MASTERS THESIS

IN PROPOSING AN ENHANCEMENT OF SACU COMPETITION POLICY

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A. Ayayee

NAME: AYITEY AYAYEE

IDENTITY NUMBER: 8504135982182

CANDIDATE MASTERS OF LAWS IN INTERNATIONAL TRADE & INVESTMENT

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Abbreviation

1. AU- African Union
2. BLNS – Botswana, Lesotho, Namibia, Swaziland & South Africa
3. CARICOM -
4. CEMAC - Central African Economic and Monetary Community
5. CEN-SAD - Community of Sahel-Saharan States
6. CEPGL - Economic Community of Great Lakes Countries
7. COMESA - Common Market for Eastern and Southern Africa
8. DTI – South African Department of Trade & Industry
9. EAC – East African Community
10. EC – European Commission
11. ECCAS - Economic Community of Central African States
12. ECOWAS – Economic Community of West African States
13. EPA – Economic Partnership Agreements
14. FDI – Foreign Direct Investment
15. GATT – General Agreement on Tariffs & Trade
16. HCT – High Commission Territories
17. IGAD - -Governmental Authority on Development
18. IMF – International Monetary Fund
19. IOC – Indian Ocean Community
20. MFN – Most Favoured Nation Principle
21. MNC – Multi National Corporations
22. MRU – Mano River Union
23. RDP – Reconstruction Development Program
24. RISDP - Regional Indicative Strategic Development Plan
25. RTA- Regional Trade Agreement
26. SACU – Southern African Customs Union
27. SADC – Southern African Development Community
28. SME – Small Medium Sized Enterprises
29. UEMOA - West African Economic & Monetary Union
30. UMA – Arab Maghreb Union
31. WTO – World Trade Organization

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Abstract

The South African Customs Union (SACU) is one of the many regional trade arrangements that litter the African continent. However unlike its counterparts it is unique in terms of the huge disparities between the economic states of its member states. SACU is currently struggling to redefine itself from its historical trimmings as a plumped up South African foreign policy tool to a regional body that caters for the needs of all its member nations. Key to this purported transformation would be how SACU copes with the increased presence of foreign multinational companies within the common market and coupled to this the persistent threat from established South African companies on infant industries within smaller SACU states.

This dissertation highlights the potential role of competition policy as a market correcting mechanism within the regional context. It does so by shedding insights as to the workings of competition law, its natural impediments, modifications it would require and the objectives which it can be used to achieve. It considers the current state of competition law within SACU both on the domestic and regional front and compares them with examples found in other regional arrangements. It strives having regard to peculiarities within SACU to draw attention to shortfalls in its current approach to competition issues and makes a case for the modifying the current modus operandi. It proceeds from the viewpoint that without a fortification of SACU current approach to competition issues, the huge lacuna currently existing would deprive the regional body of any true gains to be made from trade liberalisation. It also proposes a regional competition policy as a means of controlling the ever present threat of established South African to infant industries in smaller SACU states and hopes this instrument will have the secondary effect of easing political tensions within the union. It makes an important call that special consideration be given towards smaller SACU states noting the cost and burden of implementing competition policy. It also considers the role competition law plays within a development framework dispelling prevailing conceptions within certain schools that it stunts growth of industries.

It factors into its analysis, the ongoing negotiations between the European Union and SADC. It holds these processes as placing a further impetus on SACU nations to consider a movement from the current positive comity form which competition policy takes in the region by declaring it to be a weak form of cooperation and unsuited to effectively managing the new challenges that successfully negotiated EPA's would place on competition authorities within SACU.

Ultimately it proposes that SACU requires a strengthened competition policy to secure the gains from international trade but that more importantly it requires the right form of policy, a policy created in consideration of its history, current tensions, developmental needs, that foresees the potential for harm inherent in the EPA process and a policy that appreciates the burden a generic law might place on its member states. Its solution to the current crisis is a hybrid system incorporating elements of the EC supranational competition directorate and CARICOM special and differential treatment provisions.

CHAPTER 1

SACU IN CONTEXT

The origins of South African Customs Union (SACU) date back to 1889 when the Customs Union Convention was signed between the British Colony of the Cape of Good Hope and the Orange Free State Boer Republic. SACU thus has one of the longest unbroken periods of a custom union history in Africa and perhaps the world. SACU is currently made up of BLNS states, namely Botswana, Lesotho, Namibia, South Africa and Swaziland. It is to date the most effective functioning regional arrangement in Africa, a fact hardly surprising considering the state of disarray of other regional bodies on the continent. Coupled to this is the fact that its membership houses the economic powerhouses of Africa being South Africa and Botswana, arguably the most efficiently run nations on the continent.[1]

Despite its long timeline, the relationship between South Africa and other SACU member states has been characterized by much acrimony. This is driven by the fact that the huge development gap between South Africa and the other BLNS states currently exists as a direct result of trade policies that the former put in place in bygone decades that had a detrimental effect on their economies. These sentiments are further justified win light of the fact that SACU was the very vehicle used for the implementation of these policies. The sub-continent of course has its own peculiar challenges, events such as the spread of HIV has had negative implications especially for countries such as Botswana and Swaziland. This however does not dispel the fact that from a purely economic and trade standpoint the relationship of the BLNS with South Africa can be viewed as much a blessing as a curse.

Economic integration is an interesting subject especially with regard to Africa where it has found place as a political buzzword. It is doubtful, though, that the drafters of the General Agreement on Tariffs and Trade anticipated the popularity of economic

*The writer acknowledges with appreciation the assistance received from lecturers and staff at the University Of Pretoria, South Africa and in particular acknowledges the contributions of Memory Dube and Sizwe Gcanyi colleagues at the University Of Pretoria to this work. Their key insights into SACU and SADC truly were indispensable to the completion of this thesis.

[1] Richard Gibb (University of Plymouth),The New Southern African Customs Union Agreement: Dependence with Democracy, Journal of Southern African Studies, Volume 32, Number 3, September 2006, page 3

integration when they included in the GATT permission to deviate, at article XXIV[2] and through the enabling clause,[3] from the Most Favoured Nations principle (MFN)[4] in favour of regional trade groups.

Africa currently has 14 regional integration groupings, with two or more in almost all sub-regions. In West Africa the West African Economic and Monetary Union (UEMOA) and the Mano River Union (MRU) coexist with the Economic Community of West African States (ECOWAS). Central Africa has three groupings: the Economic Community of Central African States (ECCAS), the Central African Economic and Monetary Community (CEMAC), and the Economic Community of Great Lakes Countries (CEPGL). East and Southern Africa share six regional economic communities: the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Inter-Governmental Authority on Development (IGAD), the Indian Ocean Commission (IOC), the Southern African Development Community (SADC), and the Southern African Customs Union (SACU). North Africa hosted only the Arab Maghreb Union (UMA) until the Community of Sahel-Saharan States (CEN-SAD) emerged, although CENSAD's membership straddles other economic communities and sub-regions.

Prior to any in depth study being done on SACU, it is imperative that the right geopolitical lenses are worn. As Gibbs puts it, regionalism can be understood as an attempt by nation states to control at a regional level what they have increasingly failed to manage at the national and multinational level. On this premise, regionalism

[2] Article XXIV envisages reciprocal benefits, under this regime a RTA will only be WTO compatible if reciprocal preferences granted cover substantially all trade between parties as provided for under Article XXIV: 8. There has been differing opinions as to the implication of the term 'substantially all trade' centred on two possible propositions. The first propounds establishing a set point of reference based on the percentage of trade between the countries. This is a point that finds favour amongst the Chinese and the EU. The latter advocates that the yardstick should be set at 80%. An alternate approach is to perceive the issue of market access form a qualitative standpoint. This propounds the view that no major sector should be excluded.

[3] The enabling clause incorporates an element of development and stipulates 3 provisions that must be met to meet the compatibility test. It requires that an RTA: *a)* Shall be designed to facilitate and promote the trade of developing countries and not raise barriers to or create undue difficulties for the trade of any other contracting parties; *b)* Shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis; *c)* Shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

[4] Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members.

has the dual effects of not only intensifying the mobility of production factors but at the same time limiting the threat of foreign competition. In a very real sense regionalism enables a state to regain control over the macro-economic management of their economy that some may rightly argue was lost to multilaterism.

However beyond Gibbs conception and perhaps what is most defining of the beginnings of SACU is an RTA which was used as a tool to achieve colonial conquest. SACU is in present times struggling to redefine itself from the perceived role of a plumped up South African foreign policy tool to one that is considerate of the interests of all its member states. As earlier mentioned there exists a great deal of acrimony towards South Africa within the customs union, with even talks of the possible withdrawal of Botswana from the Union. The cause of these tensions must naturally be explored to gain an understanding of its context and thus dictates a brief consideration of the history of SACU.

From its establishment SACU's policy objective has always followed the theme of acting foremost in the interest of South Africa. Any gain that the BLNS would receive was always ancillary to this object. Pretoria was always placed at the centre of SACU, a thinking spawned by the marginal subordinate positions of the HCTS in the 1900's when already, plans for their incorporation into South Africa had reached an advanced stage and was seen as a given.[5] The HCT States as made reference to herein were comprised of Bechuanaland, Basutoland and the Rhodesia's. Their territories cover present day Lesotho, Botswana, Zimbabwe, Zambia and Swaziland.

These states though admitted to SACU enjoyed diminished rights in comparison to South Africa.[6] Neither country had power to amend the customs union treaty, alter its terms or vote on new accessions. The logic presumably was that the black man could not understand these matters and that Britain which controlled Bechuanaland and Basutoland could make its will felt through its Cape membership.[7]

[5] Part IX of the Union of Southern Africa Act, 'Act of the British Parliament to Constitute the Union of Southern Africa; British and Foreign State papers 1908-1909, Vol. 011, part IX, London His Majesty's Stationary Office 1909, p.15
[6] Richard Gibb, The New Southern African Customs Union: Dependence with Democracy, Journal for Southern African Studies Volume 32, No. 3, (September 2006), page 587
[7] Ibid at page 587

The plight of the Bechuanaland and Basutoland worsened with the renegotiation of the second customs union convention in 1898. This resulted from the fact that Britain had emerged victorious post the Anglo-Boer war. The practical implications of this victory was that Britain's hegemonic rule made negotiating the second customs union convention less onerous but also lopsided in catering for the interests of member nations, and in 1903 a Customs Union Convention was signed between the Cape, Natal, Orange River Colony, Transvaal and Southern Rhodesia (Zimbabwe).[8] Bechuanaland and Basutoland were admitted under a separate protocol which effectively categorised them as second class members of the customs union. Their plight further worsened in 1910 with the formation of the Union of South Africa, which had the resultant effect of fragmenting Southern Africa with imperial responsibility retained in the Bechuanaland and Basutoland protectorates, hence the reference to them as High Commission Territories.

This was never intended as a permanent arrangement with the 1909 Act constituting the Union of South Africa making provision for the transfer of the HCT territories to South Africa. Due to this train of thought the interest of the HCT states were not borne specifically in mind in the customs union discussion which resulted in many hardships for these territories, the effects of which are still felt to this day.[9] Thus some rightly argue that barring international pressure spurred on by Pretoria democratic deficit and racist policies, the object of assimilating the HCT territories into South Africa would have been long realised and the imbalances that plague current SACU and existing acrimonious relationship would never have resulted.

Further to this point SACU's early framings had no developmental object, unsurprising considering the already earmarked assimilation of the HCT territories into South Africa.[10]The sole object behind its creation and its most contentious aspect was the setting up of a revenue sharing formula to govern the disbursement of the proceeds of international trade amongst participating territories and secure access for South African corporations into HCT territories. Due to the intention to transfer their sovereignty, HCT's were viewed as peripheral to the South African economy.

[8] Ibid at page 588
[9] Ibid
[10] Ibid at page 592

The current problems that plagues SACU advanced from this geopolitical perspective can always be traced to the subjugation of the developments needs of the HCT's to that of Pretoria and imperial interest to use them as an effective prize to keep the national government in Pretoria in line. The asymmetries of these bygone days have had a marked effect on present day SACU and can be held to account for:

- The over reliance on South Africa and the latter's virtual carte blanche right to unilaterally create and change policies affecting the combined territories
- The fact that inter regional trade within SACU is stifled by virtue of member states producing the same goods
- The lack of common institutions in SACU with the resultant effect of present BLNS states being almost completely dependent on the goodwill and revenue of Pretoria to see to the day to day running of the customs union. Considering its long history it is indeed disconcerting that there to this day exist no independent customs administrations. An oft cited instance where this acted to the detriment of the smaller BLNS nations was the industrial growth strategy Pretoria followed in 1925 that was based on import substitution policy, which had a marked negative impact on the welfare of BLNS as a result of trade diversion as they were forced to purchase more expensive goods from South Africa, lowering their welfare.[11]

Much remains unsaid but as a consequence of the brief exposition above any propositions advanced to fortify competition policy within this customs union must strive to achieve two salient points. The first being to protect the union from market distorting measures undertaken by industries within the union, more pointedly industries of South African origin, already viewed as having an unfair head start, with the hope of normalising relations within SACU and dispelling decades of mistrust. In addition such a process must endeavour to prevent en masse, negative externalities to market conditions emerging that would result directly from the current SADC negotiations with the European Union and the United States towards an Economic Partnership Agreement (EPA) going forward. Th resoning behind the last point is that this would lead to a surged increase of the levels of foreign owned multi-national

[11] Ibid at page 590

companies (MNC's) operating within the common market adn might threaten certain development objectives. Bearing in mind that SACU is essentially a SADC[12] minus group the integration model of the latter needs to be borne in mind.

SADC & Economic Integration

The Southern African Development Community (SADC) was declared a Free Trade Area on 17 August 2008. The Free Trade Area is the ultimate objective of the Trade Protocol on trade cooperation in SADC, signed in 1996. The Protocol is supported and complemented by the ambitious Regional Indicative Strategic Development Plan (RISDP). The idea behind the SADC Trade Protocol was to counter the developmental challenges facing SADC member states and to improve the productive and trade capacity of SADC countries. The implementation of the SADC Free Trade Area has been guided by the WTO/GATT regulatory framework on regional trade agreements, particularly GATT Article XXIV.

