

**HARMONIZATION OF COMPETITION LAW IN SOUTHERN AFRICA:
THE CORRECT APPROACH**

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ABSTRACT

In the light of globalization, the establishment of the World Trade Organization (WTO) in 1995, and the establishment of the Southern African Development Community (SADC) in 1992 and the Southern African Customs Union of 1969 (SACU), this research examines the approach (both internationally and regionally) towards one of the important disciplines, namely, competition policy.

While the WTO-GATT Agreement of 1995, does not contain a chapter on competition law, Article 25 of the SADC Protocol on Trade, which came into force in 2000, only calls on Member States to implement measures within the Community that prohibit unfair business practices and promote competition. Similarly, Article 40 of the Final SACU Agreement requires all its members to have competition policies and to *cooperate with each other with regard to the enforcement of competition laws and regulations*. Noting these obligations of member states, the research studies the viability of harmonization of competition law in the Southern Africa region, considering the fact that all SACU members (Namibia, South Africa, Botswana and Swaziland) are members of SADC too and both institutions (SADC and SACU) have more or less the same objectives (although there are notable differences, such as while SACU is a “customs union” SADC is a “development community”), which can be captured to be ‘the free movement of goods between member states and economic development of the region.’

There are no guidelines at SADC and SACU levels on what amounts to unfair business practices (although one may assume that these practices are similar to those recognized in developed countries, see Article 85(81) of the EC Treaty compared to the approach taken by South Africa and Namibia) or on the nature and content of the measures to be undertaken. Should such measures be the same in all Member States, or should whatever measures adopted have the object of prohibition of unfair business practices and the promotion of competition? How should state trading enterprises be handled and to what extent, if at all, should social and political considerations play a role in the nature of competition policy in Southern Africa? Lastly, is there room for the establishment of a SADC Competition Commission to oversee the proper

implementation of competition rules (direct application of self-executing nature of the rules) in the region? In sum, it is submitted that the SADC and SACU provisions dealing with competition law are empty in many respects and it is these lacunae that this research wishes to address.

One can afford to overestimate the value of this research, not only at multilateral level, but also at regional level in Southern Africa. The research will help carve the best model of competition policy that Southern Africa should adopt and will as such contribute towards the realization of general goal and poverty eradication and economic development in the region. The disciplines of trade and competition are interrelated and ought to complement each other for a successful regional market. Different competition laws in the region, and the absence of a credible institution to administer competition law may run counter to the good intentions or objectives of both SADC and SACU.

Apart from defining competition and competition law in Chapter 1, this paper briefly introduces in Chapter 2, SADC and SACU, and reviews the state of competition law in this region. Chapter 3 contains the theoretical debate around harmonization of competition law at international level, while Chapter 4 contains a comparative study of other models of integration like the European Union, the Common Market of the Southern Cone (Mercosur), the North American Free Trade Area with a view of noting the strengths and weaknesses of each model and so to extract those qualities that SADC and SACU should consider at regional level. The research also discussed the United Nations (UN) efforts of harmonizing competition law in this chapter. The conclusions and recommendations are contained in Chapter 5, which is analytical in nature. It concludes that harmonization of competition policy in Southern Africa is a viable project.

The nature of the multilateral agreement that may be negotiated at the WTO level is a constraint that this research has noted. However, an attempt to make SADC/SACU Agreement¹ on competition law at least compatible with the existing WTO Agreements is made in the last part of this research. It is there where consideration is also given to

the United Nations Conference on Trade and Development's Model Law on Competition of 2000.

¹ Such agreement is inevitable in the light of what may be referred to as "regionalization" of the Southern African region where markets are about to open and where competition policy would be necessary to uniformly and fairly regulate business competition.

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L Geingos
2005

LIST OF ABBREVIATIONS

COMESA	Common Market for Eastern and Southern Africa
EC	European Community
ECSC	European Coal and Steel Community
EEA	European Economic Area
EU	European Union
GATS	General Agreement on Trade in Services, 1994
GATT	General Agreement on Tariffs and Trade, 1994 which came into force in 1995
MERCOSUR	The Common Market of the Southern Cone
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
SA	South Africa
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
WTO	World Trade Organization

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CHAPTER 1

INTRODUCTION

1.1 Competition and competition law defined

Competition denotes a relationship between a number of undertakings selling similar, identical or like products or services at the same time to consumers in the same geographical market ¹. The goal of each undertaking is to have the biggest market share of supply in the market, thereby outcompeting the rival and making maximum profit. Competition is what firms do to win the game, in other words, the conduct by and between them.

However, if firms were to adopt whatever conduct to remain successful, such conduct may result in anti-competitive benefits which results in inefficient allocation of resources and negative economic growth. To prevent this from happening, many states ² recognized the need to legally proscribe anti-competitive behaviour in order to allocate economic resources as efficiently as possible and so to realize their goal of economic development.

Such proscription is in the form of the adoption of a competition law, either in the form of an act of parliament (at national level) or a treaty (at international level). Competition law can thus be referred to as the 'rules of the game of competition' set by authorities to regulate competition in the market in order to promote the following objectives. ³

- Consumer welfare;
- Consumer protection,
- Redistribution of wealth;

- Protection of small and medium sized industries;
- Regional, social and industrial considerations; and
- Market integration.

Briefly explained, consumer welfare means that if competition is promoted in a market, this will lead to improved economic performance which in turn leads to improved living standards of consumers because they will be getting the best products at the lowest prices. Consumers are as such protected from monopolistic companies, which could abuse their dominant position by limiting production and raising prices or producing goods that are not of food quality.⁴

Competition also prevents a small number of firms from accumulating large amounts of wealth and, as such, leads to the distribution of wealth equally to all sectors of society. Small and medium-sized firms play an important role in a competitive market. A good competition law should encourage the entry of new firms in the market and should ensure that such new firms are not forced in an unjustified manner out of the market by larger firms who could abuse their dominant position.⁵

Regional, social and industrial considerations have to do with the use of competition policy to attain non-related competition policy ends, such as the development of regions where there is not much economic activity, the promotion of formerly disadvantaged business establishments or the attainment of global presence in a particular sector.⁶

Finally, competition policy is important for the realization of market integration in regional trading blocks in that it eliminates privately constructed barriers between members of the regional block.⁷

¹ Goyder 1998:9.

² Like South Africa, the United States of America and the EU and Namibia, although the latter's law, the Competition Act 2 of 2003, is not yet applicable, but awaiting the establishment of the Namibian Competition Commission.

³ Cini & McGowan 1998:4

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Like in the case of the EU and NAFTA; SADC can be mentioned, but competition policy in this region is still infant and has not started moving towards this objective. It is hoped that this research will move competition policy towards that objective.

1.2 The scope of competition law

As summarized by the Organization for Economic Cooperation and Development in 1984,⁸

“Competition policy has as its central economic goal the preservation and promotion of the competitive process, a process which encourages efficiency in the production and allocation of goods and services, and over time, through its effects on innovation and adjustment to technological change, a dynamic process of sustained economic growth. In conditions of effective competition, rivals have equal opportunities to compete for business on the basis and quality of their outputs, and resource deployment follows market success in meeting consumers’ demand at the lowest possible cost.”

Apart from built-in provisions to attain other goals⁹, it seems to be generally accepted that competition policy prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which prevent, restrict or distort trade within a given market.

This may be in the form of horizontal agreements (collusion by suppliers)¹⁰, vertical agreements (collusion between suppliers and their customers downstream)¹¹, abuse of dominant position by dominant firms and mergers and acquisitions. In sum, any conduct by a firm or firms that prevents, restrict or distort trade will violate

⁸ In Coyder 1998: 15

⁹ See Chapter on competition law in Southern Africa and other models below

¹⁰ Horizontal agreements are those agreements between two or more firms at the same level of production, i.e. between competitors in the market. The object of such agreements are usually to fix prices in the market, such that it becomes difficult for other market entrants to enter the market, or such that some competitors are unfairly forced out of the market. As they distort competition and even harm the consumer, they are prohibited.

¹¹ Vertical restraints generally refer to agreements between firms at different levels in a market, e.g., between a supplier and a distributor or a franchiser and a franchisee. These agreements leave their customers with no choice but to keep buying exclusively from such suppliers, for example giving unreasonable rebates or incentives to only those suppliers who buy certain quantities. See page 16 below.

competition policy of a given country or a region. Competition law aims at balancing the playing fields for all competitors and as such, the promotion of competition.

1.3 The economics of competition law

10 The importance of competition policy in a market ¹² can better be illustrated by reference to some elementary economic theories behind the discipline. The word ‘some’ is deliberately used to indicate that there are many, most of them complicated, theories (and their critics) that purport to explain the purpose of competition policy in a given market.

Since the object of this research is to show the importance of harmonization of competition policy in Southern Africa, only the most basic economic models, namely, the perfect competition paradigm and the monopoly paradigm will be introduced here. It is arguable that these models may not accurately reflect real market behaviour. However, this research adopts the most elementary approach to competition policy by painting a hypothetical scenario of what would have
20 happened if SADC decided not to have a regional competition policy.

