a regional competition regulatory framework in SADC to improve the efficiency of dispute settlement and enforcement of competition law matters at a regional level.

1.3 Research hypothesis

The research examines the assumption that the current cooperation model adopted by SADC is not effective enough to address anti-competitive trade practices within the region.

1.4 Aim of research

This study aims to evaluate the prospective benefits and challenges of developing a regional competition regulatory framework in SADC. Further, the study seeks to identify important lessons from the EU and COMESA that are crucial for the pursuance of a regional competition regulatory framework.

1.5 Research questions

The main question this paper seeks to answer is what are the prospective benefits and challenges of developing a regional competition regulatory framework in SADC? To answer this question, the following sub-questions will be addressed:

1. What is the interaction between competition law and international trade?
2. What are the challenges of the cooperation model in addressing cross-border anti-competitive practices in SADC?
3. What are the legal implications of the establishment of a regional competition regulatory framework in SADC?
4. What lessons can SADC learn from the EU and COMESA competition regimes?

³⁹ Gal MS and Wassmer IF 'Regional Agreements of Developing Jurisdictions: Unleashing the Potential in *Competition Policy and Regional Integration in Developing Countries*', (2012) Bakhom M, Drexl J, Gal M, Gerber D, Fox E (eds) available at <http://ssrn.com/abstract=1920290> (accessed on 24th October, 2014).

⁴⁰ Gal MS and Wassmer IF 'Regional Agreements of Developing Jurisdictions: Unleashing the Potential in *Competition Policy and Regional Integration in Developing Countries*', (2012) Bakhom M, Drexl J, Gal M, Gerber D, Fox E (eds) available at <http://ssrn.com/abstract=1920290> (accessed on 24th October, 2014).

1.6 Scope of study

It is admitted that competition law and international trade are two broad concepts. Therefore, the paper focuses on the idea of curbing anti-competitive behaviour in SADC so as to promote regional trade.

1.7 Research methodology

The study will be based on a desktop and library study. The primary sources of information will be case law, treaties, protocols, memorandum of understanding agreements, and articles written by experts and organisations in the field. The secondary sources will include textbooks and information available from electronic resources and databases.

A comparative study will be used to indicate the experiences of other regions in the pursuance of region competition regulatory framework. The comparison will be limited to the EU which is arguably the most successful regional competition regime in the world, and COMESA a budding competition regulatory regime in Southern and Eastern Africa.

1.8 Significance of study

As part of the process of consolidating the SADC free trade area, and to address all forms of barriers to trade including those in the area of competition policy, the SADC secretariat recently embarked on an assessment exercise of the existence of, and possible remedies for, cross-border anti-competitive business practices.⁴¹ This paper will provide a useful evaluation to the SADC secretariat on whether a regional competition regulatory framework is a viable means of dealing with cross-border anti-competitive practices in SADC. Further, the study will fill the gap in the existing literature on the prospective benefits and challenges of developing a regional competition regulatory framework in SADC.

⁴¹ Drexel J (ed) *Competition Policy and Regional Integration in Developing Countries* (2012) 64 Northampton MA: Edward Elgar Publishing.

1.9 Sequencing of chapters

The topic under examination will be discussed in five chapters.

Chapter One

This chapter introduces the research and discusses the problem of the study. Further, it sets out the context of the research in terms of identifying the problem and outlining the methodology.

Chapter Two

Chapter two generally provides a conceptual and theoretical framework of the paper. It does so by discussing the interaction between competition law and international trade, theories and levels of competition regulation and the current status of competition law under the WTO multilateral framework.

Chapter Three

This chapter will discuss the current competition regime in SADC. The chapter will highlight the challenges of the cooperation model adopted by SADC in addressing anti-competitive trade practices.



Chapter Four

This chapter focuses on the prospective benefits and challenges of developing a regional competition regulatory framework in SADC. It also discusses the legal implications of developing a regional regulatory framework and lessons to learn from EU and COMESA.

Chapter Five

Finally, this chapter concludes the research and proposes recommendations on whether SADC should develop a regional competition regulatory framework.

1.10 Conclusion

To sum up, it cannot be overemphasised that trade liberalisation has opened up a whole new dimension to competition law and policy. What was once a domestic issue, anti-competitive trade practices are now an international concern or to the very least a regional concern. In view of this transition, national approach to competition law and policy has proved to be insufficient for regulating cross-border anti-competitive

practices. Thus in today's global economy it is proposed to look into other avenues of regulating competition beyond the national laws.

It need not be speculated that anti-competitive practices by private enterprises have a bearing on the progressive liberalisation of trade. It is therefore imperative that one clearly understands the interaction between competition law and international trade. The succeeding chapter will discuss the interaction between international trade and competition law. It will also define the much recurring concepts of competition, competition law, competition policy, competition regulation and international trade.



CHAPTER TWO

THE INTERACTION BETWEEN INTERNATIONAL TRADE AND COMPETITION LAW

2.1 Introduction

It is now widely recognised that competition law can complement the advancements made by trade policies in achieving open and accessible markets.⁴² At the same time, opening the global market has had a significant impact on competition law.⁴³ As such, it is inevitable that there is some degree of interaction between international trade and competition law.

This chapter discusses the interaction between international trade and competition law in five parts. First, the chapter begins by defining the concepts of competition, competition law and competition policy. Secondly, it analyses the interaction between international trade and competition law. Thirdly, it lays down the theories of competition regulation. Fourthly, it outlines the levels of competition regulation and finally it discusses the status of competition law at the World Trade Organisation (WTO).

2.2 Understanding the concepts of competition law and policy

‘Competition’ is an everyday word meaning a struggle or contention for superiority, and in the commercial world this means striving for the custom and business of people in the market place.⁴⁴

It has been argued that in competition, only the fittest survive.⁴⁵ For small businesses with fewer capital and resources, the survival of the fittest notion may seem somewhat

⁴² Epstein J. ‘The other side of harmony: Can trade and competition laws work together in the international marketplace?’ (2002) 17 *American University ILR* 343.

⁴³ Kelly DA ‘Should the WTO have a role to play in the internationalisation of competition law?’ (2007) 7 *Hibernian LJ* 17.

⁴⁴ Kellerhals A & Mahncke H ‘Competition law in difficult economic times’ (2009) 39 *Hong Kong LJ* 719.

⁴⁵ Islam M.R ‘A WTO multilateral framework for competition policy and trade-induced development- Debunking their complementarity in developing countries’ (2004) 5 *J World Investment & Trade* 491.

unfair.⁴⁶ When these small businesses are faced with heavy competition especially on the international market, national governments may feel inclined to shield the domestic market from competition.⁴⁷ However, competition ought not to be shunned outright; rather, healthy competition – where smaller businesses that are efficient are able to grow - should be encouraged.

Competition is important as it encourages innovative activities and increases productivity and efficiency.⁴⁸ In addition, competition provides for a greater variety and better product quality for a lower price and is therefore in the interest of consumers.⁴⁹ In view of the benefits of competition, competition law and policy are there to ensure that competition in the market place is not restricted in a way that is detrimental to society.⁵⁰

Whilst it is tempting to use competition law and competition policy interchangeably, the two concepts are not synonymous.⁵¹ Generally speaking, competition law is one of the policy options available to governments to prevent or eliminate anti-competitive practices by businesses.⁵² Regarded the optimal form of government intervention, competition law refers to the minimum necessary regulation of competition consistent with the correction of market failures associated with market power and the maximisation of economic efficiency.⁵³

Competition laws vary from nation to nation, however, there are certain core provisions which underpin nearly all competition law regimes and these include: prohibitions on anti-competitive cartel activities (such as price fixing and market sharing by competitors), anti-competitive conduct by dominant firms, and mergers that

⁴⁶ Ergas H 'Should developed countries require developing countries to adopt competition laws? Lessons from the economic literature' (2009) *European Competition Journal* 347.

⁴⁷ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell.

⁴⁸ Sweeney B 'Globalisation of competition law and policy: Some aspects of the interface between trade and competition (2004) *MelbJIL* 375.

⁴⁹ Kellerhals A & Mahncke H 'Competition law in difficult economic times' (2009) 39 *Hong Kong LJ* 719.

⁵⁰ European Commission *Competition* (2012) available at http://ec.europa.eu/competition/consumers/why_en.html accessed on 27 (April 2015).

⁵¹ Sweeney B 'Globalisation of competition law and policy: Some aspects of the interface between trade and competition (2004) *MelbJIL* 375.

⁵² Sweeney B 'Globalisation of competition law and policy: Some aspects of the interface between trade and competition (2004) *MelbJIL* 375.

⁵³ Taylor MD *International Competition Law: A New Dimension for the WTO?* (2006) Cambridge: Cambridge University Press p. 326.

substantially reduce competition.⁵⁴ In the United States (US), competition law (other than mergers) is referred to as 'antitrust law'. The expression 'competition law' will be used throughout this paper.

Competition policy is a much broader concept than competition law. In its broadest sense, competition policy encompasses a set of policies and laws that protects, enhances and extends competition.⁵⁵ Admittedly, this definition has a somewhat circular reasoning.

The broad nature of competition policy has rendered it difficult to define the concept in a few words. Competition policy is therefore capable of many definitions. The World Trade Organisation(WTO) Working Group on the Interaction between Trade and Competition policy (WGTCP) defines competition policy as the policies which 'comprise the full range of measures that maybe used to promote competitive markets structures and behaviour, including but not limited to a comprehensive competition law dealing with anti-competitive practices of enterprises.'⁵⁶

Various authors have also attempted to define competition policy. Kennedy perceives competition policy as having evolved from competition law.⁵⁷ He argues that competition law was until a few years ago purely a domestic issue but today, it has a new name- competition policy, signifying a set of issues broader than the prescriptive rules of competition law.⁵⁸ In Kennedy's view, this change was triggered by several factors including the simultaneous trends toward globalisation and regional integration,

⁵⁴ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell, p. 1-2.

⁵⁵ Evenett SJ 'What is the relationship between competition law and policy and economic development?' (2005) University of Oxford available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=https%3A%2F%2Fwww.alexandria.unisg.ch%2Fexport%2FDL%2F22316.pdf&ei=i6pSVNT1HMzeOK2gfgJ&usq=AFOjCNFC52UzUpGlc8HRRX1y7TviLCKz5g&sig2=Vq1FOGgaB4pDIHKv3KS15g> accessed on (30 October 2014).

⁵⁶ WTO Working Group on the Interaction between Trade and Competition policy *The Fundamental Principles of Competition Policy*, (1999) WT/WGTCP/W/127, para 2.

⁵⁷ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell.

⁵⁸ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell, p. 1-2.

the creation of the WTO and the growing number of competition cases involving more than one country.⁵⁹

Perhaps the broader issues referred by Kennedy consist of what Sweeney includes in his definition of competition policy namely, government policies on deregulation, privatisation, foreign direct investment, and government procurement practices.⁶⁰ Further, Sweeney argues that when used in its broadest sense, competition policy also refers to all those factors which influence the nation's competition conditions, including trade policy and industry policy.⁶¹

In the same line of thought as Sweeney, Swann argues that competition policy includes other conditions that affect competition such as administrative complications which arise when goods cross frontiers.⁶² Some of them which 'arise from disparities between the indirect taxation system of different member states, subsidies, the effects of differing national laws and standards in respect of the design and composition of goods.'⁶³ Furthermore, intellectual property laws have also been considered part of competition policy as they allow consumers to make choices between competing entrepreneurs, and the goods and services they sell.⁶⁴

While competition policy is capable of many definitions, this paper discusses competition policy in the context of international trade. Therefore trade policies will not be embedded within the meaning of competition policy. Competition policy will be understood to encompass competition law and government policy towards the implementation of the law.

Since the paper focuses on developing a regional competition regulatory framework in SADC, the paper is concerned primarily with competition law. However, where

⁵⁹ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell.

⁶⁰ Sweeney B 'Globalisation of competition law and policy: Some aspects of the interface between trade and competition (2004) *MelbJIL* 375.

⁶¹ Sweeney B 'Globalisation of competition law and policy: Some aspects of the interface between trade and competition (2004) *MelbJIL* 375.

⁶² Swann D *Competition and Industrial Policy in the European Community* (1983) London: Methuen.

⁶³ Swann D *Competition and Industrial Policy in the European Community* (1983) London: Methuen.

⁶⁴ Correa CM 'Intellectual property and competition law: Exploring some issues of relevance to developing countries' (2007) Issue Paper No. 21, Geneva: ICTSD, available at http://www.iprsonline.org/resources/docs/corea_Oct07.pdf accessed on (10 March 2015).

competition policy is mentioned, it will be in reference to both competition law and government policy on competition.

Where concepts of competition law and competition policy are used throughout the paper, they carry the meanings adopted above.

2.3 The interaction between international trade and competition law

The concepts of competition law and international trade have important complementarities and differences that define their relationship.

2.3.1 Convergences of trade and competition law

The close and complementary relationship between competition law and international trade is founded on the similarity of their objectives: both trade and competition law aim to enhance welfare through the provision of a more efficient allocation of resources, whether it be by lowering governmental barriers to trade or through promoting competition respectively.⁶⁵

Besides sharing similar goals, competition law and the concept of 'liberal trade' in international trade are also interrelated, and are partially overlapping.⁶⁶ Although not explicitly stated in the General Agreement on Tariffs and Trade (GATT) or any other WTO agreement, the guiding economic premise that underlies the entire GATT agreement system is open trade, also known as liberal trade.⁶⁷ Liberal trade policies permit the unrestricted cross-border flow of the highest quality goods and services at the lowest prices.⁶⁸ Liberal trade is grounded on the principle of 'comparative advantage' which says that countries prosper first by taking advantage of their assets in order to concentrate on what they can produce best, and then by trading these products for products that other countries produce best.⁶⁹ In other words, to reap the benefits of liberal trade, countries have to produce the best products, with the best design, at the

⁶⁵ Weiss F 'From world trade law to world competition law' (1999) 23 *Fordham International Law Journal* 250.

⁶⁶ Weiss F 'From world trade law to world competition law' (1999) 23 *Fordham International Law Journal* 250.

⁶⁷ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell, p. 1-2.

⁶⁸ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell, p. 1-2.

⁶⁹ WTO *The Case for Open Trade* (2015) available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm accessed on (25 February 2015).

best price. In the end, liberal trade policies not only allow the unrestricted flow of goods and services but like competition law also sharpen competition and motivate innovation.⁷⁰

Another key element in the convergence between competition law and international trade is that both affect access to markets.⁷¹ The two policies strive to eliminate or reduce market distortions and barriers to market entry to promote efficiency and contribute towards increased welfare.⁷² While the removal of external governmental trade barriers facilitates market entry, the control of anti-competitive conduct by market operators opens access to competitive markets.⁷³ In combination, potential welfare gains derived from comparative advantage are made safe against anti-competitive erosion.⁷⁴

2.3.2 Divergences of trade and competition law

Despite their intimate interrelationship and common economic objective, care must be taken not to overstate the synergy between trade and competition law.⁷⁵ There are some critical points of departure.

Traditionally, competition laws were a tool employed by governments in order to address issues relating to restrictions of trade conducted by private firms within the national borders.⁷⁶ Competition laws focus on 'behind the border' (national) issues and is largely based on domestic legal principles intended to maximise economic efficiencies.⁷⁷ In contrast, trade laws mainly regulate acts by government or public bodies that restrain the free flow of goods and services between and amongst countries.⁷⁸ Trade laws focus on 'at the border issues', whereby governments create

⁷⁰ WTO *The Case for Open Trade* (2015) available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm accessed on (25 February 2015).

⁷¹ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

⁷² OECD *Complementarities between Trade and Competition Policies*, (1999) 12 Unclassified COM/TD/DAFFE/CLP(98)98/FINAL.

⁷³ Weiss F 'From world trade law to world competition law' (1999) 23 *Fordham International Law Journal* 250.

⁷⁴ Weiss F 'From world trade law to world competition law' (1999) 23 *Fordham International Law Journal* 250.

⁷⁵ Sweeney B 'Globalisation of competition law and policy: Some aspects of the interface between trade and competition' (2004) *MelbJIL* 375.

⁷⁶ Epstein J. 'The other side of harmony: Can trade and competition laws work together in the international marketplace?' (2002) 17 *American University ILR* 343.

⁷⁷ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

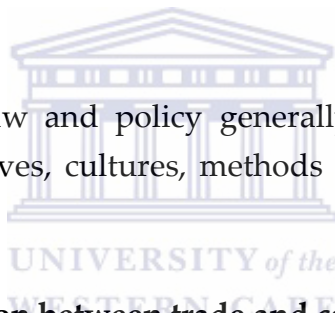
⁷⁸ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell.

tariff and non-tariff market barriers, thereby protecting domestic producers at the expense of foreign competitors.⁷⁹

The different actors in trade and competition law perhaps explain why trade unlike competition law has international roots. Trade law aims to regulate the acts of governments at an international level and seeks to achieve efficiency in more general terms and from the global perspective.⁸⁰ It does so by safeguarding competitive opportunities rather than competition itself in some specific market. In contrast, competition laws are more of a national nature and the prime concern of competition law is the welfare of consumers in a certain market.⁸¹

Further, unlike competition laws, trade law is aimed at opening markets to exporters and protecting domestic industries, not at optimising market place efficiencies and consumer benefits.⁸²

In short, the two bodies of law and policy generally involve different actors with different institutional perspectives, cultures, methods of dispute resolution, and legal principles.



2.3.3 Analysis of the interaction between trade and competition law

The relationship between trade and competition law has received creative definitions by various authors. According to Nkomo and Van Wyk trade and competition law are 'frenemies'; friendly towards each other despite their rivalry.⁸³ In Kelly's view their relationship is uneasy⁸⁴ and to Weiss it is 'not necessarily stable'.⁸⁵ Epstein describes the harmonisation of world's competition laws as the new 'Achilles heel' of international trade as it is a 'difficult' but necessary step.⁸⁶

⁷⁹ Weiss F 'From world trade law to world competition law' (1999) 23 *Fordham International Law Journal* 250.

⁸⁰ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

⁸¹ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

⁸² Sweeney B 'Globalisation of competition law and policy: Some aspects of the interface between trade and competition (2004) *MelbJIL* 375.

⁸³ Marumo N and Van Wyk M 'Competition and trade policy - Frenemies?' Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-and-Trade-Policy-Frenemies.pdf> accessed on (26 February).

⁸⁴ Kelly DA 'Should the WTO have a role to play in the internationalisation of competition law?' (2007) 7 *Hibernian LJ* 17.

⁸⁵ Weiss F 'From world trade law to world competition law' (1999) 23 *Fordham International Law Journal* 250.

⁸⁶ Weiss F 'From world trade law to world competition law' (1999) 23 *Fordham International Law Journal* 250.

As discussed earlier, trade and competition law share the common goals of increasing efficiency and encouraging market access. Thus, in the process of reaching those goals, the two policies can be said to be mutually consistent and reinforcing.⁸⁷ Nevertheless, the means to achieving these common objectives are different and this creates tension.⁸⁸

At their worst point of divergence, trade laws may have an adverse effect on competition and competition law may impede trade. On one hand, the underlying rationale of multilateral trade liberalisation is to increase aggregate world wealth and to achieve global productive efficiency.⁸⁹ On the other hand competition law is focused on enhancing consumer welfare within national markets.⁹⁰ Further, unlike competition policy, national trade policy is consumed with fashioning adequate trade remedy laws such as safeguards, anti-dumping and countervailing duty.⁹¹

As a result of these vital divergences, national trade policy makers and legislators are in some instances faced with a dilemma whether to sacrifice consumer welfare to protect producers within an industry threatened by import competition.⁹² A good example of this dilemma is reflected in the issue of import tariff hike on frozen poultry in South Africa (SA).

In January 2012, the International Trade Administration Commission of South Africa (ITAC) imposed provisional anti-dumping duties on Brazil's chicken imports. The decision was a result of an investigation which found that three Brazilian exporters sold their chicken meat in the Southern African Customs Union (SACU) market at lower prices⁹³ compared with the Brazilian market.⁹⁴ ITAC concluded that SACU chicken

⁸⁷ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

⁸⁸ Marumo N and Van Wyk M 'Competition and trade policy - Frenemies?' Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-and-Trade-Policy-Frenemies.pdf> accessed on (26 February).

⁸⁹ Kelly DA 'Should the WTO have a role to play in the internationalisation of competition law?' (2007) 7 *Hibernian LJ* 17.

⁹⁰ Kelly DA 'Should the WTO have a role to play in the internationalisation of competition law?' (2007) 7 *Hibernian LJ* 17.

⁹¹ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell.

⁹² Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell.