The Free Trade Area is seen as the first step towards regional economic integration in the region and is to be followed by a Customs Union, a Common Market and then eventually an Economic Community with its own central bank and regional currency. It is envisaged that the region and hence SACU will proceed through all these traditional theoretical phases of economic integration between 2008 and 2018. The implementation of the Trade Protocol has been beset with institutional, administrative and infrastructural challenges which pose obstacles to the attainment of the other stages of economic integration in the time frames prescribed in the RISDP.

Further to this the history of economic integration in Africa is inundated with problems and failures and this sets the stage behind the attempt of SADC. The economic conditions pertaining in Africa do not seem conducive for economic integration as that envisaged by SADC. There have been no discernible benefits from integration attempts within Africa, not even within SACU as the longest

[12] The Southern African Development Community (SADC) has been in existence since 1980, when it was formed as a loose alliance of nine majority-ruled States in Southern Africa known as the Southern African Development Coordination Conference (SADCC), with the main aim of coordinating development projects in order to lessen economic dependence on the then apartheid South Africa. SADCC was formed in Lusaka, Zambia on April 1, 1980, following the adoption of the Lusaka Declaration - Southern Africa: Towards Economic Liberation. The founding Member States are: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. Current Member States are: Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

surviving RTA in Africa.[13] Other factors also contribute to the failure of integration in Africa, such factors as the African preoccupation with metropolitan centres, failure to link the economies and infrastructure and where linked, the production structures cannot complement each other thus obviating the need for linkage.[14] The external dependency is another problem and it feeds the further marginalisation of the African economies.[15]

Where states have managed to find a way of overcoming the above problems, such as the development integration approach of the SADC, other problems arise. Among these problems are: a consistent failure by African countries to bring domestic policies, such as competition policies in line with their international treaty bindings and an unwillingness to put regional interests ahead of domestic ones;[16] or to give regional institutions the necessary authority needed for them to push forward the regional agenda. This is clearly evidenced by the absence of effective supranational bodies on the continent. There is also an absence of monitoring and enforcement mechanisms with regard to the treaty obligations. The problem of regional economic integration can also be divided into three categories: economic, legal and political.[17] Africa's economic geography is generally unsuited for integration due to the fact that states dabble in the same industries. In light of this Africa is thus using an inappropriate method of economic integration, a method well suited for the industrialised states of the West.

The liberal trade model of integration is driven by three things, "incrementalism", the use of trade as a driving force of integration, and reliance on market forces as a

[13] The system used within SACU has left the economies of the BLNS states in a dependence relationship with the South African economy. Being the most developed member of the group, South Africa gets to be the most eligible candidate and the recipient of most major investment. The customs revenue that the BLNS states get from the CU cannot compensate for the huge trade deficit that is four times larger than the revenue received. The common external tariff also forces the states to buy South African goods as the most affordable and thus contributing to South Africa's economic growth. SACU is a prime example of the effects of trade liberalisation among countries of different economic capacities.

[14] F Gwaradzimba "SADCC and the Future of Southern African Regionalism" (1993) 21 *Issue: A Journal of Opinion* 51 at 55.

[15] *Ibid.*

[16] This is a direct product of nationalism, which, in this context, poses a major constraint to regional integration as regional schemes are only relevant and used to the extent that they further domestic interests.

[17] H Mutai "The Regional Integration Facilitation Forum: A Simple Answer to a Complicated Issue" (2003) Working Paper No3/2003 Trade Law Centre for Southern Africa 22.

pertinent integration mechanism".[18] This colonial production structuring aimed at stripping and exploiting Africa's resources for the benefit of overseas markets make intra-regional trade impossible today, as the states trade in the same products and no impetus exists to trade amongst each other. Herein and most notably South Africa is different, sanctions imposed on its former nationalist governments forced it to re-engineer its economy away from its colonial strapping's thus though it possesses the same comparative advantage as other SACU states in agriculture it also possesses a well developed industrial sector. The consequence of this ensuring a lopsided intra regional trade interaction with its neighbours whom it regularly sells to but does not in most instances need to buy from.

Underdevelopment and economic inequity has also served as a bar to integration hopes as economic power is necessary to make meaningful the political power required to undertake the task of integration. These political tensions manifest themselves in the operations of the institutions created by African states for integration purposes. Secretariats are not ceded enough authority and are thus rendered incompetent. There is a general unwillingness to have any form of supranational institution exercising authority over the states, however minimal. In SADC, for instance, despite the 2001 restructuring exercise that left the Secretariat more empowered in terms of authority and scope of work, the states still guard their sovereignty jealously to the extent that it negates the objective behind empowering the Secretariat. Trade liberalisation was imposed on SADCC in the 1980s through donor interests and priorities. It was implemented as a means of obtaining loans and funding from the International Monetary Fund (IMF) and the World Bank and the political will for proper implementation of such liberalisation is therefore lacking. The legal intricacies involved pertain to the status of international law within the national arena. Treaty obligations do not pose a legal problem for those countries that follow the monist approach to international law but where the dualist system is followed, implementation can take very long. African trade integration initiatives are also notorious for imposing terms and norms whose legality is highly questionable and thus become unenforceable.[19]

[18] GH Oosthuizen *The Southern African Development Community. The Organisation, its Policies and Prospects* (2006) 104.
[19] Mutai "Regional Integration" 24.

The patterns of trade that have played out in Africa since independence and the fate of most RTAs have led some commentators to conclude that there is no pressing need for economic integration in Africa and the traditional integration theory, based on the *laissez faire* approach, is largely irrelevant to the "actual purposes, processes and problems of Third World economic coordination".[20] Despite this, First World forces still call for the economic integration of Africa. The "neutrality" of such forces is therefore questionable and calls for a closer inspection of the position of Africa as it penetrates the world market.[21]

Nonetheless, regional integration could be seen as a protective shield against manipulation by the global economy. This was the case in post-independent Africa where Pan-Africanist sentiment fed the idea of linking the African economies and making them sustainable on their own. Nonetheless, regional integration can also be used to "institutionalise openings to the international economy"[22] which is the ideal scenario. Both arguments fail to consider the dynamics of African regional integration and are premised on the idea of regional integration being merely economic integration. The problems associated with African regional integration span across other socio-political considerations, with politics playing a major role.

SADC has long been toasted as a region of so much potential and the one most likely to succeed with its integration initiative. During the apartheid era, expectations were that a post-apartheid southern Africa could grow to be a force to reckon with. It is one of the richest regions in the world,[23] which would translate into huge fossil fuel reserves, the most valuable mineral resources in the world and fertile agricultural land. Therefore, in terms of resources, the region has enough potential to build a strong economy. It is true that there is pressure from international economic thought to create a viable institutional mechanism for regional economic integration. However, Africa is not just responding to international economic thought but economic integration is being pursued as part of its goals of economic, social and political development. The paradox of economic integration in SADC and hence

[20] Gwaradzimba 1993 *IAJO* 55.
[21] A Pallotti "SADC: A Development Community without a Development Policy?" (2004) 101 *Review of African Political Economy* 513 at 514.
[22] R Gibb "Southern Africa in Transition: Prospects and Problems Facing Regional Integration" (1998) 36 (2) *The Journal of Modern African Studies* 298.
[23] MC Lee "Development, Cooperation and Integration in the SADC Region" (1999) 2 *Social Sciences & Humanities and Law & Management Research Journal University of Mauritius* 29 at 44.

SACU is that it would be the most efficient way of transforming and modernising the weak economies, but at the same time the standard strategy would not work for Africa, principally because of low intra-regional trade. The real result as seen from SACU is merely the granting of access to South African industries into the markets of other BLNS States.

One of the most visible successes of southern Africa is the political unity culminating from the liberation struggles for independence. The sense of regional identity born of the states' cooperation during the liberation struggles could be used as a foundation for economic integration.[24] There are other reasons that speak for integration within the region, political instabilities which have a spill-over effect, environmental problems, diplomatic disputes, democracy and constitutionalism; all of these are issues that cut across borders and SADC, being an intergovernmental organisation, needs an institutionalised approach to cooperation.

The trade liberalism approach to regional economic integration neglects to consider that regional integration inevitably "interferes" with the sovereignty of states and their power relations in order for it to work. One allows needs to consider the current uncertainty as to whether Botswana and South Africa would remain members of SACU to gain sight of how politics feeds into the integration process. Will Botswana continue to passively watch South Africa reap a disproportionate amount of foreign direct investment entering the union and will South Africa continue to subsidise other SACU states through a clearly unsustainable revenue sharing formula whilst funding almost unilaterally the work of so called SACU institutions. What would be the role of trade unions and civil society in the answering of these questions and what would remain if such an exodus occurs? Where does it leave smaller economies in SACU who have relied on South Africa to act as watch dog in the international trade arena?

The considerations above would be instrumental to the continued viability of SACU. The only catalogued success of regional integration initiatives like the EU, took place within developed and highly industrialised regions, within a different economic, social and political ethos. There is need, therefore, to consider other strategies that are

[24] S Amin *et al* (eds) *SADCC: Prospects for Disengagement and Development in Southern Africa* (1987) 148. It must be noted, however, that this political unity and identity has somehow been diluted by the accession into SADC of such states as Mauritius, Seychelles (former member) and Madagascar. These states have no political ties to SADC and found acceptance by virtue of economic considerations.

more fitting of the South-South regional integration setup. Also, to date, there is no available all-encompassing strategy for regional integration in both developed and developing countries.[25]

In consideration of SADC's integration initiative, it must be borne in mind that the approach is not pure market based, but is a broader one that encompasses development in all critical sectors. Indications are that trade and economics will however occupy a greater part of the policymakers' attention and the region has basically come to be regarded as a regional economic integration organisation. The Regional Indicative Strategic Plan, which is complementary to the SADC Trade Protocol, all but consolidates this perception. It highlights the sequence of events that is followed under the traditional economic integration theory and practice. Foregoing these political considerations and moving with the pure economic intent of replacing national markets with one common market as a custom union envisages, SACU would be ill equipped at the present moment to police the common market especially one with increased numbers of foreign MNC's in it. What then becomes of its developmental object especially where local companies are concerned?

As Valentine Korah frames it, there would be very little point to remove barriers created by government interventions in the market merely to replace them with concentrations and other restrictive business practices as well as concerted practices among private firms.[26] Unlike following neo-liberalist precepts, control of the common market resulting from trade liberalisation is vital to securing true benefits for the end consumer especially if subsequent EPA strive to open the corridors of free enterprise granting increased access to western industries.

This dissertation will thus analyse the rational, scope and basis for its proposition that the current positive comity arrangement that SACU has adopted both fails to enhance true economic integration of the customs union. It will further determine the implications of proceeding with the earmarked SADC EPA with the EU, prior to creating a supranational competition policy for the customs union. It will include a discussion of strengthening competition policing on the domestic and regional front with an in depth discussion of how competition can be used to assure developmental

[25] Pallotti 2004 *ROAPE* 514.
[26] Korah Valentine, An Introductory Guide to EC Competition Law and Practice, 6th ed. Oxford: Hart Publishing (1997a), 1.

gains from market integration especially within a liberalised common market, that allows substantial access of foreign firms. It would also contain a cursory discussion of competition law workings to control[27] market abuse by giving consideration to its objects, limits and enforcement mechanisms.

Chapter 2 will consist of a basic exposition of the working of competition law focusing in on its role within a legal system and impediments to transplanting it from the domestic scene to the regional scene. It will highlight the peculiar needs of RTA's that calls for the creation of regional competition policy once again using SACU as a test subject. It will further consider the potential developmental benefits of competition policy, especially within RTA where there exist huge economic disparities between member states. It will conclude with a survey of current competition provisions existing within SACU member states in determining the current state of affairs in as far as SACU is concerned.

The reason for the peculiar focus on SACU delves from the fact that the new SACU agreement commits to the creation of a common market. This chapter lays the foundation for proposing that this aim will not hold true benefits for all nations especially smaller ones unless SACU commits itself to the establishing harmonised competition regulatory framework. It will contend that the neutrality of competition policy makes it both fitting to both regulating the market but also has added benefits of assuaging tensions currently being experienced within SACU, the source of this tension being the dominance of South Africa within the union. It will further hold out competition policy as providing a true basis for SACU member states to evaluate the efficiencies gained by allowing foreign investors access to its markets.

Chapter three will flowing from the same theme commence by means of analysing current SACU provisions on competition policy. Subsequent to this it will look at regional examples of competition policy currently in existence. It will look at trends from as far out as the European Union to COMESA provisions. The purpose of this would be to rank the SACU provisions in terms of its structure and make suggestions to address any shortfalls identified.

[27] Control here means to exercise restraint or direction on the free action of another in order to keep the market open and to refrain from abuse of dominant market power.

Chapter four will contain a full exposition on economic partnership agreements. This would include a look at what they are, how they came about and their implications for international trade. From the focal lenses of SACU it would look at the potential destructive implications of such agreements and how this is heightened by the non-existence of competition laws and a regional competition policy for the union.

Chapter 5 will tender solutions to enhance and strengthen competition laws in SACU whilst summing up the key arguments of the dissertation. It will also cast an eye to current developments in SACU and look at its implications for SACU going forward.

Chapter 2

Competition Law: Purpose and Basic Principles

Competition law lies at the core of a cluster of laws and regulations that cumulatively sustain the free market system. It is a key element of virtually all advanced national legal systems based on capitalist systems. Its aim is to achieve market equilibrium, a state where producers and traders compete freely based solely on the quality of products and services they offer coupled with pricing rather than through the improper exercise of market power whether that power was acquired unilaterally or in concert with others.