(a) The perfect paradigm

This paradigm proceeds from the assumption that there is a competition policy in place, or firms simply behave as if there was one. The perfect competition model depicts many buyers and sellers of a homogeneous product, of which the quantity either sold by seller or brought by buyers is “small relative to the total quantity
30 traded, that changes in these quantities leave market prices unchanged.

¹² A market can be defined by reference to trade in specific product in a given area, say the trade in different beer in Windhoek, or by reference to trade in specific competing products in a given geographic region, say in Namibia.

With perfect competition, all role players in the market are well informed and there is free entry into and exit out of the market.”¹³

These assumptions imply that:¹⁴

- (1) the market price of the product is equal to the marginal cost of production. If this wasn't the case, for example, if the market price of the product was above the marginal cost of production, the seller could realize more profits by selling one more unit of production. If the cost of production was more than the market price, a producer could increase profits by reducing the output, which is the quantity of products produced. The market price for all products will be the same due to the 'assumed' homogeneous nature of the product, and this also implies that each seller will expand the output to the point where the marginal cost of production equals the market price.
- (2) No firm is able to realize excessive profits because if this was possible, since it is a free market entry, other firms would enter the market to share in the excess profits, at least until there is none left.
- (3) Finally, firms would remain in the market to the extent that they continue to make profits. Firms making losses would definitely leave the market.

In sum, the perfect competition paradigm depicts a scenario of tight and fair competition between firms in the market. The competitive process itself regulates the entry and exit in the market and determines the 'winners'. This leads to effective competition, which in turn leads to the most efficient allocation of economic resources, which benefits both consumers and the economy in general.

(b) The monopoly paradigm

- 30 The monopoly paradigm depicts instances where perfect competition in a given market is distorted by (a) firm(s) abusing (its) their dominant position and

¹³ Bishop S, Walker M The Economics of EC Competition law: Concepts, Application and Measurement, 1999, p. 17 para 212 (cited as Bishop & Walker 1999)

¹⁴ Ibid.

monopolizing the entire market.¹⁵ A monopolist, who abuses its dominant position or distorts competition in its favour, will typically eliminate all forms of competition¹⁶ by whatever means, limit production and sell at higher prices, because there is no factor in the market to control his actions. There would be no free entry or even exit in the market, no competition, and the market is made to rely on the product of the monopolist, who is at liberty to independently determine market prices.¹⁷ Furthermore, although this point is debatable, economists report that a monopoly leads to a deadweight or social welfare loss to society, a point, if accurately confirmed, could be very relevant to SADC with its poverty alleviation policies.

The basic point underpinning this research is that a market such as SADC needs a competition policy at multilateral level in place to promote perfect competition which in itself promotes efficient economic development. Such policy should also address the interaction between firms aimed at distorting competition in the market, such as concerted practices.

20 1.4 Competition policy at the World Trade Organisation (WTO)

The WTO is an international organization, which was established in 1995 when the Uruguay Round of Negotiations¹⁸ ended. The WTO was born by the signing of a Treaty in Marrakesh in 1994 and its main object is the promotion of trade between member countries in order to raise standards of living and incomes, employment and allowing the optimal use of world resources.¹⁹ At the heart of the WTO Agreement are three substantive agreements namely:²⁰

¹⁵ Bishop & Walker 1999: 20, par 2.16

¹⁶ Competition law does not target or discourage monopolies per se, but the abuse of that dominant position which has anti-competitive effects on a given market. See sections 25 and 26 of the Competition Act 2 of 2003 of the Republic of Namibia.

¹⁷ Ibid.

¹⁸ GATT 1947, which was the preceding agreement on trade liberalisation, was developed through a system of 'rounds', where member countries came together to negotiate on further trade issues, which they felt, were important to include in their agreement. There was a total of eight rounds of negotiations, of which the eighth one is known as the Uruguay Round of Multilateral Negotiations, negotiated from 1986 to 1994.

¹⁹ See the Preamble of the Marrakesh Agreement establishing the World Trade Organisation.

²⁰ The 1999 Business Guide to the World Trading System, 4.

- (1) Multilateral Agreements on Trade in Goods, inclusive of the General Agreement on Tariffs and Trade (GATT 1994) and its associate Agreements;
- (2) The General Agreement on Trade in Services; and
- (3) The Agreement on Trade Related Aspects of Intellectual Property Rights.

The four main functions of the WTO are:

10

- (1) to facilitate the implementation, administration, and operation of the Uruguay Round legal instruments and of any new agreements that may be negotiated in the future;²¹
- (2) to provide a forum for further negotiations among member countries on matters covered by the Agreements, on new issues falling within its mandate and on further liberalization of trade;²²
- (3) to settle disputes among member countries;²³ and
- (4) to carry out periodic reviews of the trade policies of its member countries.²⁴

20 There is no agreement at the WTO level that deals with competition. However, a number of the WTO Agreements, such as the General Agreement on Trade in Services prohibit abuse of dominant position by monopolies and other restrictive business practices.²⁵ Service suppliers are prohibited from adopting measures that may distort competition.²⁶

The Trade Related Aspects of Intellectual Property Rights Agreement also contain provisions aimed at preventing intellectual property rights owners from abusing their rights or adopting measures that unreasonably restrain trade or adversely affect the transfer of technology.²⁷

²¹ Article III: 1 of the Marrakesh Agreement Establishing the WTO.

²² Article III: 2 of the Marrakesh Agreement, supra

²³ Article III: 3, supra

²⁴ Article III: 4, supra

²⁵ GATT 1994, Article VIII: 1 and 2, in the 1999 Business Guide to the World Trading System.

²⁶ GATS Article IX, in the 1999 Business Guide to the World Trading System.

²⁷ The 1999 Business Guide to the World Trading System, 249.

There is no comprehensive multilateral code on competition at the WTO level²⁸, and the Working Group on Trade and Competition Policy, which was established at the 1996 Singapore Ministerial Conference, does not seem to have such a programme on its agenda.²⁹

The only document that paves the way for multilateral negotiations on competition policy is par 23 and 24 of the Doha Declaration.³⁰ Par 23 reads:

10

“Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development ... we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on a basis of a decision to be taken...”

Par 24 states:

20

“We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives...”

Par 25 mandates the Working Group on the Interaction between Trade and Competition Policy to focus on the clarification of core principles, including transparency, non-discrimination and procedural fairness and provisions on hard core cartels, modalities for voluntary cooperation, and support for progressive

²⁸ See Vauter K M, Tsai I W “Competition Policy, Developing Countries and the WTO”, 2000. They state at page 15 that the WTO does not address competition policy as such and have no explicit objective relating to the promotion of competition policy.

²⁹ See Chapter 23 of the 1999 Business Guide to the World Trading System. Even if there are, such developments are infant at this stage, see the Focus of the Working Group on Trade and Competition’s future work at 298. Whether competition law should be controlled by a treaty provision such as the WTO is a noble idea, which may prove difficult to reach and even to implement in practice.

³⁰ Which was adopted at the Doha Ministerial Conference of 2001.

reinforcement of competition institutions in developing countries through capacity-building.

The absence of a multilateral competition policy at the WTO is a factor that Southern Africa, being a member to the WTO, should consider in her development of a regional competition policy. Such policy should reflect the mandatory norms of the WTO rather than being in conflict with such norms. In other words, regional competition policy should complement the general objectives of the WTO and should incorporate the wishes of the WTO in the three paragraphs of the Doha Declaration quoted above. These paragraphs show that there is an there has always been a will on the part of the WTO to address the special needs of developing countries.³¹

³¹ See also UNCTAD “Closer Multilateral Cooperation on Competition Policy: The Development Dimension.” A Consolidated Report on issues discussed during the Panama, Tunis Hong Kong and Odessa Regional Post Doha Seminars on Competition Policy, held between 21 March and 26 April 2002, 13.

CHAPTER 2

BACKGROUND TO SADC AND SACU³²

2.1 SADC

For those who are new to SADC, the idea of greater cooperation between Southern African States started in the early 1970s when the so-called Frontline states³³ realized that as new states, they needed to forge greater cooperation among themselves for both political and economic stability in order to minimize their reliance on South Africa.³⁴

In July 1979, the Frontline States held a meeting in Arusha, Tanzania, which culminated in the birth of an institution called the Southern African Development Coordination Conference.³⁵ The objectives of this new body was to (1) reduce Member States' dependence on apartheid South Africa, (2) to implement programmes and projects with national and regional impact, (3) to mobilize Member States' resources in the quest for collective self-reliance, and to (4) secure international understanding and support.³⁶

The SADCC was transformed into a community in August 1992 with the signing of a Declaration and Treaty establishing the new Southern African Development Community, founded on sovereign equality of all member states, solidarity, peace and security, human rights, democracy and the rule of law, equity, balance and mutual benefit and peaceful settlement of disputes.³⁷ The new SADC aims to.³⁸

³² See generally Ng'ong'ola C "The Reconstruction of the Southern African Development Community: Some International Trade Law Perspectives", in SALJ Vol 117 2000, 258.