⁹³ Aurora Alimentos, Sao Paulo-based Brasil Foods, and Palotina-based C Vale, exported at prices that were 6.3 %, 62.9% and 46.6% lower respectively.

producers had suffered material injury from the increased chicken imports as they experienced a substantial decline in profits, price under-cutting, reduced market share, decrease in growth of revenue, and under-utilisation of production capacity.⁹⁵

In a twist of events, in January 2013, SA's Department of Trade and Industry rejected ITAC's bid to impose definitive anti-dumping duties on Brazilian poultry.⁹⁶ Instead it raised import tariffs on five types of chickens, the whole bird being hit worst from 27% paid previously to 82%.⁹⁷

The tariff hike of frozen poultry raised an important policy debate between the trade and competition policy makers. From the point of view of the South Africa's Poultry Association (SAPA), representing the domestic producers, the aim of the tariffs was not to be punitive, nor reduce volumes of imports, but to put importers and local producers on an equal competitive footing.⁹⁸ They submitted that the local poultry industry was struggling due to dumped imports and therefore needed protection from the vast increase in imports, which had suppressed prices.⁹⁹

Obviously, the competition commission had a contrary view. The Commission was clear on the fact that it was on the side of the consumers.¹⁰⁰ From a competition perspective, imports might force domestic producers to compete, resulting in lower prices for consumers and more product choices.¹⁰¹ In the Commission's view, increasing

⁹⁴ Ndlovu P 'South African trade: Too chicken to definitively challenge Brazilian poultry imports?' (2013) available at <http://www.polity.org.za/article/south-african-trade-too-chicken-to-definitively-challenge-brazilian-poultry-imports-2013-09-17> accessed on (18 November 2014).

⁹⁵ Ndlovu P 'South African trade: Too chicken to definitively challenge Brazilian poultry imports?' (2013) available at <http://www.polity.org.za/article/south-african-trade-too-chicken-to-definitively-challenge-brazilian-poultry-imports-2013-09-17> accessed on (18 November 2014).

⁹⁶ Ndlovu P 'South African trade: Too chicken to definitively challenge Brazilian poultry imports?' (2013) available at <http://www.polity.org.za/article/south-african-trade-too-chicken-to-definitively-challenge-brazilian-poultry-imports-2013-09-17> accessed on (18 November 2014).

⁹⁷ FSP Invest 'Will raising the tariffs on chicken imports have the desired effect?' available at <http://fspinvest.co.za/articles/south-africa/will-raising-the-tariffs-on-chicken-imports-have-the-desired-effect-1708.html> accessed on (19 November, 2014).

⁹⁸ Marumo N and Van Wyk M 'Competition and trade policy - Frenemies?' Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-and-Trade-Policy-Frenemies.pdf> accessed on (26 February).

⁹⁹ Marumo N and Van Wyk M 'Competition and trade policy - Frenemies?' Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-and-Trade-Policy-Frenemies.pdf> accessed on (26 February).

¹⁰⁰ Competition Commission of South Africa *The Impact of Poultry Tariffs on Competition* (2013) available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/130910impact.pdf> accessed on (27 February 2015).

¹⁰¹ Competition Commission of South Africa *The Impact of Poultry Tariffs on Competition* (2013) available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/130910impact.pdf> accessed on (27 February 2015).

import tariffs may mean the sustainability of poultry producers with poor operational performance at the expense of consumers, less product choice and high prices, which impacts on food security.¹⁰² Unfortunately, for SA consumers, this was one clear case where the national trade policy makers and legislators indeed sacrificed consumer welfare to protect domestic producers from import competition.

Notwithstanding their rivalry, there is interdependence between trade and competition law. International trade law complements competition law by facilitating the removal of certain governmental structural measures that would otherwise facilitate anti-competitive behaviour by private enterprises and would have been addressed by competition law alone.¹⁰³ Competition law aids international trade by providing a means to regulate private anticompetitive activity, thereby providing an important mechanism for promoting greater market access for foreign firms.¹⁰⁴

In short, it can be concluded that trade and competition law often has a symbiotic, albeit at times problematic, relationship. One cannot survive without the other. In the absence of an effective competition law, the gains from liberalised trade may be undermined because of private restraints that deter or prevent access to foreign goods and services. Conversely, the absence of trade liberalisation deters access to pro-competitive foreign goods and producers, therefore hindering the ability of competition law to promote the contestability of markets.

2.4 Theories of competition regulation.

There are a number of theories that explain why competition regulation should or should not exist. The phrase 'competition regulation' here is understood to mean governance of competition using competition laws. This paper will focus on two broad schools of thought; one camp in support of free competition and another in support of competition regulation.

¹⁰² Competition Commission of South Africa *The Impact of Poultry Tariffs on Competition* (2013) available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/130910impact.pdf> accessed on (27 February 2015).

¹⁰³ Kelly DA 'Should the WTO have a Role to Play in the Internationalisation of Competition Law?' (2007) 7 *Hibernian LJ* 17.

¹⁰⁴ Kelly DA 'Should the WTO have a role to play in the internationalisation of competition law?' (2007) 7 *Hibernian LJ* 17.

The issue of competition regulation has been addressed particularly by economists, lawyers and political scientists. All three disciplines were later influenced by sociology which, despite developing relatively recently, often provides guiding principles for other disciplines.¹⁰⁵ This paper is law centred, however, it is admitted that the economic, sociological, and political reasoning of competition regulation are unavoidable. With that in mind, the following discussion will take into account various economic schools of thought that have influenced competition law over time; particularly the Classical, Neo-Classical, Harvard, Chicago, and Post-Chicago schools.

2.4.1 Free competition

Proponents for free competition believe that a free market should be free from intervention, restraint or regulation.¹⁰⁶ An insightful explanation of free competition is given in the Classical and Neo-Classical economic theories which believed in individual autonomy and the welfare-generating capacity of self-interest.¹⁰⁷

The Classical theory dates back to the 17th century when Adam Smith published his seminal work, *The Wealth of Nations* (1776), in which he explains that individuals pursuing self-interest will promote societal welfare, primarily by generating wealth.¹⁰⁸ He considered competition as a race by individuals which make them improve their production and force price of the traded products be lower, thereby benefiting the whole community.¹⁰⁹ Smith also introduced the 'Invisible Hand' theory which suggests that free market economies left to their own devices will produce results more beneficial than can be realised by intervening in the markets.¹¹⁰

¹⁰⁵ Andriychuk O 'The concept of perfect competition as the law of economics: addressing the homonymy problem' (2011) 62 *N. Ir. Legal Q.* 523.

¹⁰⁶ Brassey M, Campbell J, Legh R, Simkins C, Unterhalter D, Wilson J *Competition Law* 1 ed (2002) Cape Town: Juta.

¹⁰⁷ Smith A 'The wealth of nations'(1975) J M Dent & Sons in Nicholas E. (ed) 'Adam smith's legacy: His thought in our time' (1990) ASI (Research) Limited: London available at http://www.adamsmith.org/sites/default/files/images/uploads/publications/ADAM_SMITH_Legacy.pdf accessed on (10 March 2015).

¹⁰⁸ Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge: Cambridge University Press p. 268.

¹⁰⁹ Smith A 'The wealth of nations'(1975) J M Dent & Sons in Nicholas E. (ed) 'Adam smith's legacy: His thought in our time' (1990) ASI (Research) Limited: London available at http://www.adamsmith.org/sites/default/files/images/uploads/publications/ADAM_SMITH_Legacy.pdf accessed on (10 March 2015).

¹¹⁰ Smith, A 'The theory of moral sentiments' (1976) in *The Glasgow Edition of the Works and Correspondence of Adam Smith*, Oxford University Press: London.

Smith ultimately took a *laissez-faire* approach to competition law.¹¹¹ In *The Wealth of Nations* he pointed out the problem of cartel, but did not advocate legal measures to combat them. He argued as follows:

‘People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.’¹¹²

Later on, another team of economists attempted to add to Smith’s theory by incorporating mathematics in the analysis of markets.¹¹³ According to these Neo-classical theorists, the adjective ‘free’ in ‘free competition’ is used in equilibrium economics in its technical, economic sense.¹¹⁴ To them, it is a mechanism of price determination, which implies that suppliers and consumers are not restrained in their choices and react on the situation in the markets by changing their respective supply and demand.¹¹⁵ That is to say, in a free market economy the price of any product is set by the relationship between the demand for the product and the supply of the product.¹¹⁶ For example, the greater the supply, and the less the demand, the less the price of the product will be.

¹¹¹ Ross ‘Canadian competition policy: Progress and prospects’ *The Canadian Journal of Economics*, Vol 37 No 2 (May 2004) 243 at 252-253.

¹¹² Smith A ‘The wealth of nations’(1975) J M Dent & Sons in Nicholas E. (ed) ‘Adam smith’s legacy: His thought in our time’ (1990) ASI (Research) Limited: London available at http://www.adamsmith.org/sites/default/files/images/uploads/publications/ADAM_SMITH_Legacy.pdf accessed on (10 March 2015).

¹¹³ Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge University Press: Cambridge p. 268.

¹¹⁴ Andriychuk O ‘The concept of perfect competition as the law of economics: addressing the homonymy problem’ (2011) 62 *N. Ir. Legal Q.* 523.

¹¹⁵ Andriychuk O ‘The concept of perfect competition as the law of economics: addressing the homonymy problem’ (2011) 62 *N. Ir. Legal Q.* 523.

¹¹⁶ Nicholas E. (ed) ‘Adam Smith’s legacy: His thought in our time’ (1990) ASI (Research) Limited: London. Available at http://www.adamsmith.org/sites/default/files/images/uploads/publications/ADAM_SMITH_Legacy.pdf accessed on (24 March 2015).

Neo-classical theorists further developed an analysis of the market by creating the notion of perfect competition which is the equilibrium of a polypolistic market.¹¹⁷ The notion of perfect competition essentially assumes a perfect market where each seller and consumer sells and purchases small amounts relative to the total amount sold and purchased in the market and where all participants are rational, profit maximisers and well informed.¹¹⁸ It further assumes that scarce resources are allocated as efficiently as possible and products sold in the market are homogeneous, so that customers are indifferent as to the supplier from which they purchase the product.¹¹⁹ What clearly makes this theory different from the classical theory is that it attempts to analyse the effects of competition, rather than a behavioural process.¹²⁰ The theory has been criticised as overly simplified, idealised and often incapable of accommodating the nuance and complexity of market behaviour in the real world.¹²¹

Besides the economic theories, other authors' support for free competition is mainly driven by their concerns over the challenges of competition regulation.¹²² For example Glaeser and Shleifer arguing against regulation state as follows:

'The first, and arguably most important, message of the model is that [there are situations in which] the optimal government policy is to do nothing. When the administrative capacity of the government is severely limited, and both its judges and regulators are vulnerable to pressure and corruption, it might be better to accept the existing market failures and externalities than to deal with them through either the administrative or the judicial process. For if a country does attempt to correct market failures, justice will be subverted, and resources will be wasted on subversion without successfully controlling market failures.'¹²³

¹¹⁷ Polypolistic market simply means 'many sellers'; firms have a small market share so that all elements of monopoly are absent and the market price of a commodity is beyond the control of individual sellers. See Voigt S & Schmidt A 'Making European merger policy more predictable' (2005) available on <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.115.897&rep=rep1&type=pdf> accessed on (7 May 2015).

¹¹⁸ Sutherland & Kemp, *Competition Law of South Africa*, LexisNexis Butterworths (looseleaf) at 1-11.

¹¹⁹ Sutherland & Kemp, *Competition Law of South Africa*, LexisNexis Butterworths (looseleaf) at 1-11.

¹²⁰ Strader JM 'The consequences of neoclassical price theory for US predatory pricing law' (2012) available at <https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-7-2012> accessed on (11 March 2015).

¹²¹ Sutherland & Kemp, *Competition Law of South Africa*, LexisNexis Butterworths (looseleaf) at 1-22.

¹²² Ergas H 'Should developed countries require developing countries to adopt competition laws? Lessons from the economic literature' (2009) *European Competition Journal* 347.

¹²³ Glaeser E and Shleifer A, 'The rise of the regulatory state' (2003) 41(2) *Journal of Economic Literature* 401.

Similarly, Ergas argues that by expanding the scope of discretionary intervention in the economy, it creates additional opportunities for corruption in countries where endemic corruption already stifles and distorts economic growth.¹²⁴ He therefore concludes that competition law may do more harm than good in the society.

2.4.2 Competition regulation

Paradoxical as it may sound, those who support for regulation of competition believe in the notion that constraints are necessary before freedom can be achieved.¹²⁵ This is not to say that they see no value in free competition, rather they advocate for free and fair competition.¹²⁶

The idea to regulate the market was originally supported by the Harvard school of thought in the 20th century.¹²⁷ According to their theory, it is the market structure which determines the conduct of firms and consequently the performance of the market- this is known as the structure-conduct-performance paradigm.¹²⁸ Based on this paradigm the Harvard School suggested that high concentration in a specific market is the main, if not the only, determinant of barriers to entry.¹²⁹ Therefore, the aim of competition law should be to avoid concentrated markets and high entry barriers.¹³⁰ This school gives to competition law a more interventionist role and places less confidence in the markets.

The Chicago school criticised the Harvard School for its 'inhospitable' approach to market structures with high levels of supplier or buyer concentration, and its hostile attitude towards mergers and non-standard vertical contractual agreements between

¹²⁴ Ergas H 'Should developed countries require developing countries to adopt competition laws? Lessons from the economic literature' (2009) *European Competition Journal* 347.

¹²⁵ Brassey M, Campbell J, Legh R, Simkins C, Unterhalter D, Wilson J *Competition Law* 1 ed (2002) Cape Town: Juta.

¹²⁶ Wyman B 'The justification of fair competition' (1907) 19 *Green Bag* 277.

¹²⁷ Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge University Press: Cambridge p. 271.

¹²⁸ Weiss 'The Structure-Conduct-Performance Paradigm and Antitrust' 27 *University of Pennsylvania Law Review* 1104 (1979).

¹²⁹ Strader JM 'The consequences of neoclassical price theory for US predatory pricing law' (2012) available at <https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-7-2012> accessed on (11 March 2015).

¹³⁰ Strader JM 'The consequences of neoclassical price theory for US predatory pricing law' (2012) available at <https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-7-2012> accessed on (11 March 2015).

firms.¹³¹ In the former's view, competition law should be less interventionist than demanded by the structure-conduct-performance paradigm.

The main focus of the Chicago school which they deem as the sole goal of competition law is the pursuit of economic efficiency, and accordingly consumer welfare.¹³² Basing their analysis on Neo-Classical Price Theory, they posit that the motive to earn profits supercharges competition, ensuring the transitory nature of market imperfections, and therefore markets can take care of themselves without heavy regulations.¹³³ Further, they urged judicial enforcers to proceed cautiously, lest it mistakenly proscribes behaviour that promotes consumer welfare.¹³⁴

The Post-Chicago School also known as new industrial economics, considers the conduct and performance of the market as important in the evaluation of the competitiveness of the market.¹³⁵ By using Game theory, this model challenged the Chicago presumption that monopolists have no incentive to engage in anticompetitive practices. They argued that the Chicago School gave a too lenient interpretation of competition law.¹³⁶

More recently, the Post-Chicago theory has argued that competition does not necessarily prevent or remedy market failure and that firms can therefore take advantage of such imperfections to produce inefficient results even in apparently competitive markets.¹³⁷ Like the Chicago school however, it has also expressed more faith in the ability of government to identify and remedy anti-competitive practices.

¹³¹ Qaqaya H and Lipimile G (Ed) 'The effects of anti-competitive business practices on developing countries and their development prospects' (2008) New York and Geneva: United Nations, available at http://unctad.org/en/docs/ditcclp20082_en.pdf accessed on (12 March 2015).

¹³² Hovenkamp 'Antitrust policy after Chicago' 84 *Michigan LR* (1985) 213 at 215.

¹³³ Strader JM 'The consequences of neoclassical price theory for US predatory pricing law' (2012) available at <https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-7-2012> accessed on (11 March 2015).

¹³⁴ Strader JM 'The consequences of neoclassical price theory for US predatory pricing law' (2012) available at <https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-7-2012> accessed on (11 March 2015).

¹³⁵ Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge University Press: Cambridge p. 273.

¹³⁶ Holland H 'Transaction Cost Economics: Applications to Competition Policy in South Africa' available at <http://www.compcom.co.za/wp-content/uploads/2014/09/TCE-Conference-Paper-Final.pdf> accessed on (12 March, 2015).

¹³⁷ Strader JM 'The consequences of neoclassical price theory for US predatory pricing law' (2012) available at <https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-7-2012> accessed on (11 March 2015).

2.4.3 Conclusion on theories of competition regulation

In sum, it is important to note that both proponents for free competition and those for competition regulation recognise the importance of competition in the market. In order to protect the market from unwarranted anti-competitive behaviour, it is a compelling argument that regulation is indeed required.

If the market should be left alone to be driven by individuals' self interest it may in the end produce the undesired result of market distortion. The idea of non-intervention of free market in the hope for a self-regulating, self-disciplining and self correcting market is indeed ambitious. So too the idea of a perfect market is just as idealistic; it is premised on a mathematical precision which is unlikely to be achieved in practice. Therefore, in view of the impracticability of a perfect market, competition law is required to remedy some of the situations in which the free market system breaks down.

Further, it would be merely cowardice for a country to fear having a competition law merely because of its anticipated challenges.

Finally, as seen from the above discussion, the various economic theories that have shaped competition law over time have their distinct strengths and weaknesses. In that regard, this paper subscribes to Paul Joskow's assertion that 'the development of sound competition rules and remedies would benefit from integrating these approaches and recognising that they are complements rather than substitutes.'¹³⁸

2.5 Levels of competition regulation

There are various levels at which cross-border anti-competitive practices can be regulated such as; unilateral, bilateral, regional, plurilateral or multilateral level.

2.5.1 Unilateral framework

Unilateral application of competition laws is based on the approach that nation states apply their own national law beyond the borders of their territories; this is referred to as extra-territorial application of national law.¹³⁹ The concept of extraterritoriality has, however, always been a highly controversial issue mainly because of issues of

¹³⁸ Joskow, P.L. (2002) Transaction Cost Economics, Antitrust Rules, and Remedies. *The Journal of Law, Economics & Organisation*, 18(1), 95-116.

¹³⁹ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

sovereignty and territorial integrity of states.¹⁴⁰ In addition, when left to their own devices, national competition policy and law makers will more often than not favour domestic producer interests over foreign producer and consumer interests.¹⁴¹

Further challenges of unilateral approach include 'forum-shopping' and circumvention of the rules. For example, the applicable jurisdiction is ordinarily where a firm has been established. Therefore firms would seek the most beneficial jurisdiction without any connection to the actual business conduct of the firms.¹⁴²

Furthermore, in trans-border cases the uncoordinated application of a variety of national competition laws can lead to overlapping or even contradictory decisions.¹⁴³ As a result, businesses incur higher transactions costs since they have to check the applicability of a number of legal orders, each with its own scope of application. This challenge is even worse in many developing countries which lack the expertise and resources to pursue this avenue of relief.¹⁴⁴

2.5.2 Bilateral framework

Bilateral agreements are often concluded between countries, which have similar competition policies.¹⁴⁵ Such agreements usually provide rules for notifications, exchange of information, rules on confidentiality and different consultation procedures.¹⁴⁶

With Bilateral framework, wariness and the problems of extraterritoriality are replaced by mutual trust to a large extent.¹⁴⁷ Since co-operation is in the common interest of the

¹⁴⁰ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

¹⁴¹ Kearns JE 'International competition policy and the Gats: A proposal to address market access limitations in the distribution services' (2001) 22 *J Int'l L* 285 available at <http://scholarship.law.upenn.edu/jil/vol22/iss2/2> accessed (12 October 2014).

¹⁴² Baetge D 'Competition law and perspectives for harmonisation' (2004) 9 *Unif LR* 501

¹⁴³ Kearns JE 'International competition policy and the Gats: A proposal to address market access limitations in the distribution services' (2001) 22 *J Int'l L* 285 available at <http://scholarship.law.upenn.edu/jil/vol22/iss2/2> accessed (12 October 2014).

¹⁴⁴ Hufbauer G and Kim J 'International competition policy and the WTO' (2009) 54 *Antitrust Bull* 327.

¹⁴⁵ Campbell N and Masse MG 'The interplay between competition law and Free Trade Agreements - The Canadian Experience' (2012) 8 *Competition L. Int'l* 64.

¹⁴⁶ Gal MS and Wassmer IF 'Regional agreements of developing jurisdictions: Unleashing the potential' in *Competition Policy and Regional Integration in Developing Countries*, (2012) Bakhom M, Drexl J, Gal M, Gerber D, Fox E (eds) available at <http://ssrn.com/abstract=1920290> (accessed on 24th October, 2014).

¹⁴⁷ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

parties, bilateral agreements facilitate the application of their respective competition laws. The co-operation also promotes better understanding of the economic conditions and theories relevant to the activities of the other party.¹⁴⁸

Bilateral co-operation agreements on the other hand, assume pre-existing domestic competition laws and have important limitations such as: where a nation does not have an effective domestic competition law, where a nation under-enforces its competition law, where there are procedural impediments to enforcement of domestic competition law, where there are jurisdiction overlaps amongst others.¹⁴⁹

A good example of a bilateral agreement is the European Union (EU) and the US Government Agreement regarding the application of their competition laws.¹⁵⁰ This agreement provides an important analysis of the workability and challenges of bilateral agreements as it relates to two major 'players' in international trade with mature competition systems.¹⁵¹ There have been cases where conflicts arose between the EU and the US where both competition regulators claim jurisdiction.¹⁵² In such circumstances, bilateral agreements have revealed a crucial weakness in providing viable solutions to cross-border competition issues.



2.5.3 Plurilateral framework

Plurilateral agreements are broader than regional agreements but narrower than multilateral agreements.¹⁵³ The fewer the countries the more it is comparable to regional agreements and the more countries that are involved, the more it is comparable to a multilateral agreement.¹⁵⁴ An example of a plurilateral agreement is the Government Procurement Agreement, which is incorporated into the WTO.¹⁵⁵

¹⁴⁸ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

¹⁴⁹ Crampton P & Barutciski M 'Post privatisation in the America: Competition law policy and the alternative - Trade distorting private restraints: A practical agenda for future action' (1999) 6 *Sw JL & Trade Am* 3.