Informally defined it is a set of rules found both in statute and in tradition that is used by governments, to deal with industry structures and practices that give excessive market powers to sellers. Its aims are as follows:

- The encouragement of free open markets with priority given to the protection of infant industries
- Promotion of efficiency
- Maximizing consumer welfare
- Establishment of transparency and fairness in the regulatory process

As a core tenet of competition regulation is the presupposition that freedom to compete presumes freedom to enter the market, freedom to develop and grow and freedom from collusive activities aimed at driving new businesses from the market.[28] It thus takes the necessary actions required to keep the playing field level.

Normally thought of as a key component of domestic regulation, there is a new growing awareness by national governments and international organisations that appropriate structuring and rigorous enforcement of competition law helps promote international trade especially where market integration is prioritized by minimizing the ability of private firms to use national practices to avoid trade obligations.

[28] ECOWAS – Regional Competition Policy Framework, Recommendations of the Ministerial Monitoring Committee, Copy with Author, page 3

It is important from the onset to distinguish between the terms competition law and competition policy. Competition policy is broader than competition law as it encompasses other activities of governments beyond mere regulations that relate to conditions in the marketplace either to protect or create competition and include policies dealing with privatization and deregulation. Competition policy as a term is also broad enough to encompass other laws with pro-competitive aspects such as unfair trade practice law, consumer protection laws and laws set up to regulate foreign direct investment into the local market.

Competition law is chiefly concern with the tackling of two forms of practices by private sector operators; these are the prevention of anticompetitive agreements and enforcing discipline in instances where market dominance by few entities prevail.[29] By way of example Section 2 of the US Sherman Antitrust Act of 1980 which is the chief competition legislation in the United States provides in part that:

"Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several states or with foreign nations is declared to be illegal", it continues and stipulates with regard to monopolies as follows: "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among several states, or with foreign nations, shall be deemed guilty of a felony".

It further provides for sanctions for violations of these provisions which can range from administrative orders to criminal penalties in some rare cases. It might be off interest to point out that for competition sanctions to be enforced the conduct of the private operator must have been voluntary and not for example obliged by governmental regulation. Moreover competition law does not apply to inter-governmental anti-competitive practices. These practices would include acts such as commodity regulation by entities such as OPEC. The regulation of such agreements would be covered by other WTO rules concerned with direct governmental acts.[30]Competition policy however is only truly effective within the national boundaries being after all national legislation. Its natural structuring is an impediment to its ability to tackle international cartels as the scope of its application is defined by

[29] Ibid at page 8
[30] Ibid at page 18

domestic law. This causes it to lack bite in addressing the needs of custom union as an effective tool to ensure the unhindered operation of the common market mechanism.

However the continued and ever increasing notifications of regional trade agreement with the World Trade Organization (WTO) prompts a renewed focus on competition laws. This is because current discussions about regional and international competition law and policy have as backdrop broader international trade liberalization. The proliferation of RTA's aimed at closer economic integration through dismantling of governmental barriers to the movement of goods, services and hence capital and persons has made the need for competition policy ever more apparent and hence their incidence even more commonplace.

Attention in particular must be drawn to custom unions and how they deal with unfair market practices. Of particular interest are custom unions whose member states are at varying developmental levels with some lacking competition policies in totality and others at very early stages of its implementation. Their approach to ensuring the unimpeded operation of the market mechanism and the protection of nascent industries from actions both within and without the common market will be consequential to the continued viability of such regional bodies.

Competition policy has also not received as much attention in the WTO jurisprudence as more widely settled principles such as MFN but this should not be seen as detracting from its importance within international trade. As earlier advanced competition policy covers the full range of measures that can be used to promote competitive market structures and behaviour, including but not limited to a comprehensive competition law dealing with anti-competitive practices of enterprises.[31] In a submission by Japan to the competition policy working group, a "competition-oriented principle" was held to constitute a fundamental concept of competition law. The submission was of the view that this principle was based on the idea of not obstructing the market mechanism by barring the operations of elements such as cartels that would distort the market mechanism in exempted sectors where undisturbed market mechanisms are allowed to operate.[32] Though this point will be

[31] WT/WGTCP/2, para 20; see also WT/WGTCP/M/3, para. 12.
[32] WT?WGTCP/W/119

further explored in later chapters of this thesis, the submission by Japan crystallizes a key point. It introduces the conception of so called exempted sectors within which there is no direct government control in place. These are sectors of the economy which even though key to the economy prove more profitable when the government takes a night watchman role as opposed to active regulation. The framing by Japan thus suggests that there might be areas of a country's economy where uncompetitive actions of firms are not only allowed but actively encouraged. The acceptance of such a framing will add weight to arguments that call for special and differential treatment in as far as the application of competition rules is concerned, a discussion that will be tackled in later chapters.[33]

Notwithstanding the lack of agreement on a common framing for the term, its importance in the field of trade is apparent. Globalization by definition aims to speed up the integration of economies through significantly increasing investment, the exchange of technology and importantly cross border trade.[34] In a nature typical to the regionalization phenomenon amongst nations, industries worldwide find themselves challenged to meet the demands of new expanded markets. This has led to a global restructuring of industries which have taken place through various forms of inter-firm alliance.[35]

The objects behind these alliances are not necessarily to achieve dominance of markets, in most cases and from a competition perspective this is merely a negative externality. Most have worthwhile aims such as the facilitation of technological synergy, to share product development costs and risks amongst other positive aims, but there do exist sinister agreements formed merely to gain market access with the view of establishing and abusing dominant positions. It is thus important that antitrust authorities ensure that whilst allowing for such synergy gains, they guard against firms striving to prevent competition either directly or indirectly. Focusing in on SACU such enforcement would require cooperation on a regional level between the competition authorities of SACU nations due to the girth of these multi-national

[33] See in general, Philippe Brusick and Julian Clarke, The operationalizing of special and differential treatment in cooperation agreements on competition law and policy, Part 1, Chapter 5 (UNCTAD Publication 2005) UNCTAD/DITC/CLP/2005/1
[34] George Addy, International harmonization and enforcement cooperation: the Canadian Experience, Background Paper submitted for the Symposium on International Harmonization of Competition Laws Taipei, Taiwan, March 11-4-1994
[35] Ibid, page 1

corporations. The size of MNC's increases the likelihood of collusion that cuts across national borders. This hampers the efficacy of domestic investigations, a consequence compounded by the fact that the free internal movement of goods in a customs union almost ensures that effects of uncompetitive agreements are felt outside the country of origin.

In the absence of such regulation the benefits of the multilateral trading system would be negated especially with respect to developing countries as MNC's could through price slashes capture domestic markets and collude to retain control even at unfavourable pricing to the end consumer. Relying on the framing of the working group on competition there are 3 central themes underlying the interrelation of competition policy with trade. These interrelations are identified as:

- practices affecting market access for imports
- practices affecting international markets
- practices having a differential impact on the national markets of countries.[36]

The first identified area expresses the fear the international community has of competition policy being used as an internal measure to resurrect trade barriers which still exists as a very real threat. This can be achieved in two ways; firstly an intentional failure to put in place completion regulations could help enshrine the positions of monopolies in a market made more awkward within the African experience where monopolies are mainly government parastatals or large companies with direct links to government due to their strategic importance. The lack of such laws will give new entrants in a market no recourse against the bullying tactics of such companies. A more direct implication is the setting up of regulation so burdensome in terms of administrative duties it imposes concerning obligations such as notification duties on foreign entrants that it effectively serves as a trade barrier. However as a positive for trade, competition policy allows developing states to guard against fears they view intrinsic to the multilateral trading system, which would include the fear of dominance from foreign firms. It also affords foreign companies the peace of mind by knowing that they would not be the subject of discrimination

[36] See M/4, paragraph 22. The observer from the World Bank agreed that this was a useful analytical framework.

that could impact on their bottom line after incurring massive start up costs to operate in a country.

Competition policy is often implemented as part of a set of interrelated reforms of policies with the goal of achieving economic and social development.[37] A feature of this is the placing of greater reliance on market forces as an engine of development and a movement to create a framework to ensure that these forces operate in the public interest whilst a nation embarks on market opening mechanisms such liberalization its trade and foreign investment regime.[38] In view of the last point it can be logically inferred that competition policy is of heightened importance in emerging markets remain where often the capital base of local industries makes them ill placed to survive tactics such as undercutting by major international players entering the market due to liberalization.

More specifically the proliferation of RTA's if not supplemented by appropriate arrangements of competition law has the potential to exacerbate competition issues as RTAs by definition makes it easier for companies to cause damage in partner countries. In the absence of interstate cooperation on competition issues, the standard reaction in such circumstances by any government to apply domestic legislation to international acts has the potential of causing unwanted frictions on the international scene. Thus regional competition law also serves the role of building confidence and amicable international relations at a regional level.[39]

The WTO multilateral trading system already has some global provisions on competition such as the 1996 Reference Paper on Telecommunication services.[40] There are huge efforts especially post the 1996 Singapore Ministerial Conference to introduce a generic competition agreement applicable to every sector much in the way of current provisions on antidumping and countervailing measures. These aspirations are yet to be realised on the competition front and the competition policy

[37] See, e.g., comments made by the representatives of Mexico, Kenya and Turkey in introducing their national legislation (summarized in M/3, paragraphs 43, 44 and 45, respectively), contributions by Peru (W/36) and Brazil (W/93), and general observations by the representatives of Brazil and the European Community and its member States, reported in M/3, paragraph 29. (Trade Competition and Development report)
[38] Ibid page 4
[39] Melaku Geboye Desta, Exemptions from competition law in regional trade agreements: A study based on experience in the agricultural and energy sectors, Part 2, Chapter 13, page 443 (UNCTAD Publication 2005) UNCTAD/DITC/CLP/2005/1
[40] Ibid

instruments currently in existence at an international level are limited to the soft law of the OECD Guidelines for Multinational Enterprises (revised in 2000) and the 1980 United Nations Set of Principles on Restrictive Business Practices.[41]

Why SACU requires Competition Law

The benefits of competition regulation in relation to SACU are numerous. As a starting point the relationship between competition policy and trade liberalisation is evident if one has regard to the idea of contestability within the territorial market which is an object shared in common by these two subjects.[42] It is undesirable looking at the fundamental object of market integration to allow monopolies and other restrictive business practices to run rife especially if the goal behind such integration is to benefit the end consumer by allowing for greater product variety at minimal pricing.[43] In addition It is naturally a feature of competition law to be pro-consumer a perspective that makes it aimed at increasing the welfare of consumers over the mere encouragement of industrial growth and thus from a social welfare lenses, a most useful instrument.

Further to this competition law can serve as a mechanism strengthening economic integration in the region especially ones with further plans to expand. To ensure such regions reap the true benefits of integration the legal systems applicable must be strengthened both to encourage investment and growth but also to control it. This currently stands as a foil to SACU within which can be found countries with no competition rules to speak off.

There are added advantages that competition policy gives specifically to developing nations. Developing nations are particularly vulnerable to uncompetitive actions by Multi National Corporations (MNC) because they tend to have smaller consumer markets that lack depth with respect to product quantity and range and thus are

[41] Ibid
[42] ECOWAS – Regional Competition Policy Framework, Recommendations of the Ministerial Monitoring Committee, page 6 (Copy with author)
[43] See in general, UNCTAD World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy, United Nations Publications, New York/Geneva (1997).

vulnerable to market capture and abuse.[44] These nations in most instances also lack resources and expertise to both enforce their minimal existing competition provisions against international cartels which makes them an especially vulnerable class because of the lack of enforcement ability.[45] Compounded to this is that most of these developing states have over time benefitted from international price discrimination. With the influx of goods into a territory, local companies that have overtime used these benefits to price their goods in a manner ensuring they break even with cost, find themselves having to compete with cheaper influxes from competitors who are able to sustain these prices due to efficiencies gained from mass production in source countries. The inability of local industries to compete with such price slashes forces them out of the markets and in some instances allows the foreign firm to gain a monopoly of the market with its attendant evils.[46]

From the developing country perspective it is thus important to ensure that competition policy included in RTA make special provisions to protect infant industries of less developed member states. Even though this detracts from the neutrality of this instrument it is truly indispensable if a balance is to be maintained between economic and social benefits.[47] Such conforming special and differential treatment (SDT) would include provisions garnered towards:

- safeguarding the interests of less developed partners[48]
- exemptions from certain obligations[49]
- including phased in time periods, and;[50]
- technical assistance[51]

There are yet still further benefits to establishing a regional policy on competition policy. Especially for developing countries the process of enacting and implementing completion policies are implicitly both lengthy and expensive, thus political capital is normally found lacking in this regard. Regional competition policy may take away the

[44] See in general, Lakshmi Puri, Executive Summary, Competition Provisions in Regional Trade Agreements: How to assure developmental gains (UNCTAD) 2005
[45] Ibid at page 8
[46] Ibid
[47] Ibid
[48] Ibid
[49] Ibid
[50] Ibid
[51] Ibid

need for a country to go through this costly process and this should hold a special appeal for smaller SACU nations. Making competition policy a regional undertaking, implemented by a supranational body further assists weak governments by limiting the authority of corruptible national government officials who play a lead role in its enforcement.

As an added bonus foreign investment is encouraged with the setting up of a harmonised competition policy regime. It does this by establishing clear rules for entry into the market place be it by mergers or through acquisitions of stake in a local enterprise. Foreign investors above all else value certainty and a strong competition regime bridges fears they hold about having to meet different standards in more or less parts of the same market. It also assuages the fears of these investors that conquest from more powerful transnational corporations might unfairly result in them losing their market share through acts such as price fixing, thus allowing them to view the common market more favourably.

For SACU in particular the threats of actions by foreign MNC's distorting the local market is not as potent as the threat other nations within SACU face from South African industries. One needs only to consider recent rulings against Tiger Brands and Pioneer foods for price fixing and ICASA recent ruling on the high connection cost charged by cell phone operators within South Africa to realise the potential that these monoliths have to wreck damage within the common market if not properly policed. Can South Africa be truly obliged under current arrangements to place them in check if the feared actions do result, and can it afford to with regard to the importance of these industries to its local economy, its need to create further jobs coupled with its strong trade union lobby?