³³ Angola, Mozambique, Tanzania, Zambia and Zimbabwe.

³⁴ See www.sadc.int/english/about/background.html

³⁵ Ibid.

³⁶ Ibid.

³⁷ Article 4 of the SADC Declaration and Treaty of 1992.

³⁸ Article 5 of the SADC Declaration and Treaty, *ibid.*

- “Achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through *regional integration*;
 - Evolve common political values, systems and institutions;
 - Promote and defend peace and security;
 - Promote self-sustaining development on the basis of collective self-reliance and the interdependence of Member States;
- 10
- Achieve complimentarily between national regional strategies and programmes;
 - Promote and maximize productive employment and utilization of resources of the Region;
 - Achieve sustainable utilization of natural resources and effective protection of the environment;
 - Strengthen and consolidate the long-standing historical, social and cultural affinities and links among the people of the Region.”

In order to achieve these objectives, SADC undertakes to, amongst other things:³⁹

20

- (a) “harmonise political and socio-economic policies and plans of Member States;
 - (b) encourage economic, social and cultural ties across the Region, and to participate fully in the implementation of the programmes and projects of SADC;
 - (c) create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its Institutions;
 - (d) develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people
- 30
- (e) ...

³⁹ Only the relevant sections quoted from Article 5.2 of the SADC Declaration and Treaty, *ibid.* Subsections (e), (h), and (i,) are not relevant to this dissertation.

- (f) promote the development, transfer and mastery of technology;
- (g) improve economic management and performance through regional cooperation;
- (h) ...
- (i) ...
- (j) develop such other activities as Member States may decide in furtherance of the objectives of this Treaty.”

10 Article 6 is very important because it calls on Member States “to adopt adequate measures to promote the achievement of the objectives of SADC, and to refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty”.⁴⁰

Member States are also required to take all steps necessary to ensure the uniform application of the SADC Treaty⁴¹, and to accord it the force of national law⁴². As mentioned earlier, Article 25 of the Protocol on Trade calls on Member States to adopt measures that promote competition and that also promotes the objectives of

20 SADC. The extent to which SADC law should be reflected in national legislation and the relationship between SADC law and domestic laws of national states remains an area of ‘speculation’.⁴³ It is submitted that it would be helpful if SADC law had direct application in member states, as is the case with EU.

Finally Article 16 of the SADC Declaration and Treaty establishes the SADC Tribunal to resolve disputes emanating from the interpretation of the Treaty between Member States. The applicable law in the resolution of disputes is, according to Article 21, the Treaty and the Protocols. In terms of Article 32 of the Protocol on Trade 2000,

⁴⁰ See Article 6.1

⁴¹ Article 6.4

⁴² Article 6.5

⁴³ A helpful approach here to SADC is the EU Treaty, which automatically applies to and within territories of all member states. This is a type of self-executing treaty.

disputes are to be settled by negotiation between the disputing parties, by retaliation by the injured party or by a panel of experts to be established.

The problem with this type of dispute resolution arrangement is clear when one considers whether retaliation in a region such as SADC would not create disharmony. The decisions of the Tribunal should be final and there should not be another avenue left for states to use against each other. It is only then that there would be an effective and good harmonization of competition policy in Southern Africa.

2.2 The Southern African Customs Union (SACU)

The Southern African Customs Union which is the oldest in the world, started in 1910 with an agreement between Botswana, South Africa, Lesotho and Swaziland. This 1910 Agreement was replaced by another in 1969 and Namibia joined only with her independence in 1990.⁴⁴

Article 2 of the Final SACU Agreement⁴⁵ sets out the objectives of SACU which are to:

- (a) “facilitate the cross-border movement of goods between the territories of the Member States;
- (b) create effective, transparent and democratic institutions which will ensure equitable trade benefits to Member States;
- (c) promote conditions of fair competition in the Common Customs Area;
- (d) substantially increase investment opportunities in the Common Customs Area;
- 30 (e) enhance the economic development, diversification, industrialization and competitiveness of Member States;
- (f) promote the integration of Member States into the global economy through

⁴⁴ See tralac doc: An overview of SACU at www.tralac.org/scripts/content.php?id=26, and www.dfa.gov.za/for-relations/multilateral/sacu.htm

⁴⁵ Of 21 November 2002.

- enhanced trade and investment;
- (g) facilitate the equitable sharing of revenue arising from customs, excise and additional duties levied by Member States; and
 - (h) facilitate the development of common policies and strategies”.

Article 7 establishes SACU institutions, the most relevant ones to this research being the Customs Union Commission, which is responsible for the
 10 implementation of the Agreement, and the Ad hoc Tribunal which is tasked with the resolution of disputes arising from the Agreement. The decisions of the tribunal are final and binding.⁴⁶

Article 40 obliges SACU Members to have competition policies in place⁴⁷ and to cooperate with each other with respect to the enforcement of competition laws and regulations.⁴⁸ In order to prove that there is a political will and determination towards harmonization of laws in SACU, article 40 should be seen in the light of article 38, which states that Member States recognise the importance of balanced
 20 industrial development of the Common Customs areas as an important objective to economic development, and that they agree in this regard to develop common policies and strategies with respect to industrial development. This reaffirms the Article 2(h) objective of development of common policies, and, as submitted, competition policy is one such important area where SACU is prepared to harmonize her laws. What needs to be done is to start the process, as it is strongly submitted that harmonization of competition policy in Southern Africa is possible.

2.3 Competition laws of SADC/SACU Member States

The following SADC States have developed or are in the process of developing a
 30 competition policy for application in their territories: South Africa, Tanzania, Zambia and Zimbabwe. Namibia recently passed her Competition Act 2 of 2003.

⁴⁶ See article 13(3).

⁴⁷ Article 40(1)

⁴⁸ Article 40(2)

There are infant developments in Mauritius to enact a competition policy. This part summarizes the most salient features of the competition acts of the four countries and the bill of Namibia, the object being to compare similarities and dissimilarities. The main objective is to look at the extent to which these laws point to a uniform approach in Southern Africa, which paves the way for harmonization.

10 2.3.1 South Africa

South Africa enacted her Competition Act ⁴⁹ to regulate competition in the SA market and to balance or contribute toward the fair distribution of wealth among all South Africans, irrespective of colour ⁵⁰. Section 2 states that the purpose of the act is to promote and maintain competition in the Republic in order –

- (a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;
- 20 (c) to promote employment and advance the social and economic welfare of South Africans;
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy, and
- (f) to promote a greater spread of ownership, in particular, to increase the ownership stakes of historically disadvantaged persons.

30 The Act provides for the establishment of a Competition Commission which will investigate, control and evaluate restrictive business practices, abuse of dominant

⁴⁹ Act 89 of 1998, as amended.

⁵⁰ See Preamble.

position and mergers⁵¹. The Act also establishes a Competition Tribunal⁵² and the Competition Appeal Court⁵³. Section 3 prohibits restrictive horizontal practices, these being agreements between two or more firms at the same level of production which has the effect of substantially preventing or lessening competition in a market, unless it is proven that the conduct has more technological, efficiency or other pro-competitive gains. Price fixing agreements, collusive tendering or the division of markets by sellers or parties in a horizontal relationship are prohibited.⁵⁴

Section 5 prohibits all restrictive vertical practices between firms and suppliers that have the same effect as in s2 above. Ss7-9 deals with dominant firms. The thresholds for firms to be regarded as dominant in the market are set out in s7 and ranges between a minimum of 35 – 45% market share, or if less than 35%, if it can still be proven that it has market power. Section 8 prohibits dominant firms from:

- (a) “charging excessive prices to the detriment of consumers;
- (b) refusing to give a competitor an essential facility when it is economically feasible to do so;
- (c) engaging in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain, or
- (d) engaging in any of the following exclusionary acts...
 - (i) requiring or inducing a supplier or customer not to deal with a competitor;
 - (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
 - (iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of the contract, or forcing a buyer to accept a condition unrelated to the object of the contract;

⁵¹ Chapter 4, ss19 – 25.

⁵² S26

⁵³ S36

⁵⁴ S4.

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⁵¹ Chapter 4, ss19 – 25.

⁵² S26

⁵³ S36

⁵⁴ S4.

- (iv) selling goods or services below their marginal or average variable cost; or
- (v) buying up a scarce supply of intermediate goods or resources required by a competitor.

Price discrimination by dominant firms is also outlawed and involves a conduct where a dominant firm supplies the same goods or services at different price to
 10 different firms or customers when such conduct ‘is likely to have the effect of substantially preventing or lessening competition in the market.’⁵⁵

Part C, section 10 deals with exemptions. Firms may apply to the Commission for exemption from application of the provisions of Part B to their practice. Section 10 provides that such exemptions may only be granted if the agreement or practice of the firm concerned contributes towards any of the following objectives:

- (i) “maintenance and promotion of exports;
- (ii) promotion of the ability of small businesses, or firms controlled or owned
 20 by historically disadvantaged persons to become competitive;
- (iii) change in productive capacity is necessary to stop decline in an industry; or
- (iv) the economic stability of any industry designated by the Minister after consulting the Minister responsible for that industry.”