¹⁵⁰ The agreement was concluded in 1991 and finally entered into force in 1995

¹⁵¹ Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge University Press: Cambridge p. 64.

¹⁵² *Boeing/McDonnell Douglas Case No IV/M.877* and *General Electric/Honeywell Case No COMP/M.2220*.

¹⁵³ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

¹⁵⁴ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

¹⁵⁵ WTO *Government Procurement: The Plurilateral Agreement - Overview of the Agreement on Government Procurement* available on https://www.wto.org/english/tratop_e/gproc_e/gpa_overview_e.htm accessed on (8 May 2014).

2.5.4 Multilateral framework

There is currently no international competition regulatory framework. However, there is a considerable amount of informal cooperation on an international level through participation in international bodies. Examples of international bodies include the Competition Law and Policy Committee of the Organisation for Economic Co-operation and Development (OECD), the OECD Global Forum on Competition, the Working Group on Trade and Competition Policy WGTCP at the WTO and the International Competition Network (ICN).¹⁵⁶

The obvious advantage of a multilateral approach is greater jurisdictional coverage.¹⁵⁷ Nonetheless, the deadlocked discussion at the WTO on multilateral competition framework has proved the difficulty in reaching an agreement between a large number of players.¹⁵⁸ However, this does not mean plans for a multilateral approach should be written off, rather it is suggested that a piecemeal approach should be taken in developing a multilateral competition framework. For example progress made at a regional level may contribute to the further development in multilateral context.

2.5.5 Regional framework

Regional competition regimes are usually the results of free trade agreements which are completed by rules to control private business restrictions in order not to compromise the gains of free trade.¹⁵⁹ The consensus that has proved to be possible to reach in a regional context does not necessarily indicate successful cooperation in a broader context.¹⁶⁰ Nonetheless, a regional approach gives important practical knowledge when analysing the benefits as well as the difficulties in establishing more integrated competition laws.¹⁶¹

¹⁵⁶ Sweeney B 'Globalisation of competition law and policy: Some aspects of the interface between trade and competition (2004) *MelbJIL* 375.

¹⁵⁷ MacLaren R 'Two steps forward and no steps back: Charting a new course for trade and competition policy' (1996) 24 *Int'l Bus. Law.* 464.

¹⁵⁸ Epstein J. 'The other side of harmony: Can trade and competition laws work together in the international marketplace?' (2002) 17 *American University ILR* 343.

¹⁵⁹ Campbell N and Masse MG 'The interplay between competition law and Free Trade Agreements - The Canadian Experience (2012) 8 *Competition L. Int'l* 64.

¹⁶⁰ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

¹⁶¹ Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.

The advantages and disadvantages of developing a regional competition regulatory framework will be discussed more thoroughly in chapter four.

For the purposes of this paper, a regional competition regulatory framework means supranational competition laws that govern competition in a region. Thus, regional rules on cooperation, information sharing or technical assistance alone do not suffice as regional competition regulatory framework.

2.6 Competition law in the WTO

The interaction between international trade and competition law can be traced back to the 1940s during the establishment of the International Trade Organisation (ITO). The ITO was the proposed name for an international institution for the regulation of trade. Although efforts to form the ITO eventually failed, the successful passing of the ITO Charter also known as 'Havana Charter' brought into light the link between international trade and competition law.¹⁶² The ITO Charter, proposed comprehensive provisions dealing with restrictive business practices. These provisions provided for a comprehensive control over price-fixing and other forms of anti-competitive law.¹⁶³

Since the ITO Charter never entered into force, some portions were later adopted in the GATT in 1947 and eventually superseded by the WTO in 1994.¹⁶⁴ Unfortunately, the comprehensive restrictive provisions for the anti-competitive practices of private enterprises were not incorporated in the GATT or the current WTO.¹⁶⁵ To the contrary, the GATT/WTO addresses anti-competitive trade practices by government bodies through trade policies such as tariffs, anti-dumping, quotas and technical barriers to trade.¹⁶⁶

Although comprehensive competition law was not incorporated into the WTO, the interaction between trade and competition policy became one of the key issues at the

¹⁶²Van Grassek C. *The History and Future of the World Trade Organisation* (2013) World Trade Organisation: Geneva.

¹⁶³Matsushita M 'Symposium: Cultural conceptions of competition - Competition law and policy in the context of the WTO system' (1995), 44 *DePaul Law Review* 1097.

¹⁶⁴Van Grassek C. *The History and Future of the World Trade Organisation* (2013) World Trade Organisation: Geneva.

¹⁶⁵ Matsushita M 'Symposium: Cultural conceptions of competition - Competition law and policy in the context of the WTO system' (1995) 44 *DePaul Law Review* 1097.

¹⁶⁶ Mavroidis PC & Hoekman B 'Economic development, competition policy and the WTO' (2003) *Journal of World Trade* 37(1) available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2917> accessed on (31 October 2014).

1996 WTO's Singapore Ministerial Conference.¹⁶⁷ It was believed that anti-competitive practices, private or public, undermined the gains made by the WTO with regard to trade liberalisation.¹⁶⁸ This Ministerial Conference established the WGTCP to discuss beneficial issues raised by the interaction of trade and competition policy.¹⁶⁹

During the 2001 WTO Doha Ministerial Conference, the participants recognised that a multilateral framework could enhance the contribution of competition policy to international trade and development.¹⁷⁰ The Doha Declaration provided that negotiations would commence after the Fifth Ministerial Conference, subject to a decision on modalities of negotiations. In addition, the Declaration authorised the WGTCP to clarify:

'core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.'¹⁷¹

As mandated by the Doha Declaration, ministers were to decide by explicit consensus on the modalities of negotiations on a multilateral framework on competition at Cancun in 2003. However, a bargaining impasse among the developed and developing members resulted in a failure to reach an agreement.¹⁷² Several developing countries expressed opposition to the multilateral framework. They argued that such an approach would be controversial, if not unhelpful.¹⁷³ India's representatives stated that, instead of developing multilateral rules, the WGTCP should continue to study this issue because it

¹⁶⁷ Lee JS 'Towards a development-oriented multilateral framework on competition Policy' (2006) 7 *San Diego Int'l LJ* 293.

¹⁶⁸ Lee JS 'Towards a development-oriented multilateral framework on competition Policy' (2006) 7 *San Diego Int'l LJ* 293.

¹⁶⁹ WTO *Competition Policy: Documents - Documents of the Working Group on the Interaction between Trade and Competition Policy (WGTCP)* available at http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm (accessed 10 October 2014).

¹⁷⁰ WTO Ministerial Declaration of November 2001, WT/MIN(01)/Dec/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration] Paragraph 23.

¹⁷¹ WTO Declaration of November 2001, WT/MIN(01)/Dec/1, 41 I.L.M. 746 (2002) Paragraph 25.

¹⁷² The International Centre for Trade and Sustainable Development (ICTSD) and the International Institute for Sustainable Development (IISD) *Doha Round Briefing Series August 2003 - The Singapore Issues: Cancun Update Investment, Competition Policy, Transparency in Government Procurement and Trade Facilitation 2003* available at http://www.iisd.org/pdf/2003/wto_doha_singapore_issues_2.pdf (accesses 10 October 2014).

¹⁷³ WGTCP Report on the WGTCP Meeting of 19-20 April, WT/WGTCP/M/8, P 20 (June 10, 1999).

is too complex and WTO members were far from agreement.¹⁷⁴ Brazil argued that there is a need to consider differing levels of development and cultural contexts for these regimes, as well as the difference in available resources for this purpose and levels of institutional development.¹⁷⁵

In July 2004 the General Council of the WTO decided that the interaction between trade and competition policy would no longer form part of the Work Programme set out in the Doha Ministerial Declaration and therefore, that no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.¹⁷⁶ Consequently, there is currently no multilateral system of competition law under the WTO.

In the absence of a comprehensive competition regulation, the WTO law nevertheless includes some provisions that explicitly address anti-competitive practices by private firms, although with minimal force.¹⁷⁷

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) addresses abuse of intellectual property rights, but without specifying abusive conduct.¹⁷⁸ It also refers to contractual licence control, but again, without describing the cases in which these licences could be prosecuted.¹⁷⁹

Further, the General Agreement on Trade in Services (GATS) includes rules designed to ensure that monopolies and exclusive service suppliers do not nullify or impair obligations and commitments under the GATS.¹⁸⁰ Without stipulating any legal obligation, it also recognises that other anti-competitive business practices of service suppliers may restrain competition and thus, trade in services.¹⁸¹ All in all, except for some highly specific regulations in the telecommunications sector, WTO competition

¹⁷⁴ WTGCP Report on the WTGCP Meeting of 19-20 April, WT/WGTCP/M/8, P 20 (June 10, 1999).

¹⁷⁵ WTGCP Report on the WTGCP Meeting of 19-20 April, WT/WGTCP/3, (October 11, 1999).

¹⁷⁶ WTO *Interaction Between Trade and Competition Policy* available at http://www.wto.org/english/tratop_e/comp_e/comp_e.htm (accessed 10 October 2014).

¹⁷⁷ Sweeney B 'Globalisation of competition law and policy: Some aspects of the interface between trade and competition (2004) *MelbJIL* 375.

¹⁷⁸ Article 8, TRIPS.

¹⁷⁹ Article 40, TRIPS.

¹⁸⁰ Article VIII, GATS.

¹⁸¹ Article IX GATS.

provisions do not yet include a clear commitment with regard to the prosecution of private anti-competitive conduct.¹⁸²

2.7 Conclusion

To sum up, it is evident that international trade and competition law are independent of each other. However, although there has been much discussion about protecting competition on the international trade market, there is little or no progress in the development of a multilateral framework at the WTO.

It is suggested that a piecemeal approach to developing a multilateral competition framework might be helpful in addressing the current cross-border anti-competitive practices. A good avenue to explore in this piecemeal approach is regional competition regulation.

In view of the above conceptual and theoretical analysis, this paper proceeds on the understanding that competition law is important in restricting anti-competitive trade practices. Unfortunately, SADC does not have supranational competition laws. On that basis, the following chapter will discuss the challenges of the cooperation model adopted by SADC in addressing cross-border anti-competitive trade practices in the region.

¹⁸² Baetge *D 'Competition law and perspectives for harmonisation'* (2004) 9 *Unif LR* 501.

CHAPTER THREE

CHALLENGES OF THE COOPERATION MODEL IN ADDRESSING CROSS-BORDER ANTI-COMPETITIVE PRACTICES IN SADC

3.1 Introduction

The concept of competition law is not entirely alien in the Southern African Development Community (SADC). Although comprehensive regional competition laws are not in place, firms doing businesses in SADC are faced with a *de facto* regime generated by a patchwork quilt of domestic laws. In addition, there exists a SADC Declaration on Regional Cooperation in Competition and Consumer Policies which sets out a cooperation framework on competition policy in the region. Hence, before addressing the question whether there should be a regional regulatory framework in SADC, one first has to analyse whether the challenges of the existing system renders it necessary to consider developing a new competition regime.

This chapter discusses the challenges of the cooperation model adopted by SADC in addressing cross-border anti-competitive practices in the region. It shall first provide a brief overview of SADC in terms of its historical background, objectives, members and notification to the WTO. Thereafter, the concepts of cooperation model and anti-competitive practices will be defined and finally challenges of the cooperation model will be discussed.

3.2 A brief of overview of SADC

SADC is an intergovernmental organisation composed of fifteen Southern African states, namely: Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Malawi, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.¹⁸³

¹⁸³SADC *Overview: History and Treaty* available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/> accessed on (17 March 2015).

The predecessor of SADC was the Southern African Development Co-ordination Conference (SADCC), established in 1980 in Lusaka, Zambia.¹⁸⁴ SADCC was formed to advance the cause of national political liberation in Southern Africa, and to reduce dependence particularly on apartheid-era South Africa through effective coordination of utilisation of the specific characteristics and strengths of each country and its resources.¹⁸⁵

SADCC was transformed into SADC on 17 August 1992, with the adoption by the founding members of SADCC and newly independent Namibia of the Windhoek declaration and treaty establishing SADC.¹⁸⁶ The SADC Treaty sets out the main objectives of SADC - to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration. These objectives are to be achieved through increased regional integration, built on democratic principles, and equitable and sustainable development.¹⁸⁷

The SADC protocol on trade (2005), as amended, envisaged the establishment of a Free Trade Area (FTA) in the SADC Region by 2008.¹⁸⁸ The FTA was launched in August 2008.¹⁸⁹ Further objectives of the protocol are: to further liberalise intra-regional trade in goods and services; ensure efficient production; contribute towards the improvement of the climate for domestic, cross-border and foreign investment; and enhance economic development, diversification and industrialisation of the region.¹⁹⁰

¹⁸⁴ SADC *Overview: History and Treaty* available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/> accessed on (17 March 2015).

¹⁸⁵ SADC *Overview: History and Treaty* available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/> accessed on (17 March 2015).

¹⁸⁶ SADC *Overview: History and Treaty* available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/> accessed on (17 March 2015).

¹⁸⁷ SADC: *History and Treaty* available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/> accessed on (17 March 2015).

¹⁸⁸ Sandrey R 'An analysis of the SADC Free Trade Area' (2013) *Tralac Trade Brief*. No. D13TB01/2013. Available at <http://www.tralac.org/files/2013/06/D13TB012013-Sandrey-Analysis-of-SADC-Free-Trade-Area-20130619-fin.pdf> accessed on (17 March 2015).

¹⁸⁹ Sandrey R 'An analysis of the SADC Free Trade Area' (2013) *Tralac Trade Brief*. No. D13TB01/2013. Available at <http://www.tralac.org/files/2013/06/D13TB012013-Sandrey-Analysis-of-SADC-Free-Trade-Area-20130619-fin.pdf> accessed on (17 March 2015).

¹⁹⁰ SADC *Documents and Publications: Protocol on Trade* (1996) available at [http://www.sadc.int/documents-publications/show/Protocol%20on%20Trade%20\(1996\)](http://www.sadc.int/documents-publications/show/Protocol%20on%20Trade%20(1996)) accessed on (17 March 2015).

The SADC FTA was notified to the World Trade Organisation (WTO) under General Agreement on Tariffs and Trade article XXIV (7) (a) 1947 (GATT)¹⁹¹ on 2 August 2004.¹⁹² As per art XXIV (8) of GATT, a FTA is understood to mean ‘a group of two or more customs territories in which the duties and other restrictive regulations are eliminated on substantially all the trade between the constituent territories in products originating in such territories. Since SADC attained its FTA status in 2008, over 85% of intraregional trade amongst the partner states has attained zero duty.¹⁹³ As a result of the liberalised trade, there is a significant amount of cross border business activities and enhanced competition in SADC. Mindful of anti-competitive practices that can undermine the progress of trade liberalisation, SADC uses the cooperation model to prohibit unfair business practices and to promote competition and cooperation in the region.¹⁹⁴

3.3 Understanding the concept of Cooperation model

In its ordinary meaning, cooperation is the act of doing something together or of working together towards a shared aim.¹⁹⁵ Cooperation in the context of competition policy has been defined by the United Nations Conference on Trade and Development (UNCTAD) as ‘collaboration between competition authorities aimed at creating synergies as well as partnerships for mutual assistance and reciprocity in enforcing their respective competition rules.’¹⁹⁶ Additionally, cooperation can also involve countries without competition rules, for instance by offering them technical assistance so that they develop their own competition laws.¹⁹⁷

Cooperation in competition cases can take place in different forms such as the following:

¹⁹¹ ‘Any Contracting party deciding to enter into a customs union or free trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the contracting parties and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they deem appropriate.’

¹⁹² Erasmus G ‘Is the SADC trade regime a rules-based system?’ (2011) 1 *SA LJ* 17-35.

¹⁹³ Sandrey R ‘An analysis of the SADC Free Trade Area’ (2013) *Tralac Trade Brief*. No. D13TB01/2013. Available at <http://www.tralac.org/files/2013/06/D13TB012013-Sandrey-Analysis-of-SADC-Free-Trade-Area-20130619-fin.pdf> accessed on (17 March 2015).

¹⁹⁴ See The SADC Declaration on Regional Cooperation in Competition and Consumer Policies.

¹⁹⁵ Oxford Learners Dictionary *Definition of Cooperation* available at <http://www.oxfordlearnersdictionaries.com/definition/english/cooperation> accessed on (18 March 2015).

¹⁹⁶ UNCTAD *Informal cooperation among competition agencies in specific cases* (2014) TD/B/C.I/CLP/29 available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd29_en.pdf accessed on (18 March 2015).

¹⁹⁷ See Paragraph 2(b)(iii) of the SADC Declaration on Cooperation in Competition and Consumer Policies.

- (a) **Informal cooperation based on the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980)** (the “UN Set”) - The UN Set is a sole universally applicable multilateral competition instrument. It is however voluntary in nature, uses precatory language and provides mere guiding rules and principles. The goal of the document is the elimination and control of restrictive business practices that have a negative impact on international trade liberalisation, especially within developing countries.¹⁹⁸

Apart from recommending competition principles and rules,¹⁹⁹ the UN Set also encourages extensive international cooperation on competition law and policy issues.²⁰⁰ It also provides for the formation of an Intergovernmental Group of Experts (IGE) that facilitates the implementation of the Set.²⁰¹ The IGE has no judicial or binding powers, but instead provides a forum for consultations and exchange of experiences among competition policy experts.²⁰²

- (b) **Informal cooperation based on the 1995 OECD Recommendation on Cooperation or other similar soft law instruments with no particular legal basis** - The Organisation for Economic Co-operation and Development (OECD) is an international economic organisation of 34 countries founded in 1961 to stimulate economic progress and world trade.²⁰³ In 1967 the OECD adopted its first Recommendation encouraging its member counties to cooperate in enforcement on competition law issues.²⁰⁴ The First Recommendation of 1967 has been modified several times, most recently in 1995.

The 1995 revised Recommendation recognises that competition law investigations by one country may affect important interests of other OECD

¹⁹⁸ Section A of the UN set.

¹⁹⁹ Section E of the UN Set.

²⁰⁰ Section F of the UN set.

²⁰¹ Section G of the UN Set.

²⁰² Section G of the UN Set.

²⁰³ There's currently no African members state in OECD. See <http://www.oecd.org/about/membersandpartners/> accessed on (8 April 2015)

²⁰⁴ The OECD *Competition: Recommendation concerning International Co-operation on Competition Investigations and Proceedings* available at <http://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm> accessed on (8 April 2015).

member countries.²⁰⁵ Thus, in recognition of the potential cross-border conflict, it encourages closer co-operation between member countries in the form of notification, exchange of information, co-ordination of action, and consultation and conciliation on a fully voluntary basis.²⁰⁶

(c) Cooperation based on waivers - A waiver of confidentiality is consent from an immunity/amnesty applicant to waive, within the limits set out in the consent, the confidentiality protections afforded to it by the applicable confidentiality rules in the jurisdiction of the investigating competition agency.²⁰⁷ In the perspective of the immunity/amnesty applicant, the waiver enables better coordination of investigatory measures, expediting the review and decision-making process, whilst minimising the risks of conflicting outcomes.

(d) Cooperation based on provisions in national law - The provisions in national law which facilitate and promote co-operation between agencies or jurisdictions fall into two categories. On one hand there are those which directly authorise the competition agency to co-operate with the agencies of other jurisdictions such as the competition law of Zambia.²⁰⁸ On the other hand there are those like South African competition law which have no such direct effect, but act as a mandate for the conclusion of competition-specific co-operation agreements with other jurisdictions, pursuant to which co-operation can take place.²⁰⁹

(e) Cooperation based on non-competition-specific agreements and instruments - These are treaties which do not specifically concern competition law but may have cooperation provisions to address anti-competitive practices between the members. For example investment treaties, trade agreements or economic

²⁰⁵ Preamble to the OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings.

²⁰⁶ The OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings.

²⁰⁷ International Competition Network *Co-operation between Competition Agencies in Cartel Investigations* (2007) Report to the ICN Annual Conference: Moscow available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf> accessed on (18 March 2015).

²⁰⁸ For example section 5(i) of the *Zambian Competition and Consumer Protection Act No. 24 of 2010* permits the commission to exchange information with other agencies. Further, Section 65 permits the commission to enforce competition law at the requests of foreign competition authority belonging to either SADC or COMESA countries.

²⁰⁹ Section 82(4) of the *South African Competition Act 89 of 1998*.

partnership agreements can have provisions that encourage members to cooperate in combating cross-border anti-competitive practices.²¹⁰

- (f) Cooperation based on competition-specific agreements** -These are agreements that have been entered specifically to encourage cooperation in addressing competition law issues. Examples of such agreements include; the 1976 Germany-United States Antitrust accord, the 1982 Australia-US Antitrust Cooperation Agreement, the European Union (EU)-US Cooperation Agreements, amongst others.
- (g) Regional cooperation instruments-** These can be in the form of legally binding competition rules such as the 2004 COMESA Competition Regulations or non-binding principles such as the SADC Declaration on regional cooperation in competition and consumer policies

The above forms of cooperation fall into two categories: formal and informal cooperation.²¹¹ It is worth mentioning at this point that there is no generally agreed distinction between formal and informal co-operation but there is a continuum of forms of co-operation.²¹² Be that as it may, this paper distinguishes formal cooperation as that which is based on a legally binding instrument such as the EU and COMESA competition legal frameworks. In contrast, informal cooperation is unofficial, friendly, voluntary and non-binding form of collaboration between competition agencies. Thus, SADC applies an informal approach to cooperation.