Smaller nations within SACU thus need to put in place individual measures to address this most burdensome question. This chapter will hence proceed with a consideration of measures already in place in the various SACU countries.

Survey of SACU Laws Relating to Unfair Competition

Overview

Currently only South Africa and more recently Namibia have passed competition legislation and have further set up independent regulators tasked with monitoring

and enforcing these pieces of legislation. Botswana and Swaziland have passed competition laws but are still in the process of setting up regulatory bodies whilst Lesotho is as yet to finalise its competition law.[52] This section will survey the law of SACU member states relating to unfair competition and analyse the effectiveness of enforcement mechanisms in place.

- *South Africa's* approach to competition issues still depicts remnants of an economy highly influenced by the extractive industry and isolation. In particular its earlier history of isolation spurred the granting of monopoly concessions to certain industries as part of government efforts to prevent the collapse of these strategic industries. Manufacturers also benefitted from protective tariffs and low cost of inputs that were supplied by state companies.[53] The Regulation of Monopolistic Conditions Act of 1955 was the first instance of a South African general law on competition. In truth this legislation merely set out an administrative process for examining instances of suspected unfair market practices and making recommendations to the Minister of Trade and Industry who could then at discretion decide whether or not to enforce the finding.

  This practice that might well be today found to infringe upon the separation of competence doctrine as espoused by *Montesqieu*[54] was ridden with faults. Though based on a sound '*public interest test*' as the standard for analysis, the role of the minister in enforcing the finding of the board had the fundamental consequence of virtually ruling out the possibility of state action ever being found to be uncompetitive or actions by sensitive industries ever coming under scrutiny. For an appreciation of the legacy of this text, one needs only to turn attention to the lengthy process that finally culminated in Neotel acceptance as the second fixed line telephone operator in the country,

[52] Taku Fundira, Competition Law and Regional Integration, Trade Law Centre for Southern Africa (Tralac); http://www.tralac.org/cgi-bin/giga.cgi?cmd=print_article&news_id=83676&cause_id
[53] South Africa Competition Policy, Peer Review Report OECD 2003, page 8
[54] See in general, Montesqieu, The Spirit of Law, Book 11 http://en.wikipedia.org/wiki/Separation_of_powers#Montesquieu.27s_tripartite_system (accessed 22nd May 2010)

a position which until 2006 was reserved exclusively for Telkom South Africa.[55]

This irregularity came in for a fair bit of criticism by the commission of enquiry established in 1975 to come up with ways of better formulating an approach to competition issues. Though not all recommendations from this commission were adopted, certain important recommendations it made in holding out acts such as horizontal collusion[56], resale price maintenance[57] and bid rigging[58] as uncompetitive led to important amendments in 1984 to new competition legislation that replaced the Act of 1955.

An ambitious reform of competition policy was undertaken after the toppling of the apartheid regime in South Africa. This policy reform formed part of the ANC's new policy guidelines for a democratic South Africa. The general framework for competition under this reform was influenced largely by the dual policies of RDP[59] and GEAR[60] introduced by the new government to help

[55] http://business.iafrica.com/features/2029980.htm (accessed on the 22nd of May 2010)
[56] In the study of economics and market competition, collusion takes place within an industry when rival companies cooperate for their mutual benefit. Collusion most often takes place within the market structure of oligopoly, where the decision of a few firms to collude can significantly impact the market as a whole. Cartels are a special case of explicit collusion. Collusion which is not overt, on the other hand, is known as tacit collusion. According to neoclassical price-determination theory and game theory, the independence of suppliers forces prices to their minimum, increasing efficiency and decreasing the price determining ability of each individual firm. However, if firms collude to increase prices loss of sales is minimized as consumers lack alternative choices at lower prices. This benefits the colluding firms at the cost of efficiency to society
[57] Resale price maintenance is the practice whereby a manufacturer and its distributors agree that the latter will sell the former's product at certain prices (resale price maintenance), at or above a price floor (minimum resale price maintenance) or at or below a price ceiling (maximum resale price maintenance). If a reseller refuses to maintain prices, either openly or covertly, the manufacturer will stop doing business with it.
[58] Bid rigging is a form of fraud in which a commercial contract is promised to one party even though for the sake of appearance several other parties also present a bid. This form of collusion is illegal in most countries. It is a form of price fixing and market allocation, often practiced where contracts are determined by a call for bids, for example in the case of government construction contracts
[59] The Reconstruction and Development Program (RDP) is a socio-economic policy framework implemented by the ANC in South Africa in 1994. The RDP is meant to address the immense socioeconomic problems brought about by its predecessors under the Apartheid regime. It is specifically aimed at poverty alleviation and addressing the massive shortfalls in social services across South Africa. Its modus operandi is the use of a combination of measures to boost the economy, such as contained fiscal spending, sustained or lowered taxes, trade liberalisation amongst others, coupled with socially minded social service provisions and infrastructure projects. In this way the policy incorporates both social and neo-liberal elements.
[60] The Government of South Africa demonstrated its commitment to open markets, privatization and a favourable investment climate with its introduction of the Growth, Employment and Redistribution (GEAR) strategy - the neoliberal economic strategy to cover 1996-2000. GEAR sets for the South African government the goals of achieving sustained annual real GDP growth of 6% or more by the year 2000 while creating

create a more competitive and dynamic business environment whilst having regard to the legacy of apartheid which had stripped economic power from large sectors of persons in the South African economy. These policies focused on firstly discouraging pyramid systems that created the environment for overconcentration of economic power and interlocking of directorships.[61] The consequence of this was a phase where established conglomerates like the First Rand unbundled interests it held in other sectors. Flowing from a further call by the RDP for a re-assessment of the structure and control of companies to develop efficient and democratic solutions, the first white paper on competition law was formulated.[62]

This ultimately led to the DTI new framework of competition in 1995 that importantly saw competition law and development as complementary. The DTI proposed competition policy in common with modern practices with particular focus on allowing for powers of divestiture to control the overconcentration of ownership. Debate on the new policy was done through the National Economic Development and Labour Council and culminated with the passing of the Competition Act no. 89 of 1998 that became effective on the 1st of September 1999.

The Competition Act set up the 3 institutions chiefly concerned with the regulation of competition in the country. These are the Competition Commission, the Competition Tribunal and the Competition Appeal Court. The fundamental drive behind South Africa's competition legislation is the achievement of economic efficiency. The achievement of this is evaluated using 6 qualifying criteria which are:

- Achieving efficiency and development of the economy
- Promoting consumer welfare as one of the core priorities of competition law
- Increasing employment
- Social welfare with regards to addressing the legacies of apartheid.

400,000 new jobs each year. The policy was meant to increase investment, especially Foreign Direct Investment, in the country to help achieve these goals.

[61] South Africa Competition Policy, Peer Review Report OECD 2003, page 15

[62] Ibid at page 18

- Gaining access into the world market
- Equitable opportunities for Small and Medium sized enterprises (SME's)

Thus as clearly seen within its interpretation of economic efficiency as evidenced by the set qualifying criteria, South African competition policy object is more than the achievement of market equilibrium but also has the political motivation of achieving equity. Thus credible fears still exist that these so called public interest considerations contained in the qualifying set might be used to justify what are in essence political considerations, tarnishing the neutrality of the instrument. The DTI still firmly resists all suggestions that economic efficiency conflicts with public interest. These fears have been further allayed by the stringent economic efficiency based rulings of the competition tribunal.[63]

On the international front, South Africa's competition policy recognizes trade liberalisation and encouraging foreign direct investment (FDI) as important tools for promoting domestic competition. It however still maintains the need for interventionist strategies to ensure the continued accessibility of small black business into the market. Substantively SA competition laws authorize comparisons to be made to international law.[64] It uses merger standards similar to Canadian law provisions and price discrimination rules which are in essence an improved version of the United States Robinson Patman Act.[65] It incorporates normal competition norms of prohibitions of certain acts which it then moderates by incorporating policy considerations such as equity. It also allows for opportunity for public comment even though it has a formalised investigating process of determining the public interest gains of certain acts.

South African law determines abuse of dominance by looking at the concept of control as used in many international jurisdictions. It presumes companies with market shares over 35% to be dominant. In the same vein it evaluates mergers based on certain thresholds that then determine whether or not they need to be notified and flowing from this allowed. However as a consequence

[63] Ibid at page 18
[64] South Africa, Competition Act No. 89 of 1998, Section 1(3)
[65] Robinson-Patman Act of 1936 (or Anti-Price Discrimination Act, Pub. L. No. 74-692, 49 Stat. 1526

of public interest considerations mergers without competition concerns may still be barred. Amongst its SACU neighbours South Africa undoubtedly possesses the most modern and efficient competition legislation.

- *Botswana*

  Botswana has no competition laws currently in place though it has for long period prior accepted the benefits of such regulation. It has in recent times been prodded into putting into place such legislation as a result of its international commitments, namely obligations under the COMESA agreement and article 40 of the SACU agreement. This article prompts all SACU member states to put in place domestic competition laws.

  On the 9th of December 2009, the Botswana Minister for Trade and Industry, Baledzi Gaolathe presented the Botswana Competition Bill to parliament for its second reading. The minister as quoted in local news media stated that the objective of this legislation was both to regulate the conduct of firms in the market but also importantly to establish a Competition Authority in Botswana. The aim of the bill according to the minister is the addressing of problems stemming from globalization and the threat of monopolization of key sectors of the economy by corporate entities following the opening up of the Botswana market as a result of economic reforms and liberalization of international trade.

  Under the bill proposed, the state is still allowed to participate actively within the Botswana economy in a manner consistent to that of other enterprises participating in the market. The proposed enforcement authority would also consist of two tiers: an administrative wing known as the Competition Authority which would be responsible for receiving complaints and carrying out investigations empowered with divestiture powers and the Competition Commission which will act as an adjudicative arm exercising a quasi-judicial

function. The Competition Authority will be empowered to hand down civil financial penalties.[66]

The current safeguards in place to protect competition in the market are contained in provisions of other pieces of legislation, making it both cumbersome and complex to enforce from a law enforcement perspective. Legislation with competition implications include:

- The Botswana Companies Act which regulates market entry or the establishment of businesses in Botswana. This remains the principle competition provision.
- The Botswana Industrial Development Act which regulates entry into parts of the manufacturing industry of Botswana otherwise not falling under the ambit of any other piece of legislation. It notably also reserves certain manufacturing businesses exclusively for Botswana citizens, apposition that falls foul of Botswana's International commitments.
- The Botswana Consumer Protection Act which regulates the supply of goods and services to end users. It exercises control through the issuance of licenses which must be renewed every 12 months. Such licenses can also be canceled or suspended at the instance of the minister.
- The Public Procurement and Asset Disposal Act which is concerned with the sourcing of goods and services for government. It is transparent and pro competitive though it awards citizens preferential treatment.

In essence what currently exists in Botswana is a crude system of regulation enforced or ignored at discretion. A system that would be unable to meet the needs of Botswana post the liberalization process proposed through SACU and through the SADC EPA negotiations.

- Namibia

[66] Information on the proposed Botswana competition Act is garnered solely from a publication in the Botswana print media newspaper the Mmegi (http://allafrica.com/stories/200912110784.html) (accessed on the 15th March 2010). The Botswana Government Gazette is offline and it would seem to remain so for the rest of the immediate future.

Though Namibia gained its independence in the 1990's it still lags behind the sub-region in terms of economic development and is ranked as a lower middle income country. The Namibian economy is dominated by the government, it is very highly export oriented and its key sectors are agriculture and fisheries.

Namibia's first national competition law was passed in 2003, prior to this the 1958 South African Regulation of Monopolistic Conditions Amendment Act applied a situation no longer tenable after Namibia achieved independence. The current competition model in place shares many similarities with its South African counterpart, though drafted with EU assistance. Of particular interest is the scope of the legislation that stipulates that it is applicable to all economic activity happening in Namibia or having effect in the country. Unlike the preceding South African Act it is also binding on the state save its provisions relating to criminal liability.

Namibian law prohibits two broad categories of anti-competitive practices that it terms BRP's i.e.

- Restrictive agreements, practices and decisions.[67]
- Abuse of dominant position with the object of protecting public interest that may be compromised by acts such as price fixing and predatory pricing.[68]

Much like the South African version it creates exemptions for certain categories of restrictive practices. These include activities aimed at promoting/encouraging:

- Exports
- Small industries
- Product and distribution
- Technical/economic progress in an area denoted by the minister

Importantly these exemptions can be revoked on findings that it was granted based on materially incorrect information or that there has been a significant change in circumstances since it was granted, an incredibly important

[67] Namibian Competition Act No. 2 of 2003, Section 23
[68] Ibid Section 26

provision from a development perspective though it creates a lot of uncertainty and will be the centre of many debates going forward.

The newly established Namibian competition commission serves as its main enforcement mechanism. Pursuant to section 33(1) of its Competition Act the commission may on its own initiative or on receipt of a compliant, conduct an investigation to determine if an entity is carrying out a restricted practice in terms of the act.

Though Namibia must be lauded for its achievements on this front, a remaining concern is the capacity of its law enforcement agencies to properly enforce this new legal instrument in the face of sophisticated actions of foreign industries. A huge concern noting its recently established with limited resources available.