Mergers are subject to approval by the Competition Commission or the Competition Tribunal. Before a merger is approved, these two bodies first have to determine whether or not the merger is likely to substantially prevent or lessen competition, and if so, whether such merger, despite being potentially anti-competitive gain which will be greater than, and offset the effects of any

⁵⁵ S9.

prevention or lessening of competition that may result from the merger. The tribunal is also required to weigh public interest grounds in approving or rejecting the merger.⁵⁶

2.3.2 Tanzania

As Hartzenberg reports⁵⁷, Tanzania has a Fair Competition Act 8 of 2003 which
 10 condones monopolization for as long as such monopolies are in the public interest. Restrictions are imposed on those that are found not to be in the public interest. The Act prohibits all restrictive trade practices, which are defined as:⁵⁸

- agreements that reduce or eradicate the opportunity to take part in the production or distribution of goods or services, reduce or eliminate the opportunities of paying a fair market price to acquire or purchase the goods or services by arrangement or agreement between manufacturers, wholesalers, retailers or contractors;
- discriminatory agreements or arrangements between sellers or between
 20 sellers and buyers to grant rebates to buyers of goods calculated with reference to the quantity or value of the total purchases by those buyers from those sellers not to sell/buy goods in any particular form or kind to buyers/sellers;
- arrangements or agreements between persons whether as producers, wholesalers or retailers or buyers to limit or restrict the output or supply of any goods, or withhold or destroy supplies of goods, or allocate territories or markets for the disposal of goods.

Mergers in Tanzania are subject to prior approval by the Minister, on
 30 recommendation by the Commission which is required to undertake investigations

⁵⁶ S16(1)

⁵⁷ Hartzenberg T “Competition Policy in a Regional Context: A SADC Perspective on Trade, Investment and Competition issues”, November 2002 at www.tralac.org/scripts/content.php?id=965, page 10. See section 8, Part 11 of the Act.

⁵⁸ Ibid.

following set guidelines. The Minister's decision is subject to appeal to the Competition Tribunal.⁵⁹

Two bodies are established by the Act to implement its provisions, namely, the Fair Trade Practices Commission which is responsible for the monitoring, investigations, evaluations and prosecutions, the issuing of order and the overall resolution of problems; and the Appeals Tribunal to which all appeals from the
10 decisions of the Commission and the Minister are directed for reconsideration.⁶⁰

2.3.3 Zambia

Zambia has a Competition and Fair Trading Act 18 of 1994 (which can be found in s4 of Chapter 417 of the laws of Zambia) and the Act is aimed at:⁶¹

- (1) Encouraging Competition in the economy;
- (2) Protect consumer welfare;
- (3) Strengthen the efficiency of production and distribution of goods and
20 services;
- (4) Secure the best possible conditions for the freedom of trade; and
- (5) Expand the base of entrepreneurship.

The Zambian Act prohibits anti-competitive trade practices that aims at preventing, restricting or distorting competition in Zambia and abuse of dominant position. Like in the case of SA, vertical arrangements⁶² are dealt with on a casuistic basis and the rule of reason applies, whereas authorization from the Minister has to be obtained from mergers.⁶³ The Act also covers trade agreements; price fixing arrangements, collusive tendering, refusals to supply, sales or production quotas
30 and market allocations. The Act is administered by the Zambian Competition Commission.⁶⁴

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Zambia Competition Commission Annual Report 1999, in T Hartzenberg, *supra*, page 8.

⁶² See page 3 above

⁶³ *Supra*, page 3.

⁶⁴ *Supra*, page 3.

2.3.4 Zimbabwe

The objectives of the Zimbabwean Competition Act 7 of 1996 are the maintenance and promotion of the competitive process by:⁶⁵

- (1) Prohibiting price fixing agreements and abuse of dominant position;
- (2) Lessening the adverse effects of government intervention in markets;
- (3) Improving access and opening markets by reducing barriers to entry;
- 10 (4) Preventing abuse of economic power thereby protecting consumers and producers;
- (5) Achieving economic efficiency so as to encourage allocative and dynamic efficiency through lowered production costs and technological change and innovation.

There is an Industry and Trade Competition Commission, which has similar functions to the SA and Zambian Competition Commissions and an Administrative Court which hear appeals from the Commission.⁶⁶ According to Hartzenberg, there are two types of prohibited practices in the Act, namely, *per se* and rule of reason prohibitions. *Per se* prohibitions (which covers collusive agreements, predatory pricing, bid rigging and undue refusal to distribute goods or services) 20 only require proof of the existence of an unfair trade practice for such practice to be prohibited, whereas the *rule of reason* prohibits (which cover restrictive practices) require an examination of whether the act in question is *pro* or anti-competitive.⁶⁷

In sum, although there is no supranational competition policy in place in Southern Africa (SADC and SACU), competition policies of all countries discussed above show one pattern of being strikingly similar. They all are based on the same 30 objectives, i.e., that of promotion of competition, have the same scope of coverage of anti-competitive practices, and the handling of mergers and acquisitions. This trend strengthens the case for harmonization of competition laws at both SADC and

⁶⁵ Hartzenberg T, *supra*, page 9

⁶⁶ *Ibid*

⁶⁷ *Ibid*.

SACU levels for the sake of certainty and uniformity of the law in Southern Africa. Such harmonization should be backed by an institution in a form of a commission and an appeal body which will oversee the proper resolution of competition disputes at regional level.

CHAPTER 3

THEORETICAL DEBATES AROUND HARMONIZATION OF COMPETITION LAWS

As different goals, cultures and institutions shape the nature of competition policy in any given geographic market, the object of this part is to discuss some of these differences and their relevance to endeavours to internationalise competition policy. The core question here is whether differences in competition policy goals in general, could impede the internationalisation of the discipline and whether internationalisation itself is a desirable move, and if so, how such an international code could be achieved.⁶⁸

There are two opposing groups to the internationalisation of competition law, and these groups will be divided into (a) the positivists and (b) the ‘axis’ of criticism. The positivists believe that such a move is possible and viable, and cannot be derailed by anything. The axis of criticism on the other hand either foresee difficulties with internationalisation of competition law due to differences in competition legislation, or are not convinced by any evidence why that needs to happen. The last part of this chapter analyses the arguments of both groups and concludes that harmonization of competition law at SADC/SACU level would be a successful project, considering the work already done by UNCTAD combined with the EU model.⁶⁹

3.1 The Positivists

Proponents of internationalisation of competition law believe that such a move will address the following existing problems:

⁶⁸ See the United Nations Conference on Trade and Development (UNCTAD) Model Law on Competition, Series on Issues in Competition Law and Policy, 2000, discussed in Chapter 4 below. This part of the research is based on Discussion Papers on the topic, which are published in Claus Dieter Ehlermann & Laraine L Laudati (eds) *European Competition Law Annual Review 1997: Objectives of Competition Policy*, pages 157ff. Cited as Ehlermann & Laudati 1997 ed)

⁶⁹ Ibid.

- (1) market access restrictions by firms operating in other countries; and
- (2) jurisdictional problems where more than two competition authorities assert decision making authority.

On market access restrictions, R S Khemani and R Schone ⁷⁰ submit that market access restrictions caused by foreign firms is unaddressed at the moment. In supporting the idea of common competition policy at the WTO level, they

10 recommend that such a policy should compel member states to have and enforce competition policy on a non-discriminatory basis, that the competition agency should be independent, excluded exporters should have the right to sue in the excluding nation, that there should be convergence on principles and minimum standards of competition policy backed by cooperative links among competition authorities, strategic anti-competitive policy such as export cartels should be prohibited, there should be minimum standards for Research and Development Cooperation and that mergers should be governed b prodecural minimum standards.⁷¹

20 Roderick E Abbot, in support for a multilateral code, states ⁷² that there are instances where more than two competition authorities are investigating or dealing with the same competition issue and both assert decision making authority. He cites the example when Boeing Company wanted to merge with MacDonnell Douglas. This created a stir between both the US and the EU Competition authorities, to the extent that the issue had to be resolved at political level. There are to date no international rules (except in the case of the EU and the US Cooperation Agreement of 1991 which followed the Boeing saga) to resolve this problem, hence the need for a multilateral code.⁷³

⁷⁰ In Ehlermann & Laudati 1997 ed, 159.

⁷¹ Ibid.

⁷² In Ehlermann & Laudati 1997 ed, 167

⁷³ Ibid.

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⁷⁰ In Ehlermann & Laudati 1997 ed, 159.

⁷¹ Ibid.