3.4 Modalities of cooperation in SADC

The SADC Treaty (1992) does not contain competition provisions. Nonetheless, under section 25 of the SADC Trade Protocol, member States are required to adopt comprehensive trade development measures within the community which prohibit

²¹⁰ For example the South Africa-European Union Trade Agreement includes a provision on competition policy. It provides for consultative mechanisms to attempt to accommodate the interests of each Party with the application of domestic law.

²¹¹ UNCTAD) *Informal cooperation among competition agencies in specific cases* (2014) TD/B/C.I/CLP/29 available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd29_en.pdf accessed on (18 March 2015).

²¹² Organisation for Economic Cooperation and Development *Challenges of International Co-operation in Competition Law Enforcement* (2014) available at <http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf> accessed on (18 March 2015).

establish a transparent framework that contains appropriate safeguards to protect confidential information of the parties, and appropriate national judicial review.²²⁰ The SADC Secretariat further encourages exchange of technical knowhow that would enable SADC countries without competition policies, legislation and institutions to develop such.²²¹

A recent development within SADC, which is aimed at enhancing cooperation and exchange of case information, is the establishment of an online competition case management database launched in 2012.²²² Member States agreed that some of the key objectives of the database are that the system will:

- '(I) Act as a central repository of information on both on-going and resolved competition cases, especially cases of interest,
- (II) Promote collaboration and cooperation on cross-border cases, e.g. making it easier to find out if the same parties/cases are being investigated by different authorities, repeat offenders, etc., and
- (III) Provide easy access to case information and best practices in a user friendly fashion with search capability.'²²³

The online database is hosted on the SADC platform and uses the SADC website domain: <http://www.sadc.int/competitioncases>. This is a login and access database for now, and is restricted to national competition authorities, the administrator and relevant secretariat staff.²²⁴ Plans have been proposed to open access to the public after a safeguard mechanism on confidentiality of competition cases information is put in

²²⁰ Paragraph 1(e) SADC Declaration on Regional Cooperation in Competition and Consumer Policies.

²²¹ Paragraph 3 SADC Declaration on Regional Cooperation in Competition and Consumer Policies.

²²² UNCTAD *Modalities and procedures for international cooperation in competition cases involving more than one country* (2013) TD/B/C.I/CLP/21 available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd21_en.pdf (accessed on 18 March 2015).

²²³ Africa Competition Forum Newsletter July 2013 available at http://www.africancompetitionforum.org/sites/default/files/docs/ACF_First_Newsletter_English_0.pdf accessed on (18 March 2015).

²²⁴ Africa Competition Forum Newsletter July 2013 available at http://www.africancompetitionforum.org/sites/default/files/docs/ACF_First_Newsletter_English_0.pdf accessed on (18 March 2015).

place.²²⁵ The system is up and running and countries have already started posting case information.

3.5 Cross-border anti-competitive practices affecting SADC

Competition authorities in SADC are increasingly being faced with the need to enforce competition policy domestically and to deal with cross-border anticompetitive practices. As will be seen in the below case studies, SADC has experienced anti-competitive practices such as regional cartels, cross border mergers and acquisitions, vertical restraints and abuse of dominant position.

Below is a brief review of the anti-competitive practices faced in SADC, particularly in regards to their effect on trade.

3.5.1 Cartel activity

A cartel is an agreement, a concerted practice, or a decision by an association of firms which substitutes practical cooperation between firms for independent conduct and the risks of competition.²²⁶ Typically, cartel members agree on: prices, output levels, discounts, credit terms, which customers they will supply, which areas they will supply, who should win a contract (bid rigging) amongst others.²²⁷

Competition legislation will usually distinguish between two types of cartel practices : those that are prohibited without determining whether they have produced or may produce anti-competitive consequences in the particular situation (*per se* prohibitions) and those that will only be condemned once it has been established on the facts of the case that they affect competition negatively (rule of reason prohibitions).²²⁸ An arrangement consisting of price fixing, market allocation, or collusive tendering is outrightly prohibited; these are also known as Hard core cartels.²²⁹

²²⁵Africa Competition Forum Newsletter July 2013 available at http://www.africancompetitionforum.org/sites/default/files/docs/ACF_First_Newsletter_English_0.pdf accessed on (18 March 2015).

²²⁶ Sutherland & Kemp, *Competition Law of South Africa*, LexisNexis Butterworths (looseleaf) at 5-12.

²²⁷ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell p.205.

²²⁸ Sutherland & Kemp, *Competition Law of South Africa*, LexisNexis Butterworths (looseleaf) at 5-57.

²²⁹ Sutherland & Kemp, *Competition Law of South Africa*, LexisNexis Butterworths (looseleaf) at 5-57.

A concerted practice is a co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action but which does not amount to an agreement.²³⁰ For example, in the *Dyestuffs Cartel* case the European Commission fined several producers of dyestuffs which it considered had been guilty of price fixing through concerted practices relying upon various pieces of evidence, including: the similarity of the rate and timing of price increases, the similarity of instructions sent by parent companies to their subsidiaries and the fact that there had been informal contact between the firms concerned.²³¹ Conversely, parallel conduct cannot be regarded as furnishing proof of concertation, unless concertation constitutes the only plausible explanation for such conduct.²³²

Cross border cartels; cartel arrangements between competitors in the domestic market and a foreign country may have adverse effects to consumers and to trade.²³³ Price-fixing cartel for example, negatively affects consumers because it enables producers to charge higher prices than they would be able to under free market conditions. Further, the market-sharing cartel, under which firms seek to divide the market up among themselves, can exclude new entrants to that market thereby undermining trade liberalisation.

A good example of a global cartel case in SADC is a matter handled by the South African Competition Commission involving multiple international airlines. The commission referred a complaint to the competition tribunal against South African Airways Cargo, British Airways, Air France-KLM, Alitalia Cargo, Cargolux, Singapore Airlines, Martinair and Lufthansa.²³⁴ The commission alleged that the airlines concluded agreements, the effect of which was to fix the rate of fuel surcharges on international cargo. The competition tribunal found in part that the respondents were involved in discussions and exchanged information by way of calls or emails with their competitors and consequently did not act independently in setting fuel surcharge rates.²³⁵ The

²³⁰ Sutherland & Kemp, *Competition Law of South Africa*, LexisNexis Butterworths (looseleaf) at 5-30.

²³¹ *In Case 48/69 Imperial Chemical Industries vs. Commission of the European Communities, (Dyestuffs)* [1972] ECR 619.

²³² *Ahstrom Osakey-tio v. Commission of the European Communities (The Woodpulp Case)* (ECJ), 778.

²³³ A number of competition laws in SADC have been reformed to include prohibition of cartels, see <http://www.tralac.org/news/article/7106-sadc-aiming-to-protect-local-businesses.html> accessed on (20 March 2015).

²³⁴ *The Competition Commission vs. South African Airways Cargo, British Airways, Air France-KLM, Alitalia Cargo, Cargolux, Singapore Airlines, Martinair and Lufthansa*; CT Case No:41/CR/Apr12; CC Case No.: 2008/Jan3488. (*Multiple airlines case*)

²³⁵ *Multiple airlines cases*; CT Case No:41/CR/Apr12; CC Case No.: 2008/Jan3488.

tribunal penalised the respondents and has concluded settlement agreements with some of the respondents in the matter.²³⁶

3.5.2 Cross-border mergers

A merger takes place where the business or part of a business conducted by a firm or firms is transferred to another firm or firms.²³⁷ Mergers and acquisitions can have an impact on not only the particular country where the merger is done, but also in the national markets of other countries. Usually, national competition laws prohibit any merger, acquisition or takeover likely to substantially lessen competition or prevent access to a market unless there are other outweighing pro-competitive gains, or if the merger would be in the public interest.²³⁸

Mergers can be problematic for example, where a foreign corporation acquires a domestic enterprise and as a result of the acquisition gains a dominant position in the relevant market, enabling it to enjoy a high profit margin, and charge prices well above a competitive level.²³⁹ Another scenario often encountered in developing and transition economies, is where the affiliates of two separate multinational companies have been established in competition with one another in a particular market and subsequently, the parent companies overseas decide to merge.²⁴⁰ With the affiliates no longer independent of one another, competition in a host country may be virtually eliminated and the prices of the product increased.

²³⁶ See Consent Order between The Competition Commission and British Airways (PLC) available at <http://www.saflii.org/za/cases/ZACT/2012/87.pdf> accessed on (8 April 2015).

²³⁷ Sutherland & Kemp, *Competition Law of South Africa*, LexisNexis Butterworths (looseleaf) at 8-4.

²³⁸ In the *Rothmans of Pall Mall/ British American Tobacco Merger* The Zimbabwe Commission noted that although the merger would result in a creation of a monopoly situation in the relevant market (i.e. the manufactured cigarette market), it had other public interest benefits provided for in the Competition Act. The said public interest included the creation of greater economies of scale resulting in more efficient use of resources, the generation of foreign currency through exports, and the stabilisation of product prices on the local market. See UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, Geneva, July 03-05, 2002.

²³⁹In the *Walmart/Masmart merger* the South African Competition Commission found that the merger actually resulted in lower prices, this was treated as a compelling public interest and the merger was approved although with certain conditions.

²⁴⁰ For example in the *Rothmans of Pall Mall/ British American Tobacco Merger* the British American Tobacco Plc of the United Kingdom merged with Rothmans International, Compagnie Financiere Richemont AG of Switzerland. The merger affected a number of SADC countries as it had the effect of substantially lessening competition in the domestic markets.

SADC countries have also experienced cross-border mergers of multinational companies. For example in the *Coca-Cola/Schweppes merger*, the Zambian Competition Commission (ZCC) found that the merger would substantially lessen competition in the national market for the production and wholesale supply of carbonated soft drinks.²⁴¹ The merger was however approved with conditions noting that opportunities for Coca-Cola to engage in anti-competitive practices were available even without the merger. Any such breaches would then be dealt with under the ZCC Act sections 7 (1) and (2) should any third parties raise concerns.²⁴²

3.5.3 Vertical restraints

Vertical restraints may be defined as ‘agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.’²⁴³ A distinction is made between restrictions that regulate intra-brand competition and inter-brand competition.

Intra-brand competition includes resale price maintenance and exclusive distribution arrangements.²⁴⁴ Resale price maintenance, or a vertical price arrangement, is concluded where a supplier and distributor agree that the distributor will resell the products sold to him by the supplier, at a particular price or at a price above or below a minimum or maximum determined in their arrangement.²⁴⁵ The minimum resale price maintenance is *per se* prohibited while maximum price maintenance is judged according to a rule of reason.²⁴⁶ In an exclusive distribution agreement the supplier agrees to sell his products only to one distributor for resale in a particular territory.²⁴⁷ At the same time the

²⁴¹ AllAfrica Zambia: *Coke, Schweppes granted conditional merger* available at <http://allafrica.com/stories/199912210026.html> accessed on (9 April 2015).

²⁴² Comment by Zambian Competition Commission chairman Nicholas Kwendakwema available at AllAfrica Zambia: *Coke, Schweppes granted conditional merger* available at <http://allafrica.com/stories/199912210026.html> accessed on (9 April 2015).

²⁴³ Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge: Cambridge University Press p. 42.

²⁴⁴ Sutherland & Kemp, *Competition Law of South Africa*, LexisNexis Butterworths (looseleaf) p. 6-7.

²⁴⁵ Sutherland & Kemp, *Competition Law of South Africa*, LexisNexis Butterworths (looseleaf) p. 6-7.

²⁴⁶ Sutherland & Kemp, *Competition Law of South Africa*, LexisNexis Butterworths (looseleaf) p. 6-7.

²⁴⁷ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell p. 217.

distributor is usually limited in his active selling into other exclusively allocated territories.²⁴⁸

Exclusive dealing, output and tying restrictions are the most prominent forms of the regulation of inter-brand competition.²⁴⁹ An exclusive dealing restriction is an arrangement in terms of which a distributor agrees to purchase its entire requirement of a particular product from a particular supplier.²⁵⁰ An exclusive supply contract or output restriction is an agreement by a firm to provide its entire output to a particular firm or consumer.²⁵¹ Inter-brand competition also can be restricted by means of tying restrictions; this is where a supplier undertakes to sell a particular good or service subject to that person also agreeing to take another good or service with it.²⁵²

National competition enforcement authorities' concern with vertical restrictions is their potential for raising prices, lowering the quality and quantity of goods, or preventing market entry and innovation.²⁵³ For example, in the *Federal Mogul* case, the South African Competition Appeal court expressed that; '[t]he drafters of the Act clearly regarded resale price maintenance as an egregiously anti-competitive activity...'.²⁵⁴ Accordingly, the appeal court confirmed the tribunal's penalty in the amount of R3 million.

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3.5.4 Abuse of dominant position

A business holds a dominant position if it has such a position of strength that it is not constrained by competitive pressures.²⁵⁵ Similarly, unlawful monopolisation is a conduct through which a firm achieves or maintains a monopoly, primarily by

²⁴⁸ Sutherland & Kemp, *Competition Law of South Africa*, LexisNexis Butterworths (looseleaf) p. 6-7.

²⁴⁹ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell p. 217.

²⁵⁰ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell p. 217.

²⁵¹ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell p. 217.

²⁵² Sutherland & Kemp, *Competition Law of South Africa*, LexisNexis Butterworths (looseleaf) p. 6-10.

²⁵³ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell p. 215.

²⁵⁴ *Federal-Mogul Aftermarket Southern Africa (Pty) Limited and The Competition Commission and The Minister of Trade and Industry* Case No.: 33/Cac/Sep03 at p.8.

²⁵⁵ Sutherland & Kemp, *Competition Law of South Africa*, LexisNexis Butterworths (looseleaf) Cap 7.

excluding other efficient competitors.²⁵⁶ Although the monopoly itself is not prohibited, abuse of monopolistic powers is.

If a firm is dominant, its actions must be judged against the conduct prohibited under the relevant competition legislation. For example, the following conducts by a dominant firm are usually condemned as abuse of dominant position: excessive pricing; refusing to give a competitor access to an essential facility; conduct that impedes or prevents others from entering or expanding in a market; requiring a supplier or customer not to deal with a competitor; refusing to supply scarce goods to a competitor; tying; predatory pricing and buying up scarce supply price discrimination.²⁵⁷ In most of these cases it is also necessary to prove that the conduct has a negative effect on competition.²⁵⁸ Of note, in determining the dominance of a firm in a market, competition laws vary in their definition of relevant market, market share, predatory conduct and unfair pricing.

Most SADC countries have experienced potential abuses of a dominant position especially in the sugar distribution, cement manufacturing and distribution, diamond mining and marketing, beef market, wholesale and distribution, and in both clear and opaque beers.²⁵⁹ For example in Zimbabwe, Nesbitt Brewery (Pvt) Limited of Chiredzi complained to the Competition Commission that National Breweries Limited was engaged in predatory pricing.²⁶⁰ Nesbitt Brewery alleged that the National Breweries which was in a dominant position had drastically reduced the price of its clear beer in Chiredzi to levels that were unprofitable, with the intention of driving Nesbitt Brewery out of the market. The Competition commission of Zimbabwe found the alleged practices to be predatory and prohibited anti-competitive practice within the terms of section 2 of the Zimbabwe Competition Act. Notably, the Commission did not challenge

²⁵⁶ Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell p. 227.

²⁵⁷ Section 8 of the South African Competition Act 1998.

²⁵⁸ See Section 9 of the South African Competition Act 1998.

²⁵⁹ *Modalities Competition, Competitiveness and Development: Lessons From Developing Countries* (2004) available at http://unctad.org/en/docs/ditcclp20041_en.pdf accessed on (22 March 2015).

²⁶⁰ *Clear beer distribution in Chiredzi case*, Zimbabwe Commission, Source UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, Geneva, July 03-05, 2002.

the dominance of the National Breweries of Zimbabwe of the clear beer industry but its attempts to drive smaller breweries out of the market.²⁶¹

3.6 Challenges of the cooperation model in addressing anti-competitive practices in SADC

The SADC cooperation model has experienced several challenges in addressing cross border anti-competitive in the region. Whilst general challenges of cooperation model are many, the following challenges have been identified as particularly affecting SADC, namely: Absence of competition laws in some countries, lack of capacity, lack of coordination, different priorities, voluntary nature of cooperation, lack of harmonisation of laws and, confidentiality of information.

3.6.1 Absence of competition laws in some countries

The vast majority of competition authorities within SADC are relatively young agencies and some are yet to be established. The competition laws of Zambia, Zimbabwe, South Africa and Malawi were the first to be enacted in the region, in the mid/late 1990s.²⁶² Competition laws of Tanzania and Namibia were enacted in 2003;²⁶³ Madagascar in 2005;²⁶⁴ Mauritius and Swaziland in 2007,²⁶⁵ Seychelles and Botswana in 2009.²⁶⁶ Most of the competition agencies were in operation a year or more later after enactment of their competition laws. As for Angola, DRC, Lesotho and Mozambique, they are in the process of adopting competition laws and policies.²⁶⁷

The research carried out by SADC in its member states revealed that in countries without proper competition enforcement mechanisms tended to have market structures

²⁶¹ Courts have thrown out allegations of anti-competitive practices where there is insufficient evidence that an arrangement between the supplier and its distributors has lessened competition in the market. *See Competition Commission v South African Breweries Limited and Others* (129/CAC/Apr14) [2015] ZACAC 1 (2 February 2015).

²⁶² Zambia Competition and Consumer Protection Act 24 of 2010 (which was initially the Competition and Fair Trading Act 18 of 1994); Zimbabwe Competition Act 7 of 1996, as amended; Malawi Competition and Fair Trading Act was enacted in 1998; South Africa Act 89 of 1998 was enacted in 1999.

²⁶³ Tanzania Fair Competition Act 8 of 2003 and Namibia Act no. 2 of 2003 respectively.

²⁶⁴ Competition Law No 2005-020 of 2005 and its implementing decree No 2008-771 of 28 July 2008.

²⁶⁵ Mauritius Competition Act 2007 and Swaziland Act 8 of 2007 respectively.

²⁶⁶ Seychelles Fair Competition Act 18 of 2009 and Botswana Competition Act 17 of 2009.

²⁶⁷ Banc ABC *Staying up to date with Local Laws in Africa* available on <http://www.bancabc.co.mz/news/staying-up-to-date-with-local-laws-in-africa.aspx> accessed on (24 March 2015).

that made it easier for infiltration of anti-competitive practices.²⁶⁸ A notable example is the 2001 acquisitions by Lafarge of France of major cement companies in Zambia, Zimbabwe, Tanzania and Malawi. At that time, only Zambia and Zimbabwe had competition laws in place.

Both Zambia and Zimbabwe were aware that Lafarge, the biggest producer of cement in the world, could, if not regulated properly, foreclose enterprise development in the sector. Lafarge was made to increase production by rehabilitating plant and machinery in their respective countries.²⁶⁹ Further, in Zambia, Lafarge had to give undertakings to the competition authority that due to capacity constraints; priority for the supply of cement shall be the local market before consideration of exports.²⁷⁰ There was also to be an increase of productive capacity within a stipulated time, and that the price of cement in Zambia shall not be disadvantaged by the production of cement by other subsidiary plants in the region.²⁷¹ Clearly, the Lafarge takeover of cement plants in Tanzania and Malawi could have received a competitive scrutiny if the national competition authorities had been operational.²⁷²

In the absence of a supranational body, countries whose competition commissions are not yet in operation are highly susceptible to cross-border anti-competitive practices. Worse still, in the current cooperation framework, assessments of cross-border anti-competitive practices are done at a national level without much regard to their impact on the regional market.

3.6.2 Lack of capacity and resources

The introduction of competition laws in some SADC countries has contributed in the fight against hardcore cartels, promoting enterprise development in these developing countries. However, it can be argued that the cooperation model is too weak to make an impact in fighting cross-border cartels at a regional level. This is so because some

²⁶⁸ SADC *Review of the experience gained in the implementation of the UN Set, including voluntary peer reviews* (2010) Geneva available at http://unctad.org/sections/wcmu/docs/tdrbpconf7_s2_SADC.pdf accessed on (18 March 2015).

²⁶⁹ See *The Takeover of Chilanga Cement by Lafarge of France*, Zambia Competition Commission and *The takeover of Circle Cement by Lafarge of France*, Zimbabwe Competition Commission.

²⁷⁰ *The Takeover of Chilanga Cement by Lafarge of France*, Zambia Competition Commission.

²⁷¹ *The Takeover of Chilanga Cement by Lafarge of France*, Zambia Competition Commission.

²⁷² Lafarge of France took over Portland Cement in Malawi and Mbeya Cement in Tanzania.

countries in the region lack the capacity and resources to participate in cross-border cartel investigations.

Capacity constraints in the region vary between different countries; on one hand there is South Africa, Zimbabwe and Zambia whose competition laws are older, more experienced and have established case law looking at cross-border issues. On the other hand there is Botswana and Swaziland whose competition law is only a recent introduction as such they may be less equipped to deal effectively with cross-border anti-competitive behaviour. Moreover, the SADC economies are at different levels of development; with some countries like South Africa being more financially capable of handling international cartels than would small and least developed economies such as Lesotho and Malawi.

