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THESIS

**Competition Policy Enforcement – Ideas for Regional Enforcement in
Developing Countries, with particular reference to the Southern African
Customs Union.**

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1. Introduction.

The Singapore meeting of World Trade Organisation (WTO) ministers identified competition policies one of four areas that might be well suited for the development of multilateral disciplines to promote greater market access in the world trading system.

In the debate about a multilateral framework for competition policy considerable time, effort and writings are devoted to the questions of *why* it is necessary to have a multilateral framework for competition law and policy and *what* rules such a multilateral framework should contain.¹ Less time and effort are devoted to *how* such a multilateral framework could be enforced, especially in developing and least developed countries. Often the debate on *why* and *what* is influenced by a constrained view of *how* these rules could be enforced. This thesis contributes some thoughts on how enforcement of competition law could be implemented in the context of developing and least developed countries with specific focus on the Southern African region.

It is hoped that such a contribution may lead to ideas how to overcome obstacles to the implementation of competition law enforcement mechanisms in developing and least developed countries. If so, it may also contribute to the debate on a multilateral framework for competition law.

The thoughts developed in this thesis would be applicable even in the absence of a multilateral framework for competition policy being agreed to by the World Trade Organisation. It is also valid for the implementation of competition policy and law in the Southern Africa region in the absence of a multilateral framework for competition policy. Although the thesis considers the establishment of a regional competition authority in the Southern African Customs Union (SACU)², the same reasoning may hold true for other regions of developing and least developed countries.

¹ For an excellent summary and commentary to the current state of the deliberations at the World Trade Organisation see J.L. Clarke and S.J. Evenett 'A Multilateral Framework for Competition Policy?' in S.J. Evenett, et al., eds., *The Singapore Issues and the World Trading System: The Road to Cancun and Beyond* (Bern, seco 2003) at pp. 77-168.

² The Southern African Customs Union, the oldest customs union in the world, consists of Botswana, Lesotho, Namibia, South Africa and Swaziland. These countries also belong to the fourteen countries that form the Southern African Development Community.

The thesis first examines the arguments for the enactment of competition law. The reasons explored below to enact competition law and provide for enforcement are convincing. In the light thereof the obstacles and costs involved in enforcement of competition policy are assessed. Particular reference is made to the experience of South Africa.³

After the discussion of obstacles and costs the thesis considers existing regional models of competition law enforcement. From these and in the light of the particular circumstances of the Southern African region some thoughts on the enforcement of competition law in SACU are suggested.

2. Competition policy and competition law.

2.1 Competition policy and competition law distinguished.

Competition policy and law are often used interchangeably. There is however a clear distinction as competition law has a more narrow meaning than competition policy. This thesis is concerned with the enforcement and implementation of competition law.

Competition policy in a country refers to all the measures employed in a country to influence all practices by private and public actors that impacts on the extent of competition in markets. A government uses various instruments that affect trade barriers, barriers to foreign direct investment, the issuing of licensing requirements and the competition in markets in general. Competition policy is the collective application or non-application of the available measures by the government to influence the extent of competition in its markets.

One of the instruments available to the government is the enactment of rules that will govern the competitive rivalry of private firms in the market. These rules reflect the competition law of the country.⁴

³ South Africa is chosen for different reasons. South Africa established a new competition authority in 1999 and thus gives a good indication of the issues, obstacles and costs involved in establishing a new competition authority. Secondly, South Africa is by far the most powerful economy in the Southern African Economic Developing Community and it is natural to assume that it would play a leading role with a more advanced competition policy, thirdly the South Africa competition authority made useful information available and lastly because the writer is familiar with the South African situation. The last reason is however enough to caution the reader to be critical to the extent that the writer may make a contribution that draws too heavily on the South African example.

⁴ For a distinction between competition law and policy see Clarke and Evenett, loc. cit. n. 1, at pp. 83-84.

2.2. Enforcement of competition law.

Although the enforcement of law is done through the normal channels of law enforcement such as the police and judiciary, the enforcement of competition rules require special skills in understanding the effect of competition law and in analysing the actions of firms to determine whether their action conform to the rules of competition law. The accepted practice throughout the world is the enforcement of competition law through a specialized branch or office of the law enforcement agencies or an enforcement authority specifically created for that purpose. Although some jurisdictions also allow the private enforcement of competition law such private enforcement is overshadowed by public enforcement.⁵

The enforcement of competition law requires personnel skilled in economics and law. The availability of money is not enough to ensure effective enforcement of competition law; the most important aspect is the necessity to have enough skilled personnel in the whole enforcement system to do the necessary investigations and analysis and to be available in the courts or bodies where competition matters will be adjudicated. In this regard South Africa followed an interesting strategy by creating an independent competition authority, an independent competition tribunal and a dedicated court of appeal for competition matters.⁶ In this way a smaller pool of experienced personnel have a more effective impact on the enforcement of competition law. The South African experience raises the question whether more effective cooperation on a regional basis between countries such as South Africa, Namibia, Lesotho, Botswana and Swaziland can use a smaller pool of resources to make an effective impact on competition in the SACU region.

⁵ A. Ogus, *Regulation. Legal Form and economic Theory* (Oxford, Clarendon Press 1994) at p. 23.

⁶ For an overview and a review of the South African competition law and enforcement see OECD *Competition Law and Policy in South Africa* OECD Global Forum on Competition Peer Review: Paris 1 February 2003 at p. 29, see <http://www.comptrib.co.za/Publications/South%20Africa%20Peer%20Review.PDF> last visited on 23 September 2003.

3. Competition law enforcement: Should developing countries bother?

3.1 Introduction.

Before embarking on a discussion about a regional competition enforcement body for developing and least developed countries it is necessary to determine whether these countries should care about competition law at all. This section discusses the reasons for the implementation of competition law with particular reference to developing countries.

Competition law regulates the actions by private firms in the economy of a country. The justification for interfering with the actions of private firms through competition law is found in the economic literature.

The arguments in favour of competition law are both political and economical. The main political reason is that concentrated power, whether public power or private power, is less desirable than power that is decentralized and dispersed. Such political considerations played an important role in the first anti-trust legislation in the United States.⁷ The economic justification of competition law however gained over political justification through the last century. The economic justification evolved from arguments for the efficient allocation of resources (also referred to as the static effect or argument)⁸ to include views that competition law produces beneficial effects for innovation, technical progress and development over time (the dynamic argument).⁹

3.2 Efficient allocation of resources.

Since the 1960's the economic justification for competition law centered on the benefits of perfect competition. Perfect competition exists when the number of firms selling a homogeneous product is so large and the share of the market of each individual firm is so small that no firm is able to influence the price of the product by varying the amount of product that it sells.

⁷ See the discussion of the goals of antitrust in the first cases under the Sherman Act in H. First, 'Antitrust's Goals: Theories of Antitrust in the United States and Japan', in C.A. Jones, et al., eds., *Competition Policy in the Global Trading System. Perspectives from the EU, Japan and the USA*. (The Hague, Kluwer 2002) p. 175 at p. 177.

⁸ See 3.2 *infra* for an explanation of static efficiency.

⁹ See 3.3 *infra* for an explanation of dynamic efficiency. See also First, loc. cit. n. 7, at pp. 181-185 and Clarke and Evenett, loc. cit. n. 1, at p. 82.

Each firm will produce up to the point where the price paid by the consumer for the last unit produced equals the cost to the firm of producing the last unit.¹⁰ What is most significant about this equilibrium point in perfect competition is that it represents the most efficient use of resources of a country, absent any externalities.¹¹ There is thus no other combination of resources used in the production of the product that will give a more efficient outcome in producing and selling this specific product. The marginal social benefit and the marginal social cost of producing the product are equal.

When these conditions prevail in an economy the maximum output relative to the input costs is achieved. It is obvious that such a point is most advantageous for an economy.

Whereas perfect competition defines the desirable outcome, the antithesis of perfect competition is the perfect monopoly. A monopoly exists when there is only one firm producing a specific product. As such the firm can control the quantity that is produced and the price to sell it at. The monopolist can sell at a price greater than the marginal cost of producing the relevant quantity of products. In the process the monopolist would sell fewer products than would be the case in perfect competition. As the monopolist raises prices above marginal costs (the price that would prevail in perfect competition) the number of consumers falls. The remaining consumers pay more for the same good, which makes them worse off. Furthermore, some consumers no longer buy the product and thereby forego the benefit of voluntary exchange. This leads to the so-called dead weight loss and leads to an inefficient allocation of resources.

There is also the loss associated with a firm that is not subjected to the rigours of competition and the constant drive to produce the maximum output with the minimum input that is part of competition. The dulling of the firm's

¹⁰ In economic theory it is referred to as the marginal revenue of production being equal to the marginal cost of production.

¹¹ An externality is an effect of producing the product in question that is not reflected in the cost of production and is thus not reflected in the price. An example of a negative externality would be the air pollution that results from manufacturing a product. The cost of cleaning up the air is not reflected in the price of production and the product is thus sold more cheaply than its real cost to society. As a result more of the product is produced than is desirable. An externality can be also positive. The result would be that the amount of the product produced would be less than the social optimum.

incentive to minimize its cost of production leads to inefficiency in the production.

In practice there are a wide variety of situations and practices that range between perfect competition and monopoly power. Competition law strives to ensure an economy that functions as close as possible to the desired point of efficiency in the allocation of resources to achieve the best economic outcome for a specific country.

3.3 Beneficial effects for innovation, technical progress and development.

The view that the effective allocation of resources is the main motivation for competition law is not without criticism. More recently the benefit of competition for innovation is seen as a separate important goal of competition law.¹² This view has been present for a long time,¹³ but became more prominent in the United States as the growth of high technology industries became more important to the United States economy.¹⁴ This view holds that even more important than the efficient allocation of resources is the welfare that results from new innovations.¹⁵

Competition law ensures an environment of competition between firms. This competition encourages firms to innovate in order to be more competitive or to get an advantage above its competitors. This innovation may be in the form of new and better products or better ways of managing the businesses or a more innovative way of marketing or understanding the market. The products from

¹² For a comprehensive review of the relevant arguments see S.J. Evenett, 'Study on Issues Relating to Possible Multilateral Framework on Competition Policy' *World Trade Organisation Study Document* (2003) WT/WGTCP/W/228 para 48 – 94 and para 140 – 147.

¹³ In *United States v Aluminum Co. of America*, 148 F 2d 416, 427 (2d Cir 1945) it was said: "Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone." Although this does not refer specifically to the process of product innovation, it implicitly refers to innovation of all kinds being it product innovation or innovation in business management.

¹⁴ First, loc. cit. n. 7, at p. 182.

¹⁵ For a review of the recent research on the dynamic effect of competition see D.B. Audretsch; W.J. Baumol and A.E. Burke, 'Competition policy in dynamic markets', *International Journal of Industrial Organization*, Vol. 19 (2001) at pp. 613 - 634. See also the discussion on the enforcement of competition in network economies by R. Posner, 'Antitrust in the New Economy', *Antitrust Law Journal* (2001) pp. 925 - 941.

innovation allow for more output with the same or even less input and lead to greater welfare. The enforcement of competition law today thus leads to the development of better products that will be used in the future; therefore it is called the dynamic effect.