⁷² In Ehlermann & Laudati 1997 ed, 167

⁷³ Ibid.

might result in a lowest common denominator, legitimating weak and ineffective rules; the WTO dispute resolution would be infeasible, inappropriate or – if it is limited to review of nations’ obligations to adopt and enforce anti-trust rules- ineffective because competition laws go beyond core WTO concerns, and competition law enforcement is fact-intensive and involves confidential information.’

10 Mr Klein submits also⁷⁵ that the WTO initiatives on trade and competition could undermine the ongoing cooperative efforts among competition authorities. The writer of this paper disagrees completely with Mr Klein’s submissions above, and believes that differences in competition laws and national objectives such laws seek to address are not unresolvable obstacles to the internationalization of competition law.⁷⁶

20 Negotiations can be done under the umbrella of the World Trade Organization in the same way all annex agreements to the General Agreement on Tariffs and Trade of 1994 were negotiated. Differences may largely come from developing countries and their concerns can be accommodated under the WTO Generalized System of Preferences or under exceptions. That internationalization is possible at the WTO level and that this task now enjoys preference at that level, is evident from Par 3 of the Doha Ministerial Declaration of 2001, which recognises that a multilateral framework could enhance the contribution of competition policy to international trade and development.

30 As far as the Singapore issues on competition policy are concerned, the rift seems to be between “developed and developed”⁷⁷ countries and developing countries. Developed countries, such as the EU (although the new members added this year cannot be classified as developed) submit that such policy should be

⁷⁵ Ibid.

⁷⁶ See the confirming submissions of Prof J H Bourgeois in Ehlermann & Laudati 1997ed, 175.

⁷⁷ Meaning that developed countries are in disagreement as to the nature and content of such multilateral policy, as shall be seen on the next page.

comprehensive and that the principle of non-discrimination should be applied in this area in a more robust manner, while prohibiting hard core cartels.⁷⁸ Other developed countries' (such as the USA, Canada and Japan) approach to a multilateral competition policy is that hard core cartels should not *per se* be prohibited but that the policy should be based on voluntary cooperation . On the other hand, developing countries are more interested in a type of competition policy that is flexible and that takes account of the countries' different levels of development.⁷⁹ It is submitted that harmonization of competition policy at both regional and multilateral levels is possible and that there are no unresolvable differences.

For example, the United Nations Set of Principles and Rules on Competition⁸⁰ provides in Part C for the Multilaterally agreed equitable principles for the control of restrictive business practices. These principles call for appropriate action to be taken in a mutually reinforcing manner at national, *regional*, and international levels to eliminate or to effectively deal with restrictive business practices, including those of transnational corporations adversely affecting international trade, particularly that of developing countries and the economic development of these countries.⁸¹ What is interesting in this document is its preferential and differential treatment for developing countries. It states that:⁸²

“In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and

⁷⁸ See the “Singapore issues: Investment, Competition, Policy, Transparency in Government Procurement and Trade Facilitation”, in the Doha Round Briefings Series, February 2003, Vol 1 No. 6 of 13, pages 1 – 4 (by the International Center for Trade and Sustainable Development and the International Institute for Sustainable Development). Hard core cartels are defined therein as anti-competitive agreements, anti-competitive concerted practices (horizontal and vertical agreements) or anti-competitive arrangements by competitors to fix prices, make rigged bids (collusive tendering), establish output restrictions on quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce. See page 4 of the “Singapore issues” document under this footnote.

⁷⁹ Ibid.

⁸⁰ Drafted by the United Nations Conference on Trade and Development, 2000.

⁸¹ See at page 11, par 2.

⁸² Page 12, par 7.

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⁷⁹ Ibid.

⁸⁰ Drafted by the United Nations Conference on Trade and Development, 2000.

⁸¹ See at page 11, par 2.

⁸² Page 12, par 7.

trade needs of developing countries, in particular, of the least developed countries, for the purpose of developing countries, in:

- 10
- (a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy; and
 - (b) Encouraging their economic development through regional or global arrangements among developing countries.”

It is submitted that if these principles would be ‘built-in provisions’ in the WTO multilateral agreement on competition, policy, internationalization of the subject would promote international trade to the advantage of all and would not undermine, but complement the ongoing cooperative efforts among competition authorities.⁸³

20 In one applies the ‘differences in objectives’ argument to SADC and SACU, the result would be different because the objectives of establishing both SADC and SACU bind member states and this should be interpreted to mean that they have already agreed on their common needs. Reference here can be made to Articles 5.1, 5(2)(a)(d) of the SADC Treaty and Article 2 of the SACU Agreement.

As seen above⁸⁴, Article 5.1 outlines the objectives of SADC, while article 5.2(a) specifically calls on member states to harmonise political and socio-economic policies and plans of Member States.

30 Article 5.2(d) of the SADC Treaty calls on Member States to develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States. Article 2(a) of the Final SACU Agreement also reiterates the obligation of members to facilitate the cross-border movement of goods between

⁸³ An alternative solution may lie in the Khemani and Schone submissions at page 23 above.

⁸⁴ At pages 10 – 12.

absence of international competition indeed leads to international inefficiencies, in the same way that a monopoly would cause to a domestic market.⁹⁰

According to Baldwin & Caves, if international competition meant more rival sellers in the relevant market than in a closed economy this would be welcome from a normative and an analytical point of view.⁹¹ A small economy's domestic procedures, in relation to the world economy, would become locked into pure competition, as opposed to being simply price takers. They assert that any international disturbance reflected in a change in a world price would cause domestic producers' output to adjust along their competitive supply curve representing optimal quantity responses to a parametric price change.⁹²

They supplement this approach with the following two assumptions:⁹³

- (1) transactions across national borders encounter large natural (transport, marketing) and/or artificial (tariffs and quotas, which aren't applicable to SADC/SACU) restrictions;
- (2) Buyer's tastes for attributes of differential goods are heterogeneous and might be nationally distinctive; a large fixed cost must be incurred to produce each differentiated variety of a product.

Assumption 1 (cited as A1) implies that trade restrictions and international transactions costs create a wide zone of insulation around the domestic price, which stretches from the delivered domestic price of importables down to the net price that can be realized from exports. Also, due to the trade restrictions imposed by either tariffs or other import duties, this tips the scale in favour of domestic producers, provided that there are enough of them at domestic level so as to keep the domestic cost and demand conditions as perfect as possible.⁹⁴

⁹⁰ Ibid.

⁹¹ Ibid 58.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

According to them ⁹⁵, import competition puts an upper bound on domestic price (which is the world price plus the domestic tariffs and transactions costs) and also limits monopoly rents from producers' domestic sales. On the other hand, export opportunities set a lower bound to domestic price (which consist of the world price minus foreign tariffs and transactions costs)⁹⁶. They conclude that before domestic producers can export profitably, the domestic equilibrium price might be determined in either of two ways: it might be locked by arbitrage to the lower bound net domestic price of exportables, or it might be set higher in the manner of the model of dumping.⁹⁷

With regard to assumption 2 (cited as A2), the incremental effect of international trade on welfare involves some combination of gains in utility to consumers from the opportunity to have more varieties to choose from at lower prices than would be the case in a typical scenario of domestic production where there may be a production of less varieties.⁹⁸

These two models show that international competition generally enhances allocative efficiency in that it reduces deadweight losses due to non-competitive behaviour of domestic sellers. The models also lead to the expectation of productive efficiency, which is the extent to which domestic producers produce in whatever quantities they can and sell these at the lowest attainable social cost.⁹⁹

The conclusions reached on the assumptions above were put to the test by Caves and Associates in 1992, who employed stochastic frontier production functions to estimate the gaps between average and best practice plant productivity in individual national manufacturing industries.¹⁰⁰ The research proceeded from the assumption that the plants or firms of one national industry employ a common

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid, 59.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid, 61.

technology or production function that determines the maximum output attainable for any given bundle of inputs.

The statistical estimation of the output-input relationship would produce an error term which is assumed to be the sum of the usual random component and some one-sided distribution of inefficiencies, or amounts by which a randomly drawn unit's efficiency might lie below the attainable frontier. One then obtains an estimate of both an industry's frontier production function and the average departure of its plants or firms from best practice efficiency.¹⁰¹

Caves and Associates applied this methodology to individual industries in the manufacturing sectors of six nations, testing in cross-section what structural factors influence differences among industry's efficiency levels in each country. Their result was that competition in general has the expected favourable effect on efficiency.¹⁰²

They found that in industries with few sellers, efficiency increases with competition in each of the countries, while it dropped in the least concentrated industries. Efficiency increased in each country where there was international competition, measured either directly by imports' share of the domestic market or inversely by the level of government protection.¹⁰³ This is clear proof that international competition supports productive efficiency and promotes allocative efficiency in both domestic and international markets.¹⁰⁴

As stated in chapter 2 above, SADC and SACU pursue the same objectives and, as shall be seen with the presentation of the EU Model (chapter 4), regional competition policy will be a successful initiative, both in terms of the effectiveness of the rules and enforcement. Opening up markets to toughest regional competition would indeed, if one considers the submissions from Baldwin and

¹⁰¹ Ibid, 62

¹⁰² Ibid.