Further, South Africa has managed to deal effectively with cartel cases, especially after the introduction of a leniency programme.²⁷³ Other countries such as Zambia that have managed to include leniency programmes in their laws are constrained by insufficient human and financial resources to fully implement these provisions.²⁷⁴ Besides, multinational companies may not even make any effort to apply for leniency in some SADC countries because leniency programmes are effective only if cartelists not seeking leniency perceive significant punishment to be sufficiently likely.

3.6.3 Different priorities and lack of coordination of competition agencies

One of the challenges in the cooperation model in SADC is the different priorities of competition agencies. The main priority for newer agencies is the building of institutional capacity. As such the focus of cooperation extended to newer agencies in the region has largely been based on the rendering of capacity-building and technical assistance in particular through staff exchanges, study tours and training workshops.²⁷⁵ As for the more established competition agencies, they are striving to combat cross-

²⁷³ For example in a recent a cartel case involving Rhodes Food Group (RFG) and one of its competitors Langeberg & Ashton, in the export market for various canned fruit products, a penalty was made only applicable to RFG, given that Langeberg & Ashton was granted immunity for its participation in the colluding activities in accordance with South African Corporate Leniency Policy. See <http://www.tralac.org/discussions/article/6434-anti-competitive-behaviour-in-export-markets-rhodes-food-group-and-the-south-african-competition-act.html> accessed on (9 April 2015).

²⁷⁴ *Modalities Competition, Competitiveness and Development: Lessons From Developing Countries* (2004) available at http://unctad.org/en/docs/ditcclp20041_en.pdf accessed on (22 March 2015).

²⁷⁵ See Paragraph 3 of the the SADC Declaration on Cooperation in Competition and Consumer Policies.

border anti-competitive practices. The different priorities of competition agencies also explain why the competition agencies lack coordination.

SADC has experienced coordination challenges in assessing cross border mergers under the current model where each country relies on its own domestic law. The disintegrated system produces different and sometimes conflicting remedies by competition agencies in the region. For example the Walmart/Massmart merger which affected many, if not all SADC countries, was assessed individually by affected countries and not as a region.

In November 2010, US-based Walmart Stores Inc, the world's largest retailer, made an offer to purchase a 51% of Massmart's ordinary share capital at a total transaction value of R16.5 billion.²⁷⁶ This transaction was Walmart's first cross-border acquisition in Africa. At the time of the proposed merger, Massmart employed 27 000 employees in 14 countries in Sub-Saharan Africa and operated 288 stores through a variety of wholesale and retail formats each focused on high-volume, low-margin and low-cost distribution.²⁷⁷ Considering Massmart's significant presence in Southern Africa, it was obvious Walmart's acquisition of Massmart essentially would have a cross border impact on the different affected markets in the SADC region. Regardless of the regional impact, each country assessed the impact of the merger for its domestic market without regard to the impact on the regional market.

Although there is much contestation about the pros and cons of the Walmart-Massmart merger in Africa, this type of multinational, cross-border transaction is inevitable or indeed necessary in the face of globalisation.²⁷⁸ Then again, mergers if not properly monitored, can sometimes produce market structures which are anti-competitive in the sense of making it easier for a group of firms to cartelise a market, or enabling the merged entity to act more monopolistic. Therefore, a coordinated competition regime for the purpose of assessing regional merger impact and a positive step to developing a

²⁷⁶ Tralac Massmart – Wal-Mart merger (finally) approved (2012) available at <http://www.tralac.org/discussions/article/5256-massmart-wal-mart-merger-finally-approved.html> accessed on (24 March 2015).

²⁷⁷ Tralac Massmart – Wal-Mart merger (finally) approved (2012) available at <http://www.tralac.org/discussions/article/5256-massmart-wal-mart-merger-finally-approved.html> accessed on (24 March 2015).

²⁷⁸ Mergers and other forms of acquisition have accounted for more than 80 per cent of direct foreign investment in the Southern African states see UNCTAD *Modalities Competition, Competitiveness and Development: Lessons From Developing Countries* (2004) available at http://unctad.org/en/docs/ditcclp20041_en.pdf accessed on (22 March 2015).

regional position on merger control is required to better deal with cross border mergers in SADC.

3.6.4 Lack of harmonised laws

One of the hurdles facing the cooperation model in SADC is the divergence in substantive provisions of the national competition laws such as provisions on confidential information and legal hindrances to the admissibility of evidence obtained through information exchanges. Competition approaches of each state vary according to differences in policy as well as differences in their respective legal systems.

Although various competition laws within the region appear to have similar general provisions, there are some significant differences in wording. For example, the Zambian Competition and Consumer Protection Act 24 of 2010 stipulates that the Commission is authorised to exchange information with other agencies in the performance of its functions.²⁷⁹ Namibia and Mauritius have similar provisions in sections 16(1)(b) and 30(i) of the respective Competition Acts.²⁸⁰

The South African position is somewhat different. Section 82(4) of the South African Competition Act 89 of 1998, as amended stipulates that 'The President may assign the Competition Commission any duty of the Republic, in terms of an international agreement relating to the purpose of the Act, to exchange information with a similar foreign agency.' From this wording it is subject to interpretation whether South African Competition Commission can only exchange information in cases where an international agreement to do so is in place.

Differences in how competition authorities in SADC region define confidential information in cartel cases can represent an obstacle to effective co-operation. Ideally, harmonised laws or better yet a regional regulatory model could possibly resolve this challenge.

²⁷⁹ Section 5(i).

²⁸⁰ Mauritius Competition Act of 2007 and Namibia Act no. 2 of 2003 respectively.

3.6.5 Constraints on the exchange of confidential information

Most countries prohibit their competition agencies from sharing confidential information they obtain in the course of an investigation. This prohibition, while protecting the rights of the parties, also constrains the degree of cooperation among competition agencies. The cooperation challenges facing competition agencies is how to promote better understanding of each other's laws and ensure effective enforcement, while protecting legitimate private and public interest.

To overcome the challenge in the exchange of confidential information, competition laws could include provisions that allow for extension and exceptions to the duty of confidentiality. For example, competition laws could emulate certain provisions as those found in South Africa's Promotion of Access to Information Act 2 of 2000 (PAIA), the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (RICA) and Protection of Personal Information Act (POPI).

PAIA provides a good balance between the right to privacy and the right to access to information. Section 64 of the Act provides for mandatory protection of commercial information of third party. However, a confidential record may not be refused in insofar as it consists of information about-

- ' (a) a third party who has consented in terms of section 72 or otherwise in writing to its disclosure to the requester concerned;
- (b) the results of any product or environmental testing or other investigation supplied by, carried out by or on behalf of a third party and its disclosure would reveal a serious public safety or environmental risk.'²⁸¹

Given the strict treatment of confidential information in national competition laws, it is suggested that competitions laws should include provisions that balance the right of privacy against other rights, particularly that of access to information and protecting the free flow of information.

²⁸¹ Section 64 (2).

3.6.6 Voluntary nature of cooperation

Finally, mechanisms for cooperation in SADC are weakened by the fact that the SADC Declaration is a soft law instrument which does not create legally binding obligations for the contracting parties. Therefore, the provisions in the Declaration do not override the existing laws of the parties.

The lack of legally binding obligations is reflected in the provision relating to the confidentiality clause. For example the SADC Declaration provides that 'Cooperation shall be enhanced by establishing a transparent framework that contains appropriate safeguards to protect the confidential information of the parties and appropriate national judicial review.'²⁸² This notwithstanding, the application of the 'confidentiality clause' to a large extent depends on the provisions of national laws on how confidential information should be treated. This means that a SADC country is at liberty not to cooperate in sharing information with other member countries.

3.7 Conclusion

To sum up, it is beyond speculation that anti-competitive practices in SADC have an adverse effect on trade. The region has experienced cross-border cartels, vertical restraints, mergers and abuse of dominant position which restrain regional trade. The cross-border anti-competitive practices are on an increase especially with growing integration of economies, market liberalisation and globalisation. Commendably, upon realisation that competition and consumer protection laws are national but the relevant markets can extend beyond national boundaries, SADC saw the need to establish a regional competition cooperation framework.

The cooperation model in SADC includes friendly consultations, information sharing, best endeavour clauses and an undertaking by the secretariat to offer technical assistance to those countries without competition laws to develop such laws. This model, unfortunately, has experienced a number of challenges including lack of coordination, lack of capacity and weak enforcement mechanisms.

²⁸² Paragraph 1(e) of the SADC Declaration on Cooperation in Competition and Consumer Policies.

Although cooperation between agencies in the region is undoubtedly important, one cannot ignore the challenges of the SADC cooperation framework in addressing cross-border anti-competitive practices.

As the SADC regional trade becomes more integrated, cross-border anti-competitive practices increase and the need for a regional competition law becomes more apparent. However, it need not be hastily concluded that SADC should develop a regional competition regulatory framework. By weighing the challenges and benefits of developing a regional competition regulatory framework, it can help determine whether the current system is better than what might otherwise exist. Thus, the following chapter discusses the prospective challenges and benefits of developing a regional competition regulatory framework in SADC. The discussion will also highlight lessons to be learnt from the competition regimes of Common Market of Eastern Southern Africa (COMESA) and the European Union (EU).



CHAPTER FOUR

PROSPECTIVE CHALLENGES AND BENEFITS OF DEVELOPING A REGIONAL COMPETITION REGULATORY FRAMEWORK IN SADC

4.1 Introduction

In today's global economy where the adverse effects of anti-competitive practices have not discriminated any borders, the importance of competition law cannot be underestimated. Accordingly, it is only reasonable to dispute such assertions as that of Paul Godeck that:

'Exporting antitrust [...] is like giving a silk tie to a starving man. It is superfluous; a starving man has much more immediate needs. And if the tie is knotted too tightly, he will not be able to eat what little there is available to him.'²⁸³

Whilst there is sense in warning against arbitrary transplant of competition law, it is disputed that competition law is unnecessary in developing countries. As the 2001 Nobel Prize winner Joseph Stiglitz said: 'Strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies'.²⁸⁴ Therefore, the following discussion is premised on the importance of competition law as has been reflected in the Harvard, Chicago and Post-Chicago Schools. To begin with, this chapter focuses on the prospective benefits and challenges of developing a regional competition regulatory framework in SADC. Thereafter it discusses the legal implications for developing a regional competition regulatory framework and highlights lessons to be learnt from the Common Market for Eastern and Southern Africa (COMESA) and the European Union (EU).

²⁸³ Godek P., 'One US Export Eastern Europe Does Not Need' (1992) 15 *Regulation* 20.

²⁸⁴ Stiglitz J 'Competing over competition policy' available at <http://www.project-syndicate.org/commentary/competing-over-competition-policy> accessed on (19 April 2015).

4.2 Prospective benefits of developing a regional competition regulatory framework in SADC

It is argued that a regional competition regulatory framework holds an important potential for overcoming some of the most significant problems that plague competition law enforcement in developing countries.²⁸⁵ This is so because small jurisdictions can benefit from joint enforcement as well as pooled resources and capabilities. It is further argued that a regional regulatory framework can increase transparency; increase certainty, predictability and compatibility, broaden enforcement jurisdiction, secure and strengthen market integration and create a formal cooperation system.

4.2.1 Joint enforcement, resources and capacity

From the experience of SADC, small jurisdictions face a number of challenges when it comes to enforcement of competition law. Financial constraints for example are one of the many reasons that prevent developing countries in SADC from monitoring international cartels due to the costs associated with investigations.²⁸⁶ However, through collective enforcement and by pooling resources and capacity, it would help developing countries to tackle cross-border cartel cases.

Further, although many SADC countries have competition laws, small jurisdictions have challenges creating a credible threat to prohibit the conduct of multinational companies, given the power asymmetries that exist.²⁸⁷ For example if a multinational firm considers the gains from trade within a particular country to be limited, it might simply choose to exit the jurisdiction if significant restrictions are imposed. This may frustrate consumers who rely on the foreign firms to supply their markets. In such instances a developing country may rather decide not to enforce its competition laws. However, a regional regulatory framework can create a credible threat by increasing leverage through the aggregation of consumers across member states and creating a

²⁸⁵ Gal MS and Wassmer IF 'Regional agreements of developing jurisdictions: Unleashing the potential' in *Competition Policy and Regional Integration in Developing Countries*, (2012) Bakhom M, Drexl J, Gal M, Gerber D, Fox E (eds) available at <http://ssrn.com/abstract=1920290> (accessed on 19 April, 2015).

²⁸⁶ *Modalities Competition, Competitiveness and Development: Lessons From Developing Countries* (2004) available at http://unctad.org/en/docs/ditcclp20041_en.pdf accessed on (19 April 2015).

²⁸⁷ Gal MS and Wassmer IF 'Regional agreements of developing jurisdictions: Unleashing the potential' in *Competition Policy and Regional Integration in Developing Countries*, (2012) Bakhom M, Drexl J, Gal M, Gerber D, Fox E (eds) available at <http://ssrn.com/abstract=1920290> (accessed on 19 April, 2015).

critical mass.²⁸⁸ Consequently, multinational firms would feel more compelled to comply with the regional law so as to maintain its large number consumers.

Furthermore, a regional body can also help those countries that have less capacity to deal with competition law matters. In this regard, COMESA is empowered to deal with national competition law issues, if requested by a member state due to its limited capacity.²⁸⁹ It should be noted that the EU has also acted in a similar fashion with regard to smaller member states such as Luxemburg.

4.2.2 Increased transparency

Finally, the creation of a new authority- at the regional level- may be an efficient way to overcome deep rooted limitations of existing authorities, including corruption, inefficiency and bureaucratic obstacles.²⁹⁰ A joint authority might work as a mechanism allowing members to create binding commitments of compliance that will be enforced beyond the term of the current government that signed the commitments.

It is submitted that for transparency in a regional body to be achieved, members should be prepared to enforce the law even if it goes against the interests of strong players in the region. In addition, the regional authority must be as independent as possible, free from political interference. Further, the institutions need to be sufficiently staffed with educated and trained personnel, the leaders and staff should not be corrupt and appellate channels should be provided.²⁹¹ Furthermore, the decisions and judgements of the institutions should be published and accessible to the public.

4.2.3 Increased certainty, predictability and compatibility

A regional competition regulatory framework would increase legal certainty and predictability of decisions. In the current system, where domestic laws are different and

²⁸⁸ Gal MS and Wassmer IF 'Regional agreements of developing jurisdictions: Unleashing the potential' in *Competition Policy and Regional Integration in Developing Countries*, (2012) Bakhoum M, Drexl J, Gal M, Gerber D, Fox E (eds) available at <http://ssrn.com/abstract=1920290> (accessed on 19 April, 2015).

²⁸⁹ See Article 7(2) (e) COMESA Competition Regulations.

²⁹⁰ Gal MS and Wassmer IF 'Regional agreements of developing jurisdictions: Unleashing the potential' in *Competition Policy and Regional Integration in Developing Countries*, (2012) Bakhoum M, Drexl J, Gal M, Gerber D, Fox E (eds) available at <http://ssrn.com/abstract=1920290> (accessed on 19 April, 2015).

²⁹¹ Fox E.M 'Antitrust, economic development and poverty: The other path' (1991) Harvard Institute for International Development.

disintegrated, it brings about uncertainty for example in terms of notification of a merger that affects more than one country. Even where all countries affected by a merger are notified separately, there are chances of receiving conflicting decisions and remedies. However, if foreign firms were to file one notice to a regional authority in cases where a merger substantially affects the regional market, it may be less burdensome and therefore incentivise foreign investors to enter and expand in the regional market.

Taking a regional perspective in assessing a merger, complemented by a focus on specific national concerns, could also benefit SADC countries. If decision-makers ignore the impact of their decisions beyond their borders, their decisions might impose negative externalities on other jurisdictions.²⁹² For example, SADC has experienced cross-border mergers that reduced competition significantly within the region but the mergers were assessed (and approved) separately by affected countries.²⁹³ The various competition agencies imposed certain undertakings to ensure that the mergers do not abuse their market power, but this was only in regards to the particular national market and not that of the region.²⁹⁴ An integrated merger policy would have been able to limit the negative welfare effects of some of these mergers on the region and not just on individual countries.²⁹⁵ In general, a regional merger control not only brings legal certainty but also allows the region itself to defend its territorial interests in the external competition policy arena.

4.2.4 Broaden enforcement jurisdiction

Ordinarily, competition law is concerned with business practices on the domestic market. Therefore most countries only prosecute conduct that causes anti-competitive effects in the domestic market. This becomes problematic where the business practices

²⁹² Gal MS and Wassmer IF 'Regional agreements of developing jurisdictions: Unleashing the potential' in *Competition Policy and Regional Integration in Developing Countries*, (2012) Bakhoun M, Drexl J, Gal M, Gerber D, Fox E (eds) available at <http://ssrn.com/abstract=1920290> (accessed on 19 April, 2015).

²⁹³ For example the Walmart-Masmart merger, Rothmans of Pall Mall/British American Tobacco merger and the takeover of cement companies by Lafarge of France.

²⁹⁴ See undertakings imposed by South Africa in the *Walmart-Masmart merger* in South Africa Competition Annual Report 2012/12 available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-Commission-Annual-Report-web-base-Final.pdf> accessed on (24 March 2015).

²⁹⁵ At the point of merger and acquisition notification, the mandated competition authority is given an opportunity to influence the structure of markets through structural undertakings and/or influence behaviour of market players through behavioural undertakings aimed at ensuring that a particular player does not abuse its market power *vis-à-vis* other players, notably smaller players.

in one country have adverse effects on another country. A good example is export cartels which by their nature do not really affect the country where the cartelists are situated but the importing country.²⁹⁶ Ordinarily, the affected country here does not have jurisdiction to address the cartel activity. However, in a regional regulatory framework, a regional body would have jurisdiction to preside cases of export cartel; that is, if both the importer and exporter are from within the regional bloc.

There are of course, principles of extraterritoriality and comity that mitigate the jurisdiction limits of domestic law. Extraterritorial jurisdiction is an international law principle where a government has the legal ability to exercise authority beyond its normal boundaries.²⁹⁷ In competition law, the extra-territorial application is embodied in the effects doctrine which has its origins in the United States anti-trust law.²⁹⁸ The European Union also adopted a version of the effects test known as the implementation test - jurisdiction may be exercised over any practice that is implemented within the EU.²⁹⁹

The position of extra-territorial application in most SADC countries is unclear; probably owing to the fairly recent competition laws. In South Africa, however, the *American Natural Soda Ash cases (ANSAC cases)*³⁰⁰ brought into light insightful analysis of extra-territorial application in regards to the South African Competition Act. The Competition Tribunal in that case commented as follows:

The “effects test” seeks to avoid a juristic lacuna where restrictive practices cross borders. We accept the doctrine is open to abuse by states exercising jurisdiction when their connection to the conduct is only tangential. This does not mean throwing it out. It means limiting it sensibly to avoid the *de minimis* case. We do

²⁹⁶ An Export cartel is an agreement or arrangement between firms to charge a specified export price and/or to divide export markets. See Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell p.208.

²⁹⁷ *Lotus case*

²⁹⁸ The most famous statement of the effects test is Judge Learned Hand’s pronouncement in the Alcoa case:

‘Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which the state reprehends’ *United States vs. Aluminum Co. of America*, 148 F. 2d 416, 443 (2d Cir. 1945).

²⁹⁹ *Ahlstrom Osakeyhtid v. Commission (Wood Pulp case)* Cases 89/85, 114/85. 116-117/85, 125-129/85.

³⁰⁰ . See *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa* (554/2003) [2005] ZASCA 42; [2005] 1 CPLR 1 (SCA) ; [2005] 3 All SA 1 (SCA) (13 May 2005).

not need now to set that test out, as it is not relevant to the facts of this case as the “effects” if proved are not trivial.³⁰¹

From the string of ANSAC decisions it appears that the South African Competition Act has extra-territorial application. Unfortunately, the extra-territoriality comes with a cost. As noted by the Tribunal, the ‘effects test’ is prone to abuse by states and therefore needs to be limited ‘sensibly’. Sutherland and Kemp suggests that courts should assert jurisdiction only if effects are substantial, direct and reasonably foreseeable. Whilst limitation of scope may indeed reduce abuse, most countries would not readily cede their sovereignty in the absence of an agreement and this creates overlapping and sometimes conflicting jurisdictions.³⁰²

Similarly, within the context of extra territorial enforcement there is a long established principle of comity. Traditional Comity (also referred to as negative comity) refers to the general principle that a country should take another country’s important interests into account in its own law enforcement in return for their doing the same.³⁰³ Conversely, positive comity involves a request by one country that another country undertakes enforcement activities in order to remedy an allegedly anti-competitive conduct that is substantially and adversely affecting the interests of the referring country.³⁰⁴ Whilst comity does help to avoid conflicts about the application of extraterritorial jurisdiction, the principle does not provide a legal obligation on countries to take interests of other countries into account.

In short, a regional competition law in SADC can help mitigate the jurisdiction limits of unilateralism.

³⁰¹ 49/CR/Apr00 and 87/CR/Sep00 Part A.5.

³⁰² The *GE/Honeywell* case evidences that different enforcement standards may exist even between advanced jurisdictions. The rapprochement of the EU to the US competition law and the bilateral cooperation agreements concluded between the two competition authorities reduce the gap between their enforcement standards and help avoid conflicts. See *General Electric/Honeywell (Case COMP/M2220)* [2004] OJ L048/1.