- Lesotho

  Lesotho currently has no competition laws in place but regulates economic entities in terms of provisions contained in its Industrial Property Order, No. 5, 1989. Lesotho is currently drafting a Competition policy with assistance with UNCTAD. The expected completion date for this exercise was early 2008. The fact that this process has yet to be finalized leaves a bid lacuna in regulation of part of the SACU common market and undermines the application of Article 40 of the SACU agreement.[69]

- Swaziland

  Swaziland is in the process of adopting a competition law. It is compelled in this light not only by article 40 of the SACU agreement but also by Article 5 of the COMESA treaty of which it is signatory. Article 5 requires it to help create competitive market conditions within the common market. It is thus more specific and places firmer obligations on Swaziland than its SACU

[69] See in general country fact sheet, http://www.globalcompetitionforum.org/africa.htm#lesotho (accessed 24th of February 2010)

counterpart. With the assistance of the Zambian Competition Commission, Swaziland has put in place a draft Competition Bill which presently awaits parliamentary assent.[70]

The objectives of the new Bill is to encourage competition in the economy by controlling anti-competitive trade practices, mergers and acquisitions, monopolies and the over concentration of economic power. It is hoped that via this means economic development and growth and the protection of consumer welfare would be promoted. The new Bill also provides an appropriate institutional and operational mechanism for administration and the establishment of a Competition Commission with investigative and adjudicatory powers.

[70] See in general country fact sheet, Swaziland, http://www.globalcompetitionforum.org/africa.htm#swaziland (accessed on the 24th of February)

Chapter 3

Comparison between SACU's proposed regional competition framework and existing competition models in Regional Trade Agreements (RTA)

Almost every modern RTA devotes a chapter or so to competition law issues, however significant diverges exist in the form and content of the competition law obligations that are created by these instruments. There exists on one end of the spectrum competition commitments framed broadly with no true binding obligations on states such as the New Zealand Singapore bilateral agreement which makes no true attempt to discipline anti-competitive behaviour, and on the other hand advanced region wide competition policies as found within the European Community (EC), which not only imposes substantive obligations but also establishes a supranational body charged with the enforcement of competition law throughout the Community.[71]

This section will consider closely the competition laws of four RTA's namely SACU, the EC, COMESA and CARICOM. The purpose of this exposition is in all instances to refer back to SACU's competition provisions as a term of reference in comparing and suggesting improvements to its framing.

SACU current competition law framework

Articles 40 and 41 form the core provisions in the new SACU agreement that have implications for competition. On a whole the SACU treaty does not establish a common SACU area competition law but rather focuses on cooperation amongst member states for the effective application of national competition laws.[72] The relationship between these competition geared articles and the SACU treaty must thus be narrowly surmised as more tilted to preserving the gains of trade liberalisation and meeting the commitments undertaken by member states in

[71] Melaku Geboye Desta, Exemptions from Competition Law in Regional Trade Agreements: Experiences form the Agricultural & Energy Sectors, UNCTAD/DITC/CLP/2005/1, page 444
[72] The SACU Regional Competition Framework on Competition Policy and Unfair trading Practice, UNCTAD research programme on Competition Law and Policy Report, 2005, page 1

agreeing to tie in their markets rather than the aspiration to achieve factual market equilibrium.

Articles 40 & 41 of the SACU agreement as paraphrased, are framed in a manner that makes them applicable in instances where:

a. Action is required to be taken against a private barrier to trade even when domestic law has not been infringed.[73]
b. Enabling action to be taken only when domestic competition legislation has actually been infringed.[74]

Article 40 of the SACU agreement relates primarily to the agreement by member states to adopt individual competition policies which are still surprisingly lacking in the region whilst Article 41 broadly refers to unfair trade practices. By way of further differentiation Article 40 refers to policies yet in no way designates a role for its enforcement by SACU institutions. Its enforcement fall within the exclusive remit of individual member states as they agreed through this provision to formulate and implement their own national competition policies. The reference point in terms of Article 40 is the state and not the community.

Article 41 stands in contrast to the restrictive approach taken by Article 40. It provides that the Council i.e. an actual SACU institution be responsible on the advice of the Commission to develop policies and instruments needed to deal with unfair trade practices between the member states. It suggests the creation in essence of supranational law or at the very minimal the imposition of a set minimum criteria that member states must adhere to when formulating national laws to address unfair trade.

In terms of the SACU treaty certain classes of actions are held to be incompatible with its competition provisions. These actions are set out under Article 35. These are as follows:

a) agreements and concerted practices between firms in horizontal relationships, decisions by associations of firms, and agreements between firms in vertical relationships, which have the effect of substantially preventing or lessening

[73] Ibid
[74] Ibid

competition in the territory of the Community or of South Africa, unless the firms can demonstrate that the anti-competitive effects are outweighed by the pro-competitive ones;[75]

(b) abuse by one or more firms of market power in the territory of the Community or of South Africa as a whole or in a substantial part thereof."[76]

Article 35 clearly defines the nature and scope of practices that community member states are compelled to act against. These are instances wherein the conduct has the effect of affecting trade between the member states in as far as the effects is felt within any portion of the territory of the customs union. By further implication article 35 seems to suggest that the action must both affect trade and lessen competition before an obligation is created to address it.[77]The use of the trade affecting test, as condition precedent without which the parties merely assume a general obligation to simply apply competition law firmly ties competition law and policy to the realisation of the free trade object.

The free trade objective is hence the overall priority policy and establishes the parameters for the application of competition policy and all other common policies within the SACU treaty. Article 41 especially, speaks to this core priority whilst the Article 40 formulation is more in the interest of the national market. Thus on the Article 40 formulation even though an action might be restricting market access, it may only be actionable under competition law if competition itself is lessened within the domestic market. Article 41 thus seems to act almost as a safety net, making actionable a larger set of practices that do affect trade but which do not fall within strict competition definitions.

This interpretation establishes the respective competence and demarks the overlap between the two articles. Practices that escape Article 40 might still be covered by Article 41 and within the same vein certain actions falling within the scope of Article 41 may also fall under Article 40. These two articles cannot be read in a vacuum, for

[75] Ibid
[76]Ibid
[77] Ibid at page 10

in as much as though these provisions do not contain special and differential treatment provisions for smaller member states, certain other articles within the treaty do and this moderates the working of these articles. Article 25 and 26 are examples of articles that contain trade exceptions and provisions for the protection of infant industries. This reserves for SACU member states, significant policy space for them to pursue their own development strategies. These articles will be especially important in lieu of the current negotiations between SADC and the EC, a consideration that will be fully unpacked in latter chapters.

The true limitation of Article 40 does not lie in its framing but rather its purported backbone. Article 40 requires the existence of national competition laws as it is based on comity which implies that a member state can only request for assistance on a competition matter if its own national laws have been contravened. It can be argued that Article 41 exists solely because of the appreciation of this current lacuna as it would be practically difficult from a legal perspective to address practices which affect trade but fall outside the ambit of local competition laws due to considerations of jurisdiction or as is the case in some SACU states where no definitive competition statute exists. However the inadequacy within this argument would be that the sole use of a trade standard does not make provision for other interest like that of consumer protection.

What would see to this interest are proper functioning domestic competition laws and currently amongst SACU member states save South Africa and Namibia, competition legislation is sorely lacking. Even those member states who have them or are considering their implementation suffer from huge capacity constraints such as expertise to deal with more sophisticated instances of market manipulation. Further larger SACU member states with established competition authorities are struggling with problems of smaller states as their domestic markets are characterized by dominant firms. These firms have an increased ability to cloak their collusive activities which outpaces the ability of the local authorities to effectively act as watch guards. A poignant example is cartel activities which require a huge deal of cooperation between various local authorities to investigate and map out its nature. It is extremely difficult for law enforcement authorities in one country to assess roots and effects of anti-competitive behaviour in another. Thus a precondition to the sort

of cooperation that Article 40 suggests would be domestic laws in the absence of this and capacity constraints a supranational model might be in order.

The EC Approach

The European Commission takes a different view to SACU. The EC boasts the most advanced and near uniform system of competition law backed by a powerful Competition Director General granted powers to enforce its rules directly on private enterprises throughout the Community.[78] The competition sector is actually the only sector where the commission is specifically entrusted to apply community rules to individual undertakings. The EC substantial rules on competition are contained in Articles 81 and 92 of the EC treaty which focus on anti-competitive agreements and abuse of dominance positions respectively.

Article 81 provides as follows:

- Article 81(1) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. This principle is supplemented by provisions that render void the specific practices of price fixing, supply restriction and market sharing agreements.[79]
- Article 81(3) provides a list of instances where anti-competitive agreements otherwise void *ab initio* would be acceptable.[80]

Article 82 provides:

- That any abuse by one or more undertakings of a dominant position within the common market or in a substantial part thereof shall be prohibited as incompatible with the common market in so far as it affects trade between the Member States. This article is also supplemented by a list of practices that are considered void *ab initio* for its purposes. Practices falling within this purview include the imposition of artificial purchase or selling prices or other

[78] Melaku Geboye Desta, Exemptions from Competition Law in Regional Trade Agreements: Experiences form the Agricultural & Energy Sectors, UNCTAD/DITC/CLP/2005/1, page 444
[79] Ibid at page 445
[80] Ibid

unfair trading conditions and limitation of production, markets or technical development to the prejudice of consumers.[81]

Compounded to this is Article 86 which singles out public undertakings and undertakings to which Member States may grant special and exclusive rights and declares these too to be in principle subject to competition law rules contained in the EC Treaty.[82] Paragraph 2 of this Article goes further and provides that:

"Undertakings entrusted with the operation of services of general economic interest or having the character of revenue producing monopolies, shall be subject to the rules contained in this Treaty, in particular to the rules on competition in so far as the application of such rules does not obstruct the performance in law or in fact of the particular tasks assigned to them".[83]

The power to issue regulations and directives were also interestingly enough given to the European Council, which was further empowered to define if need be the scope of competition provisions. The EC approach is supranational in every sense and also in every sense just as effective. So efficient and highly regarded are its functions that even recent mergers of airlines in the US, looked to the EC for approval before moving forward, it thus clearly has strong extra territorial underpinnings.

The COMESA Experience

The Common Market for Eastern and Southern Africa (COMESA) launched an FTA on the 31 October 2000 with the object of working towards a customs union. By removing tariff and non tariff barriers to trade the various Member States of COMESA have succeeded in creating an environment of stiff competition. The exposition on COMESA competition policy would be of more detail noting its proximity to SACU and the issue of overlapping membership.

To promote competition within the common market COMESA has put in place regional competition regulation in line with the United Nations Set of Principles and

[81] Ibid
[82] Ibid
[83] Ibid

the Rules of Competition developed by UNCTAD in 1980.[84]Alongside these regional regulations is the continued encouragement of the proliferation and modernization of national competition laws in line with global standards. On the 17 of December 2004, the COMESA Council of Ministers approved and gave effect to the COMESA Competition Regulations and Rules in their Member States.[85] The approval of this set of regulations is consistent with Article 55 of the COMESA treaty that provides for a competition policy.

The provision Article 55 bestows is to oblige Member States to prohibit any agreement between undertakings or concerted practices which has as its effect the prevention, restriction or distortion of competition in the common market. Further provisions with competition implications include Article 52 which prohibits the granting of subsidies or granting of access to the use of state resources in any form that has the effect of distorting trade between member states and Article 49 that calls for the elimination of quantitative and other restrictions between Member States.

Article 55 of the COMESA Treaty provides as follows:

1. *The Members States agree that any practice, which negates the objective of free and liberalized 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; 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

[84] George K Lipimile & Elizabeth Gachuri, Allocation of Competencies between National and Regional Authorities: the case of COMESA, Competition Provisions in Regional Trade Agreements, How to Ensure Developmental Gains (UNCTAD 2005 Report), page 362, UNCTAD/DITC/CLP/2005/1

[85] Ibid at page 363

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.*

The provisions stated above which form part of the COMESA's competition and regulation rules are intended to put into operation Article 55 of the COMESA treaty. After their approval by council these competition provision have gained the status of a set independent mechanism designed to meet the objectives of the common market and not merely an instrument aimed at achieving the goal of a common market. Its role is thus viewed to continue even after the attainment of the common market. The main competition regulations having implications for the public and private sector are set out in parts three and four of the regulations.[86] Article 16 prohibits arrangements between two or more entities with the resultant effect of acting as a stymie to competition in the common market. Specifically guarded against are all agreements between undertakings, decisions by associations of undertakings and concerted practices with the object of barring market access to new entrants.

There however exists exception to these rules, Article 16(1) provides that the provisions of Article 16 may be declared inapplicable in respect of cartel-type arrangements which meet four tests, two of which are positive and two negative. The two positive tests require that the agreement decision or concerted practice must contribute to improving production or distribution of goods or promoting technical and economic progress and provide a fair benefit to consumers on the downward end of the scale. The negative impositions are that the agreements don't result in restrictions unnecessary to the attainment of the positive objectives stated and must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the market in question.[87] All four of these requirements must be satisfied for Article 16 not to apply. COMESA via article 16 preserves for itself significant policy space to act in the interest of its industries, yet

[86] Ibid at page 382
[87] Ibid at page 383

by qualifying the Article 16 exemption they also place the minds of investors and foreign business at ease by showing that the process of granting such exemptions will not be haphazard.

Article 18 is the counterpart of Article 16 but more focused on regulation of abuses flowing from an undertaking enjoying a dominant position.[88] As condition precedent to its application, the abuse must occur within the common market and must affect trade between Member states. Conduct always deemed to fail the Article 18 test include restrictions of entry into market, prevention of competition in a market, elimination of undertakings in the market and limiting the range of products and services another undertaking may provide.

In attempting to make provision to address the impact of cross border cartels, the COMESA treaty in Articles 55(1) much like Article 81(1) of the European Community's Treaty of Rome prohibits any agreement between undertakings or concerted practices which has as its objective or effect the distortion of competition within the common market. It does not state that the offending agreement must affect trade between Member states. The drafters clearly envisioned this provision not merely to look at practices originating and having effects within the common market but even agreements originating outside the common markets with effects within it. Consequently the Commission will always be entitled to intervene if the competition distorting effects are felt within the common market. This distinguishes Article 55 from Article 16 and 18 which are confined to applying only when a agreement affects trade between Member states thus providing a jurisdictional limit to their application.