¹⁰³ Ibid. They report also there that there is no conclusive evidence with regard to assumption 2.

¹⁰⁴ Ibid, 64.

Caves, lead to more productive and allocative efficiency in the market and this would naturally result in steady economic development of the region. This in turn would lead to the attainment of most of the objectives the region set itself.

Having concluded that Southern Africa (referring to both SADC and SACU)¹⁰⁵ is in need of a joint regional competition policy and that this is feasible and desirable, the next part shall discuss some of the models found in the world, namely the
10 European Union, the North Atlantic Trade Area and Mercosur. The object of such discussion is to select the best model or a combination of models that SADC/SACU should consider.

¹⁰⁵ SACU members are also members of SADC. Even if one were to design a regional competition policy for only SADC, this will inevitably bind SACU members as SADC members, hence the need to concentrate on both SADC and SACU.

CHAPTER 4

MODELS FROM OTHER REGIONAL MARKETS

4.1 The European Union

(a) Establishment

10

The idea of establishing a common market in Europe dates back to the signing of the 1951 Treaty of Paris, which established the European Coal and Steel Community.¹⁰⁶ Articles 1 and 2 of this Treaty outlined the objectives of the Community, which was ‘to contribute in harmony with the general economy of the Member States and through the establishment of a Common Market... to economic expansion, growth of employment and rising standard of living in the Member States’.¹⁰⁷

20

The duties of the institutions of the Community were to ‘promote the expansion and modernization of production and the rational uses of the raw materials available within the Community and to promote international trade in those products’. Import and export duties, quantitative restrictions on the movement of products, government subsidies and restrictive trade practices aimed at sharing or exploiting markets were since prohibited.¹⁰⁸

Building on this positive development, and having realized that the 1951 Treaty of Paris was narrow in that it only covered coal and steel products, the same

¹⁰⁶ Goyder D G 1998: 20

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

members¹⁰⁹ who negotiated this earlier treaty now sought for expansion. This resulted in the signing of two 1957 treaties, namely the European Economic Community Treaty (the EC Treaty) and the European Atomic Energy Treaty (the Euratom Treaty).¹¹⁰ Articles 85 and 86 (now renumbered by the Treaty of Amsterdam of 1997, to read 81 and 82 respectively, but with the same content) contained important principles of EU competition policy and shall be discussed below.

10

The Maastricht Treaty of February 7, 1992 established the European Union, a union based on the existing EC Treaties, a Common Foreign and Security Policy and the Fields of Justice and Home Affairs.¹¹¹ The European Economic Area (EEA) was established in 1994 by the then known as the EEA Agreement. The grand objective of the EC is to

20

‘promote a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it with the aim of establishing a barrier-free EC internal trade.’¹¹²

For the purposes of this dissertation, the EU’s prime objective is the free movement of goods and services between Member States. Any action by any Member State, or a company in the EU, which is likely to disrupt the free movement of goods and services is prohibited.

(b) The relations between EU Law and national laws of member states

EU Law, which consists of the EC Treaty, the ECSC Treaty and the EEA Agreement, is part of the law of national Member States and is directly enforceable

30

¹⁰⁹ France, Luxembourg, Germany, Italy, Netherlands, Belgium.

¹¹⁰ Goyder DG 1998: 20ff and Lennart Ritter, W David Braun, Francis Rowlinson *European Competitive Law; A Practitioner’s Guide*, second edition, page 3.

¹¹¹ Ibid.

¹¹² Article 14 of the EC Treaty.

in national courts.¹¹³ EU Law creates rights and obligations on national Member States and their subject EU Community is ‘self-executing’ in this regard.

With regard to competition policy, the Commission can apply Articles 81 and 82 of the EC Treaty. National courts can directly apply this as the basis for remedies in civil suits or actions for damages.¹¹⁴ Parties do not have a choice of opting in or out of the Community law. Articles 81 and 82 apply to all economic sectors, except
 10 agriculture, the special block exemptions, the coal and steel industry, which falls under the ECSC Treaty and the field of transport.¹¹⁵

Furthermore, all member states have their own competition policies, which are not necessarily identical, but compatible with Community law.¹¹⁶ Member states may however not discriminate on grounds of nationality when applying their competition law and the application of national law should complement the full uniform application of Community law.¹¹⁷ The application of one supranational competition policy in the EU, it is submitted, leads to harmonization of this law in
 20 all national states.

In terms of Article 86 of the EC Treaty and article 59 of the EEA Agreement, EU competition law applies also to firms owned wholly or partly by states insofar as such application does not obstruct ‘the performance in law or in fact, of the particular tasks assigned to them, and provided the development of trade is not affected to such an extent as would be contrary to the interests of the Community’.¹¹⁸ Government subsidies that are likely to distort competition in the market or that affect trade between member states are prohibited by articles 87 – 89 of the EC Treaty.

¹¹³ Ritter et al, 10

¹¹⁴ Ibid, 11.

¹¹⁵ Ibid, 12.

¹¹⁶ Ibid, 14.

¹¹⁷ Ibid.

¹¹⁸ Ritters et al, 768.

Articles 81 and 82 of the EC Treaty deal with competition policy in the EU. Article 81(1) prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- 10 (a) “directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”
- 20 Articles 81(2) renders agreements in violation of article 81 void. Article 81(3) contains exceptions to the rules in Article 81(1). This article exempts certain classes of agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the benefit, and which do not impose on the undertaking concerned restrictions which aren't indispensable to the attainment of these objectives (81(3)(a)), and which afford such undertakings the possibility of eliminating competition in respect of a substantial part of the product in question (81(3)(b)). Some categories of agreements may fall within block exemptions.
- 30 Article 82 on the other hand, prohibits abuse of dominant position by firms, and which affect trade between Member States. The following types of abuse are prohibited:
- (a) “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

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Other prohibited forms of abuses not directly covered by this article are, refusals to supply when it is economically feasible to do so, refusal of access to an essential facility, network or technology, predatory pricing, exclusionary dealing arrangements and discrimination on grounds of nationality.¹¹⁹

Dominant position is a,

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‘position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers are ultimately of the consumers. Such a position does not preclude some competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.’¹²⁰

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Dominance of a firm in a market is generally not proscribed, but it is the abuse of such position that has adverse effects on competition, which is subject to regulation.

¹¹⁹ Ritters et al, 377 – 399.

¹²⁰ As defined in the Hoffmann-La Roche judgment ECJ 1979, in Ritters et al, page 331.

Mergers in the EU are subject to scrutiny in terms of the Merger Control Regulation 4064/89 as amended by Regulation 1310/97. These regulations' prime purpose to is complement articles 83 and 308 of the EC Treaty. Mergers must first be notified to the Commission which must first determine whether the transaction will create or strengthen a dominant position that would significantly prevent effective competition or distort competition in the Common Market.¹²¹

10 4.2 THE COMMON MARKET OF THE SOUTHERN CONE (MERCOSUR)

(a) Establishment

The Common Market of the Southern Cone, known as Mercosur, was established by the signing of the Treaty of Asuncion by Argentina, Brazil, Paraguay and Uruguay in 1991.¹²² The main objective for the establishment of Mercosur was the integration of the markets of all member states into one common market characterized by the free circulation of goods and services and the elimination of custom rights and non-tariff restrictions, the establishment of a common external tariff and the adoption of a common commercial policy, the coordination of macro-economic and sectoral policies between State Parties of foreign trade, agricultural, industrial, fiscal, monetary exchange, capitals services, customs, transportations and communications. State parties commit themselves to the harmonization of their laws in order to strengthen the integration process.¹²³

Although the main objective is to create a common market by 2006. the area has been operating as a customs union since 1995. The Treaty of Asuncion has been strengthened by the Protocol of Ouro Preto of 1994, which added an institutional structure to the whole agreement, as influenced by the European Model.

¹²¹ Ritters et a; 415 - 416

¹²² See the Treaty of Asuncion of March 3, 1991, at www.itcilo.it/english/actrac/telearn/global/ilo/blokit/mercoa/htm

¹²³ Article 1

The difference between Mercosur and the EU model is that Mercosur rejects the notion of supranationality of or autonomous (supranational) central institutions. Thus Mercosur functions on the basis of a 100% intergovernmental structure. This rejection makes the whole arrangement weaker because member states, apart from the laxity of enforcing the rules, they may interpret them differently, thus breaking the pattern of harmonization which is a concomitant to successful integration of markets.