³⁰³ Goyder, D. G., *EC Competition Law*, Fourth edition, (2003) Oxford: Oxford University Press p.507.

³⁰⁴ Organisation for Economic Co-operation and Development *International Cooperation in Competition Enforcement*, C/MIN(2014)17.

4.2.5 Secure and strengthen market integration

Regional competition law can function as a tool to secure and strengthen market integration. As the European experience demonstrates, joint competition law enforcement can play an important role in supporting the creation of an integrated market.³⁰⁵ The rationale of competition law in a regional integration is that the reduction of entry barriers results in an increased ability of firms to operate in larger areas, thereby increasing their ability to enjoy economies of scale and scope, and increasing competition.³⁰⁶

A regional competition law also plays a role in ensuring that trade liberalisation with the bloc is not hampered by anti-competitive practices by private firms. As a Free Trade Area, SADC has eliminated the duties and other restrictive regulations on over 85% of its intraregional trade amongst the partner states.³⁰⁷ However, this elimination of trade barriers only applies to the conduct of government and public bodies such as the use of tariffs and quotas. This means that traders can still be frustrated by the use of restraints by private firms which act to prevent goods from entering the distribution channels of the home market. Therefore, competition law is used to restrict these trade barriers by private firms in that way strengthening the market integration.

Furthermore, it is argued that the proliferation of regional integration may in the future lead to a situation where a handful of representatives from these regional blocs negotiate at the international level on behalf of the member states. Given the current stalemate in the discussion for a multilateral competition framework at the World Trade Organisation (WTO), indeed a piecemeal approach is worth exploring. Commendably, the COMESA-EAC-SADC Tripartite Free Trade Agreement provides a good avenue for the African regional blocs to further integrate their competition laws.³⁰⁸

³⁰⁵ Competition law and policy have been of primary importance in the development of the European Union. This can be seen from the inclusion of substantive competition rules since the Treaty establishing the Economic and Steel Community (ECSC) to the present Treaty on the Functioning of the European Union (TFEU).

³⁰⁶ Gal MS and Wassmer IF 'Regional agreements of developing jurisdictions: Unleashing the potential' in *Competition Policy and Regional Integration in Developing Countries*, (2012) Bakhom M, Drexl J, Gal M, Gerber D, Fox E (eds) available at <http://ssrn.com/abstract=1920290> (accessed on 19 April, 2015).

³⁰⁷ Sandrey R 'An analysis of the SADC Free Trade Area' (2013) Tralac Trade Brief. No. D13TB01/2013. Available at <http://www.tralac.org/files/2013/06/D13TB012013-Sandrey-Analysis-of-SADC-Free-Trade-Area-20130619-fin.pdf> accessed on (17 March 2015).

³⁰⁸ According to the 2011 roadmap, all negotiations should be completed within 36 months. Thereafter, COMESA-EAC-SADC are expected launch a single FTA by 2016, building on the FTAs that are already in place. Available at <http://www.comesa-eac-sadc-tripartite.org/> accessed on (16 April 2015).

4.2.6 Formal cooperation system

Through a regional competition law, countries can benefit from a formalised cooperation which unlike the informal cooperation places a legal obligation on member states to cooperate with each other and with the regional authority.³⁰⁹ For example, the above constraints on the exchange of confidential information in the informal cooperation demonstrates the limitations to cooperation arising from differences in competition laws, differences in procedures, legal regimes, efficiency of the court system and the level of mutual trust and understanding. Unlike informal cooperation, a formalised cooperation system provides clear obligations for the parties and they also provide competition agencies with the capability to exchange important information against anti-competitive practices.

Although such formal agreements may contain provisions that oblige the parties to exchange confidential information, it is advisable to balance this right access to information with the right to privacy of individuals. For example, the information exchanged under the provisions of the regional law must be used solely for enforcing competition laws.³¹⁰

4.3 Prospective challenges of developing a regional competition regulatory framework in SADC

Whilst benefits of developing a regional competition regulatory framework in SADC are anticipated, it would not do any good to turn a blind eye to the prospective challenges of embarking on the legal reform. Southern African countries have their own realities and factors that can bring challenges in developing a competition regional regulatory framework. Examples of such challenges include: fear of loss of sovereignty, lack of political will, overlapping regional integration, lack of respect for the rule of law, different levels of economic development and SADC's poor record in regards to implementation of goals.

³⁰⁹ A cooperation provision signifying formal cooperation is seen in the COMESA Competition Regulation under Article 2(d).

³¹⁰ See Similar provision in the agreement between Denmark, Iceland and Norway on cooperation in competition cases art. II, para 1.

4.3.1 Fear of loss of sovereignty

The unwillingness of governments to cede essential elements of sovereignty to regional institutions is one of the biggest obstacles to developing a regional competition regulatory framework.³¹¹ Political leaders and officials often caution against trade arrangements overstepping their boundaries.³¹² Thus, when regional institutions endeavour to exercise the powers necessary to ensure respect for community law, some governments are reluctant to comply with the rulings of regional courts and tribunals in the name of state sovereignty.

It was well articulated in the WTO's 2004 Sutherland Report that:

'Sovereignty is one of the most used and also misused concepts of international affairs and international law. The word is often repeated more or less as a 'mantra' without much thought about its true significance.'

For example, in an attempt to further national interests, governments are quick to cite only one of the meanings of sovereignty which requires respect for territorial integrity and the rule that treaties cannot bind a state unless it has given its consent to be bound.³¹³ However, the converse is true that: it is an act of sovereignty to become party to an international agreement or a member of an international organisation.³¹⁴ This has additional implications: as per the well known international law principle *pacta sunt servanda*,³¹⁵ agreements are to be kept. States therefore cannot arbitrarily dishonour their treaty obligations in the name of state sovereignty. Ceding some sovereign powers in international or regional agreements is necessary if at all international law or regional integration should exist

Therefore in developing a regional competition regulatory framework in SADC, the sovereignty of states will be affected, but that comes with the nature of the enterprise.

³¹¹ Erasmus G. 'Is the SADC trade regime a rules-based system?' *SADC Law Journal* (2011) Vol. 1, p17-24 at p. 21.

³¹² Erasmus G. 'Is the SADC trade regime a rules-based system?' *SADC Law Journal* (2011) Vol. 1, p17-24 at p. 21.

³¹³ Articles 7-18 of the Vienna Convention on the Law of treaties 1969 contain provisions relating to the expression of consent to be bound.

³¹⁴ WTO Sutherland Report

³¹⁵ The essence of the concept appears in Justinian's Code: *sancimus nemini licere adversus pacta sua venire et contrahentem decipere* ("we shall not allow anyone to contravene his agreements and thereby disappoint (deceive) his contractor"). Code Just. 2.3.29pr (Justinian 531). In the case of a person who agreed not to raise certain defenses, it was said that a mere pact (without special form) could create estoppel even without justifying a claim. Medieval canon lawyers abandoned the Roman requirements of form, to hold all agreements binding unless illegal or immoral. See generally Gordley J, *The Philosophical Origins of Modern Contract Doctrine* (1991) Oxford: Clarendon Press.

One way of reducing this obstacle is by jointly enforcing only those cases which substantially affect the regional market and leaving others outside the scope of the agreement.

4.3.2 Lack of political will

The successful development of a regional competition regulatory framework in SADC requires genuine willingness on the part of the members to participate in the implementation of the idea. This entails that political members are willing to commit themselves to obeying the regional competition rules.

Looking at past experiences, there is no political will to enforce the provisions on sanctions against members who violate their obligations under the SADC Treaty. For example, the Treaty provides for sanctions against members that 'persistently fail, without good reason, to fulfil obligations assumed under this Treaty', or when they 'implement policies which undermine the principles and objectives of SADC.'³¹⁶ However, when Zimbabwe failed to comply with the SADC Tribunal's rulings on its human rights violations the Summit was not prepared to act against Zimbabwe; instead, it decided to appoint a consultant to investigate the jurisdiction and terms of reference of the SADC Tribunal.³¹⁷



One way of overcoming the absence of political will is by lobbying politicians and officials before the regional law is developed. Experience elsewhere has shown that it is through the development of the jurisprudence about implementing community law that the momentum necessary for effective integration and the protection of trade related rights is generated and maintained.³¹⁸

4.3.3 Overlapping regional integration

The multiple and concurrent memberships of numerous Regional Economic Communities (REC) in Africa are a perfect illustration of what Jagdish Bhagwati describes as a Spaghetti bowl.³¹⁹ This tangle of regional economic integration is likely

³¹⁶ Article 33(1), SADC Treaty.

³¹⁷ See Ndlovu PN 'Campbell v Republic of Zimbabwe: A moment of truth for the SADC' *SADC Law Journal* (2011) Vol. 1, p.63-79.

³¹⁸ Erasmus G. 'Is the SADC trade regime a rules-based system?' *SADC Law Journal* (2011) Vol. 1, p17-24 at p. 21.

³¹⁹ According to Bhagwati, the multiple and simultaneous participation by countries in trade agreements, at different levels and of a differentiated nature, and the proliferation of these agreements creates a 'spaghetti bowl' effect. See

to present a daunting challenge to developing a regional competition regulatory framework in SADC.

A glimpse of African overlapping RECs can be seen from the eastern and southern countries alone. For example, South Africa, Botswana, Lesotho, Namibia and Swaziland are members of both the Southern African Customs Union (SACU) and the SADC; Swaziland is also a member of COMESA. Tanzania is a member of both SADC and the Eastern African Community (EAC). Further, of the 15 SADC member states, eight countries also belong to the COMESA whose total membership is 19.³²⁰ This multiplicity of membership can cause confusion, competition, duplication and overlapping competition regimes.

Amongst the above RECs, COMESA was the first to develop and implement competition law with the COMESA Competition Commission beginning operations in early 2013.³²¹ The EAC is another, smaller REC that also has a competition law in place, although not yet in operation.³²² The EAC Competition Act like the COMESA competition rules applies to economic activities and sectors having a cross-border effect as between its member states.³²³ The Act similarly addresses restraints by enterprises, abuse of dominance and mergers and acquisitions in more or less the same way as the COMESA Regulations do.³²⁴ The Act equally establishes the EAC Competition Authority which has broad investigative powers, power to prohibit or approve the regulated conduct and arrangements and a duty to receive merger notifications and approve or disapprove mergers.³²⁵ In short, the Act has the same powers and functions within its area of operation as the competition commission under the COMESA Regulations.

Bhagwati JN 'US Trade Policy: The Infatuation with FTAs' (1995) available at <http://hdl.handle.net/10022/AC:P:15619> accessed on (20 April 2015).

³²⁰SADC members who are also members of COMESA are: Democratic Republic of Congo, Madagascar, Malawi, Mauritius, Seychelles, Swaziland, Zambia and Zimbabwe. Whilst Angola, Botswana, Lesotho, Mozambique, Namibia, South Africa, Tanzania are not members of COMESA (Namibia, Tanzania and Angola were once members of COMESA but withdrew membership).

³²¹ See COMESA Competition Commission available at <http://www.comesacompetition.org/> accessed on (20 April 2014).

³²² Kenneth Bagamuhunda, the Director of Customs at the EAC, has indicated that the EAC competition authority should be in place by July 2015. See <http://www.golegal.co.za/politics/second-regional-competition-authority-begin-operations-east-africa> accessed on (1 April 2015).

³²³ See Section 4 of the EAC Competition Act and Article 3 of the COMESA Competition Regulation.

³²⁴ See Part II-IV of the EAC Competition Act and Part 3 and 4 of the COMESA Competition Regulation.

³²⁵ See Section 37 of the EAC Competition Act and Article 6 of the COMESA Competition Regulation.

Should SADC develop a regional competition regulatory framework, eight of its members will be bound to the competition laws of both SADC and COMESA and Tanzania will be bound by both SADC and the EAC competition laws. This can possibly result to forum shopping or conflicting decisions for instance where merging parties have to notify to more than one regional authority.

Hopefully, the establishment of the tripartite Free Trade Agreement (FTA) arrangement between the SADC, the COMESA and the EAC has a potential of addressing the challenges emanating from multiple membership.³²⁶ However, whilst plans are there to synchronise the three RECs, past experience indicates that it is difficult in the short term to rationalise the existing schemes.³²⁷ In the time being, SADC and COMESA being autonomous entities, SADC can still consider developing its own competition law.

4.3.4 Lack of respect for rule of law

The expression 'Rule of law' is multi-faceted. In the present context of regional integration, the respect of rule of law means that governments should recognise the supremacy of the regional law as well as practice democratic principles.³²⁸

To develop a successful regional competition law in SADC, all people including government officials should be subject to and accountable to the regional law. The case of *Mike Campbell (Pot) Ltd et al. v. Republic of Zimbabwe*³²⁹ provides a good example of government's disregard of the rule of law within the SADC region. In that case, the SADC Tribunal held that the Zimbabwean government violated the organisation's treaty by denying access to the courts and engaging in racial discrimination against white farmers whose lands had been confiscated under the land reform

³²⁶ The Tripartite is an umbrella organization consisting of EAC, COMESA and SADC. The regional integration programmes of the Tripartite focus on expanding and integrating trade and include the establishment of Free Trade Areas (FTA's), Custom Unions, Monetary Unions and Common Markets, as well as infrastructure development projects in transport, information and communications technology and energy. See <http://www.comesa-eac-sadc-tripartite.org/about/background> accessed on (20 April 2015).

³²⁷ SADC expressed the view in the Windhoek Summit Communiqué of August 1992 that SADC and COMESA have distinct objectives and mandates and must therefore continue to exist as autonomous but complementary entities. See http://www.sadc.int/files/3913/5292/8384/SADC_SUMMIT_COMMUNIQUES_1980-2006.pdf accessed on (1 April 2015).

³²⁸ See Common Wealth of Nations *Rule of Law* available at <http://www.commonwealthofnations.org/commonwealth-in-action/rule-of-law-2/> accessed on (20 April 2015).

³²⁹ [2008] SADCT 2 (28 November 2008), SADC Tribunal (SADC).

program in Zimbabwe.³³⁰ Following the judgment, Zimbabwe withdrew from the Tribunal and blatantly refused to comply with the judgment arguing that the Tribunal did not have the jurisdiction to render a judgment in the case.

The failure of the SADC Tribunal to rally SADC member states against a renegade member state (Zimbabwe) has shown that without respect for the rule of law some strong member states can flout standing regulations and judgments with impunity and without reprimand.³³¹ Without respect of the rule of law, the SADC competition regulatory framework will only be a beautiful law without any real legal effect.

The rule of law also closely relates to the practice of democratic principles.³³² No matter how good the arguments and intentions to integrate may look on paper, the political environment for their implementation and preservation must be right for the effort to succeed.³³³ The examples of successful harmonisation drawn from history clearly illustrate that they are based primarily upon a common outlook on political affairs among the community members.³³⁴ As highlighted in the SADC Treaty, the economic integration can best be realised with mutual understanding, good neighbourliness and meaningful cooperation.³³⁵ Unfortunately, one cannot say with confidence that SADC has achieved a peaceful and stable political environment. Apart from the Zimbabwean human rights violations discussed earlier and the disturbances of peace and democracy in Madagascar,³³⁶ the recurring xenophobic violence against foreigners in South Africa³³⁷ also goes against the idea of togetherness embedded in the ideology of regional integration.

³³⁰ Available at <http://www.saflii.org/sa/cases/SADCT/2008/2.html> accessed on (1 April 2015).

³³¹ See Ndlovu PN 'Campbell v Republic of Zimbabwe: A moment of truth for the SADC' *SADC Law Journal* (2011) Vol. 1, p.63-79.

³³² Common Wealth of Nations *Rule of Law* available at <http://www.commonwealthofnations.org/commonwealth-in-action/rule-of-law-2/> accessed on (20 April 2015).

³³³ Lee M.C *The Political Economy of Regionalism in South Africa* (2003) Capetown: UCT Press.

³³⁴ The EU, a successful regional organisation, rightfully boasts to have delivered half a century of peace and stability see http://europa.eu/about-eu/index_en.htm accessed on (20 April 2015).

³³⁵ Preamble to the SADC Treaty.

³³⁶ Ploch L and Cook N 'Madagascar's Political Crisis' (2012) available at <https://www.fas.org/sgp/crs/row/R40448.pdf> accessed on (20 April 2015).

³³⁷ See BBC News *South Africa shops looted despite Zuma calls for peace* available at <http://www.bbc.com/news/world-africa-32347305> accessed on (20 April 2015) and Times Live 'With Heads Bowed in Shame': Thabo Mbeki's 2008 Xenophobia speech available at <http://www.timeslive.co.za/politics/2015/04/14/with-heads-bowed-in-shame-thabo-mbeki-s-2008-xenophobia-speech> accessed on (5 May 2015).

In short, developing a regional competition regulatory framework in SADC will require members to take seriously the respect of the rule of law and democratic principles in the region. Political leaders must abide to the law and also take active part in promoting peace and stability within their respective countries.

4.3.5 Different levels of economic development

The SADC region comprises 15 countries at varying levels of development. These range from South Africa, which in the World Trade Organisation (WTO) parlance is a 'developed' economy to Angola, DRC, Lesotho, Malawi, Mozambique, Tanzania and Zambia, as least-developed economies, the rest are developing countries.³³⁸ These disparities in levels of development can pose as a challenge in developing a regional competition regulatory framework as they give rise to conflicting interests and priorities.

It cannot be overlooked that one of the key issues that were raised by developing countries in opposition to a multilateral competition framework at the 2003 Cancun Ministerial Conference was the differing levels of economic development.³³⁹ It was argued that there is a need to consider differing levels of development and cultural contexts for competition regimes, as well as the difference in available resources for this purpose and levels of institutional development.³⁴⁰ In particular, it had to be recognized that some countries were still in the process of introducing competition laws.

Similarly, some SADC countries are yet to introduce competition laws and there are indeed different levels of economic and institutional development. For instance, South Africa is the largest economy in the SADC region and has been able to negotiate Economic Partnership Agreements with the European Union which is considered to be the most successful in dealing with cross-border anticompetitive practices.³⁴¹ Further,

³³⁸ South Africa is in a sui generis position. It is, by way of political affiliation and policy choices, part of the developing world. It has recently been invited to join Brazil, Russia, India and China (the BRIC group). In 1995, however, it joined the WTO as a developed country. Developing country status in the WTO is based on self selection. For least-developed countries, international economic criteria have been adopted and are used in the United Nations and other international organisations.

³³⁹ WGTCP Report on the Meeting of 19-20 April, WT/WGTCP/M/8, P 20 (June 10, 1999).

³⁴⁰ WGTCP Report on the Meeting of 19-20 April, WT/WGTCP/M/8, P 20 (June 10, 1999).

³⁴¹ The EU includes elaborate legal provisions for cooperation under Article 11(3), Council Regulation 1/2003.

through their bilateral agreement, South Africa and EU undertook to assist each other in dealing with cross-border cases. At the moment South Africa compared to other SADC members has been vibrant in dealing with international cartels.³⁴² For example, the South African competition commission has dealt with one of the biggest global cartel cases involving multiple international airlines.³⁴³ The commission has also exercised its extra-territorial jurisdiction and presided over a matter where the cartel agreement was made in America.³⁴⁴ Further, the commission has made a number of dawn raids in several sectors which are allegedly involved in cartel activities such as: fertiliser, bread/wheat, steel, mining-supply, cement, construction, power cables and Bitumen cartels.

A look at the considerable progress that South Africa has made in dealing with cross-border anti-competitive practices, would make one think that it would not be keen to join a regional competition law. However, the importance of SADC market to South Africa cannot be underestimated. It has been reported that SADC is South Africa's biggest export market.³⁴⁵ Cross-border anti-competitive practices in the SADC Market can also have adverse effect in South Africa. Therefore South Africa has an interest in strengthening the competition policy of SADC. The fact that compared to other SADC countries it has a well advanced economy and a strong competition law should not be a setback to developing a regional competition regulatory framework. In fact, its membership in the SADC is an advantage to the region.

4.3.6 Poor record with regard to implementation of goals

SADC has been criticised for setting high ambitions of integration on paper and constantly failing to meet its targets.³⁴⁶ For instance, the region set itself to form a customs union by 2010, establish a common market by 2012 and a monetary union by 2016.³⁴⁷ All these targets are yet to be met. With such poor record of implementation,

³⁴² *Modalities Competition, Competitiveness and Development: Lessons From Developing Countries (2004)* available at http://unctad.org/en/docs/ditcclp20041_en.pdf accessed on (22 March 2015).

³⁴³ *Multiple airlines cases* ; CT Case No:41/CR/Apr12; CC Case No.: 2008/Jan3488.

³⁴⁴ *ANSAC case* [2005] 3 All SA 1 (SCA) (13 May 2005).

³⁴⁵ Saurombe A 'The role of South Africa in SADC regional integration: the making or braking of the organization' *Journal of International Commercial Law and Technology* Vol. 5, Issue 3 (2010) 124.

³⁴⁶ Saurombe A 'The role of South Africa in SADC regional integration: the making or braking of the organization' *Journal of International Commercial Law and Technology* Vol. 5, Issue 3 (2010) 124.