Another further interpretation to this structuring is espousing an intention by the Member States to hold onto a modicum of sovereignty. They have not given up their rights as sovereign nations only allowing COMESA treaty provisions to apply to regulate practices between member states, and not prescribe the manner they approach such conduct emanating outside the Member states but having effect in the common market thus allowing them room to define their own foreign policy.[89]

This desire by member's states to maintain a level of autonomy creates most interesting implications for competition policy. As a result of this there exist at least

[88] Ibid
[89] Ibid at page 387

two legal orders within the common market comprising of the respective bodies of legal rules within each COMESA Member State and the regional legal order comprised of the body of legal rules created at the COMESA level. A follow up to this is the COMESA Treaty and other secondary legislation like regulations and directives all of which have equal application within a member state. COMESA member states have also pledged to create conditions favourable for the achievement and the aims of the common market and to abstain from measures that would hamper the achievement of these aims as part of their general undertakings under Article 5 which states:

Article 5: General Undertakings

1. *The Member States shall make every effort to plan and direct their development policies with a view to creating conditions favourable for the achievement of the aims of the Common Market and the implementation of the provisions of this Treaty and shall abstain from any measures likely to jeopardize the achievement of the aims of the Common Market*

or the implementation of the provisions of this Treaty.

Thus in the strict sense even where by virtue of preserved policy space to deal with practices affecting competition, where the other party involved is not a COMESA member and hence does not activate Articles 16 and 18, the COMESA member state in choosing a foreign policy path must nonetheless still respond in a manner in keeping with the aims of the common market.

The conclusion to be drawn from this is that the COMESA competition regulations constitute a new legal order of international law, under which the Member States have limited their sovereign rights, albeit within limited fields, with the subject of the new order comprising

not only Member States but also their nationals.[90]

CARICOM

CARICOM consists largely of former British West Indian colonies which were granted independence over a period covering a decade and a half onwards. There

[90] Ibid at page 391

have always been attempts since their independence to integrate their economies driven by the reasoning that they were too small to be viable as independent states. Several islands in what currently forms CARICOM are still colonies of Britain, such as the British Virgin Islands, the Cayman Islands and Montserrat. Recently the governments of CARICOM have given acceptance to the realization that their small sizes and limited resources are in themselves a hamper to their development potential.[91]

In 1959 Britain tried to integrate all these economies into what it termed the West Indian Federation, granting it status of having dominion within the British Commonwealth, however this process collapsed with the withdrawal of Jamaica. Thereafter British in a fashion similar to the African experience granted independence to the colonies starting with Jamaica and Trinidad and Tobago in 1963.[92] This post independence realisation of their limitations in size prompted the new governments in 1968 to initiate a process of integration culminating in the formation of the Caribbean Free Trade Area in 1968, this level of integration was deepened in 1973 with the signing of the Treaty of *Chaguaramas* that had as its intent the establishing of a common market in the CARICOM. Also worth mentioning is that subsequent to CARICOM, another sub regional organisation called the Organisation of Eastern Caribbean States (OECS) was formed as the smaller island states realized that they required a deeper level of integration than provided under CARICOM.

The Treaty of *Chaguaramas* differentiates between what it calls the Less Developed Countries within CARICOM and states with more viable economies that it terms as More-Developed Countries (MDC's). The countries that form part of the former designation of Less Developed Countries include the current members of the OEC plus Belize. The implication of this status is the according of certain special and differential treatment to them which extends importantly into the field of competition policy.[93] Given the high level of efficiency required of competition authorities within the international trade sphere and the complexity of their role in this area, certain

[91] Taimoon Stewart, Special Cooperation Provision on Competition Law & Policy: A case for Small Economies, Competition Provisions in Regional Trade Agreements, How to Ensure Developmental Gains (UNCTAD 2005 Report), page 330, UNCTAD/DITC/CLP/2005/1
[92] Ibid
[93] Ibid at page 331

factors must always be borne in mind when establishing a regional policy on competition where smaller economies are involved.

The level of special provisions required must relate to:

• The relative level of maturity of the competition authorities as between the contracting parties.[94]

• The capacity of the competition authority in terms of technical Resources.[95]

• The extent of the obligations undertaken in the trade/cooperation agreement.[96]

• The level of openness of the economy and hence, exposure to anticompetitive conduct originating outside of the domestic market.[97]

• The dependence on imports and FDI as this increases the vulnerability of these small economies to the pernicious activities of international cartels.[98]

• The ability of the government/competition authority to successfully investigate and enforce laws in the case of multinational firms located in the domestic market and international cartels.[99]

•The factors that would impact on the ability of the country to negotiate cooperation provisions and the maturity of its institutions. A further consideration would be the extent of the convergence of the laws of the parties and the track record of enforcement of the law.[100]

Current competition provisions on CARICOM are encapsulated in Chapter 8 of the revised treaty of Chaguaramas. This establishes a competition regime for CARICOM

[94] Ibid
[95] Ibid
[96] Ibid
[97] Ibid
[98] Ibid
[99] Ibid
[100] Ibid

providing detailed guidance on provisions to be adopted, the institutional framework and the modalities for implementation. CARICOM competition regime is designed to deal with both domestic and cross border anti-competitive activity within the CARICOM single market and Economy.[101]It provides for the establishment of a competition regime at the regional level similar to its counterpart within the European community. However and much like SACU it requires the enactment of domestic legislation by all its member states coupled with an obligation to cooperate within the field of enforcing competition legislation.[102]

Article 170(3) of Chapter 8 of the Revised Treaty outlines Member states obligations with respect to cooperation on competition enforcement matters. It provides as follows:

Every Member State shall require its national competition authority to:

(a) Cooperate with the Commission in achieving compliance with the rules of competition;
(b) Investigate any allegations of anticompetitive business conduct referred to the authority by the Commission or another Member State;
(c) Cooperate with other national competition authorities in the detection and prevention of anticompetitive business conduct, and the exchange of information relating to such conduct.

Article 173(2) outlines the functions of the Community Competition Commission, which include:
(e) Co-operation with competent authorities in the Member States;
(f) Providing support to the Member States in promoting and protecting consumer welfare;
(g) Facilitating the exchange of relevant information and expertise;
(h) Developing and disseminating information about competition policy, and consumer protection policy.

[101] Ibid at page 347
[102] Ibid

As can be seen the obligation placed on member states are binding and very high. The treaty avoids any lax framing which has often been viewed as a drawback to the SACU provisions. Member States of the CARICOM are left with no doubt as to the legal obligations the treaty provisions place upon them. The CARICOM arrangement can be rightly termed as the highest possible level of cooperation, just falling short of the absolute powers its EC counterpart grants to its Competition Directorate. Even whilst admiring its widespread parlance, the question of how smaller economies within CARICOM deal with these onerous cooperation provisions are inescapable.

Whilst Chapter 8 of the Revised Treaty does not directly grant special and differential treatment for disadvantaged economies, sectors, industries and for the LDCs within CARICOM (note once again that LDCs refer to the Less-Developed Countries within the regional grouping and not Least Developed Countries as designated by the UN). Article 157(1) of the Revised Treaty prompts the provision of technical and financial assistance to such LDCs as might be required to ensure they participate effectively within the single market. It empowers the CARICOM Council on Trade and Economic Development to evaluate the need for technical and financial assistance on a case by case basis to disadvantaged countries, regions and sectors.

The council accordingly carries out this role guided by the provisions of Article 51 that circumscribe the scope for granting such financial and technical assistance. This Article provides that such financial and technical assistance may only be given to achieve the ends of:

- Meeting obligations under trade related agreements[103]
- Establishing institutions or centers for the training of retraining of employees[104]
- Providing relevant expertise to help formulate a legal policy framework conducive to fair trading and competition.[105]

One can thus surmise that LDCs will be able to garner the assistance required to meet their chapter 8 obligations. It would be perhaps wise for SACU to consider such

[103] Ibid
[104] Ibid
[105] Ibid

a provision as it moves towards deeper integration, as without such arrangements the current lacuna driven by issues of polycentricism which sidelines the establishment of competition institutions would continue especially amongst its smaller states. Such technical assistance in the case of SACU would likely have to come from South Africa, a nation which unquestionably continues to shoulder most of the expenses of keeping the customs union running. A framing such as that contained in Article 51 would ensure it maintains a semblance of control as to what its money would go towards.

Chapter 4

Economic Partnership Agreements (EPAs) and SACU without Competition Laws

One of the lasting effects of colonialism which cannot be disputed to date is the creation of lasting trade ties between Africa and Europe. At the end of colonialism it was acknowledged that for the purposes of keeping African economies participating in global trade as well as ensuring that European industries continued getting raw materials from Africa, trade links between former colonies and former colonial masters had to be maintained. Several agreements were entered into between African states and the European Economic Community (EEC). The first of these agreements was the Yaoundé Convention,[106]followed by the Lome Convention.[107] These agreements were amended and modified at different stages to respond the needs of international trade.

The coming into being of the World Trade Organisation (WTO) presented serious challenges for the continued existence of these preferential agreements because of the fact that they made no provision for reciprocity in trade relations between Africa and the West.[108]This raised complaints amongst WTO members with regard to their compatibility with the multilateral trading system especially from other developing countries that fell outside the African Caribbean and Pacific (ACP) countries who wished these preferences either cancelled or extended further afield to apply to them.[109]As a result of the complaints raised about the non-reciprocity nature of the Lome Convention, there was a need for the European Union (EU) and the ACP countries to launch a round of trade negotiations to look at reformulating economic partnership agreements that would be WTO compatible.[110]

The Cotonou agreements came into force in 2000 by virtue of a waiver obtained from WTO members. It was based on the caveat that the EU and the ACP countries

[106] See Yaoundé Convention signed in July 1963.
[107] See Lome Convention signed in February 1975.
[108] See Meyn: Economic Partnership Agreements: a 'historic step' towards a 'partnership of equals? Page1.
[109] See Economic Commission for Africa: Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements page 2.
[110] See Economic commission for Africa page 2.

would by the end of 2007 complete a Free Trade Agreement (FTA) that would entail reciprocity as required by WTO rules, a deadline which was missed.[111]

The preferences the Cotonou Agreement gave came to an end in 2007. Due to the cumbersome nature of negotiating 79 different EPA's it was proposed by the EU and accepted that negotiations would go ahead based on regional configurations. Most SACU countries fall within the SADC negotiation bloc save Swaziland whose dual membership of both SADC and COMESA grants it the discretion to choose which of the negotiations it would take part in.[112]

Since the commencement of the EPA negotiations till the signing of interim EPA's by some nations have sparked unprecedented debates in both political and academic corridors. At the heart of the debate is a deep seated mistrust spawned by history for European countries within the trade sphere and the question of whether the EPAs will be able to effectively address Africa's developmental needs? Some scholars are of the view that it is old colonial masters under different masks,[113] whilst some scholars are of the view that actual benefits could be seen by African countries under the EPAs.[114] This dissertation appreciates both sentiments shared and takes the view that it is absolutely irresponsible for SACU nations under SADC to go ahead with this negotiation without first putting in place a regional competition mechanism to protect its common market from collusive and aggressive competition from multinational corporations from the west.

This chapter will analyse EU-Africa trade relations. It will briefly look at various agreements that have defined EU-Africa relations in different times of the development of the multilateral trading system. Special focus will be given to the new wave of relations which is to be defined by the EPAs and the potential benefits as well as disadvantages they will bring for African states. Special focus also will be given to the Southern African Development Community (SADC) region and hence SACU. It's worth mentioning that South Africa's relations with the EU have always

[111] See M Meyn: The challenges of Economic Partnership Agreements for Regional Integration and Trade Capacity Building in Southern Africa page 02.
[112] See M Meyn: The EU-South Africa FTA and its effect on EPA negotiations: An examination of some options, opportunities and challenges facing the BLNS countries page 05.
[113] See Meyn; Economic Partnership Agreements page 4.
[114] See H Strydom: From Mandates to Economic Partnerships: The Return to Proper Statehood in Africa page 89.

differed with the rest of the African States for both historical as well as economic reasons. The latter part of the chapter would flowing from the potential negatives highlighted at the front end of this chapter discuss possibilities for enhancing the effectiveness of the current SACU competition cooperation mechanism, importantly making it work for both the larger and smaller states within SACU.

Why negotiate EPAs with the EU?

It is an undisputed fact that the EU is one of the biggest markets in the world. Any country with anything to sell would definitely want to have market access to the EU. In the African context it's even more compelling to have good trade relations with the EU because for historical reasons the EU is the *de facto* market for African commodities.[115] Traditionally African trade agreements with Europe developed through colonial relations. At the end of colonialism the first trade agreement to be signed between European states and the African states was the Yaoundé Convention[116] which was signed between the EEC and 18 African mostly Francophone countries.[117] An interesting factor about the Yaoundé agreement was that it was based on reciprocal and non-discriminatory terms pursuing the trade arrangements of pre-independence time.[118] The accession of the UK to the EEC brought about a need for major adjustments on the EEC's foreign trade policy to also cater for Anglophone countries.[119]

The Lome Convention was the first trade agreement signed between European and African states that would cater for Anglophone and Francophone Africa as well as Caribbean and Pacific nations.[120] One distinguishing feature of the Lome Convention was the non-reciprocity nature of the convention that only created market access for African countries into the EU.[121] This was accompanied by UK's prior agreements with commonwealth developing countries on special trade protocols that were agreed for in bananas, beef and veal, rum and sugar.[122] These agreements were

[115] See P Alves et al: Africa's Challenges in International Trade and Regional Integration: What Role for Europe? Page 4.
[116] See Yaoundé Convention signed in July 1963.
[117] See Economic Commission for Africa page 9.
[118] See Economic Commission for Africa page 9.
[119] See Economic Commission for Africa page 9-10.
[120] See Economic Commission for Africa page 10.
[121] See Economic Commission for Africa page 10.
[122] See Economic Commission for Africa page 10.

honoured by the EU in its entirety by agreeing to buy a quantity of those commodities at a price significantly higher than the world price.[123]

As indicated above the coming into existence of the WTO presented serious challenges for the continued existence of the EU-ACP trade agreements under the Lome Conventions end as a result a new round of trade negotiations had to be launched. The Cotonou Agreement came into force through a waiver which was granted by WTO members in September 2001 during a Doha ministerial conference.[124] The Cotonou agreement also pursued non-reciprocal trade arrangements however this time around there was a time frame set that required the EU and ACP countries to conclude a WTO compatible trade agreement.[125]

The Cotonou agreement took EU-Africa relations to another level as it also encompassed more issues that EU and Africa would co-operate on. These issues included amongst others:[126]

- A comprehensive political dimension consisting in an enhanced dialogue, and a special focus on conflict prevention and a resolution, as well as governance issues and the respect for human rights and the rule of law,
- A set of participatory approaches, including greater emphasis on the role of civil society,
- A focus on poverty reduction, and a central role for the private sector and regional integration strategies,
- A new framework for trade and economic cooperation that would put regional integration at the fore-front, and extended cooperation to non-trade areas,
- A reform of fiscal cooperation through the simplification and enhanced flexibility of the financial instruments of the partnership as well as the introduction of performance criteria in the allocation of aid.