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(b) Mercosur Competition Law

With regard to competition law, Mercosur drafted a Protocol for the Defense of Competition in 1996, of which the purpose, as the name indicates is the defense of competition in the framework of the Mercosur.¹²⁴ If this Protocol is implemented, it will compel all member states to have autonomous competition agencies in the future; that the national law will cover the whole economy, and that member countries will share a common view about the interplay between competition policy and other governmental actions. This Protocol does not create supranational
 20 organs and leaves the effectiveness of regional competition law to the enforcement power of the national agencies and the cooperation within the region.¹²⁵

In a nutshell, Chapter II of the Protocol proscribes all forms of restrictive business practices (which are defined in a more or less similar way to the EU article 81 and 82). Chapter III, article 7 obliges State parties to adopt within two years, for the purpose of their incorporation in the regulations of Mercosur, common rules for the control of acts and contracts which could limit or prejudice free trade or which result in the domination of the regional market of goods and services, including those actions which create an economic concentration, in order to prevent their
 30 possible anti-competitive effects in the framework of Mercosur.

¹²⁴ Article 1

¹²⁵ See www.sice.oas.org/tunit/STUDIES/COMPET/m-comple.asp.

Article 8 vests the Trade Commission (TC) of the Mercosur and the Committee for the Defense of Competition (CDC) with powers to oversee the application of the Protocol. While the TC has adjudicative functions, the CDC evaluates and investigates cases.

(c) Problems

- 10 As reported by the Organization of American States (OAS)¹²⁶ and by a prominent South American scholar, Jose Tavares de Araujo Jr¹²⁷, Mercosur competition law is far from being perfect and needs an urgent revamp. The problem comes from the fact that some member states, like Paraguay, do not have competition laws, and those who have, enforce them rather weakly. This is aggravated by inconsistent actions from government. Firms looking to monopolistic profits and easy capture of export markets prefer these locations.¹²⁸

- 20 The Protocol for the Defense Competition in Mercosur is not yet fully applicable as it awaits congressional approval by each member country to be enforceable as national law.¹²⁹ Due to the fact that national agencies, the TC and the CDC are operating independently from each other in their judgments and can overrule each other, the process of defining Mercosur dimension of each case may be cumbersome. Each may apply a different criterion on resolve an issue.¹³⁰ This, it is submitted, leaves room for political interference and undermines the consistency and uniformity of the law.

Another problem is the lack of supranational governance in Mercosur, which is opposed by the larger members of Mersocur, who by now have stalled or rejected initiatives in this direction. For example, the arbitration mechanism in Mercosur is

¹²⁶ www.sice.oas.org/tunit/STUDIES/COMPET/m-comp2e.asp

¹²⁷ In his paper on “The Harmonization of Competition Policies Among Mercosur countries” 1997, OAS

¹²⁸ Jose Tavares de Araujo, *ibid*, 1997: 4

¹²⁹ Jose Tavares de Araujo, 1997: 5

¹³⁰ Jose Tavares de Araujo, 1997: 7

based on the 1994 Protocol of Brasilia, which does not lead to an easily binding mechanism for solving disputes, at times even necessitating the intervention of the Presidents of the four countries to solve (trade) disputes of a technical character. It is submitted that Mercosur has a competition policy in place, but this cannot be enforced.

4.3 North American Free Trade Agreement (NAFTA) of 1994¹³¹

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(a) Establishment

The USA, Canada and Mexico entered into this trade agreement in 1994, which established a free trade area among these nations. The purpose of the Agreement was to:¹³²

- (a) “eliminate barriers to trade in, and facilitate the cross-border movement of goods and services between the territories of the parties;
- (b) promote conditions of fair competition in the free trade area;
- 20 (c) increase investment opportunities in their territories;
- (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party’s territory;
- (e) create effective procedures for the implementation and application of this Agreement, and for its joint administration and resolution of disputes;
- (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.”

Article 105 of this Agreement obliges all members to ensure that all necessary measures are taken in order to give effect to the provisions of the Agreement, including their observance by state and provincial governments.

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¹³¹ See Ralph. H Folsom and W Davis Folsom *NAFTA Law and Business*, 1999ed (Kluwer Law International for good background to NAFTA.

¹³² Article 102.7 of NAFTA

(a) North American Free Trade Area Competition Law

Article 1501(1) of North American Free Trade Agreement of 194 (the Agreement) compels members to adopt measures aimed at proscribing anti-competitive business conduct and also to regularly consult each other on the effectiveness of measures so undertaken. This is a good arrangement because parties would then be allowed to check on each other and to exchange information in this regard. This
 10 promotes the uniformity of competition laws of these states.

Members are also obliged to cooperate on issues of competition law enforcement policy and such cooperation includes mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition law in the free trade area.¹³³ Article 1501(3) of the NAFTA Agreement states that no party may have recourse to dispute settlement for any matter relating to this part.

Article 1502 of the NAFTA Agreement states that parties may designate a
 20 monopoly, provided that such party gives prior written notice to others who may be affected, and that such party ensures that the monopoly will operate under conditions, which will either, minimize or eliminate any nullification or impairment of benefits under this agreement. It is an obligation of each party introducing the monopoly to see to it that such monopoly complies with such parties' obligations under this Agreement and that it conducts its operations on a non-discriminatory basis.¹³⁴

Article 1503 allows the maintenance of state enterprises by member states, provided that members observe conditions set out in article 1503 (2 and 3), these
 30 being more or less similar to monopolies under article 1502. Finally, article 1504 calls for the establishment of Working Group on Trade and Competition, which is

¹³³ Article 1501(2) of the NAFTA Agreement.

¹³⁴ See Article 1502(3) of the NAFTA Agreement.

composed of representatives of each country. The task of this Group is to report and to make recommendations to the Commission within five years after the date of entry into force of the Agreement on relevant issues concerning the relationship between competition laws and policies and trade within the free trade area. This Working Group has been comparing competition laws of NAFTA countries to note differences and to investigate potential effects of such differences to trade within NAFTA.¹³⁵

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4. UNCTAD Model Law on Competition¹³⁶ and the United Nations Set of Principles and Rules on Competition of 1980.¹³⁷

Both the Model Law and the Set of Principles and Rules on Competition are efforts to reach world consensus on multilateral competition policy and are as such not finding instruments but mere guides. The objectives of the Set of Principles and Rules are:

- (1) “To ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries;
- (2) To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through:
- (a) The creation, encouragement and protection of competition;
 - (b) Control of the concentration of capital and/or economic power;
 - (c) Encouragement of innovation.

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¹³⁵ See www.sice.oas.org/trade/nafta/reports/compe-e.asp

¹³⁶ Draft Commentaries to possible elements for articles of a Model law or laws, by the UNCTAD Series on Issues in Competition law and Policy, 2000.

¹³⁷ These are known as the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices which were adopted by UN General Assembly by Resolution 35/63 of December 5, 1980

- (3) To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;
- (4) To eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries; and
- 10 (5) To provide a Set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices for adoption at international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels.”

Part C of the UNCTAD Model Law calls on states to take action to eliminate or effectively deal with restrictive business practices. It also calls for collaboration of governments to facilitate control of restrictive business practices and for information exchanged and dissemination and consultation with regard to policy issues relating to control of restrictive business practices.¹³⁸

- 20 Part D of the UNCTAD Model Law contains principles and rules for enterprises including transnational corporations and calls on them to conform to the law proscribing anti-competitive business practices and to consult and cooperate with competent authorities in this regard.¹³⁹ Enterprises are specifically prohibited, when dealing with each other, from price fixing agreements, collusive tendering, market or customer allocation arrangements, allocation by quota as to sales and production, collective action to enforce arrangements such as concerted practices, concerted refusals to supply potential importers, and collective denial of access to essential facilities.¹⁴⁰ Par 4 of the same part (of the Model Law) deals with abuse of dominant position and mergers and acquisitions.

¹³⁸ See The Set of Multilaterally Agreed Equitable Principles and Rules (The Set) 11, paras 1-3.

¹³⁹ See par 2, page 13 of the Set, *supra*

¹⁴⁰ Par 3, 13 of the Set, *supra*

Part E of the Model Law contains very important principles applicable to states at national, regional and subregional levels. It calls on states at national and regional levels to adopt, improve and effectively enforce appropriate legislation to implement judicial and administrative procedures for the control of restrictive business practices, including those of transnational corporations. Such legislation should be based on the principle of eliminating or effectively dealing with restrictive business practices.¹⁴¹

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States are also to promote exchange of information at regional and sub-regional levels and to share their experience and technical advice in this regard.¹⁴² At international level, the Principles calls for collaboration between states to regulate competition and for action aimed at achieving common approaches in national policies relating to restrictive business practices compatible with the Set of Principles and Rules and for consultations between the states.¹⁴³

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The UNCTAD Model Law on Competition contains possible elements to be covered by the articles. For example, part from the possible title of the law, article 1 would cover objectives of the law, which is to control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power which limit access to markets or otherwise unduly restrain competition, adversely affecting international trade or economic development. Article 2 of the Model Law would then contain definitions and scope of application, in that it applies to all enterprises, except those under State control or acts of sovereign states.¹⁴⁴

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The possible elements of Article 3 would be the list of prohibited restrictive agreements or arrangements such as collusive tendering, concerted refusals to purchase or supply and collective denials of essential facilities.¹⁴⁵ Par II of Article 3 of the Model Law contains exemptions or authorized conduct and this is to be

¹⁴¹ Paras 1 & 2, 15 of the Set, supra.