Another argument that stresses the dynamic effect is the role that competition law plays in growth and development of a country. The relationship between competition law and growth and development is not yet at all that clear. However, where competition law is enforced to allow innovative firms to enter the market or to allow for the incumbent firms to be innovative there is support for the theory that optimum competition promotes development and growth.¹⁶

3.4 Competition law for developing countries.

Although the above arguments are important justifications for the enforcement of competition law in general it is still necessary to make a case why developing countries in particular need or will benefit from competition laws.

Even though developing countries may have a lack of experience in competition policy and law, and even though developing countries “have come this far” without competition law there are convincing reasons for developing countries to enact and enforce competition law.¹⁷

This need follows from the vast structural changes that took place in the economies of developing countries through privatisation, deregulation and the increasing trade liberalisation through integration into the world economy.

As already explained competition law regulates actions by private firms in the economy of a country. On the other hand trade liberalisation as promoted through multilateral agreements such as the World Trade Organisation or regional trade agreements regulates government action. There is a very real danger that the trade liberalisation brought about by government action will not lead to the economic welfare envisaged in countries because the effect

¹⁶ If both development and growth is seen in terms of an increased welfare then it concurs with the aim of trade liberalisation which has as its principle motivation enhancing welfare. This asks however that the analysis accompanying the enforcement of competition law to focus on welfare enhancement and not just on perfect competition in a static sense. For developments in this regard see Audretsch *et al*, loc. cit n. 15, at p. 626 and also Evenett, loc. cit. n .12, at para 80 – 94.

¹⁷ A. Singh, ‘Competition and competition policy in emerging markets: International and development dimensions,’ (G-24 Discussion Paper Series, Paper No. 18, United Nations 2002) at p. 8.

thereof is diminished by the actions of private firms that through anti-competitive behaviour erode the benefits of trade liberalisation.

3.4.1 Private power replacing public power.

Many of the firms that are privatised in developing countries are natural monopolies¹⁸ and it is important to have the necessary framework of regulations and competition policy, including competition law, to ensure improved economic performance. Without such a framework it would only lead to the substitution of public sector monopolies for private sector monopolies. Private monopolies do not have the political constraint of public monopolies to enhance welfare, and therefore moving from a public to a private monopoly might reduce social welfare. It is thus not merely who owns the firm that determines better performance, but a more important role in better performance is played by the external environment including the competition environment.¹⁹

3.4.2 International mergers.²⁰

The cross-border international mergers of the last decade reshaped the structure of the world economy.²¹ Where a multinational firm merges with a domestic firm in a developing country it may lead to large multinational firms with considerable market power²² and the potential of abuse of their dominant position.²³ It would be a miscalculation to assume that developing countries

¹⁸ A firm is a natural monopoly where the structure of the market only supports one firm. This happens where there are high costs of entry and the average total cost per unit produced keeps on falling. The incumbent firm thus has an absolute first mover advantage and other firms do not enter the market. An example would be a provider of electricity.

¹⁹ For the experience of privatisation in the United Kingdom and a review of the literature on the subject see M. Pollit, 'A survey of the Liberalisation of Public Enterprises in the UK since 1979' (DAE Working Paper, No. 9901, Department of Applied Economics, University of Cambridge, 1999) found at <http://www.econ.cam.ac.uk/dae/repec/cam/pdf/wp9901.pdf>, website last visited 24 September 2003.

²⁰ For a general discussion on the effect of international mergers on developing countries see Singh, loc. cit. n. 17, at pp. 9 – 15.

²¹ For the reasons of this wave of mergers and a short historical perspective see Singh, loc. cit. n. 17, at pp. 9 – 12.

²² Market power is the ability that a firm has to act relatively independently of its competitors or it is also described as the ability to consistently charge a price for its products above the marginal cost of production of the product.

²³ Abuse of dominance refers to anti-competitive practices by the dominant firm in a market that restricts competition. It includes charging of excessive prices; refusal to give a competitors access to an essential facility; engaging in an exclusionary acts such as requiring or inducing a supplier or customer to not deal with a competitor; refusing to supply scarce goods to a competitor when supplying those

would not be affected by the merger activity of international firms outside the borders of the developing country. Such mergers can still have important implications for developing countries.

3.4.3 Cartel behaviour.

The abuse of dominant position of single firms with market power is not the only reason for competition law enforcement in developing countries. Two or more firms working together as a cartel²⁴ can emulate the dominant position of a single firm. The extent of the damage that cartels can inflict on economies of developed and developing countries are significant. The extent of this damage is estimated to be in the billions of dollars for consumers of developing countries. Private international cartels are found to have raised prices by between 15 and 40 percent.²⁵

A study on a single international cartel in the vitamins industry that lasted for ten years found that in jurisdictions in Asia, Latin America and Western Europe with active cartel enforcement regimes the overcharges were smaller than in those countries that did not have an active cartel enforcement regime.²⁶ Enforcing a competition law that prohibits cartel behaviour thus benefits the country not only by discouraging cartels to form in the first place; it also lessens the damage inflicted by cartel behaviour where the cartels form in any event.

goods is economically feasible; tying other products or services to the selling of the goods or services it is dominant in; selling goods or services below their marginal or average variable cost; or buying-up a scarce supply of intermediate goods or resources required by a competitor.

²⁴ A cartel can be defined as ‘an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating consumers, suppliers, territories, or lines of commerce.’ See the Organisation for Economic Cooperation and Development (OECD), *Fighting Hard-Core Cartels: Harm, Effective Sanctions, and Leniency Programmes* (Paris 2002).

²⁵ For the impact of international cartels on developing countries see S.J. Evenett; M.C. Levenstein and V.Y. Suslow, ‘International Cartel Enforcement: Lessons from the 1990s’ *World Economy* (September 2001). Also found at http://econ.worldbank.org/files/2454_wps2680.pdf last visited on 23 September 2003 as well as S.J. Evenett and B. Ferrarini, ‘Background Paper for the Global Economics Prospects 2003 (World Bank, 2002) and also J. L. Clarke and S.J. Evenett, The Deterrent effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel, available at <http://www.etsg.org/ETSG2002/Papers/Clarke%20&%20Evenett.pdf> last visited on 23 September 2003.

²⁶ Clarke and Evenett, loc. cit. n. 1, at p. 88.

3.5 Competition law and policy in Southern Africa.

The countries of Southern Africa belong to various groupings of countries. Botswana, Lesotho, Namibia, South Africa and Swaziland are the members of a customs union, the Southern African Customs Union (SACU). The five members of SACU are also members of the Southern African Development Community (SADC) that has regional integration as one of its objectives. SADC consists of fourteen Members States. Namibia and Swaziland were also two of the twenty Member States forming the free trade area, the Common Market for Eastern and Southern Africa (COMESA).²⁷ Information from the Attorney-General's office in Namibia however indicate that Namibia is no longer a member of COMESA, as it decided in 2002 not to continue with its obligations in COMESA.²⁸ However, Swaziland still is a member of COMESA.

3.5.1 Competition policy and the SACU agreement.

The newly drafted SACU Agreement provides that:

“Member States agree that there shall be competition policies in each Member State.

Member States shall co-operate with each other with respect to the enforcement of competition laws and regulations.”²⁹

The language used does not oblige the Member States to enact competition laws, it merely refers to a competition policy that each member shall have and provides for co-operation with respect to enforcement of competition laws and regulations. The language leaves room for a regional body to enforce competition law as it does not indicate the exact form of cooperation.

Of the SACU members South Africa has a competition law and a competition enforcement authority. Namibia, Botswana and Swaziland are in different stages of formulating competition laws and the enforcement thereof.³⁰

²⁷ Angola, Democratic Republic of Congo, Malawi, Mauritius, Seychelles, Zambia and Zimbabwe are the other seven countries also belong to COMESA and SADC.

²⁸ This is contrary to the information on the website of COMESA that still lists Namibia as a member of COMESA, see <http://www.comesa.int>.

²⁹ See Article 40 of the SACU Agreement, available online at <http://www.tralac.org/scripts/content.php?id=961#three>, last visited on 23 September 2003.

³⁰ R. Chance, ‘The Challenges facing Competition Authorities in Developing Countries: A Business Perspective’ Address at *International Competition Network Conference 23 – 25 June 2003*, Mexico, at

Namibia signed its competition law into law, however according to the Namibia Attorney-General's office the implementation of the law is suspended as there are not enough monetary resources to implement the competition law.

3.5.2 Competition policy and SADC.

The South African Development Community's Protocol on Trade merely refers to members that will implement measures that prohibit unfair business practices and promote competition. Article 25 provides:

“Member States shall implement measures within the Community that prohibit unfair business practices and promote competition.”³¹

The wording of the SADC protocol does not require the implementation of a competition law or institutions to enforce competition law. The members of SADC have not started any discussions on the matter either.

3.5.3 Competition policy and COMESA.

The COMESA Treaty³² in article 55 provides:

“1. The Member States agree that any practice which negates the objective of free and liberalised trade shall be prohibited. To this end, the Member States agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market.

2. The Council may declare the provisions of paragraph 1 of this Article inapplicable in the case of:

- (a) any agreement or category thereof between undertakings;
- (b) any decision by association of undertakings;
- (c) any concerted practice or category thereof;

p. 6. http://www.internationalcompetitionnetwork.org/merida_speech10.pdf , last visited 23 September 2003.

³¹ Southern African Development Community Protocol on Trade http://www.sadc.int/tifi.php?lang=english&path=legal/protocols&page=p_trade#article25 last visited on 23 September 2003.

³² The COMESA Treaty at <http://www.COMESA.int/about/treaty/TR006.htm/view> last visited on 23 September 2003.

which improves production or distribution of goods or promotes technical or economic progress and has the effect of enabling consumers a fair share of the benefits:

Provided that the agreement, decision or practice does not impose on the undertaking restrictions inconsistent with the attainment of the objectives of this Treaty or has the effect of eliminating competition.

3. The Council shall make regulations to regulate competition within the Member States.”

COMESA has followed this up with draft competition rules and draft competition regulations. The rules provide for a competition commission that shall apply the competition regulations of COMESA with regard to trade between Member States of COMESA and shall be responsible for promoting competition within the common market of COMESA.

COMESA is thus in the process of adopting a set of common competition rules and regulations that would apply to all economic activity whether conducted by private or public entities within, or having an effect within, the Common Market.³³ In the draft competition regulations provision is made for a supranational competition enforcement institution with jurisdiction where competition issues arise in the context of interstate trade.³⁴

3.6 Conclusion.

The arguments above show that there is ample reason for a country to introduce competition policy and also competition law. The different institutions involved in trade in Southern Africa accept that this is also true for the developing countries and least developed countries in this region. It is thus worthwhile to consider how such competition law and rules should be enforced in SACU. Before discussing enforcement in SACU the obstacles to enforcement of competition law in developing countries and different regional models of cooperation on enforcement of competition law are considered.