The Cotonou agreement clearly took EU-Africa trade relations to another level because it required cooperation on a vast number of issues as indicated above. It however did not solve the issue of reciprocity and hence the negotiations to conclude regional economic partnership agreements in the time frames provided.

[123] See Economic Commission for Africa page 10.
[124] See Economic Commission for Africa page 10.
[125] See Economic Commission for Africa page 10.
[126] See Economic Commission for Africa page 14.

Existing Regional Groupings in EPA negotiations

One of the objectives behind the negotiations of the EPAs was the need to strengthen regional integration in ACP countries and for that reason the EU decided to negotiate EPAs with existing Regional Economic Communities (RECs).[127] In the context of Southern Africa the task of grouping was very challenging for the most well known reason of overlapping memberships by Southern African countries into Regional Economic Communities (REC).[128] In the SADC context for example all the countries with the exception of Mozambique belong to more than one REC. [129]When the time came for countries to choose which EPA configuration to fall under most countries were looking at which configuration South Africa would fall in and then escape that one because they believed that the configuration that South Africa would fall in would attract higher tariffs.[130] Tanzania is for example one country that started negotiating with the SADC EPA configuration but soon after South Africa joined the SADC EPA group Tanzania switched to join the EAC EPA configuration.[131]

For the whole of the ACP countries the negotiating configurations were as follows:

1. Central Africa (CEMAC EPA) - within this grouping Cameroon initialed an interim EPA that was eventually signed in 15 January 2009.[132]
2. West Africa (ECOWAS EPA) - In this West African negotiating group, two separate interim agreements has been initialed by Ghana and Cote d'Ivoire. Cote d'Ivoire signed an interim agreement on 26 November 2008; Ghana initialed the interim EPA offered is still expected to sign in the near future.[133]
3. SADC EPA - In SADC an interim agreements was initialed by Botswana, Lesotho, Namibia, Mozambique and Swaziland. The rest of the other countries with the exception of Namibia went on to sign an interim agreement on 27 May 2009. South Africa despite being a member of SACU together with the BLNS has not joined the agreement and there are no

[127] See P Draper: EU-Africa Trade Relations: The Political Economy of Economic Partnership Agreements page 17.
[128] See A Saurombe: The Context of Economic Partnership Agreements (EPA) for SADC: Available Alternatives page 9.
[129] See A Saurombe: The Context of EPAs page 9.
[130] See A Saurombe: The Context of EPAs 10.
[131] See A Saurombe: The Context of EPAs10.
[132] See ECDPM: State of EPA Negotiations in May 2009 page 3.
[133] See ECDPM: State of EPA Negotiations in May 2009 page 4.

indications that it is considering joining the IEPA. South Africa instead continues trading with the EU under the Trade, Development and Cooperation Agreement (TDCA). [134]

4. East and Southern Africa (ESA and EAC EPA) - In the East and Southern African negotiating group six countries had initialed the agreement by 30 September 2008 and after the East Africa Community had signed an interim agreement with the EU negotiations then began towards a full agreement both in the EAC and ESA configuration. It is understood that the EAC countries participate in ESA meetings but however still hold separate EAC-EU negotiations in parallel.[135]
5. Caribbean - The Caribbean Group is the only group amongst all the ACP Countries that has signed a full EPA agreement with the EU which was duly notified to the WTO in October 2008. The countries are now going through the ratification process and provisionally implementing the EPA whilst preparations are made about establishing a body that will be in charge for coordinating the implementation of the EPA in CARICOM countries.[136]
6. Pacific - in the Pacific region, negotiations towards a comprehensive regional EPA are taking place after the interim agreement with the EU was initialled by Papua, New Guinea and Fiji. The Pacific countries have proposed to focus the full EPA on trade in goods, fisheries and development cooperation. The region prefers not to include provisions in services at this stage, but to formulate a rendezvous clause to negotiate trade in services at a later point.[137]

Trade liberalisation and Reciprocity

As indicated above the need to negotiate EPAs was influenced by the need to have a reciprocal trade agreement. As C Stevens observes:[138] "*one salient characteristic of the EPAs is reciprocity: the ACP will have to remove tariffs on some Imports from the EU, in contrast to the Lome and Cotonou which were non-reciprocal."* The Economic Partnership Agreements between the EU and ACP countries are expected

[134] See ECDPM: State of EPA Negotiations in May 2009 pages 4-5.
[135] See ECDPM: State of EPA Negotiations May 2009 pages 5-6.
[136] See ECDPM: State of EPA Negotiations May 2009 page 6.
[137] See ECDPM: State of EPA negotiations May 2009 page 7.
[138] See C Stevens: Economic Partnership Agreements and African Integration: A help or a hindrance? page 5.

to establish Free Trade Areas (FTAs) between the EU and the ACP countries. A pressing consideration hence is to put in place measures to ensure the positives of these FTAs are not compromised by potential negative externalities.

One of the cornerstones of the multilateral trading system under the WTO is the principle of non-discrimination which is well explained in terms of the Most Favoured Nation (MFN) principle. In terms of the MFN principle a trade concession granted by a member state to another should be automatically extended to all other WTO members.[139] There are two exceptions to this MFN principle. The first one allows preferential treatment when based on development concerns; the second one is with regard to FTAs.

The "enabling clause" authorises "preferential and more favourable treatment to developing countries," on the basis that they offered by a party, to all developing countries, without discrimination.[140] The enabling clause is for example utilised to provide preferential market access under schemes such as the various General System of Preferences (GSP) in favour of all developing countries, or the Everything But Arms (EBA) initiative, which the EU provides to the Least Developed Countries (LDCs).[141] The "enabling clause" may also be utilised for preferential trade liberalisation among developing countries.[142]

The EPAs are being negotiated between a developed economic bloc and a large number of LDCs and developing countries with vast disparities on their level of development therefore the GSP and EBA were not suitable to address all trade policy concerns between the EU and ACP countries. For purposes of this paper we will largely focus on the FTAs.

GATT Article XXIV provides that:

(8) (b)[143] a free trade area shall be understood to mean a group of two or more customs territories in which the duties and other regulations of commerce (except where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are

[139] See GATT Article 1.
[140] See Economic Commission for Africa page 12.
[141] See Economic Commission for Africa page 12.
[142] See Economic Commission for Africa page 12.
[143] See GATT Article XXIV (8) (b).

eliminated on substantially all the trade between constituent territories in products originating in such territories.

GATS Article 5 provides that:

(1)[144] This agreement shall not prevent any of its members from being a party to or entering into an agreement liberalising trade in services, between or among the parties to such an agreement:

(a) has substantial sectoral coverage, and
(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a) through:
    i. elimination of existing discriminatory measures or;
    ii. prohibition of new or more discriminatory measures

Either at the entry into force of that agreement or on the basis of a reasonable time frame, except for measures permitted under Articles XI, XII, XIV and XIV *bis*.

Both GATT Article XXIV and GATS Article contain the phrase substantially all trade, to say there must be substantial trade liberalization in trade between the two countries. Scholars however have not come up with any compelling definition of the phrase "substantially all trade"; however there seems to be consensus on one thing that "substantially all trade" does not mean all trade.[145] In the TDCA for example South Africa is required to liberalise 86% in 12 years whilst the EU is required to liberalise 95% in 10 years.[146] The negotiations of EPAs have taken a relatively similar form of liberalisation. ACP countries have been compelled to lower tariffs for substantially all imports coming from the EU and the EU would do the same for imports from ACP countries. This development was not welcomed with various concerns being raised about the fact that ACP countries still lagged behind in development and lowering tariffs for imports from the EU would destroy their infant industries.[147]

[144] See GATS Article V (1).
[145] See C Stevens: Economic Partnership Agreements and African Integration page 5.
[146] See European Commission: The European Union and South Africa.
[147] See Oxfam briefing Note: Unequal Partners: How EU-ACP Economic Partnership Agreements Could Harm the Development Prospects of many of the World's Poorest Countries: September 2006 page2.

This is a valid concern, considering the fact that the tariffs slapped on EU imports are all that enables local industries in ACP countries in a sense stay competitive. An added concern to this definition of trade liberalisation is the current existing lacuna in legislation aimed at market regulation in most SACU states. As shown by the country surveys conducted in previous chapters most of the smaller nations in SACU rely on provisions of other pieces of legislation to govern competition in the market. However because these legislation have specific focus such as the Telecommunications Act and Industrial Development Act of Botswana not all spheres of the domestic market fall under their purview. In actuality the ability of such specifically targeted legislation to found jurisdiction for government enforcement agencies is an exception as opposed to a rule. As mentioned the above definition of substantially all trade has been interpreted at liberalising trade with respect to at least 80% of the market to comply with the reciprocity requirement. The implication of this would be a flood of actions not necessarily circumscribed to areas where current competition provisions can be applied.

Further to the above although the EU has promised increased market access for ACP countries there seems to be no real increased substantial benefit for most ACP countries to go ahead with this process. As indicated above the EU established the EBA programme for the LDCs, in ACP blocs in 2001. Under this initiative eligible countries have duty free market access for the vast majority of their exports to the EU.[148] For the remaining developing countries there have been no real indications that market access will expand beyond the preferences that they already have under the Lome Convention, or remove the barriers that undermined the effectiveness of previous preferential agreements. Botswana's Minister of Trade was quoted saying:[149] "*the decision to get into an interim EPA was simply to ensure that there would be uninterrupted flows from the African countries into the European Market."* The Minister is actually indicating that there is nothing that the EPAs negotiations have actually come up with except that an IEPA had to be signed to maintain the market access they already have in the EU. The EU talk of it taking this route due to increased pressure from developing countries in ASIA not receiving these

[148] See Oxfam Briefing Note September 2006 page 4.
[149] See Trade Negotiations Insights Issue 08 page 5.

preferences is also ludicrous. If the EU ever truly conceded to pressure from any grouping, farm subsidies should have long been abolished.

Even with the EPA it is likely that ACP exporters will continue to face stringent rules of origin which will limit a number of exports that qualify for preferential treatment. Ever increasing sanitary and phyto-sanitary standards (SPS), make it hard for ACP exporters to break into European markets. Compounded to this is tariff escalation on key value chains, which levies higher taxes on processed goods (e.g. instant coffee) than on raw materials (such as coffee beans) and as such deters ACP countries from processing their own products thereby limiting the development of manufacturing industries in African countries.[150] The EU has also not shown any real commitments in its agricultural reform programme as a result even if the EU was to allow ACP countries to export many agricultural products, other than those under special trade protocols for common wealth developing countries, the ACP countries would still have to compete with heavily subsidised EU agricultural products.[151]

In terms of how much each party would liberalise the understanding has been that the EU would liberalise 100 per cent of its trade, the ACP countries will have to liberalise 80 per cent of their markets thus allowing only 20 percent protection of products from competition with European goods and services.[152] Liberalisation will pose serious challenges for many African countries. Liberalisation will amount to substantial loss of government revenue by most African countries.[153] It is however important to acknowledge that liberalisation might encourage consumers to purchase goods at cheaper prices, leading to the collapse of the infant manufacturing sectors in Africa.[154] Not only do EPAs threaten existing productive sectors, they could severely undermine the ability of African countries to support future economic development.[155] Virtually all countries that have developed in the past have used tariff policy to encourage small enterprise to move up the value chain into new manufacturing and processing industries.[156] This entails changing levels in response to the needs of the economy and to national or regional development priorities. The

[150] See Oxfam Briefing Note September 2006 page4.
[151] See Oxfam Briefing Note September 2006 page 4.
[152] See Oxfam Briefing Note September 2006 page 5.
[153] See Oxfam Briefing Note September 2006 page 5.
[154] See Oxfam Briefing Note September 2006 page 5.
[155] See Oxfam Briefing Note September 2006 page 5.
[156] See Oxfam Briefing Note September 2006 page 5.

EPAs will severely restrict the ability of African governments to use tariff policy in this way.[157]

Lowering of tariffs under EPAs, will put African countries in the very same position that they have always been, and that is locking African countries into production of primary commodities and thus preventing economic development.[158]

A further offensive interest that the EU has brought into the EPAs negotiations is trade in services. The EU has strongly pushed for the inclusion of competition policy, investment, trade facilitation and transparency in government procurement (the so-called Singapore issues) in the EPA process. With the exception of trade facilitation, developing countries have been able to exclude these issues from the remit of the WTO.[159] By allowing these issues to be negotiated in the EPAs developing countries have actually lost the gains made in the WTO Doha negotiations.

As has been the theme throughout this paper, competition policy is viewed as a tool for development. The worry with its inclusion herein and the continued interest the EU shows in pushing this offensive is the manner that the competition regime the EU suggests would take. The surveys of competition policies of SACU member states and that of other regional bodies has indicated largely a foresight to include special and differential provisions in competition policies to safeguard local industries. For example South Africa competition policy ties in the bigger reconstruction and development program, Botswana Industrial Development Act reserves certain manufacturing sectors for citizens, Namibia's competition Act creates exceptions to encourage exports and so forth.