³⁴⁷ McCarthy C 'The Roadmap towards monetary union in Southern Africa – is the European experience commendable and replicable?' available at http://paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/tralacBordeauxGarnetMcCarthy_20081022.pdf accessed on (20 April 2015).

some authors have pessimistically argued that most of the region's endeavours in future would most likely end up a dismal failure.³⁴⁸

Whilst it is true that certain targets by SADC are yet to be met, it cannot be said that the region is doomed for failure due to missed targets. Therefore, plans to develop a regional competition regulatory framework can still be achieved before SADC progresses to a monetary union, customs union and/or a common market. After all, the existence and effects of anti-competitive practices are being faced in the current SADC Free Trade Area.

4.4 Legal implications for developing a regional competition regulatory framework

The legal implications for developing a regional competition regulatory framework vary depending on the legal and institutional design of the regional framework. This study identifies two main approaches namely; centralized and decentralized regional competition law.

A centralised approach consists of regional law and a centralised authority.³⁴⁹ A regional competition law is created by a regional treaty or regulations which include comprehensive provisions of competition law and establishes an independent law and a distinct regional jurisdictional scope.³⁵⁰ In addition to the regional law, a centralised system also has an institutional mechanism at regional level to conduct investigations, enforce actions and assess and levy penalties.³⁵¹ The EU and COMESA are examples of a central approach to regional competition law.

Another approach is a decentralised regional approach which consists of a regional law but no central authority. Here the independent regional law is expressed by treaty or protocol, but the application of the law is left entirely to the member states and enforcement is done through intergovernmental cooperation.³⁵² Cases can be brought by

³⁴⁸ Mapuva J & Muyengwa-Mapuva L, 'The SADC regional bloc: What challenges and prospects for regional integration?' in *Law, Democracy and Development* (2014) Volume 18 .

³⁴⁹ The COMESA Competition Regulations and the COMESA Competition Commission for example form a centralised regional system.

³⁵⁰ See COMESA Competition Regulations.

³⁵¹ The COMESA Competition Commission is an example of a regional central authority.

³⁵² In MERCOSUR regional competition law is enforced by two inter-governmental bodies: the MERCOSUR Trade Commission (MTC) which performs adjudicative functions and the Committee for the Defence of Competition (MCDC) which consists of representatives of signing countries' national competition authorities and is responsible

the national competition authorities, as they also receive complaints dealing with regional law violations.³⁵³ The national courts may also receive private complaints for violations of regional law. The Mercado Común del Sur (MERCOSUR) competition protocol is an example of this approach where Member State authorities act together on an intergovernmental basis. This approach requires the existence of Member State authorities operating under domestic competition laws that have been passed and implemented.³⁵⁴

Given the challenges that small jurisdictions face in enforcing competition laws independently, a centralised approach is proposed for SADC. A core recommendation here is that regional competition laws should be established that includes a distinct substantive law for dealing with anticompetitive practices as they affect trade between the member states. This law should have the capacity to operate within its own jurisdictional scope of application. Further, a supranational body/ central authority should be empowered to conduct investigations, enforce actions and assess and levy penalties. In that regard, SADC can learn from the experiences of EU and COMESA in operating a central regional competition framework.

4.4.1 Lessons from EU competition framework

The EU³⁵⁵ competition law is arguably today's most successful regional competition law. The appraisal is not unjustified; the EU competition law and policy is consistently applied in member states, there is an effective enforcement mechanism and has been instrumental in the progression towards a single market in the EU.³⁵⁶ That said, it should be noted that the success of the EU competition law is a result of long years of experience.

for the investigation of cases in cooperation with the national authorities of the state in which the defendant is domiciled. See Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge: Cambridge University Press p. 178.

³⁵³ According to the MERCOSUR Fortaleza Protocol for the Defence of Competition proceedings are initiated by the competition authorities of the member states either ex officio or following complaint by an interested party See Article 10 of the Protocol.

³⁵⁴ Article 32 of the Fortaleza Protocol.

³⁵⁵ The EU is a regional organisation of 28 countries namely: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK.

³⁵⁶ Grainne De Burca PC. (ed) *The Evolution of EU Law* (2011) Oxford: Oxford University Press p. 1-13.

The EU competition law can be traced back to the Schuman Declaration of 1950 which marked the 'institutional birth' of competition policy in the EU.³⁵⁷ The Schuman Plan formed the basis of what eventually came to be the European Coal and Steel Community (ECSC).³⁵⁸ Since the establishment of the ECSC in 1950, competition law has remained the central component of the EU integration.³⁵⁹ From that time to date, EU competition law and policy has undergone an extensive evolution.

In the early years of EU competition policy, legislation secured extra-ordinary powers to the Commission. Regulation 17/62 offered the commission the competence to remove the authority for the jurisdiction of the member states by initiating its own proceedings. Further, the commission had the sole right to apply exemptions for agreements that met certain requirements.³⁶⁰ Furthermore, the examination of such cases could be carried out by the commission following a notification by the member states or by the member states involved in the agreement.³⁶¹ In practice, the commission was the sole body to enforce the competition rules of the EC Treaty.³⁶²

These extensive jurisdictional powers of the commission were strengthened in two ways. First, according to Regulation 17/62, the commission could issue decisions and impose fines which were binding upon firms that were found to have infringed competition rules of the Treaty. Secondly, the commission was granted competence to issue block exemptions on the basis of Article 101(3) TFEU without approval of the Council.

³⁵⁷ The Declaration carried the name of the French foreign minister Robert Schuman who proposed a plan for pooling the heavy industries of France and her neighbours under a common High Authority.

³⁵⁸ The ECSC was the first international organisation to be based on the principles of supranationalism which would later ultimately lead the way to the founding of the European Union. The ECSC was joined by two other similar communities in 1957, the European Economic Community and European Atomic Energy Community, with whom it shared its membership and some institutions. In 1967 all its institutions were merged with that of the European Economic Community, but it retained its own independent legal personality. In 2002 all the ECSC activities and resources were absorbed by the European Community. See Grainne De Burca PC. (ed) *The Evolution of EU Law* (2011) Oxford: Oxford University Press p. 1-13.

³⁵⁹ The antitrust provisions of the ECSC Treaty served as a basic foundation for the competition provisions of the 1957 Treaty of Rome. Articles 85 and 86 were broadly analogous to Articles 65 and 66 of the ECSC Treaty.

³⁶⁰ Article 9(1) of Regulation 17/62.

³⁶¹ Articles 2, 3 and 6 of Regulation 17/62.

³⁶² This model of enforcement is called the 'authorisation system' and was borrowed from the German law. The model was based on the assumption that all such agreements were considered unlawful until they obtained negative clearance from the Commission under Regulation 17/62, art 2. See Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge: Cambridge University Press footnote 84, p. 168.

The heavily centralised system gradually created a number of problems. The commission became overwhelmed with a large number of applications for exemptions in the context of Article 101(3).³⁶³ Further it was inadequate to meet the requirement of vigorous proactive enforcement given that the large amounts of resources were dedicated to the examination of agreements.³⁶⁴ The system was also criticised for failing to provide companies with legal certainty, as it did not provide a clarification to the type of agreements that should be notified to the commission.³⁶⁵ Furthermore, in the mid-1990s particular member states expressed their concern about the lack of transparency in the commission's decisions concerning mergers.³⁶⁶

In light of the challenges of the Regulation 17/62, in 1999 the commission published a White Paper on the modernisation of the competition enforcement system.³⁶⁷ The public debate triggered by the White paper finally led to the adoption of Regulation 1/2003 replacing the authorisation system with a directly applicable exemption system.³⁶⁸ Another major change was that national competition authorities and national courts of the member states had to apply articles 101 and 102 TFEU when they reviewed cases that might have an effect on trade between member states.³⁶⁹

To avoid jurisdiction overlap between the regional authority and National Competition Agencies (NCA), Regulation 1/2003 codified the ruling of *Masterfoods case*³⁷⁰ that NCAs are bound by decisions of the commission.³⁷¹

Whilst a number of experts criticised the extensive powers that were granted to the commission, it is argued that such centralisation of enforcement has been the secret behind the success of the EU competition system. The extensive jurisprudence gained at

³⁶³ Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge: Cambridge University Press p. 169.

³⁶⁴ Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge: Cambridge University Press p. 170.

³⁶⁵ Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge: Cambridge University Press p. 170.

³⁶⁶ Monti G *EC Competition Law* (2007) Cambridge: Cambridge University Press.

³⁶⁷ Siragusa M 'A Critical review of the White Paper on the Reform of the EC Competition Law Enforcement Rules' (1999) Volume 23, Issue 4 Article 4. *Fordham International Law Journal*

³⁶⁸ Grainne De Burca PC. (ed) *The Evolution of EU Law* (2011) Oxford: Oxford University Press p. 731.

³⁶⁹ Grainne De Burca PC. (ed) *The Evolution of EU Law* (2011) Oxford: Oxford University Press p. 1-13.

³⁷⁰ *Masterfoods Ltd v HB Ice Cream Ltd and HB Ice Cream Ltd v Masterfoods Ltd, trading as 'Mars keland'* Case C-344/98.

³⁷¹ Regulation 1, Art 16.

the regional level was gradually transposed into national legal systems which also ultimately led to convergence of national laws.³⁷² It is further observed that the decentralisation of enforcement of regional rules only came after years of experience and after a considerable convergence of competition laws.

4.4.2 Lessons from COMESA competition framework

The COMESA Competition Commission became operational in January, 2013. Being at an infant stage, the challenges faced so far by the COMESA competition supranational regime provide valuable lessons to SADC.

The Common Market for Eastern and Southern Africa (COMESA) is the largest regional economic organization in Africa, with 19 member states eight of which are also members of SADC.³⁷³ The COMESA has a free trade area and launched a customs union in 2009. The COMESA Treaty includes a number of provisions that regulate anti-competitive practices. Further, as directed by the Treaty,³⁷⁴ a Regulation on competition was published in 2003 containing extensive provisions on anti-competitive business practices.³⁷⁵

Two pertinent issues arise from the COMESA competition regime. First, there is a jurisdiction overlap between regional and national authorities in competition matters which have an effect on the Common Market but are occurring within one member state.³⁷⁶ There needs to be a system by which an allocation of cases between the Commission and the national competition authorities can be done to avoid jurisdictional conflict.

The COMESA and SADC can learn from how the EU has managed to reduce the regional-national jurisdiction overlap. For instance it has set up a system of cooperation between the European Commission (EC) and the national competition authorities that

³⁷² Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge: Cambridge University Press p. 170.

³⁷³ See Footnote 37.

³⁷⁴ Article 10(2) COMESA Treaty

³⁷⁵ COMESA Competition Regulations which were issued in the COMESA Official Gazette Vol. 9 No.2 as Decision No. 43 of Notice No 2 of 2004.

³⁷⁶ Article 3 of the COMESA Regulations provides, *inter alia*, that the Regulations shall apply to all economic activities having an effect within the Common Market.

allows for the allocation of cases. Regulation 1/2003 has provisions for allocation of cases between the EC and the national authorities.³⁷⁷ The regional-national relationship has been further elaborated on by the EC's Notice on Cooperation within the Network of Competition Authorities and facilitated through the formation of a European Competition Network, which consists of the national competition authorities and the EC.³⁷⁸

The second issue arises from the COMESA merger regulations. A number of issues have been raised by legal advisors in regards to the potential challenges that would arise from the COMESA merger regulations.³⁷⁹ It has been observed that the potential breadth of the merger review rules³⁸⁰ and the lack of any financial thresholds³⁸¹ could result in a huge number of notifications for transactions that have no competitive impact in the Common Market. Such an outcome would seriously undermine the credibility of the Commission and the merger review regime it oversees. Obviously, such a large number of cases would overburden the commission and deplete its much needed resources.

Understandably, the COMESA competition regime is still at its infancy and there is still room for improvement. Nonetheless, from the experience of COMESA it should be learnt that the Commission should focus its resources on transactions that could pose a material risk to competition in the Common Market. Further it should be made clear that foreign to foreign transactions that have no appreciable impact in the Common Market are beyond the scope of the merger review regime and do not require notification.

³⁷⁷ Council Regulation (EC) No. 1/2003 Official Journal (OJ) L 1, 04.01.2003, p. 1-25, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:NOT> accessed on (19 April 2015)

³⁷⁸ European Commission, 'Notice on Cooperation within the Network of Competition Authorities', Official Journal (OJ) C101, 27.04.2004, p. 43-53, available at

<http://ec.europa.eu/competition/antitrust/legislation/network.html> accessed on (19 April, 2015).

³⁷⁹ See for instance Comments of the ABA Section of Antitrust Law and Section of International Law in response to the COMESA Competition Commission's Request For Comments on the Proposed Draft Guidelines to the COMESA Competition Regulations, 2004 (June 2013), available at:

http://www.americanbar.org/content/dam/aba/uncategorized/international_law/comments_sal_sil_re_comesa_draft_guidelines_6_5_2013.authcheckdam.pdf accessed on (20 April 2015).

³⁸⁰ Purporting to apply even to foreign to foreign transactions with no nexus to the Common Market

³⁸¹ currently set at zero.

4.5 Conclusion

In sum, there is no such thing as ultimate competition laws and practices. The design of competition laws varies as the law serves different socio-economic goals. For instance when countries decide to converge towards a particular type of competition law, it is usually a process primarily driven by a specific competition law agenda which naturally reflects their interests. Generally, the core rationale for a regional competition law extends to incorporate the detrimental impact of anti-competitive practices on the trade liberalization commitments made by the members to achieve free trade. Further, the formation of a common integrated market could be the member's ultimate goal in eliminating trade barriers. Apart from reducing cross-border anti-competitive practices, there are other benefits that come with a regional competition regulatory framework such as: joint enforcement and resources, legal certainty, broader jurisdiction and the formal cooperation of a regional competition regulatory framework.

Like most good ideas, there are bound to be certain challenges of implementation. Most of the prospective challenges of developing a regional competition regulatory framework in SADC such as the fear of loss of sovereignty, lack of political will and lack of respect for the rule of law can be overcome if political leaders are serious about their commitment to regional integration. However, as for the challenges that come with overlapping regional agreements, it is conceded that a SADC competition law will contribute to a more complex jurisdiction overlap between COMESA and EAC competition laws. Nonetheless, SADC is a separate entity from other regions and it currently needs to strengthen its competition policy to protect its regional market. In the long run, there are hopes of eradicating this integration overlaps through the EAC-COMESA-SADC tripartite FTA. Whilst such plans are underway, in the time being SADC should consider developing a regional competition law so as to competently address cross-border anti-competitive practices in the region.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The Southern African Development Community (SADC) has fairly lived up to its status as free trade area by eliminating trade barriers on substantially all trade. However, the more the tariff walls have been diminished, the more the importance of regional competition policy has become apparent. It is clear that trade liberalisation has broadened the scope of competition law and policy beyond national borders. Anti-competitive trade practices are no longer a domestic issue; they have become an international as well as regional concern. In view of this transition, national approach to competition law and policy is proving insufficient for regulating cross-border anti-competitive practices.

Like many other regional trade agreements, SADC has experienced anti-competitive practices in the form of cartels, vertical restraints, mergers and abuse of dominant position which have adverse effects on trade. To counter this problem, the SADC Declaration on Regional Cooperation in Competition and Consumer Policies sets out a cooperation framework on competition policy in the region. Unfortunately, the cooperation model has experienced several challenges due to the absence of or inefficient competition laws in some countries. Further challenges of the cooperation model included: lack of coordination, lack of harmonised laws, constraints of the exchange confidential information and the voluntary and non-binding nature of cooperation.

It is not in dispute that cooperation between agencies in the region is undoubtedly important. However the informal cooperation model in SADC is proving too weak to competently address cross-border anti-competitive practices. It is proposed that SADC should develop a regional competition regulatory framework so as to pool its enforcement power, capacity and resources. A regional law would also benefit the region by providing legal certainty, broader jurisdiction and a formal cooperation system.

Whilst benefits of developing a regional competition regulatory framework are anticipated, it has been shown that the fear of loss of sovereignty, lack of political will and lack of respect for the rule of law can hinder the legal reform. To overcome these challenges, it is suggested that political leaders should be lobbied to understand the need to protect not only their national interests but also that of the regional market.

The most pressing challenge that is anticipated in developing a regional competition law in SADC is the potential confusion that can emanate from the jurisdiction overlap with EAC and COMESA. Optimistically, the establishment of the tripartite free trade arrangement between the SADC, COMESA and EAC has a potential of addressing the challenges that come with multiple membership and overlapping Regional Economic Communities (REC). However, whilst plans are there to synchronise the three RECs in future, SADC currently needs to strengthen its competition policy so as to competently address cross-border anti-competitive practices. The modalities of the COMESA-EAC-SADC Tripartite and whether it will untangle the jurisdiction overlap or simply add more spaghetti strands to the bowl is a good research area for the future.

The core recommendation at the present is that SADC should establish a distinct substantive law for dealing with anticompetitive practices as they affect trade between the member states. In addition, a central authority should be empowered to conduct investigations, enforce actions and assess and levy penalties. Importantly, what SADC can learn from both the EU and COMESA experiences is that, an overly centralised authority and unclear jurisdiction scope of the region can unnecessarily overburden the regional authority. Therefore the jurisdiction scope of the regional law should be carefully delineated; otherwise overburdening the regional authority can sabotage the realisation of a successful regional competition regulatory framework.

5.2 Recommendations

The following is a summary of recommendations that can be used as strategies to develop a successful regional competition regulatory framework in SADC:

- The inclusion of provisions in national laws recognising the superiority of regional laws and allowing for implementation of the regional law.

- Lobbying politicians and officials before the regional law is developed so that they understand and appreciate the importance of protecting the regional market from anti-competitive trade practices.
- Developing leniency policies at regional level so as to incentivise cartelists to blow the whistle on anti-competitive practices that affect the region.
- Member states could also consider harmonising their competition laws. This can take a piecemeal approach. For example members could start off by harmonising their merger control provisions, then the provisions on abuse of dominance and so on.
- Regional competition authorities should be sufficiently staffed with educated and trained personnel, the leaders and staff should not be corrupt and appellate channels should be provided.
- Decisions and judgements of the institutions should be published and accessible to the public.
- Regional law should clearly define the scope of its jurisdiction, for example including a provision that states that the rules only apply to anti-competitive practices that substantially affect the regional market and leaving others outside the scope of the law.
- To avoid regional-national jurisdiction overlap there is need for a system of cooperation between the regional competition authority and the national competition authorities that allows for the allocation of cases.
- Provisions on exchange of confidential information should balance the right to access to information with the right to privacy of individuals. For example, the information exchanged under the provisions of the regional law must be used solely for enforcing competition laws.

WORD COUNT: 28, 252

BIBLIOGRAPHY

Articles in books/ Law magazines

1. Godek P 'One US Export Eastern Europe Does Not Need' (1992) 15 *Regulation* 20.
2. Mapuva J And Muyengwa-Mapuva L, 'The SADC regional bloc: What challenges and prospects for regional integration?' in *Law, Democracy and Development* (2014) Volume 18 .
3. Smith A 'The theory of moral sentiments' (1976) in *The Glasgow Edition of the Works and Correspondence of Adam Smith*, Oxford University Press: London.

Articles in journals

4. Andriychuk O 'The concept of perfect competition as the law of economics: addressing the homonymy problem' (2011) 62 *N. Ir. Legal Q.* 523.
5. Baetge D 'Competition Law and Perspectives for Harmonisation' (2004) 9 *Unif LR* 501.
6. Bakhoum M 'A Dual Language in Modern Competition Law? Efficiency Approach versus Development Approach and Implications for Developing Countries', in *World Competition: Law and Economics Review* Issue 3, pp. 495–522.
7. Campbell N and Masse MG 'The interplay between competition law and Free Trade Agreements - The Canadian Experience (2012) 8 *Competition L. Int'l* 64.
8. Crampton P & Barutciski M 'Post privatisation in the America: Competition law policy and the alternative - Trade distorting private restraints: A practical agenda for future action' (1999) 6 *Sw JL & Trade Am* 3.
9. Epstein J 'The other side of harmony: Can trade and competition laws work together in the international marketplace?' (2002) 17 *American University ILR* 343.
10. Erasmus G. 'Is the SADC trade regime a rules-based system?' *SADC Law Journal* (2011) Vol. 1, p17-24.
11. Ergas H 'Should developed countries require developing countries to adopt competition laws? Lessons from the economic literature' (2009) *European Competition Journal* 347.
12. Glaeser E and Shleifer A, 'The rise of the regulatory state'' (2003) 41(2) *Journal of Economic Literature* 401.
13. Hilpold P 'International competition law and Regional Trade Agreements' (2005) 2 *MJIEL* 82.