³³ Article 3(1) Draft COMESA Competition Regulations.

³⁴ Part 2 Draft COMESA Competition Regulations.

4. Obstacles associated with enforcement of competition law in developing countries.

Although the case for the implementation and enforcement of competition law is convincing there is still obstacles faced by especially low-income developing countries and least developed countries. A regional competition authority is suggested as a way of sharing the burden in overcoming obstacles.³⁵

When a developing country establishes a competition enforcement agency it has to overcome institutional weakness, lack of expertise necessary for law enforcement³⁶ and costs as obstacles to effective enforcement. Establishing a regional competition authority adds the challenges of co-ordination and problems of sovereignty.

4.1 Institutional weakness.

A competition authority needs to act independently and with competence to establish a credible competition environment in a country. The competition authority should not be seen to be under the influence of some outside power such as the government or special business interests.

Even if a developing country succeeds in establishing a competition enforcement authority the authority may lack the desired independence. This is especially true where governments are the main source of funding and where the government influences the major appointments of the competition authority.

The lack of positive comity³⁷ with other competition authorities of developing countries or neighbouring developing countries with no competition law also

³⁵ See Clarke and Evenett, op. cit. n 1, at p. 132.

³⁶ G. K. Lipimile, "Capacity Building and Technical Assistance Needs of Developing Countries and Economies in Transition" Executive Director Zambia Competition Commission [Paper presented at the 2002 Seoul Forum on Competition Policy, Korea, November 6-8, 2002] see http://seoulforum.ftc.go.kr/ko/data_7/zambia-lipimile.doc last visited 23 September 2003. Lipimile also discusses powers of enforcement, competition advocacy and public awareness as problems or challenges. These problems have to do with the implementation of competition law in general and it is thus not strictly relevant in a paper addressing the establishment of a regional competition authority.

³⁷ Comity is a principle applied in the field of international co-operation on competition policy. Negative comity implies that every country that is party to a co-operation agreement guarantees to take account of the important interests of the other parties of the agreement when applying its own competition law. Positive comity implies a country may ask the other parties of the agreement to take

hamper the effective enforcement of competition law in developing countries.³⁸

4.2 Lack of expertise necessary for enforcement.

The lack of expertise on different levels influences the effectiveness of a competition enforcement agency. The expertise necessary to interpret and apply competition law is often scarce in the case of developing countries. This lack of expertise is often more acute at the time of first implementing competition law enforcement. When the competition authority is first established the technical staff responsible for the application often still has to undergo or is undergoing training in the doing the necessary rigorous analysis that include understanding both economics and the law. Thus at the onset there is a lack of technical staff and often also the technical resources and appropriate data to do the required economic analysis are inadequate.

At the judicial level judges are confronted with competition rules that they often do not understand. This follows from the nature of competition law and the economic arguments and analysis that are involved; from the fact that competition law is new and many of the judges in the judiciary would have no formal training in competition law and from the fact that competition cases are rare in developing countries³⁹ and therefore the regular court system is not exposed to making decisions about competition law. Even in developed countries the judiciary often lacks the widespread expertise in all the courts where competition cases may be heard to have consistent good legal precedents. The problem with sufficient widespread competence in the judiciary in developing countries can however be overcome with appropriate structured institutions.

At the legislative level expertise is necessary to adopt competition law to the circumstances in the economy of the developing country. This is true especially where the developing country models its competition law on that of a developed economy that differs significantly from the economic

appropriate measures, under their competition law, against anti-competitive behaviour taking place on their territory and affecting important interests of the requesting country

³⁸ For a more comprehensive list of factors see Lipimile, op. cit., n. 36, at p. 4.

³⁹ The market size of the economy in smaller developing countries is small so that the occurrence of certain activities that need the attention of a competition authority are irregular.

circumstances of the developing country. The expertise necessary at the legislative level also includes a sufficient understanding of the role of competition law and its place in economic development of the developing country.

The business community in a developing country often lacks a culture of competition and it is therefore difficult for businesses to adopt to new competition rules. The expertise to understand the effect of new competition rules on business are lacking and laws are only understood when offences are committed and the appropriate law then applied. There is thus a time of learning by erring. However as soon as business learns that expertise in competition law is necessary, it often competes with the competition authority for the available expertise. As business lures the experienced staff from the competition authority it further weakens the expertise available to the competition authority.⁴⁰

Of the above the lack of expertise in the enforcement agency and the judiciary are of primary concern. The problems in this regard could be alleviated by creating a dedicated adjudication authority to deal with competition matters. South Africa created a competition tribunal as a dispute resolution of first instance and a competition appeal court⁴¹ to deal with all competition matters. In such a way the problem of educating all judiciary in competition law matters are circumvented.

4.3 Financing the competition authority.

As indicated above it is desirable that a competition authority should be independent from the government. However, the competition authority would in many instances be dependant on the government for funding. This often creates the idea that the competition authority will not be able to pay for itself and be a drain on the government budget.

However, in many developing countries the size of the government purchases are now so large that even small reductions in the amount of bid rigging on

⁴⁰ OECD Peer Review, loc. cit. n. 6, at p. 29.

⁴¹ The competition appeal court has exclusive jurisdiction on all appeals of a competition nature. See Competition Act, no 89 of 1998, Part C.

state contracts or a reduction in the price of products purchased by the government and subject to mark-ups by cartel behaviour would more than cover the costs of enforcing competition law including enforcement on cartels.⁴² Even though the government might be asked to pay the full amount to fund a competition authority the saving in government expenses through a lower purchase price on goods affected by cartel pricing will be more than the cost of the competition authority. The impression that the competition authority is only a drain on the national government budget is only there because the government saving in terms of lower purchase prices is not allocated to the competition authority.

Nevertheless, the experience of many developing countries is that competition laws are costly to administer and to enforce, and the resources of governments are always inadequate to administer and enforce the law effectively.⁴³ Even where this argument seems to be too emphatic, the administration and enforcement of competition law in developing countries competes with other important and urgent priorities for limited government resources.

The cost of the South African competition institutions could however be taken as an example to determine the cost and funding requirements of a competition enforcement agency. The South African competition enforcement structure comprises three different bodies. The Competition Commission and the Competition Tribunal are two independent⁴⁴ bodies and the third body, the Competition Appeal Court is a High Court and as such forms part of the court system of South Africa. The South African Competition Commission obtained 67% of its funds for 2002 from filing fees for mergers, 23% came as a government grant and 10% came from other sources. Expenditure was 10%

⁴² Clarke and Evenett, loc. cit., n 1, at p. 127. The study is based on the likely reduction of 15% in the mark-up of cartels in countries with cartel enforcement and a cost of \$10 million per year to run a competition authority. The figure of \$10 million dollar is based on the costs of the South African competition authority. In general see Clarke and Evenett, loc. cit. n 1, at pp. 119-131. See also the discussion at 3.4.3 *supra*.

⁴³ Lipimile, loc. cit. n. 36, at pp. 5 - 6.

⁴⁴ The institutions are independent from the government, for a brief discussion on the extent of the independence see OECD Peer Review, loc. cit. n. 6, at p. 22.

more than the combined income.⁴⁵ The Competition Tribunal received 83% of its funds through filing fees and 17% of its funds through other sources in 2002. The Competition Tribunal received no grants from the South African government. Expenditure of the Competition Tribunal exceeded the income by 12,5%.⁴⁶ No financial figures are available for the Competition Appeal Court, which forms part of the South African judicial system.

The South African experience indicate that the competition enforcement institutions in a developing country of its size and complexity would cost \$7 million to \$8 million, although most of the money are obtained from sources other than the South African government. The South African government contribution for 2002 was R8,6 million or about \$1,25 million.

The bigger challenge of the South African competition authorities is to attract and obtain professional staff who can deal effectively with the private sector's experienced and well-paid representatives. The principal gap in capacity is in the mid-level professionals.⁴⁷ The expenditure on salaries and thus the total costs spend may not be optimum and some cost should be added to the above figure of \$7 million to \$8 million in order to enable the competition authority to pay more competitive salaries in order to retain its experienced staff in the mid-level.

Even though the cost to the South African taxpayer is not very high, costs may still be a high hurdle to overcome in developing countries with less economic activity where filing fees for mergers will not provide for adequate funding, either because the mergers are too few or the size of the mergers in the country would not justify high fees. Sharing the costs of a competition authority then becomes an important issue for small developing countries and

⁴⁵ Expenditure was R41, 2 million or more or less \$6 million, when the South African rand is valued at R7, 00 to the dollar. This reflects a considerably stronger rand than the average for 2002, but is only slightly stronger than the value for the first half of 2003. The income of the Competition Commission was R37,6 million. See *Competition Commission South Africa Annual Report 2002* at p. 34 available at <http://www.compcom.co.za/ARreport.pdf> last visited on 23 September 2003.

⁴⁶ Expenditure was R6, 37 million or less than \$1 million. See *Competition Tribunal Annual Report 2002* at p. 35. It can be visited at <http://www.comptrib.co.za/Publications/Annual%20Report/Comp%20Tribunal2002.pdf> last visited on 23 September 2003.

⁴⁷ OECD Peer Review, loc. cit. n. 6, at p. 29.

least developed countries as a much higher proportion of the total cost will have to be carried by the government.

4.4 Sovereignty.

Countries that work together to form a regional competition authority give up some of their right and power to make their own competition rules and their own enforcement decisions. Such countries sacrifice some sovereignty.

The sacrifice of any form of sovereignty is often contentious because of issues of national pride and scepticism. The country concerned may be sceptical whether the regional competition would not favour the interests of some members over others, openly or inadvertently.

Issues of national pride can be overcome with political will, the advantages to be gained from cooperation, carefully drafted treaties and leadership. On the other hand, the possibility that the interest of other countries would be better served than yours is a valid reason to make sure that your interests are well looked after in any agreement where a country sacrifices some sovereignty.

In the area of competition law it would mean that countries in a different state of development should make sure that the competition law adopted answers to the needs of its own circumstances. A one size fits all competition law does not exist. The competition rules for countries with different economies in size and stage of development may differ in circumstances where it is appropriate. Whilst harmonisation of competition law between countries sharing a regional enforcement agency is desirable, it should not be translated to necessarily mean the same competition law for all the countries using the same regional competition enforcement agency.

On a more practical level certain administrative decisions such as whether to go ahead with investigations may also infringe on issues of sovereignty. The fear is that an institution might be under the influence of a powerful country and the institution may make decisions that favour that powerful country. In the Southern African region the size of the South African economy might overshadow the other countries and give rise to such a fear. When a joint institution is set up these fears should be taken into consideration and provision should be made to allay such fears.