The resistance ACP states have had to the inclusion of Singapore issues within the EPA negotiations is the fear that the EU would use its economic muscle to bulldoze ACP countries to agree to issues on competition rejected within the DOHA negotiating round.[160]Further to this and a true sticking point is that it would allow the EU to interfere with legislative enactment process which falls within the exclusive preserve of the state. This is something that SACU and other regional economic

[157] See Oxfam Briefing Note September 2006 page 5.
[158] See Oxfam Briefing Note September 2006 page 4.
[159] See Oxfam Briefing Note September 2006 page 4.
[160] See Oxfam Briefing Note September 2006 page 4.

groupings which have developing states as members such as CARICOM have been loath to do due to the political tensions of tapering sovereignty with trade concerns.

The gains on the table are just not sufficient to illicit the control the EU wishes to exert in ACP states. To quote the sentiments of Thabo Mbeki one of Africa's foremost intellectuals, on the EPA process:

"*Critical in this regard is access for our products into the food markets of the developed countries, some of which continue to subsidise their own agriculture in the context that verges on intellectual, economic and social obscenity and brutal selfishness".* He goes on to state:

"*Our experience tells us that FTAs between a large market like the EU and small economies are not easily sustainable and often lead to a deficit for the weaker partner*"

The political rhetoric before the negotiations of the EPAs started was that EPAs would establish a partnership of equals between the EU and African countries. Clearly that was not to be the case and the EPA negotiations have clearly demonstrated this. Firstly the EPAs are negotiated between world's most advanced industrial economies against some of the poorest nations on earth.[161]

Under the proposed EPAs:

Farmers and producers in many of the world's poorest countries will be forced into direct and unfair competition with efficient and highly subsidised EU farmers and producers.[162]A precarious position further enhanced due to proper market regulations mechanisms in ACP countries ranging from lack of legislation to poorly resourced enforcement agencies.

Regional integration amongst the African countries will be severely hampered.[163]Many regional blocs like COMESA and SADC that are in the process of establishing Customs Unions have had their member states split into different configurations during these EPA negotiations implying that these blocs will not be

[161] See Oxfam Briefing Note page 2.
[162] See Oxfam Briefing Note page 2.
[163] See Oxfam Briefing Note page 2.

able to have one common external tariff as required by a customs union. The EPA configurations that were established were merely established for purposes of negotiating EPAs because countries in these configurations lacked expert negotiators and it was felt that by negotiating as a bloc they could pull together resources and bring their interests to the fore in these negotiations. However and perhaps as an unintended consequence, negotiating as a bloc has proved cumbersome especially as a result of the multiple memberships of Regional Economic grouping currently existing in Africa. The confusion as to which process a country such as Swaziland falls into further entrenches the power imbalances between African countries and the EU at the bargaining table. As mentioned above African governments will also loose substantial revenue along with many of the policy tools they need to support economic and social development.[164]

The benefits for the EU are quite clear African countries will lower tariffs for many of the EU products; African countries will merely continue getting the market access they already enjoyed from the EU. The true result is not a creation of a relationship as equals but rather a rebalancing of the playing field to the disadvantage of African nations. From expositions in earlier chapters, a factor hampering inter regional trade on the African continent has been the fact that most are based on agriculture and the extractive industries and thus have no true impetus to sell to one another. It is perhaps prudent to remember that this state resulted from a intentional driven campaign by European nations the then colonial powers to ensure they had a source of material to keep western industries running. Thus the disadvantage that ACP states find themselves under can be directly linked to policies of Europe.

It is indeed unrealistic and selfish to wish to level the playing field, calling for the opposition of reciprocal obligations when the EU has through a concerted effort over centuries ensured that the field was anything but level. The EPA negotiations are in essence nothing more than trumped up attempts by Europe to ease its market concentration woes by opening new markets for its products in the ACP states whilst at the same time securing preferential access for its goods over products coming through from Asia.

[164] See Oxfam Briefing Note page 2.

Chapter 5

Suggestions for enhancing current SACU competition framework and a case for including SDT provisions: an eye towards Europe

After the signing of Botswana, Lesotho and Swaziland onto IEPA, concerns were raised about the impact that the actions of these three states would have on the SACU common external tariff with some scholars going to the extent of declaring SACU officially dead.[165] This paper views the loss in common revenue to be the least of concerns SACU has currently but rather the fact that the actions of these three states have created an unregulated opening for EU industries to plunder the common market. For a nation such as South Africa, its effective competition regime serves as a buffer against underpriced EU goods attempting to gain indirect access to its market. For Namibia the signing of these IEPA stand as a plausible threat to its local industries, having just put in place competition regulation, the directorate of it which is as yet understaffed and highly inexperienced.

This paper turns its' focus on measures that can be put in place to strengthen SACU's current position with respect to competition regulation. The measures being put forward speaks to the current gaps as identified in the previous chapters. These as identified include:

- Clarifying and strengthening the obligations under Article 40 & 41
- Strengthening the ability of newly established competition directorates to cope with the ever increasing sophistication of cartel activity.
- Creating a competition policy that preserves needed policy space that both achieves the end of streamlining the recourse SACU states have with regards to actions emanating outside the customs union whilst allowing room for states to undertake domestic policy aimed at encouraging development, trade and industrialization.
- Having regard to the special needs of smaller economies within SACU.

[165] See P Draper and N Khumalo: The Future of the Southern African Customs Union page 04. Trade Negotiations Insights Issue 06. See Also C McCarthy: SACU at Cross- Roads page 04.

- Creating an effective buffer for other SACU states from dominance of South African Industries

Firstly the truth needs to be embraced, on the current framing of Articles 40 and 41, SACU has no true competition policy to speak off. What is currently in place is best described as soft law placing no true obligation on member states. It is merely another example of the eagerness of African states to ink but not to act. SACU member states must be made to understand the implications of being part of a customs union. Due to this particular undertaking any provisions in relation to competition must in general be more specific and demand higher commitments from the member states to achieve true efficacy.[166] The vagueness in current SACU language on competition must be done away with spelling in detail the obligations and manner within which member states must act.

If SACU governments are adamant in not moving towards a fully integrated regional competition body, it is essential that they formalise channels of communication. Such formalisation aids in unpacking the commitments of cooperation. Obligations as relating to notifications are of heightened importance in relation to SACU. On its current vague framing, cooperation between competition authorities in SACU merely takes the form of First Generation Agreements. Though this contains the elements of information sharing, coordination of enforcement activities and technical cooperation it is not suited for SACU. The reason for this proposition is that first generation agreements from an information sharing standpoint are limited to non-confidential data and hence upon receiving a cooperation request a competition authority is only obliged to hand over documentation not protected by confidentiality safeguards. This has the consequence of impeding the ability of the requesting authority to access information that allows it to better understand the structuring of corporations under investigation as such information is not normally contained in public documents. It is essential that SACU concludes Second Generation Agreements. These agreements in addition to incorporating the elements of information sharing, cooperation between competition authorities and technical assistance importantly allows for the sharing of

[166] Barbara Rosenberg and Mariana Tavares De Araujo, Implementation costs and burden of international competition law and policy agreements, (UNCTAD 2005 Report), page 146, UNCTAD/DITC/CLP/2005/1

confidential information even allowing one agency to collect information on behalf of another.[167]

This is in true essence what SACU needs. It is undisputable that within SACU South Africa serves as a hub when one considers where most foreign establishments choose to incorporate, thus South Africa in most instances exercises jurisdiction. The implication of this is that South Africa sits with the bulk of information other SACU states require in investigating competition issues of these foreign establishments not to mention that of their very own local firms who together account for the bulk of the economic activity in the region. Current SACU provisions do not do enough to foster information sharing, certainly not the sort required to conduct proper investigations. The failure to streamline information sharing also results in an unnecessary duplication of costs, with human resource and money wasted in duplicating processes already carried out by what are in essence partner agencies.

In the field of technical assistance, it is clearly evident that cooperation agreements between parties with similar levels of institutional development and legal frameworks do not result in capacity building. Much has been alluded to in terms of the huge disparities existing when one considers competition regulating institutions in SACU. With the exception of South Africa all other competition authorities in SACU are relative infants. South Africa must be applauded for its role in assisting Namibia put together a credible statute on competition. However much remains to be done in terms of strengthening the actual competition authorities of these nations. This involves gathering the right mix of experts and equipping them with the resources needed to perform their duties. The decisive factor in this respect would be how to reduce the cost implications. Funding more than any other consideration has the ability to incapacitate institutions. In countries of Africa where competition regulation is a relatively newcomer on the regulation scene, it is extremely difficult to gain financial commitment from governments for institutions that are viewed peripheral to other government agencies. It is thus important for SACU states to diversify their funding bases, using the EPA negotiations in particular as a platform to gain commitments from the EC to supply the funds needed to keep these all important directorates running.

[167] Ibid at page 193

Smaller SACU states namely Namibia, Lesotho and Swaziland will feel the pinch of funding such agencies the most. It might be worthwhile to consider the possibility of these three states combining their competition authorities. This would necessarily dictate a harmonisation of their competition law. Outside its potential financial benefits there are other gains to be made from such an amalgamation and it's certainly not without precedent. As alluded to in the study on CARICOM, smaller states within the regional group have moved towards deeper integration through the formation of a sub regional group known as the Organisation of Eastern Caribbean States (OEC). Fact remains by virtue of their geographical small economies these three states require a deeper level of integration than currently afforded by SACU. They can through moving towards deeper integration benefit from synergies. For example having one competition commission as opposed to three reduces considerably the cost of running the directorate, combined with enhanced investigative abilities due to the sharing of experiences.

As relating to the threat from South African companies it is important that BLNS states do not apply domestic competition in a manner that renders it a tool for protectionism. This is a likely tendency noting the development objects that underlies the industrial policies of most SACU nations. A call for more special and differential treatment provisions in as far as competition policy within the SACU treaty is concerned solves only a part of this complex issue. Discussions on protecting domestic industries are always charged with tension. It would be short sighted to suggest that valid reasons do not exist for governments in smaller states proceeding in such a fashion because states that decry protectionist policies of government not too long ago shielded their own key industries. There is thus a basis for smaller countries taking the stance that despite the move to liberalise markets they should also be given the opportunity to shield key industries in their countries till such a time when they are reasonably established and able to fend off competition on their own.

The reality is that competition policy is but one instrument in regulating the market. Noting the threat from South African industries and would be threats from foreign MNC's SACU states must hasten to put in place a common industrial policy. This policy would be responsible for setting out areas of the economy of strategic importance. This allows all member states to reserve parts of their markets on justification from normal obligations under trade liberalisation. Discussions must be

entered into to determine whether such actions would be in perpetual or have set time periods. The current SACU agreement under Article 38 makes provision for such a common industrial policy. The establishment of this would further lead to ameliorating the tensions that have held SACU states from putting in place a common competition policy on realisation that its establishment does not automatically contrive to exclude the policy space they have to defining their developmental goals. This will not only serve as an effective buffer against the dominance of South African industries but also force SACU states to rethink and perhaps enhance their development strategies as the process of applying for an exemption for a sector entails justifying its importance.

Lastly this paper suggests the putting in place of a minimum set of criteria that protects the trade interest as a framework for the continual development of SACU law relating to competition. This must be backed up with the establishment of a regional competition advisory council which automatically is considered amicus curiae in all competition challenges before domestic courts in SACU where concerns exceed a minimum monetary threshold or falls within a sector of the economy considered of strategic importance to the domestic market or integration efforts. It would make recommendations to the courts that hopefully minimise huge diverges of opinion on competition rulings by domestic courts in SACU. The spin off effect of this would be more certainty and a natural inclination to harmonisation through case law. It would also do much in readying SACU for the establishment of a regional competition appellate and embracing other regional approaches to solving its issues.

Conclusion

In summation SACU is at a crucial point in what has been a long yet unremarkable existence in terms meeting the needs of its member states. How it responds to the threat from within the union being South African industries and competition from without would be key to its continued survival. To meet these challenges effectively it must rethink its currents precepts on issues such as competition. The current state of regulation most countries within the region does not bode well for making it an investment destination, for protecting its industries nor for enhancing its readiness to face stiffer competition post the SADC EPA negotiations.

It would be prudent on SACU's part to hasten its processes in the drafting of its common policies if it ever wishes to see true gains from trade. Competition policy especially would do much to foster the well being of industries in the union especially those in SACU's smaller states. Whatever the path it chooses, its choice must be considerate of the disparities in the union and the burdens that common obligations confer. With this appreciation this paper suggests a merging of the EC and CARICOM approaches to competition. A hybrid system that calls for the immediate harmonisation of laws and institutions in the smaller states, establishing a competition directorate with powers on the scale of what exists in the EC within these states , that creates an effective yet financially less burdensome institution because of shared costs for the smaller states. This should be engineered in a manner that it preserves through special and differential provisions policy space for industrial development in SACU's smaller states however with sunset clauses attached to these exemptions to prevent it from being perceived as a protectionist tool. In combination to this should be a program for a structured phased in harmonisation process made applicable to all of SACU, with similar bindings however structured in such a manner to give SACU's smaller states extra time to meet these bindings.

Whether a willing participant or not, the rapid development of information and communication technologies, the reduction of international transaction costs, privatization, deregulation and trade liberalization will result in the world economy being integrated into a single block. The EPA negotiations plus the global economic meltdown of 2008 sparked by the property slump in the United States suggests that the world economies are interwoven together more strongly than had ever been appreciated. This brings with it opportunities for trade and as seen in 2008, many potential threats. SACU is part of this movement, however whether it benefits or looses out depends on its actions today. Formalising and enhancing the competition regime in the region must not to be seen as the ultimate solution to the problems that plague the union, but it is undoubtedly a step in the right direction.

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