14. Hopt KJ, Von Friedrich Kfibler ed *Wetbewerbsbeschränkungen Und Verrechtlichung* (1985) in Weiss F 'From World Trade Law to World Competition' *Law* (1999) 23 *Fordham International Law Journal* S250.
15. Hovenkamp 'Antitrust policy after Chicago' 84 *Michigan LR* (1985) 213 at 215.
16. Hufbauer G and Kim J 'International competition policy and the WTO' (2009) 54 *Antitrust Bull* 327.
17. Islam MR 'A WTO multilateral framework for competition policy and trade-induced development- Debunkig their complementarity in developing countries' (2004) 5 *J World Investment & Trade* 491.
18. Joskow, PL 'Transaction cost economics, antitrust rules, and remedies' (2002) 18(1)*The Journal of Law, Economics & Organisation* 95–116.
19. Kearns JE 'International competition policy and the Gats: A proposal to address market access limitations in the distribution services' (2001) 22 *J Int'l L* 285.
20. Kellerhals A & Mahncke H 'Competition law in difficult economic times'(2009) 39 *Hong Kong LJ* 719.
21. Kelly DA 'Should the WTO have a role to play in the internationalisation of competition law?'(2007) 7 *Hibernian LJ* 17.
22. Lee JS 'Towards a development-oriented multilateral framework on competition Policy' (2006) 7 *San Diego Int'l LJ* 293.
23. MacLaren R 'Two steps forward and no steps back: Charting a new course for trade and competition policy' (1996) 24 *Int'l Bus. Law.* 464.
24. Matsushita M 'Symposium: Cultural conceptions of competition - Competition law and policy in the context of the WTO system' (1995), 44 *DePaul Law Review* 1097.
25. Mavroidis PC & Hoekman B 'Economic development, competition policy and the WTO' (2003) *Journal of World Trade* 37(1).
26. Piilola A 'Is there a need for multinational competition rules?' (1999) 10 *Finnish YB Int'l L* 263.
27. Ross "Canadian competition policy: Progress and prospects" *The Canadian Journal of Economics*, Vol 37 No 2 (May 2004) 243 at 252-253.
28. Saurombe A 'The role of South Africa in SADC regional integration: the making or breaking of the organization' *International Journal for Commercial Law and Technology* vol 5 2010. www.jiclt.com › Home › Vol 5, No 3 (2010).
29. Siragusa M 'A critical review of the white paper on the reform of the EC competition law enforcement rules' (1999) Volume 23, Issue 4 Article 4. *Fordham*

International Law Journal 1089.

30. Sweeney B 'Globalisation of competition law and policy: Some aspects of the interface between trade and competition (2004) *MelbJIL* 375.
31. Sweeney B 'International competition law and policy: A work in progress' (2009) 10 *MelbJIL* 58.
32. Weiss F 'From world trade law to world competition law' (1999) 23 *Fordham International Law Journal* 250.
33. Wyman B 'The justification of fair competition' (1907) 19 *Green Bag* 277.

Bilateral agreements

34. Australia-United States Antitrust Cooperation Agreement (1982).
35. European Union-United States Agreement on the application of positive comity principles in the enforcement of their competition laws (1998).
36. Germany-United States Antitrust accord (1976).
37. South Africa-European Union Trade, Development and Co-operation Agreement (1999).

Books

38. Brassey M, Campbell J, Legh R, Simkins C, Unterhalter D, Wilson J *Competition Law* 1 ed (2002) Cape Town: Juta.
39. Drexler J (ed) *Competition Policy and Regional Integration in Developing Countries* (2012) Northampton MA: Edward Elgar Publishing.
40. Furse M *Compendium of E.C. competition law* (1989) London: Butterworths.
41. Gordley J *The Philosophical Origins of Modern Contract Doctrine* (1991) Oxford: Clarendon Press.
42. Goyder DG *EC Competition Law*, Fourth edition, (2003) Oxford: Oxford University Press.
43. Grainne De Burca PC (ed) *The Evolution of EU Law* (2011) Oxford: Oxford University Press.
44. Kennedy K *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell.
45. Lee MC *The Political Economy of Regionalism in South Africa* (2003) Cape Town: UCT Press.

46. Lester S, Mercurio B, Davies A & Leitner K *World Trade Law: Text, Materials and Commentary* (2008) Portland: Hart Publishing.
47. Monti G *EC Competition Law* (2007) Cambridge: Cambridge University Press.
48. Palmeter NR *The WTO as a legal system: essays on international trade law and policy* (2003) London: Cameron.
49. Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge: Cambridge University Press.
50. Swann D *Competition and Industrial Policy in the European Community* (1983) London: Methuen.
51. Taylor MD *International Competition Law: a new dimension for the WTO?* (2006) Cambridge: Cambridge University Press.
52. Van Grassek C *The History and Future of the World Trade Organisation* (2013) World Trade Organisation: Geneva.

Cases

53. *Ahstrom Osakeyhtiö v. Commission of the European Communities (The Woodpulp Case)* (ECJ), 778.
54. *American Natural Soda Ash Corporation and Another v. Competition Commission of South Africa* (554/2003) [2005] ZASCA 42; [2005] 1 CPLR 1 (SCA) ; [2005] 3 All SA 1 (SCA) (13 May 2005).
55. *Boeing/McDonnell Douglas merger Case No IV/M.877.*
56. *Competition Commission v. Rhodes Food Group (Pty) Ltd Case No 019539.*
57. *Competition Commission v. South African Breweries Limited and Others* (129/CAC/Apr14) [2015] ZACAC 1 (2 February 2015).
58. *Federal-Mogul Aftermarket Southern Africa (Pty) Limited v. The Competition Commission and The Minister of Trade and Industry Case No.: 33/Cac/Sep03.*
59. *France v Turkey, Judgment, (Lotus case)* (1927) PCIJ.
60. *General Electric/Honeywell merger (Case COMP/M2220)* [2004] OJ L048/1.
61. *Imperial Chemical Industries v. Commission of the European Communities, (Dyestuffs)* Case 48/69 [1972] ECR 619.
62. *Masterfoods Ltd v. HB Ice Cream Ltd Case C-344/98.*
63. *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe* (2/2007) [2008] SADCT
64. *The Competition Commission of South Africa v. British Airways Case no. 42/CR/Jul 10, 015545.*

65. *The Competition Commission v. South African Airways Cargo, British Airways, Air France-KLM, Alitalia Cargo, Cargolux, Singapore Airlines, Martinair and Lufthansa*; CT Case No:41/CR/Apr12; CC Case No.: 2008/Jan3488.
66. *The Minister of Economic Development, Competition Tribunal and others v. The Competition Commission of South Africa, Wal-mart stores inc, Massmart holdings limited and others (Walmart/Massmart merger)* CASE NO: 110/CAC/Jul11, 111/CAC/Jun11.
67. *United States v. Aluminium Co. of America, (Alcoa case)* 148 F. 2d 416, 443 (2d Cir. 1945).

Competition commission reports

68. *Clear beer distribution in Chiredzi case*, Zimbabwe Commission, Source UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, Geneva, July 03-05, 2002.
69. *Rothmans of Pall Mall/ British American Tobacco Merger*, Zambia commission, UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, Geneva, July 03-05, 2002.
70. *The Takeover of Chilanga Cement by Lafarge of France*, Zambia Competition Commission.
71. *The Takeover of Circle Cement by Lafarge of France*, Zimbabwe Competition Commission.
72. *Zambia: Coke, Schweppes granted conditional merger*, Zambia commission.

Declarations

73. SADC Declaration on Competition and Consumer Policies (2009).
74. Schuman Declaration (1950).
75. WTO Ministerial Declaration of November 2001, WT/MIN(01)/Dec/1, 41 I.L.M. 746 (Doha Declaration) (2002).

Electronic database

76. Sutherland & Kemp *Competition Law of South Africa* Butterworths, LexisNexis looseleaf – SI 13.

International organisation's articles and online publications

77. COMESA Competition Commission *A Guide to Anti-Competitive Business Practices* available at http://www.comesacompetition.org/?page_id=498 accessed on (20 February, 2015).
78. COMESA Competition Commission available at <http://www.comesacompetition.org/> accessed on (20 April 2014).
79. COMESA Competition Commission *Background* available at http://www.comesacompetition.org/?page_id=375 accessed on (20 February, 2015).
80. COMESA-EAC-SADC Tripartite <http://www.comesa-eac-sadc-tripartite.org/> accessed on (16 April 2015).
81. Common Wealth of Nations *Rule of Law* available at <http://www.commonwealthofnations.org/commonwealth-in-action/rule-of-law-2/> accessed on (20 April 2015).
82. Competition Commission of South Africa *The Impact of Poultry Tariffs on Competition* (2013) available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/130910impact.pdf> accessed on (27 February 2015).
83. Correa CM 'Intellectual property and competition law: Exploring some issues of relevance to developing countries' (2007) Issue Paper No. 21, Geneva: ICTSD, available at http://www.iprsonline.org/resources/docs/corea_Oct07.pdf accessed on (10 March 2015).
84. European Commission *Competition* (2012) available at http://ec.europa.eu/competition/consumers/why_en.html.
85. European Commission, 'Notice on Cooperation within the Network of Competition Authorities', *Official Journal (OJ)* C101, 27.04.2004, p. 43-53, available at <http://ec.europa.eu/competition/antitrust/legislation/network.html> accessed on (19 April, 2015).
86. International Competition Network *Co-operation between Competition Agencies in Cartel Investigations* (2007) Report to the ICN Annual Conference: Moscow available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf> accessed on (18 March 2015).
87. OECD *Challenges of International Co-operation in Competition Law Enforcement* (2014) available at <http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf> accessed on (18 March 2015).

88. OECD *Complementarities between Trade and Competition Policies*, (1999) 12 Unclassified COM/TD/DAFFE/CLP(98)98/FINAL.
89. OECD *Competition: Recommendation concerning International Co-operation on Competition Investigations and Proceedings* available at <http://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm> (accessed on 18 March 2015).
90. OECD *International Cooperation in Competition Enforcement*, C/MIN(2014)17.
91. Qaqaya H and Lipimile G (Ed) 'The effects of anti-competitive business practices on developing countries and their development prospects' (2008) New York and Geneva: United Nations, available at http://unctad.org/en/docs/ditclp20082_en.pdf accessed on (12 March 2015).
92. SADC 'Competition Policy' (2012) available at <http://www.sadc.int/themes/economic-development/trade/competition-policy/> accessed on (28 October 2014).
93. SADC 'Competition Policy' (2012) available at <http://www.sadc.int/themes/economic-development/trade/competition-policy/> accessed on (28 October 2014).
94. SADC *Competition Policy* available at <file:///C:/Users/Sal/Desktop/CHAPTER%20THREE/Southern%20African%20Development%20Community%20%20%20%20Competition%20Policy.html> accessed on (18 March 2015).
95. SADC *Documents and Publications: Protocol on Trade* (1996) available at [http://www.sadc.int/documents-publications/show/Protocol%20on%20Trade%20\(1996\)](http://www.sadc.int/documents-publications/show/Protocol%20on%20Trade%20(1996)) accessed on (17 March 2015).
96. SADC *Overview: History and Treaty* available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/> accessed on (17 March 2015).
97. SADC *Review of the experience gained in the implementation of the UN Set, including voluntary peer reviews* (2010) Geneva available at http://unctad.org/sections/wcmu/docs/tdrbpconf7_s2_SADC.pdf accessed on (18 March 2015).
98. The International Centre for Trade and Sustainable Development (ICTSD) and the International Institute for Sustainable Development (IISD) *Doha Round Briefing Series August 2003 - The Singapore Issues: Cancun Update Investment, Competition Policy, Transparency in Government Procurement and Trade Facilitation* 2003 available at http://www.iisd.org/pdf/2003/wto_doha_singapore_issues_2.pdf (accesses 10 October 2014).

99. UNCTAD *Informal cooperation among competition agencies in specific cases* (2014) TD/B/C.I/CLP/29 available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd29_en.pdf accessed on (18 March 2015).
100. UNCTAD *Modalities and procedures for international cooperation in competition cases involving more than one country* (2013) TD/B/C.I/CLP/21 available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd21_en.pdf (accessed on 18 March 2015).
101. UNCTAD *Modalities Competition, Competitiveness and Development: Lessons From Developing Countries* (2004) available at http://unctad.org/en/docs/ditcclp20041_en.pdf accessed on (22 March 2015).
102. WTO *Competition Policy: Documents - Documents of the Working Group on the Interaction between Trade and Competition Policy (WGTCP)* available at http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm (accessed 10 October 2014).
103. WTO *Competition Policy: Documents - Documents of the Working Group on the Interaction between Trade and Competition Policy (WGTCP)* available at http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm (accessed 10 October 2014).
104. WTO *Interaction between Trade and Competition Policy* available at http://www.wto.org/english/tratop_e/comp_e/comp_e.htm (accessed 10 October 2014).
105. WTO *Interaction between Trade and Competition Policy* available at http://www.wto.org/english/tratop_e/comp_e/comp_e.htm (accessed 10 October 2014).
106. WTO *Regional Trade Agreements and Preferential Trade Arrangements, (2015)* available at http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm accessed on (20 February, 2015).
107. WTO *Regional Trade Agreements and Preferential Trade Arrangements, (2015)* available at http://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm accessed on (20 February, 2015).
108. WTO *The Case for Open Trade* (2015) available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm accessed on (25 February 2015).

International organisations' reports and policies

109. OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings (1995).
110. United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980).
111. WGTCP Report on the Meeting of 19-20 April, WT/WGTCP/M/8, P 20 (June 10, 1999).
112. WGTCP *The Fundamental Principles of Competition Policy*, (1999) WT/WGTCP/W/127.
113. WGTCP, Report on the WGTCP Meeting of 19-20 April, WT/WGTCP/3, (October 11, 1999).
114. WGTCP, Report on the WGTCP Meeting of 19-20 April, WT/WGTCP/M/8, P 20 (June 10, 1999).
115. WTO 2004 Sutherland Report.

International trade Agreements

116. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).
117. The General Agreement on Trade in Services (GATS).
118. The General Agreement on Tariffs and Trade (GATT).

Legislation/ Regulations

119. Botswana Competition Act 17 of 2009.
120. COMESA Competition Regulation.
121. East Africa Community Competition Act (2006).
122. European Union Council Regulation 1/2003.
123. European Union Regulation 17/62.
124. Madagascar Competition Law No 2005-020 of 2005.
125. Malawi Competition and Fair Trading Act of 1998.
126. Mauritius Competition Act of 2007.
127. Namibia Act no. 2 of 2003.
128. Seychelles Fair Competition Act 18 of 2009.
129. South African Competition Act 1998.
130. Swaziland Act 8 of 2007.
131. Tanzania Fair Competition Act 8 of 2003.

132. *Zambian Competition and Consumer Protection Act No. 24 of 2010.*
133. *Zimbabwe Competition Act 7 of 1996.*

Other internet sources

134. *Africa Competition Forum Newsletter July 2013* available at http://www.africancompetitionforum.org/sites/default/files/docs/ACF_First_Newsletter_English_0.pdf accessed on (18 March 2015).
135. *AllAfrica Zambia: Coke, Schweppes granted conditional merger* available at <http://allafrica.com/stories/199912210026.html> accessed on (9 April 2015).
136. *Banc ABC Staying up to date with Local Laws in Africa* available on <http://www.bancabc.co.mz/news/staying-up-to-date-with-local-laws-in-africa.aspx> accessed on (24 March 2015).
137. *BBC News South Africa Shops Looted Despite Zuma Call for Peace* available at <http://www.bbc.com/news/world-africa-32347305> accessed on (20 April 2015).
138. Bhagwati JN 'US Trade Policy: The Infatuation with FTAs' (1995) available at <http://hdl.handle.net/10022/AC:P:15619> accessed on (20 April 2015).
139. Evenett SJ 'What is the relationship between competition law and policy and economic development?' (2005) University of Oxford available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=https%3A%2F%2Fwww.alexandria.unisg.ch%2Fexport%2FDL%2F22316.pdf&ei=i6pSVNT1HMzeOK2gfgJ&usq=AFQjCNFC52UzUpGlc8HRRX1y7TviLCKz5g&sig2=Vq1FOGgaB4pDIHKv3KS15g> accessed on (30 October 2014).
140. Fox E.M 'Antitrust, economic development and poverty: The other path' (1991) Harvard Institute for International Development available at http://unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0003_en.pdf accessed on (22 April 2015).
141. FSP Invest 'Will raising the tariffs on chicken imports have the desired effect?' available at <http://fspinvest.co.za/articles/south-africa/will-raising-the-tariffs-on-chicken-imports-have-the-desired-effect-1708.html> accessed on (19 November, 2014).
142. Gal MS and Wassmer IF 'Regional Agreements of Developing Jurisdictions: Unleashing the Potential' in *Competition Policy and Regional Integration in Developing Countries'*, (2012) Bakhoum M, Drexl J, Gal M, Gerber D, Fox E (eds) available at <http://ssrn.com/abstract=1920290> (accessed on 24th October, 2014).

143. Golegal A *Second Regional Competition Authority to Begin Operations in East Africa* available at <http://www.golegal.co.za/politics/second-regional-competition-authority-begin-operations-east-africa> accessed on (1 April 2015).
144. Holland H 'Transaction Cost Economics: Applications to Competition Policy in South Africa' available at <http://www.compcom.co.za/wp-content/uploads/2014/09/TCE-Conference-Paper-Final.pdf> accessed on (12 March, 2015).
145. Marumo N and Van Wyk M 'Competition and trade policy - Frenemies?' Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-and-Trade-Policy-Frenemies.pdf> accessed on (26 February).
146. Mavroidis PC, Hoekman B 'Economic Development, Competition Policy and the WTO' (2003) *Journal of World Trade* 37(1) available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2917> accessed on (31 October 2014).
147. McCarthy C 'The Roadmap towards Monetary Union in Southern Africa – is the European experience commendable and replicable?' available at http://paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/tralacBordeauxGarnetMcCarthy_20081022.pdf accessed on (20 April 2015).
148. Ndlovu P 'South African trade: Too chicken to definitively challenge Brazilian poultry imports?' (2013) available at <http://www.polity.org.za/article/south-african-trade-too-chicken-to-definitively-challenge-brazilian-poultry-imports-2013-09-17> accessed on (18 November 2014).
149. Nicholas E. (ed) 'Adam Smith's legacy: His thought in our time' (1990) ASI (Research) Limited: London. Available at http://www.adamsmith.org/sites/default/files/images/uploads/publications/ADAM_SMITH_Legacy.pdf accessed on (24 March 2015).
150. Ploch L and Cook N 'Madagascar's Political Crisis' (2012) available at <https://www.fas.org/sgp/crs/row/R40448.pdf> accessed on (20 April 2015).
151. Sakata N. 'Are Southern African competition law regimes geared up for effective cooperation in competition law enforcement?' available at <http://www.compcom.co.za/assets/Uploads/events/Fifth-Annual-Conference/African-Regional-cooperation-PaperFinal-27-Sept-11-.pdf> (accessed on 24 October 2014).
152. Sandrey R 'An analysis of the SADC Free Trade Area' (2013) Tralac Trade Brief. No. D13TB01/2013. Available at

- <http://www.tralac.org/files/2013/06/D13TB012013-Sandrey-Analysis-of-SADC-Free-Trade-Area-20130619-fin.pdf> accessed on (17 March 2015).
153. Senona L, Letsike T, and Jiki C 'A SADC sheriff to police anti-competitive behaviour – is it the way to go, or not?' available at <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-4/SADC-Sheriff-Paper-Final-Draft-21-August-13.pdf> accessed on 24 October, 2014.
154. Smith A 'The wealth of nations'(1975) J M Dent & Sons in Nicholas E. (ed) 'Adam smith's legacy: His thought in our time' (1990) ASI (Research) Limited: London available at http://www.adamsmith.org/sites/default/files/images/uploads/publications/ADAM_SMITH_Legacy.pdf accessed on (10 March 2015).
155. Spier 'The interaction between trade and competition policy: The perspective of the Australian Competition & Consumer Commission' 1997 Taipei. Seminar on International Trade Policies after the WTO Singapore Ministerial Conference 2 May 1997 available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB8QFjAA&url=https%3A%2F%2Fwww.accc.gov.au%2Fsystem%2Ffiles%2Fthe%2520Interaction%2520between%2520Trade%2520and%2520Competition%2520Policy.doc&ei=P0VOVP_IO-PB7gaa4oCQDQ&usg=AFQjCNFMnyYxXEGUBY8pdwfcA5lh3VV62Q&sig2=Bp2jSzhLkLsXAf7aKVcO9w accessed on (27 October 2014).
156. Stiglitz J 'Competing over competition policy' available at <http://www.project-syndicate.org/commentary/competing-over-competition-policy> accessed on (19 April 2015).
157. Strader JM 'The consequences of neoclassical price theory for US predatory pricing law' (2012) available at <https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-7-2012> accessed on (11 March 2015).
158. Times Live 'With Heads Bowed in Shame': Thabo Mbeki's 2008 Xenophobia speech available at <http://www.timeslive.co.za/politics/2015/04/14/with-heads-bowed-in-shame-thabo-mbeki-s-2008-xenophobia-speech> accessed on (5 May 2015).
159. Viljoen W 'Anti-competitive behaviour in export markets: Rhodes Food Group and the South African Competition Act' (2014) available at <http://www.tralac.org/discussions/article/6434-anti-competitive-behaviour-in-export->

[markets-rhodes-food-group-and-the-south-african-competition-act.html](#) accessed on (October 2014).

160. Voigt S & Schmidt 'A Making European Merger Policy More Predictable' (2005) available on <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.115.897&rep=rep1&type=pdf> accessed on (7 May 2015).

Protocols

161. MERCOSUR Fortaleza Protocol for the Defence of Competition proceedings (1996).
162. SADC Protocol on Trade (1996).

Treaties and conventions

163. Treaty Establishing the Common Market for Eastern and Southern Africa (1993).
164. Treaty establishing the Economic and Steel Community (1950).
165. Treaty Establishing the European Community (1992).
166. Treaty Establishing the Southern African Development Community (1992).
167. Treaty on the Functioning of the European Union (2007).
168. Vienna Convention on the Law of treaties (1969).