4.5 Coordination.

In the enforcement of competition law it is often necessary to have the co-operation of competition authorities from other countries. To make this possible there should be agreement to cooperate. However mere agreement may not be enough, as the lack of competition law or enforcement agencies complicates the matter to the point where it becomes virtually impossible. It may be that the other countries even allow for practices that are seen as anti-competitive in another country or the conduct of a meeting to fix prices may not be illegal in a neighbouring country. The lack of positive comity was already discussed above.⁴⁸

5. Regional Models.

There are different ways in which competition law enforcement are dealt with in different regions of the world. The thesis will explore the enforcement features of the European Union, NAFTA, ANZCERTA, COMESA, Mercosur and the Andean Community. The only region that has a regional competition authority is the European Union. COMESA also proposes a regional authority in its draft competition regulations.⁴⁹ It is however useful to look at different regional models to learn which features would be helpful for a regional competition enforcement authority for SACU.

The features that will be generally explored is whether a regional supra-national enforcement agency exist; whether regional enforcement is a substitute for national enforcement; whether the enforcement mechanism requires an additional outlay of fiscal and other resources and what is the judicial oversight of the regional enforcement mechanism.

5.1 The European Union.

The most prominent regional competition authority is the model of the European Union. The competition policy of the European Union was one of the four areas of common policy provided for in the Treaty of Rome. From the start competition policy was envisaged as a complement to the Common Market, which would prevent private restraints on trade from stopping the full

⁴⁸ See 4.2 *supra*. See also Lipimile, loc. cit., n. 36, at p. 4.

⁴⁹ See Draft COMESA Competition Regulations Part 2.

benefit of the removal of public restraints to flow to the consumers in the European Market.⁵⁰

5.1.1 Competition policy in the European Union.

The competition policy of the European Union is a common policy that affects all the states of the European Union (and some states outside the European Union) with the same set of rules. The European Union developed a broad set of policies to promote competition in the markets of the European Union for all goods, services and factors.⁵¹ Free movement of goods, services and factors such as labour and capital requires national treatment⁵² as well as the removal of border restrictions. Competition law and the law regarding state aids is the vehicle of this common competition policy.⁵³

The application of competition law is divided between the competition law applied at the European Union level and that applied by national jurisdictions. The division is determined by the principle of subsidiarity.⁵⁴ In competition law the European Union has jurisdiction where competition issues affect actual or potential trade between Member States. All competition issues that do not affect the trade between Member States are the responsibility of the national governments and the national competition enforcement agencies. With merger control there is a determined threshold when a merger falls within the competence of the European Union or whether the merger should be dealt with at national level. There is thus coexistence between national and European Union competition laws, subject to the primacy of the European Union law.

⁵⁰ P.J. Loyd and K.M. Vautier *Promoting Competition in Global Markets A Multi-National Approach* (Cheltenham, Edward Elgar, 1999) at p. 62.

⁵¹ Loyd and Vautier, op. cit. n. 50, at p. 59.

⁵² National treatment refers to the non-discrimination principle that determines that goods, services, labour or capital that originate from a foreign source or country should receive no less favourable treatment in any national jurisdiction than the goods, services, labour and capital from a domestic source.

⁵³ Loyd and Vautier, op. cit. n. 50, at p. 62.

⁵⁴ The subsidiarity principle is intended to ensure that decisions are taken as closely as possible to the citizen of the European Union and that constant checks are made as to whether action at European Union level is justified in the light of the possibilities available at national, regional or local level. Specifically, it is the principle whereby the Union does not take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level. It is closely bound up with the principles of proportionality and necessity, which require that any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaty.

The European Union entered into agreements with the members of the European Economic Area (1992) and the Associated States of the Central and East European countries (signed between 1991 and 1996) and the Mediterranean countries (signed between 1995 and 1997) which extended the influence of the competition law of the European Union beyond the members of the European Union.⁵⁵

5.1.2 Institutions enforcing competition law.

The European Union has a supra-national enforcement agency that enforces competition law that falls within the competence of the European Union law. The supra-national authority acts only when it has competence and does not interfere with or substitute national enforcement of competition law. On the other hand the national courts of the Member States act in a complementary manner in the enforcement of European Union competition law when it enforces European Union law.⁵⁶

The enforcement of the competition law of the European Union is done by the European Commission and the Court of Justice, the Court of First Instance and National Courts.

5.1.2.1 The European Commission.

The European Commission is the main administrative body in the European Union. In the field of competition policy the Commission enforces the competition law embodied in the European Treaty.⁵⁷ The Directorate General⁵⁸ is responsible for the enforcement of competition law. The Commission has wide powers to investigate, to order termination of infringements and to impose fines. The Commission is the primary administrative agency in the enforcement of competition law. It makes the first administrative decision in competition issues after it investigated the matter. The affected parties may accept the ruling of the Commission or if it is not satisfied with the decision approach the courts that exercise judicial oversight

⁵⁵ Loyd and Vautier, op. cit. n. 50, at pp. 62 and 63.

⁵⁶ See 5.1.2.3 *infra*.

⁵⁷ Specifically articles 81 and 82 of the European Treaty.

⁵⁸ DG IV as it is known within the Commission.

on the work of the Commission. The courts involved in judicial oversight are the Court of First Instance and the Court of Justice.

5.1.2.2 The Court of Justice and Court of First Instance.

The Court of First Instance was created in 1989 to alleviate the task of the Court of Justice. It is competent to hear appeals against decisions from the Commission brought by natural or legal persons in competition cases. It also has the jurisdiction to hear actions for annulments, failure to act and damages. The decisions of the Court of First Instance can be appealed to the Court of Justice on points of law only.

The Court of Justice hears appeals from the Court of First Instance. It also has the jurisdiction to issue preliminary rulings on the interpretation of European Union Law when the national court refers such a matter to the Court of Justice. In this way the Court of Justice plays an important part in the interpretation and enforcement of competition law.

These institutions require the Member States of the European Union to provide the funding for the functioning of these institutions as part of the functioning and implementing of the European Union.

5.1.2.3 The National Courts.

The European law has direct effect in the Member States. The result of this is that national courts also have the jurisdiction to hear competition law matters that fall under the European law. National courts are thus not limited to hear only competition law matters that fall within the threshold of national competition policy.

European Union Law does not specify the remedies that should be available in national law. In its domestic legal system, each Member State can determine the legal remedies that will be available in enforcing European Union law (including competition law) in that Member State.

5.1.3 Conclusion.

The European Union model of regional competition enforcement provides for coexistence of national and European Union competition laws where the

European Union law takes primacy over national laws. It also allows for allocating competence among the competition authorities of the European Union and national authorities of the Member States. There is co-operation in the investigation or evaluation of practices and exchange of documents, including confidential information; representation at hearings and the communications of opinions on draft decisions for comments between the European Union and national competition authorities.⁵⁹

The Commission, the Court of First Instance, the Court of Justice and the national courts all play an integral part in the enforcement of European competition law. The institutions tasked with enforcing competition law on national level are the respective national competition authorities and the national courts.

Such a system requires wide spread expertise in competition law. It also requires substantial financial resources as every Member State has its own enforcement agency and the Commission has one as well. It is expensive and it has the potential for conflicting decisions and legal principles.

The strengths of the system are that sovereignty issues do not represent too high an obstacle. Competition law on European Union level is embedded in a much larger project of the European Union. The European Union competition law does not engage in micro management of competition matters as matters are left to the Member State in terms of the subsidiarity principle when the issue does not affect trade between Member States. Competition law is part of the extensive harmonisation of the European Union on many other standards that enhance trade in the European Union. The Member States working together has a very clear common goal to establish a common or single market in Europe.

Where the competition law of the European Union reaches beyond its Member States, the respective countries in the other areas are responsible for their enforcement. The institutions of the European Union and its Member States do not enforce competition law in those countries. Where cooperation

⁵⁹ UNCTAD “Experiences gained so far on International Cooperation on Competition Policy Issues and the Mechanisms Used” (April 2003) (TD/B/COM.2/CLP/21/Rev.2) at http://www.unctad.org/en/docs/c2clp21r2_en.pdf last visited on 23 September 2003.

and coordination is desirable, this is achieved by agreements to enable the enforcing agencies in the different jurisdictions to work together.

The features that make it less desirable for a regional grouping of developing countries is the expensive structure and the need for wide spread competition law expertise in the competition authorities as well as in the different courts. Developing countries in a regional grouping are also unlikely to have such a strong single focus on a common or single market.

5.2 NAFTA.

The North American Free Trade Agreement (NAFTA) was implemented on January 1, 1994. Its purpose was to remove tariff barriers between Canada, the United States and Mexico. NAFTA was preceded by an agreement between the United States and Canada entitled the U.S.-Canada Free Trade Agreement, which was enacted on January 1, 1989, but has now been superseded by the NAFTA. The Agreement includes a chapter⁶⁰ on competition policy. The experience of NAFTA is an important example of the possibilities and the difficulties in developing a regional approach to cross-border competition.⁶¹

5.2.1 NAFTA competition policy.

Although NAFTA is a trading arrangement that affects economic activity of a very significant portion of the world trade the provisions on competition policy is not nearly as extensive as that of the European Union.

The three Member States have developed competition policies, but these policies are exclusively national policies. Chapter 15 of NAFTA⁶² that essentially deals with competition law imposes on each of the three Member States a general obligation to maintain and enforce competition law. It also requires them to cooperate with each other in the enforcement of these national laws.⁶³

⁶⁰ Chapter 15 of the NAFTA Treaty.

⁶¹ Loyd and Vautier, op. cit. n. 50, at p. 101.

⁶² Available at <http://www-tech.mit.edu/Bulletins/Nafta/15.compete> , last visited on 23 September 2003.

⁶³ Loyd and Vautier, op. cit. n. 50, at p. 103.

The United States generally has a low level of border restrictions on trade in goods⁶⁴ and services. Canada has a fairly liberal policy in terms of restrictions on trade in goods and services. Mexico started a programme to aggressively liberalise its economy in the early 1990's. It included privatisation, deregulation, price liberalisation and international trade liberalisation. Mexico helped this process along with the implementation of a comprehensive national competition law to ensure competition in the markets following liberalisation.

The NAFTA Agreement imposes on each Member State the obligation to maintain and enforce a competition law and to cooperate with each other in the enforcement of their respective competition laws. This cooperation comprises of mutual legal assistance, notification, consultation and exchange of information. In this instance there are no common rules as with the EU-level competition law and there is no supra-national authority to enforce the competition law.

The NAFTA Agreement does not have a focus of a single market as the European Union and it is reflected in its approach to competition policy. Its competition policy consists mainly of ensuring that each country has a functioning national competition law with the institutions to enforce it.

While significant differences remain in the substantive provisions of each Member State's laws, the three legal regimes are nevertheless based on the same broad principles and are largely consistent in scope.⁶⁵

5.2.2 Institutions enforcing competition law.

There is no regional competition enforcement agency in the NAFTA region. The enforcement of competition law is left to the individual Member States. The United States has two competition authorities: the Antitrust division of the Department of Justice and the Federal Trade Commission. Canada and Mexico each have a competition enforcement authority.

⁶⁴ There is however an exception of agriculture quotas.