¹⁴² Paras 4 – 9, 16 of the Set, supra.

¹⁴³ See Part F, 16-17 of the Set, supra.

¹⁴⁴ See article 2, Pa II(c) of the Set, supra.

¹⁴⁵ Article 3, Par 1

granted when competition officials conclude that the agreement as a whole will produce net public benefit. Other parts of the Model Law cover abuse of dominant position¹⁴⁶, merger regulation and investigation procedures¹⁴⁷, consumer protection¹⁴⁸ the establishment of the administering authority and its powers and functions¹⁴⁹, sanctions and relief for violations of the law¹⁵⁰, appeals¹⁵¹ and actions for damages¹⁵².

- 10 An analysis of all the above-discussed models of competition law shall follow in my conclusion which shall select the best model for Southern Africa.

¹⁴⁶ Article 4.

¹⁴⁷ Article 5.

¹⁴⁸ Article 6.

¹⁴⁹ Articles 8 and 9

¹⁵⁰ Article 10

¹⁵¹ Article 11

¹⁵² Article 12.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Analysis of other Models of Competition

10 This research has highlighted the importance of the discipline competition law to SADC and SACU and concludes that a move towards regionalization of the discipline is a feasible project. This last part of the research revisits the approaches in the EU, NAFTA and Mercosur discussed in Chapter 4, and ends with a recommendation to what this writer believes to be the correct approach that the region should adopt. It was already mentioned that SADC/SACU do not have differences in national objectives.

20 The idea of a common competition law at Mercosur level would have been a success if it was organized in such a way to limit state interference in the process and if it was backed by the independent institutions, in other words, if it was supranational, as in the case of the EU. Another notable problem is the fact that the enforcement of the law is left entirely to the ‘goodwill’ of national authorities. This does not guarantee that such law will be enforced effectively and in a uniform manner, if it will at all be enforced. This is exacerbated by the many enforcement agencies, which have powers to overrule each other, a situation that at best would lead to anarchy. SADC and SACU would not learn much from this example, apart from the initiative to have such a law. For successful harmonization, Southern Africa needs to have one competition commission.

30 NAFTA law of competition is impressive to the extent that it sets out basic principles of competition, which members have to adhere to, and calls for cooperation, and consultation between member states with regard to competition issues. There is a Working Group on competition whose task can be said to be the forging of harmonization between the member states competition legislation.

However, allowing monopolies may create problems within the NAFTA market. State trading enterprises are a better option in providing for whatever unique needs of national states, but the same cannot be said about monopolies.

The EU competition law is by far the best model to both SADC and SACU in the sense that it is supranational and is enforced by a supranational institution. Due to the fact that the Model laws deals inadequately with the interest of developing countries under the exemptions, it is suggested that Southern Africa should combine the best provisions of EU on the competition policy, the Model Law and incorporate those of the UN Set of Multilaterally Agreed Equitable Principles and Rules because these contains provisions for preferential or differential treatment for developing countries.

With regard to the observance of the WTO obligations in the regionalization of SADC/SACU competition, the following remarks are worth nothing. The WTO is a global organization that deals with the rules of fair trade between its member states. The main goal of the WTO is to achieve trade liberalization and market access among its members on a non-discriminatory basis through the application of the MFN¹⁵³ and national treatment rules¹⁵⁴. The underlying reason why regional markets are not seen as impediments to these general objectives of the WTO are because such markets, if they meet the requirements set out in Article 24 of GATT 1994, promote the overall objectives of the WTO. Those requirements are that the object of such agreements should be to eliminate trade barriers and to liberalize trade among members and that the establishment of such regional blocks should not impose more obligations on non-member countries.

It is submitted therefore that regional competition law, crafted in such a way as to observe all WTO obligations, will promote the general objectives underpinning the

¹⁵³ Which stands for “the most-favoured-nation-rule” contained in Article 1 of the General Agreement on Tariffs and Trade (GATT) of 1994 on which the WTO is based. MFN means that countries are to treat all other countries products at import in the same way, extending the same privileges or favours to all imported products. There should be no discrimination.

¹⁵⁴ These rules contained in Article 3 of GATT 1994 prohibits “inland” discrimination against imported products in the country of import and mandates that such products be accorded the same treatment like the domestically produced products.

WTO system without compromising the development interests of Southern Africa. Thus, regional competition law that is WTO compatible should be a welcome move. The object of a multilateral competition law should be the prevention of anti-competitive conduct that restricts international trade, as submitted by Prof Bourgeois.¹⁵⁵

5.2 A recommended approach to SADC/SACU Competition Law

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Prof U Immenga¹⁵⁶ identified four categories of competition policy that he believes will aid in the identification of the importance and degree of obstacles, which must be taken into account when internationalization of competition policy is considered. Before listing these categories, it is submitted that they are indeed relevant to SADC/SACU.

They are:

- (1) differences in competition policy in a strict sense;
- (2) differences resulting from political influences on competition policy;
- 20 (3) different forms of national enforcement of competition policy; and
- (4) differences resulting from viewing in specific national contexts with different cultures and traditions.

Briefly explained before considering their relevance to SADC and SACU, differences in competition policy in a strict sense is self-explanatory in that it is aimed at determining the actual differences in the competition laws of states

¹⁵⁵ Supra, 173-178

¹⁵⁶ In Ehlermann & Laudati 1998ed, Working Paper VI, page 179

wishing to harmonize their laws. With regard to differences resulting from political influences on competition policy, one has to determine the role or the extent to which politics in a given country play a role on the nature of competition law in such country. In this regard, and as an example, Prof Immenga mentions the fact that national competition authorities are inclined to allow mergers that might create national champions considered to be ahead in international competition and so to keep workers in their jobs.¹⁵⁷

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The different forms of national enforcement have to do with both the extent to which substantive rules on competition are enforced and the discretion they apply. In other words, how they interpret the rules in the context of their current economic order and, as submitted, the type of precedent they create in this regard is important to consider in the context of harmonization of competition laws.¹⁵⁸ Category four above has to do with placing law in its social context. It is about value judgements that often accompany the interpretation and application of the law.¹⁵⁹ I shall now use the same criteria to assess the situation in SADC/SACU.

20 (1) Differences in competition policy

As seen in a previous chapter, competition policies in Southern African states studied above are similar in many respects. They have the same objective of proscribing anti-competitive practices and promoting efficient and effective competition as a tool towards economic development, and that of empowering the previously disadvantaged persons, at least in the case of South Africa and Namibia, which are young democracies. Similarities of these policies make it easier to merge them, taken that such effort would consider refining and harmonizing their socio-political objectives to reflect the interests of all member states.

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¹⁵⁷ Ibid, 180.

¹⁵⁸ Ibid, 181 - 182

¹⁵⁹ Ibid, 184.

(2) Differences resulting from political influences on competition policy

Political influences play a minimal role, if any, in SADC/SACU competition policy and is as such not a barrier to regionalization effort. One can refer to the common objectives of SADC and SACU member states to confirm the fact that there are little and resolvable differences resulting from political influences on competition policy in the region.

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(3) Different forms of national enforcement of competition policy

At least, all the countries studied in Southern Africa have competent institutions to enforce their competition laws and the nature of such enforcement largely depends on the contextual interpretation of their respective laws. Different forms of national enforcement of competition policy would not hamper regionalization efforts at SADC/SACU levels, if one were to learn from the EU and the UNCTAD Model Law on competition. In other words, if competition policy is regionalised, there would be one law that is supranational in nature and that is directly applicable in national states. Such law would then be supported by an institution, be it a tribunal or a commission, which shall be tasked with interpreting the law and lending support to national courts in cases of doubt. This will promote uniformity and certainty of the law because it will be uniformly interpreted.

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(4) Differences resulting from viewing in specific national contexts with different cultures and traditions.

Culture and tradition may be a relevant factor to constitutional interpretation, than it would be to trade and development, which tends to assume a more universal character. Besides, if SADC and SACU's prime objective is to integrate economies of their members in order to reduce poverty, and if one considers the strikingly similar historical and cultural backgrounds shared by the peoples of Southern Africa, it is an inevitable conclusion that differences in cultures and traditions are not an impediment to regionalization efforts of competition policy in Southern Africa.

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5.3 Conclusion

This study endeavoured to prove a case for regionalization of competition policy in Southern Africa. It is submitted that it is only through regionalization of competition policy that Southern Africa will realize most, if not all, her goals. It is beyond doubt that a uniform law had more advantages than different laws of national states, at least from a trade policy perspective. It is in this light that it is strongly recommended to Southern Africa to study the EU Model and the
10 UNCTAD Model law with passion, in order to craft a law suitable to the region.

As far as a multilateral competition policy at WTO-level is concerned, the study submits that such an agreement can be reached on the same basis as the existing ones. What needs to be worked out is the content of such agreement.

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