⁶⁵ R. O. Cunningham and A.J. LaRocca, 'Harmonisation of Competition Policies in a Regional Economic Intergration' *Law and Policy in International Business* (Summer, 1996) p 879 at p 897.

In terms of enforcement cooperation, NAFTA provides that the Member States will "cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation, and exchange of information relating to the enforcement of competition laws and policies in the free trade area." ⁶⁶ Additionally, the "Parties shall consult from time to time about the effectiveness of measures undertaken by each Party."

As far as cooperation on competition law enforcement is concerned the Member States may not have recourse to dispute settlement under the NAFTA Agreement for any matter arising from the cooperation on competition law matters.⁶⁷ Any dispute between the members has to be dealt with under the general provision as explained above or under bilateral competition cooperation agreements. There is a bilateral competition agreement between Canada and the United States and one between the United States and Mexico.⁶⁸

5.2.3 Conclusion.

It is clear that the NAFTA members do not have a single or common market as envisaged by the European Union in mind and therefore the competition law in NAFTA is less integrated than the EU model.⁶⁹ The strength of the system is that every Member State decides on its own competition law and enforcement agency. In this way sovereignty of the members are left largely untouched. Any cross-border competition issues are dealt with by bilateral cooperation agreements or the extraterritorial application of competition law.

In essence NAFTA is not a regional model of enforcement, but it demonstrates that competition law enforcement in a free trade area could be left to national enforcement with bilateral cooperation agreements. NAFTA only ensures that each country has a functioning competition law regime. It is left to the individual countries to organise their own competition policy and enforcement.

⁶⁶ North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., art. 1501 (2).

⁶⁷ Lloyd and Vautier, op. cit. n. 50, at p. 103.

⁶⁸ Entered into on 11 July 2000 for more see www.naftaworks.org/papers/2000/dojantitrust.htm .

⁶⁹ For an explanation as to the national institutions involved in the enforcement of competition law in United States, Canada and Mexico see Lloyd and Vautier, op. cit. n. 50, at pp. 104 – 106.

5.3 Australia and New Zealand.

New Zealand and Australia entered into a free trade agreement in 1983, the Australia New Zealand Closer Economics Relations Agreement (ANZCERTA).⁷⁰ Free trade in goods (but not all services) was achieved in 1990.⁷¹

5.3.1 ANZCERTA competition law.

ANZCERTA had in view that the two Member States would work towards the harmonisation of business laws, including competition law. The underlying policy assumption was that conformity of business laws would be good for business where free trade or a single market is the goal. The idea was that business transaction costs would be lowered. Harmonisation was made conditional upon the finding that differences in laws and regulatory practices were responsible for higher transaction and compliance costs of business operating in New Zealand and Australia.⁷²

Australia was first with the introduction of competition law with its Trade Practices Act 1974. New Zealand shared the legal tradition of Australia and could draw on the Australian experience when it introduced its Commerce Act 1986. New Zealand could borrow from the way Australia designed its institutions as well as from the legal precedents set Australia.⁷³

The harmonisation was however slow and resulted from New Zealand unilaterally adopting Australia's competition law and a similar enforcement structure. As to the remaining differences in the law there seems to be acceptance that the two countries should retain some element of regulatory independence so that each country could choose the law best suited to its circumstances.⁷⁴

⁷⁰ Also referred to as CER for short.

⁷¹ For a general discussion of the ANZCERTA agreement in this context see Lloyd and Vautier, *op. cit.* n. 50, at pp. 77 – 80.

⁷² Lloyd and Vautier, *op. cit.* n. 50, at p. 81.

⁷³ Lloyd and Vautier, *op. cit.* n. 50, at p 81.

⁷⁴ Lloyd and Vautier, *op. cit.* n. 50, at pp. 82 and 83.

5.3.2 Institutions enforcing competition law.

The two members of the ANZCERTA Agreement found a novel way of dealing with competition law enforcement. Instead of establishing a supra-national body ANZCERTA allows each of the Australian Competition and Consumer Commission and the New Zealand Commerce Commission to apply their respective domestic competition laws to conduct in the other country that affects markets in the enforcing country.⁷⁵ The powers of the respective competition enforcement agencies extend to the power to hold hearings, compel evidence and have its orders enforced in the other country.

This approach has good prospects of long term success because of the high level of harmonisation of both the substantive and procedural rules with regard to competition law.⁷⁶

The competition law enforcement authorities will (where resources permit) undertake factual investigations on market power issues at the request of the other country. In addition competition law enforcement authorities have investigatory powers, including powers to obtain information and documents from parties in the other country.⁷⁷

5.3.2. Conclusion.

The co-operation in ANZCERTA lead to a harmonisation of competition laws in Australia and New Zealand. This is a desirable feature of the co-operation especially in a free trade area or any area with close economic ties. In enacting competition law an important goal is to ensure that the actions of private parties should not undermine the liberalisation by public actors. At the same time it is ideal to harmonise competition law so as to minimize transactions costs for private players that trade in more than one national jurisdiction. If the members to the agreement can afford to each have an own enforcement regime it is very helpful.

⁷⁵ P. Crampton & M. Barutciski 'Trade Distorting Private Restraints: A Practical Agenda For Future Action', *Southwestern Journal of Law and Trade in the Americas* (Spring 1999) at p 54.

⁷⁶ Crampton and Barutciski, loc. cit. n. 75, at p 48 and 49.

⁷⁷ Cunningham and LaRocca, loc. cit. n. 65, at p. 901.

A group of developing countries could do well to recognise the benefit of harmonised competition law, without insisting on uniformity of laws. Keeping open some regulatory independence to tailor the laws to best suit the needs of each developing country seems to be sensible.

The mutual recognition of the decisions of each country's competition authority and the extensive powers of the competition authorities to operate in the other country is an innovative approach. It is particularly apt in countries with similar substantive laws and where a relatively high degree of mutual confidence in the legal and administrative institutions of each country exists.⁷⁸

Even with the harmonisation of competition policy and law of two national laws there will be room for differences in the interpretation and application of the law where two distinct competition law enforcement regimes exist without a supra-national judicial authority or a common appeal body. As such business is not assured of certainty in decisions made. However business has not made a strong call for a common judicial system or for a trans-national appeal authority.⁷⁹

5.4 COMESA.

COMESA is a regional grouping of 20 countries of Eastern and Southern Africa, spreading from Egypt in the north, down to Namibia and Swaziland in the south of the continent and including the adjacent Indian Ocean states of Comoros and Seychelles. It was established in 1994 to replace the Preferential Trade Area for Eastern and Southern Africa (PTA) which had been in existence since 1981. The PTA treaty had envisaged the grouping's transformation into a Common Market, and it was in conformity with this vision that the treaty establishing COMESA was signed in 1993 and ratified a year later.⁸⁰

5.4.1 COMESA Competition law.

COMESA is in the process of adopting a regional competition law with the draft regulations and rules already drawn up with the help of the Department

⁷⁸ Crampton and Barutciski, loc. cit. n. 75, at p 48.

⁷⁹ Lloyd and Vautier, op. cit. n. 50, at p. 83.

⁸⁰ For more information on COMESA see <http://www.comesa.org> or <http://www.comesa.int>.

for Development (DFID) and the European Union.⁸¹ It is proposed that the regional law be applicable where the matter has a cross-border impact; where the case has significant competitive impact; that exclusions be allowed in the regional law on merit and that it would apply to government business operations which are of a commercial nature.

5.4.2 Envisaged institutions enforcing competition law.

The influence of the European Union experts is clear in the institutions envisaged in the draft competition law regulations. A COMESA Competition Commission is envisaged which shall apply the competition law with regard to trade between Member States and be responsible for promoting competition within the Common Market (COMESA).

The COMESA Competition Commission would be a supra-national enforcement agency. The enforcement of the COMESA Competition law will differ from the similar structure in the European Union as COMESA law does not seem to have the same supremacy that the European Union law has in a similar context. In this regard the draft regulations provide that Member States shall take the necessary steps to ensure fulfillment of the obligations arising out of the competition regulations or resulting action taken by the COMESA Competition Commission under the regulations.⁸²

The COMESA Competition Commission will co-operate with competition authorities in Member States.⁸³ It is thus clear that the Member States will each have to have its own competition authority.

⁸¹ See COMESA “Report on the Comesa Experts’ Meeting on the Regional Competition Policy” October 2002; at par 8; available at http://www.comesa.int/trade/issues/policy/Report_Regional_Competition_Policy/en last visited 8 September 2003.

⁸² See Article 5 of the Draft COMESA Competition Regulations, and see also article 5(2)(b) of the COMESA Treaty. The COMESA Treaty indicates that the COMESA law does not have automatic supremacy, but it depends on the implementation by the Member State, although the Member State undertakes to take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty [COMESA Treaty] and in particular: (a) to confer upon the Common Market legal capacity and personality required for the performance of its functions; and take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty and in particular: (a) to confer upon the Common Market legal capacity and personality required for the performance of its functions; an (b) to confer upon the regulations of the Council the force of law and the necessary legal effect within its territory.

⁸³ Article 7(2)(iv) of the draft COMESA Competition Regulations.

The regulations also provide for a Board of Commissioners that would be able to hear appeals, or review any decision of, the Commission that in terms of the regulations be referred to it.⁸⁴

The budget for the supra-national commission will be provided by annual payments from Member States, grants and donations from co-operating partners and fees that the Commission may charge in respect of programmes, publications, seminars, consultancy and other services.⁸⁵ The budget of the Board of Commissioners would come from annual contributions of the Member States.⁸⁶

The funding of the proposed COMESA Competition Commission is uncertain at best and it would rely heavily on donor funding. This is clear from the situation that Namibia currently finds it in. Despite the fact that Namibia is no longer part of COMESA, more of the COMESA countries may find it in a position where it would not be able to implement a competition authority and it would then be a difficult task to fund a regional competition commission as well.

5.4.2. Conclusion.

The structure of the enforcement of the regional competition law in COMESA is very similar to that of the European Union. However, it differs in that there is no primacy of COMESA law and there is not a similar structure of adjudicating bodies and courts in COMESA.

The structure will require widespread expertise and an expensive structure of national competition authorities as well as a regional authority. The delineation of competencies will present the usual problems of determining the dividing line or the possible shared competence in certain circumstances. A desirable feature is the fact that there is a common or shared regional competition law. However this law only applies to the actions as far as it affects trade between Member States.

⁸⁴ Article 15 of the draft COMESA Competition Regulations.

⁸⁵ Rule 16 of the Draft COMESA Competition Rules.

⁸⁶ Rule 27 of the draft COMESA Competition Rules.

5.5 MERCOSUR.

The Treaty establishing the Southern Common Market (Mercosur) had the harmonisation of competition policy on its agenda since the signing in 1991.⁸⁷ The Member States of Mercosur are Argentina, Brazil, Paraguay and Uruguay. The Treaty aims at the coordination of macroeconomic and sectorial policies between the Member States in order to ensure proper competition between the Member States and therefore the Member States are committed to harmonise their legislation in the relevant areas in order to strengthen the integration process.

5.5.1 Competition policy in MERCOSUR.

In 1996 the Member States signed the Protocol for the Defense Competition in Mercosur (the Protocol) that indicates the guidelines toward a common competition policy in the region.⁸⁸ The Protocol provides for mechanisms to control the anticompetitive behaviour of firms where the behaviour has a Mercosur dimension.⁸⁹ It also provides for national competition laws that will make regulations to ensure similar conditions of competition and independence among firms with regard to pricing and other market variables. The Protocol also provides for the surveiling of public policies that distort competition conditional and affect trade among the Member States.

The Protocol does not create supranational enforcement mechanisms. It foresees cooperation within the region and enforcement at national level. It provides for autonomous national enforcement agencies and that the national competition law will cover the whole economy.

Where the conduct of firms has an interstate effect the institutions of Mercosur are expected to develop rules to regulate such conduct. As far as enforcement of competition issues with an interstate effect are concerned that

⁸⁷ T. de A. (Jr). Jose and L. Tineo, "The Harmonisation of Competition Policies Among MERCOSUR Countries", *Organization of American States*, (July 1997) available at http://www.sice.oas.org/tunit/STUDIES/COMPET/m_comp1e.asp last visited on 23 September 2003.

⁸⁸ This document needs the congressional approval by each country to be enforceable as national law.

⁸⁹ Article 2 Protocol of the Defense of Competition.

is left to the cooperation of national competition authorities where the institutions of Mercosur play a role of political mediation.⁹⁰

5.5.2 Envisaged institutions enforcing competition law.

The enforcement of competition law with regard to any competition issue with a local or national dimension only is enforced by the autonomous national authority of the Member State.⁹¹

Where the competition issue has an interstate or extraterritorial effect the issue is dealt with in a rather round about way where the Trade Commission of Mercosur⁹² and the Committee for the Defense of Competition⁹³ (CDC) play a role.

The process to deal with the competition issue with interstate effect is started by an interested party that initiates proceedings before the competition enforcement authority of a Member State. The national competition authority makes a preliminary technical evaluation whether the competition issue has interstate effect and then submits the issue to the CDC.⁹⁴ The CDC will then make its own preliminary technical evaluation and decide whether to initiate an inquiry or whether to shelve the case.⁹⁵

If the CDC decide to initiate an inquiry it establishes guidelines for the definition of the relevant market structure, the evidence regarding conduct and the analytical criteria of the economic effects of the investigated practice.⁹⁶

The matter is then referred back to the national competition authority where the defendant is domiciled, which would carry out the investigation of the competition issue bearing in mind the guidelines set forth by the CDC.⁹⁷ When the process of investigation is concluded the national competition authority presents a conclusive ruling on the matter to the CDC.⁹⁸ The CDC taking into account the ruling of the national enforcement body decides on the infringing practices and establishes the appropriate sanctions or other measures to be

⁹⁰ Jose and Tineo, loc. cit., n. 87.

⁹¹ Article 3 Protocol of the Defense of Competition.

⁹² The Trade commission of Mercosur is made up of one member of each Member State.

⁹³ This is an inter-government body comprising those in each state responsible for the application of the Protocol.

⁹⁴ Article 10 Protocol of the Defense of Competition.

⁹⁵ Article 11 Protocol of the Defense of Competition.

⁹⁶ Article 14 Protocol of the Defense of Competition.

⁹⁷ Article 15 Protocol of the Defense of Competition.

⁹⁸ Article 18 Protocol of the Defense of Competition.

imposed.⁹⁹ This CDC ruling is then submitted to the Trade Commission for final adjudication by means of a directive, setting forth the sanctions to be applied to the infringing party or other measures to be implemented.¹⁰⁰ If consensus were not reached at the Trade Commission on the directive the Trade Commission shall bring the different proposed solutions before the Common Market Group.¹⁰¹ The Common Market Group shall make a ruling upon the matter through adoption of a resolution.¹⁰² If the Common Market Group does not arrive at a consensus about the resolution, then the interested Member State could resort to the dispute settlement procedure of Mercosur.¹⁰³

It is the task of the national competition authority where the defendant is domiciled to monitor whether the measures in the directive are implemented and to enforce any sanctions.¹⁰⁴

The Protocol makes provision for actions where the matter is urgent as well as for procedures where the defendant may agree to cessation of the investigated conduct and then be subject to measures agreed upon with the CDC. These matters are however beyond the scope of this discussion.

The structure seems cumbersome and it is easy to be skeptical about the practical effect of a system where three different bodies at various stages can make their own determinations. This however will depend on the mutual trust that exists between the different countries. In the circumstances the process to promote and enforce competition law will be greatly enhanced if the national competition policies are harmonised. In this respect the Australia and New Zealand cooperation is an example of how things may work.

5.5.3 Conclusion.

It is not easy to determine whether there is a supra-national enforcement agency in Mercosur. The CDC does not start any investigations on its own, but it does a determination following a referral by a national competition authority. Any sanctions or measures are then recommended to the Trade

⁹⁹ Article 19 Protocol of the Defense of Competition.

¹⁰⁰ Article 20 Protocol of the Defense of Competition.

¹⁰¹ Article 20(2) Protocol of the Defense of Competition.

¹⁰² Article 21 Protocol of the Defense of Competition.

¹⁰³ Article 21 Protocol of the Defense of Competition.

¹⁰⁴ Article 20(1) Protocol of the Defense of Competition.

Commission. The Trade Commission thus serves as a body that provides oversight, but it is not a judicial overview or an appeal process. In fact it seems that once the Trade Commission has spoken it is the end of the matter. The national competition enforcement agency then has to enforce the implementation of the final outcome.

The system may well satisfy the different Member States' quest for remaining sovereign and working together as equal partners, but it does not seem practical for a grouping of countries where financial and other resources to enforce competition law are scarce. Furthermore, it seems as if the process may be subject to political pressures at different levels.

The environment for such a system to work would need a considerable amount of trust and common purpose between countries and would involve duplication of investigation and determination processes and lacks an appeal procedure.

5.6 Andean Countries.

The Andean countries, Colombia, Peru, Venezuela, Bolivia and Ecuador, seek to establish a fully integrated market model on the European Union. To obtain this goal harmonisation of various policies was undertaken. However, for a long time a regional competition policy was not considered. In 1991 the Andean countries adopted an agreement "to prevent or correct distortions in competition resulting from practices aimed at restricting free competition"¹⁰⁵

5.6.1. Andean countries and competition policy.

On a national level three of the five Andean countries—Colombia, Peru, and Venezuela—have adopted competition laws that are enforced by independent agencies. Bolivia and Ecuador rely solely on trade liberalisation and deregulation measures for their competition policy. Competition policy in this

¹⁰⁵ See Article 1 Decision 285 available at <http://www.comunidadandina.org/ingles/treaties/dec/d285e.htm> ; see also A. J. Jatar, and L. Tineo. "Competition Policies in the Andean Countries: the ups and downs of a policy in search of its place, *The Andean Community and the United States*", Chapter 12, Organization of American States, (1998), no page numbers, available at <http://www.sice.oas.org/compol/Articles/cpandea.asp#12.CP> last visited on 23 September 2003.

region has a national focus and the regional perspective is lacking.¹⁰⁶ Decision 285 adopted in 1991 to address the regional aspect of competition policy in the Andean countries focuses on restrictions on competition law only in so far as these would undermine the integration process in the Andean Community, but even in this the language used is reminiscent of anti-dumping law.¹⁰⁷ As in the European Union the competition principles with a regional dimension that was adopted has primacy over national laws.

5.6.2 Institutions enforcing competition law.

National competition issues are dealt with by the national competition enforcement agencies in the countries that have competition law and enforcement structures¹⁰⁸. On a regional level there is a Board that has a supra-national character. The Board has authority in respect of regional practices that restrict free competition and originate in the sub region¹⁰⁹ or involve an enterprise that carries out its economic activity in a Member State.¹¹⁰ Practices with a national implication only are excluded from the application of the Decision.¹¹¹

The Board is responsible for the enforcement of decision 285. A competition issue of regional impact may be brought before the board by a Member State or an enterprise with a legitimate interest. The Board then investigates and conducts its proceedings and provides a ruling within two months.¹¹² If the Board determines that the practice is restrictive of competition, it may issue an order to cease it. The Board may also authorise the affected country to impose corrective measures. Corrective measures mean the lowering of tariffs on imported products competing with the products affected by the restrictive practices.¹¹³

¹⁰⁶ Jatar and Tineo, loc. cit., n. 105.

¹⁰⁷ Lloyd and Vautier, op. cit., n. 50, at p. 116 see also Jatar and Tineo, loc. cit., n 15.

¹⁰⁸ Article 2 Decision 285.

¹⁰⁹ Originating in the subregion is understood to mean practices carried out by enterprises that pursue their economic activities in one or more Member States. See Article 2 decision 285.

¹¹⁰ The involvement in a Member State is understood to mean a practice carried out among enterprises whose economic activities are conducted in one or more Member States and enterprises located outside the Subregion. See Article 2 Decision 285.

¹¹¹ Article 2 Decision 285.

¹¹² Article 11 decision 285.

¹¹³ Article 16 decision 285.

The Board cannot initiate investigations on its own. It has to be requested to start an investigation. The Board has no punitive power or power to coerce or force firms to adopt its decisions. The remedy to grant preferential tariffs is unusual in a competition environment and is impractical where trade liberalisation has resulted in low overall tariffs.

5.6.3 Conclusion.

The competition rules and enforcement in the Andean countries are rudimentary at best. The national enforcement is left to the national competition authorities for those countries that do have a competition law.

The Board acts as a supra-national authority, however its impact is fairly limited due to the lack of powers to act unilaterally in investigations. The remedies the Board can impose are also without bite. The regional enforcement does not substitute for national enforcement. The national enforcement authority does not have authority to act on regional practices.

There is no judicial oversight provided for the decisions of the Board. This is not surprising as the effect of the ruling of the Board is rather limited. The remedies provide for the cessation of the practice without any mechanism to enforce the decision. Such a ruling to permit a political or governmental decision to lower tariffs is normally not subject to judicial review any way.

As an example to a grouping of developing countries the enforcement of competition law in the Andean countries shows that there is difference drawn between competition issues with national effect and those with regional effect.

6. Suggestions for SACU.

6.1 Introduction.

Botswana, Namibia, Lesotho, Swaziland and South Africa formed SACU as a customs union in 1910 already.¹¹⁴ SACU Member States differ in levels of economic scale, structure, and development. Although they have a very different economic structure Botswana and South Africa are upper middle-income countries. Namibia and Swaziland are lower middle-income countries, and Lesotho is a least developed country. The challenges facing all SACU

¹¹⁴ The SACU Agreement was re-negotiated in 1969 and again in 2002. The 2002 is awaiting ratification by all the Member States.

Member States are eradicating poverty; combating HIV/AIDS; promoting sustainable economic growth and development, and a more equitable income distribution; reducing high unemployment rates; and being more fully integrated into the world economy.¹¹⁵

In the recently completed SACU Agreement the goals listed for SACU are: (a) to facilitate the cross-border movement of goods between the territories of the Member States; (b) to create effective, transparent, and democratic institutions which will ensure equitable trade benefits to Member States; (c) to promote conditions of fair competition in the common customs area; (d) to substantially increase investment opportunities in the common customs area; (e) to enhance the economic development, diversification, industrialization and competitiveness of Member States; (f) to promote the integration of Member States into the global economy through enhanced trade and investment; (g) to facilitate the equitable sharing of revenue arising from customs and excise duties levied by Member States; and (h) to facilitate the development of common policies and strategies.¹¹⁶

The challenges for the implementation and enforcement of competition law in developing countries discussed above¹¹⁷ all apply to the Member States in SACU. The extent to which these obstacles apply to different Member States vary, but generally all of the challenges should be kept in mind when considering the development and implementation of a regional competition authority.

A brief look at the challenges as they apply to SACU and its Member States reveal that institutional weakness is evident in SACU in that only South Africa has a competition law and authority. Namibia has a competition law that is not implemented yet, probably due to resource constraints to establish the enforcement mechanisms. It is not practical to cooperate in the enforcement of competition law with the Member States in SACU on the basis of positive comity.

¹¹⁵ World Trade Organisation 'Trade Policy Review Southern African Customs Union Report by the Secretariat' (2003) WT/TPR/S/114 at p 7.

¹¹⁶ For a comprehensive overview of the trade policies and economic situation in SACU see WTO *Trade Policy Review of SACU*, loc. cit. n. 115.

¹¹⁷ See 4 *supra*.

Member States in SACU do not have enough experienced personnel to staff competition enforcement authorities in all the Member States. This shortage is also experienced at the judicial level and in the business community. It needs to be said that the main reason for this is because none were needed in the four Member States without a competition law in operation. In South Africa the expertise in the business community and the legal circles serving the business community has grown fast since 1999 when the current competition law regime was introduced.

Financial resources are also a constraint for SACU members. The South African competition enforcement structure is mostly financed through filing fees for mergers. It is however quite safe to say that the other Member States because of the size of their economies would not be able to use filing fees for mergers to finance such a high percentage of the costs of a national competition enforcement authority as South Africa are currently doing.

Sovereignty is always a contentious issue. A similar strong commitment to a common market to muster the political will to hurdle the obstacle of sovereignty is not present in SACU as it is in the European Union. It is often rumoured that other Member States are wary of South Africa as it has by far the most powerful in SACU.¹¹⁸ It is submitted that once the structure of a regional competition authority is conceptualised the troubling aspects concerning sovereignty in SACU can be overcome in negotiations for and design of a regional competition authority. Ways to overcome this are discussed at the appropriate instances below.

6.2 Competition law in SACU.

The difference in the level of development of the economies in SACU is quite stark. On the one hand there are Botswana and South Africa with well developed economies, and on the other hand there is Lesotho which is classified as a least developed country. Although a coordinated and harmonised competition law for the Member States may be desirable it is at the same time clear that this does not necessarily translate to the same competition law for the different Member States.

¹¹⁸ For instance see Editorial *Die Burger* 15 September 2003 p 20. *Die Burger* is an Afrikaans newspaper distributed in the Western Cape and Eastern Cape provinces in South Africa.

Having a regional competition law that also applies to competition issues of a national nature may make Member States uneasy. Member States may be of the opinion that a uniform domestic competition law would leave the smaller economies open to pressure from stronger economies to accept the competition law measures more attuned to the needs of the stronger economies. In this regard the ANCERTA arrangement is of guidance. New Zealand and Australia each have its own competition law although they work towards harmonisation of competition law to lower transaction costs for businesses operating in both markets. It is thus suggested that each Member State of SACU write its own competition law that would apply nationally. In this way there is much less infringement on national sovereignty.

If the enforcement of the competition law will be done by the same enforcement authority in different Member States there will be a natural process towards harmonisation. The most likely outcome is that the interpretation of competition law by a shared or regional enforcement body will gravitate to harmonisation of the respective competition laws.

An important question is whether the same competition enforcement institutions would be able to administer different statutes in different Member States. From the point of view of the adjudication by institutions similar to courts it would not present an obstacle too high. In SACU there are many examples of judges of the courts of one Member State being appointed as judges of other SACU members as well and in the process they deal with different laws in different Member States without any apparent problem.

Whether or not to provide for a competition law applying to interstate trade is a question that still needs to be addressed. In all of the regional models discussed, except for the ANZCERTA model there are special rules for interstate trade, apart from the national competition laws. If the position of interstate trade is left to the extraterritorial working of national laws, it may be difficult for a regional competition authority to apply conflicting national laws.

However, enforcing conflicting national laws is not impossible. There are instances where it would be perfectly possible for the competition authority to come to a conclusion based on the law of say Namibia and come to a

different conclusion based on the law of Botswana. It would be clear what the result of the finding will be and how it will be applicable in Namibia and Botswana. Thus it would be fully implementable in both Member States.

In other cases the results may be too messy. As an example think of a merger in South Africa that affects trade in Botswana or Namibia and the laws of Botswana or Namibia differ markedly from the South African position. Where the relevant market in the circumstances described is defined as separate markets for South Africa, Namibia or Botswana each of the relevant markets would be judged according to the laws of the specific Member State. Where the relevant market is defined however as inclusive of more than one Member State the decision of the competition authority would be based on the South African competition law for the South African merger, but it will have to apply the national laws of Botswana and Namibia as well in so far it has application where a merger in South Africa has an economic effect in Namibia and Botswana respectively. However, the Botswana and Namibian competition laws may differ and then neat footwork would be needed to apply the Botswana and Namibia law. A successful integration of conflicting laws may not be possible. It is thus foreseen that competition issues that affect interstate trade warrant a special regional competition law.

The suggestion for SACU is thus that each Member State should enact its own national competition law to make provision for its own level of development. In the process harmonisation of the domestic laws is desirable. A special regional competition law for interstate trade will also be a positive development. Such a regional dispensation would lessen the possible friction between Member States and bring more certainty for the business community.

6.3 *The Institutions.*

In none of the regional models that provide for a regional enforcement mechanism for competition law and discussed above, did the latter mechanism replace the use of national enforcement mechanisms.¹¹⁹ The regional models without a regional authority relied on national enforcement

¹¹⁹ Compare the European Union, COMESA, Mercosur and the Andean Countries.

mechanisms to enforce competition law.¹²⁰ This thesis proposes something different. It proposes a regional authority that would enforce competition law in the different national jurisdictions of the SACU Member States as well as the competition law that pertains to interstate trade.

The choice of such a regional authority does not preclude the possibility that may only be a temporary measure. In SACU there are different challenges or obstacles that would limit the effectiveness of national competition enforcement agencies or may make the implementation thereof impossible. The regional competition enforcement authority proposed should overcome enough of those obstacles to make it an effective enforcement mechanism for the Member States and the region concerned. However, as much as the regional enforcement authority is a solution to overcome the obstacles the solution need only be applied as long as the obstacles exist.

A regional competition enforcement authority may become a permanent fixture or it may be a temporary structure to help countries share scarce resources in the area of competition law as a start-up to the enforcement of competition law. It could be seen as a very practical exercise in building capacity and sharing technical expertise until a country graduates from the system to where it can implement its own national enforcement mechanism.

The choice of a permanent structure or a temporary structure lies with the different governments. However, the desire to have a full functional national competition authority should not stand in the way of a regional enforcement agency which could in the mean time realize the benefits of competition law enforcement and build institutional capacity and expertise.

The institutions enforcing competition law should be independent institutions. They should be seen as institutions not under direct government control. The need for independence was identified in the discussion of institutional weakness. A more pressing reason why it could not be under the auspices of a specific national government has to do with the obvious implications of sovereignty. The regional authority should be created by agreement between the Member States with each Member State enacting the necessary

¹²⁰ Compare NAFTA and ANZCERTA.

legislation to make it effective. For the actions that it carries out in the different Member States of SACU the regional competition enforcement authority should be subject to the constitution and law of each respective Member State.

The further discussion would separate the functions of investigation and administrative application; the adjudication on the recommendations of the investigative and administrative body and the eventual judicial oversight or right to appeal. In the South African context these three functions are dealt with in three different institutions. The same threefold structure is proposed for SACU.¹²¹ The Institutions should include a SACU Competition Commission, a SACU Competition Judicial Board (or Tribunal) and a SACU Competition Appeal Court. The benefit of having these institutions is that it concentrates the expertise available in the different SACU members to achieve the maximum effect with a relative small core of expertise.¹²²

In general the functions of the SACU Competition Commission would be to investigate and evaluate alleged contraventions of competition law; to grant or refuse exemptions; investigate and authorise, with or without conditions, prohibit or refer mergers, make referrals to the SACU Competition Judicial Board and appear before the SACU Competition Judicial Board or the SACU Competition Appeal Court.

The SACU Competition Judicial Board would in general adjudicate any matter that may be referred to it and hear appeals from or review any decision of the SACU Competition Commission.

The SACU Competition Appeal Court would in general review any decision of the Judicial Board or consider an appeal arising from a decision of the Judicial Board and may give any judgment or may make any order confirming,

¹²¹ The reasons are threefold. The South African example has overcome certain of the obstacles mentioned in the South African context and it is also recognized as an example that works fairly well. Secondly, the South African example gives a practical framework for discussion and eliminates too wide an approach to the subject and thirdly, the writer knows the South African example. This is however not to say that this is the only way a regional competition enforcement agency should or could work. The principles applied for solving the enforcement problem in the SACU context could be applied elsewhere leading to a different structure appropriate for different circumstances.

¹²² The benefits of the three institutions in the South African experience are discussed in 2.2 and 4.2 *supra*.

amending or setting aside a decision of the Judicial Board or remit a matter to the Judicial Board.

The different components will be discussed separately. The institutions are discussed in reverse order as they appear above. The possible structure of an appeal body is the least controversial of the three institutions in the light of the history of SACU where such structures existed in the past and some features still exist. Once the possibility of a workable appeal structure is accepted it makes the idea of a shared Judicial Board and Competition Commission less controversial. In a sense this is akin to a mediator that first tackles the points of dispute that can be solved more easily to build the confidence of the conflicting parties that they can reach agreement on all disputes.

6.3.1 SACU Competition Appeal Court.

The necessity of an appeal court flows from the principles of natural justice that determines that there should be judicial oversight of the administrative functions of administrative bodies. The principles of natural justice also allow for the appeal of a decision from a court or tribunal of first instance. The ANZCERTA experience shows that even where the laws of two countries are harmonised it is still possible and likely that different judicial bodies will come to different conclusions. In a common law environment such as SACU the law is also set by judicial precedent. It is therefore in the interest of legal certainty to have an appeal court that is the highest authority that could clear up any uncertainty as to the final interpretation of a rule where conflicting interpretations exist.

Different options to structure an appeal court are possible. The appeal court could be a regional court that specialises in competition matters. In the region there is no other example of a regional dispute resolution body that has a higher authority than national courts.¹²³ However, in the past the High Court of Appeal in South Africa acted as the highest court of appeal for Lesotho as

¹²³ There is currently a process to revise the dispute resolution mechanism provided for in the SADC Protocol for trade disputes that may arise within SADC. The 2002 SACU Agreement also envisages a dispute resolution structure for SACU. Such mechanisms may give the necessary guidance and familiarity with a regional dispute resolution body to pave the way for a regional competition appeal court.

well. South Africa also had a similar relationship with the House of Lords in the United Kingdom at some point in its judicial history.

Another possibility would be for each of the national jurisdictions to provide for a competition appeal court within their national structures, but for the members of the different appeal courts to be appointed from a panel of judges that the Member States agree to. In the SACU region this possibility would be closer to the current reality where judges of one SACU Member State serve on the courts of other SACU members. It is not uncommon to find that the chief justice of one SACU Member State may be a judge from another SACU Member State.

When the decision is eventually made on what the structure of the competition appeal court system in SACU should be it is necessary to take into account what is that the appeal court system should address. Apart from the obvious appeal function of the court there is at least two other important guidelines. The first is that the court should make it possible to achieve the maximum effect with scarce financial resources and a small pool of judges with competition law expertise and, secondly that the court should promote harmonisation of competition law in the region. It is not desirable to have different judicial interpretations in the different SACU Member States of the same competition law principle.

If the judges in one regional competition appeal court are the same judges that may serve in separate appeal courts in the different Member States then both objectives above will be met regardless of the alternative taken. Where the competition appeal court is part of the court system of each of the SACU members' present court system, it could be agreed that a precedent set in the competition appeal court of any SACU Member State would be binding on all other Member States. Following the precedent set in another jurisdiction is not uncommon in Southern Africa. Court decisions of Zimbabwe were often report in South African law reports and became precedents which could be considered in the interpretation of South African cases. Making the precedents of the appeal court of another Member State binding in the national jurisdiction of a Member State would however be a new innovation and an extension of the practice that was followed in certain instances.

An important element in the eventual choice might be the influence of the concept of sovereignty in SACU. In this regard the idea of a regional appeal court may be more difficult to conceive, however this would be balanced by the fact that the regional appeal court would be adjudicating in a particular dispute on the basis of the applicable national competition law.

A further factor that might appease any feelings of a loss of sovereignty will be the composition of the appeal court. A number of possibilities exist. It should be easy to determine and indeed desirable to do so that the panel of judges to serve as competition appeal judges in SACU should be representative of all Member States. Furthermore it could be determined that the appeal court will not sit with less than three members from the panel. The final composition of the appeal court for a specific dispute could then depend on the locality of the matter. For instance, if it is a matter falling within the jurisdiction of Namibian Competition Law then the composition of the panel of judges must consist of at least one Namibian judge.¹²⁴ In this way judges would acquire expertise in competition matters through learning by doing. It is expected that a rational appointment of judges would always include a judge experienced in competition law in composing the panel and it would enhance the building of expertise at judicial level. If a SACU Member State would then at any moment decide to graduate to a national competition enforcement authority much experience would have been gained by the shared experience.

The ultimate choice is best taken on the consideration of other practical matters as well. These practical matters refer to the effect of a judgment by the appeal court in the national jurisdictions concerned and the way the appeal court will fit into the constitutional framework of the various national jurisdictions. The decision on the structure of the appeal court would also depend on the overall structure of the competition commission and the judicial board.

¹²⁴ The precise composition could be tailored to fit many of the concerns of the different Member States. If the SACU members might be concerned that South Africa might play to big a role then the composition for a Namibian case may be one Namibian and two more judges of two other Member States. In the South African example it could be two South African judges and a third from any other SACU Member State. Considerable flexibility is possible.

The budget of the appeal court would depend on the alternative chosen. In either alternative the budget for the court does not seem to be a high cost. The South African Competition Appeal Court forms an integral part of the South African judicial system and as such the cost of it is not readily obtainable, but the judges appointed fulfill their function on a part time basis. The competition appeal court would be mobile and could sit in any of the Member States depending on the convenience of the matter at hand. This would make it a flexible structure that would be relatively inexpensive to administer.

6.3.2 SACU Competition Judicial Board.

The SACU Competition Judicial Board would have the power to adjudicate any matter that may be referred to it from and hear appeals from or review any decision of the SACU Competition Commission.

As the SACU Competition Judicial Board would play the role of adjudicator of first instance for the actions of the SACU Competition Commission many of the considerations that apply to the SACU Competition Appeal Court would also apply to the SACU Competition Judicial Board. The SACU Competition Judicial Board could be a single body with panelists from all the Member States. The composition of the panel in a specific competition issue could be similar to those discussed under the appeal court above.

The difference is however that the panelists could be drawn from persons with a wider experience than legal experience. It could also include members with their principal experience in other fields related to competition law such as economics, commerce, industry or public affairs.

The budget of the SACU Competition Judicial Board could come from the filing fees and a formula for the contribution by the different governments. The experience of the South African Competition Tribunal is that such a mechanism of funding would contribute a large percentage of the necessary funds.¹²⁵ To save on the budget members could be appointed on a temporary basis, with probably the chairperson being a permanent appointment.

¹²⁵ See the funding of the SA Competition Tribunal at 4.3 *supra*.

The SACU Competition Judicial Board could get its power of jurisdiction from a SACU Protocol conferring the power to do so. The rulings made by the Board would be implemented in the Member States concerned by acknowledging it as ruling made by an authority from the Member State. This is possible and such a precedent already exists. In SACU provision is made for the application of anti-dumping duties by all the Member States once the South Africa Trade Administration Commission (previously the Board on Tariffs and Trade) has determined that such an anti-dumping duty should be levied.¹²⁶ With the acceptance of the 2002 SACU Agreement it is envisaged that each Member State would have a similar body dealing with anti-dumping and that a finding of any such authority to impose an anti-dumping duty would be followed by all other Member States in SACU.

Special provision should be made for judicial review of matters before the Board. This is necessary to give effect to the Constitutions of Member States that provide for administrative justice. In this regard citizens of different Member States appearing before the Board should be able to bring an action on review before the national courts in their respective Member States. If the Board is recognized as an instrument of SACU this will not prove to be an insurmountable hurdle.

6.3.3 SACU Competition Commission.

The SACU Competition Commission has the functions of seeing that competition law is implemented in the different Member States of SACU. This would require it to do the necessary investigations in regard to restrictive practices and to scrutinise mergers to approve, disapprove or approve with conditions.

The Competition Commission may have to deal with different possibilities. If SACU decides to adopt a competition law that is applicable in all Member States on a uniform basis, then it is fairly simple to foresee that the Commission will not experience too much difficulty in the substance of its activities. Where each Member State adopts its own competition law on the

¹²⁶ See WTO Trade Policy Review. Loc. cit., n. 115, at p. 33. See also the Board of Trade and Tariffs Act, 1986 and the International Trade Administration Act, 2002 that provides for the legal basis for anti-dumping, countervailing and safeguard measures in South Africa, and by extension in SACU.

basis of harmonised competition law, the Commission would not have difficulty in applying the substantive law. It may be a lot more difficult for the Commission to do so where Member States adopt vastly different laws.¹²⁷

Adherence to the procedural law in the different Member States could present a more substantial problem. This could however be dealt with in Protocol provisions. The Commission could overcome the difference in procedural laws in different Member States by having different departments in the Commission to deal with the procedural aspects in the different Member States. Procedural aspects would include the co-operation in the investigation between the Member State and the Commission; treatment of confidential information and the implementation of decisions. Procedural aspects could also be the subject of an agreement between the SACU Member States to iron out cooperation on procedural matters.

A SACU Competition Commission would have the desired independence from the respective governments. However, the perceived independence from the influence of a specific Member State should be carefully considered. This could be overcome by a requirement that the employees of the Commission include citizens from all the Member States. This would also ensure that each Member State would build capacity and expertise in competition law enforcement. If the head of the Commission has a strong influence on the work and decisions of the Commission and create fears of leaning towards the interests of competitors in one Member State then the sensitive decisions to be taken could be taken by more than one person on a formula more acceptable to the Member States.¹²⁸ A policy of rotation for the head of the Commission may also be a strategy that may allay any fears of favouritism.

The finances of the SACU Competition Commission could come from filing fees for mergers that is currently responsible for the bulk of the financing of the South African Competition Commission. Being a Competition Commission for the whole of the SACU region would no doubt increase the budget. It is

¹²⁷ In terms of the objectives of the 2002 SACU Agreement it seems unlikely that the future trade policies and competition policies would be divergent.

¹²⁸ I am not sure what kind of decisions would constitute such sensitive decisions as the decisions of the Commission could be appealed to the Board and eventually the Appeal Court. Any favouring by such a person would eventually be overturned or would show up. Nevertheless, it is better to take the possible fears into consideration.

clear that mergers in Botswana, Lesotho, Namibia and Swaziland would not contribute a considerable amount of money to the SACU Commission. Any shortfall would probably have to be made up by a contribution from the Member States. As discussed above the cost invested in competition enforcement could easily repay itself in terms of savings on government purchases of goods affected by cartel behaviour.¹²⁹

6.3.4 Comment on the suggested regional competition enforcement in SACU.

A regional competition authority with national reach in SACU would bring several benefits. First and foremost it would make competition law enforcement possible in all of the Member States of SACU. Scarce resources would be used optimally and the shortage of expertise could more easily be overcome. It would contribute to the harmonisation of competition policy and lower transaction costs for people doing business. As a single institution that affects five countries it would certainly be placed well to receive technical support from international bodies. The infrastructure of SACU is such that such a regional authority could function effectively. Furthermore, such an institution would be an incubator for building capacity in all five Member States of SACU.

From the discussion it is evident that the obstacles to the enforcement of competition law in SACU could be overcome in the structure of a regional competition enforcement authority. This also is also true for the tricky issue of sovereignty.

7. Conclusion.

A review of the reasons to implement competition policy and competition law in developing countries shows convincing reasons for developing countries to do so. This conclusion is supported by the SACU, SADC and COMESA Agreements that all provide for the implementation of competition policy and law.

¹²⁹ See 4.3 *supra*.

Developing countries do experience obstacles in implementing competition law enforcement authorities. There have been suggestions that a regional competition authority should be able to help developing countries to share scarce resources to make it possible to have a regional enforcement authority. However, all the models with regional enforcement looked at in this study use a regional authority only as a complement to national competition authorities, if at all. In the light of the circumstances and historical practices in the SACU region it seems probable and even likely that a regional competition enforcement authority of a different kind could be established and could function effectively. This regional competition enforcement authority could be one that does not complement a national authority, but could do the necessary enforcement on a national and interstate level.

Such a development would be an example that can be adopted and adapted elsewhere where groups of developing countries can share resources to make competition law enforcement possible on a national and interstate level. Such a development may spread the benefit of having competition enforcement to the participating developing countries.

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