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Regulation Of Export Cartel In South African Competition Law and Southern African Development Community.

BY:

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Declaration

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

Signed: *Thandeka Ndlovu*

Date: 28 September 2019

Dedication

To my late brother, my family and friends; I am trully grateful for your support throughout my research journey and this Masters degree. Thank you.

Acknowledgement

I hereby acknowledge the National Research Foundation for its financial assistance that funded my LLM studies. This research paper is solely mine and the views expressed in this paper are mine, not of the NRF.

I would like to thank God for giving me this opportunity and for good health throughout the programme. Special thanks to my family and friends for their love and support.

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KEY WORDS

Administrative penalties

Cartels

Competition law

Cooperation

Criminalisation

Developing countries

Enforcement

Leniency policy

Regional Economic Communities.

Regional trade agreements

Settlement procedures

List of Abbreviations

CA	Competition Authority
CANPOTEX	Canadian Potash Export
CCOPOLC	Competition and Consumer Policy and Law Committee
CLP	Corporate Leniency Policy
COMESA	Common Market for Eastern and Southern Africa
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
MERCOSUR	Mercado Comum do Sul
NCA	National Competition Authority
OECD	Organisation for Economic Co-operation and Development
OPEC	Organisation of Petroleum Exporting Countries
RCA	Regional Competition Authority
REC	Regional Economic Community
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Co-operation Conference
SME	Small to Medium Enterprise
UNCTAD	United Nations Conference on Trade and Development
WCCFP	Western Cape Citrus Fruit Producers
WTO	World Trade Organisation
ZCC	Zambian Competition Commission

Abstract

An export cartel is an agreement or arrangement between exporters to act collusively in respect of any of their export activity. Export cartels are often professed as having little to no effect on the domestic market in which they operate, thus, jurisdictions are often less incentivised to pursue an export cartel in their territory than they would to a traditional hard core cartel. This is evident in South Africa where export cartels are exempt from the Competition laws if those cartels do not have a substantial effect on the South African market. While this 'beggar thy neighbour' approach was considered the norm for decades, with the development of globalisation and international trade, export cartels affect the goal of achieving a deeper intergreition in a free trade area like the Southeren Development Community.

The calls for reform are particulary important for developing countries because they are likey to suffer the effects of an export cartel, while not having the ability to challenge these themselves. This is due to lack of a comprehensive competition law systemn and a lack of resources to gather the necessary evidence to bring a claim. Thus, a deeper understanding is required concerning the effects of export cartels and it calls for enforcement collaborations at a regional level.

This article will explore the effects of export cartels and the inconsistency between socio-economic objectives and competition law in South Africa. Furthermore, the regulation of competition law in the SADC region and international trade laws.

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CHAPTER ONE

INTRODUCTION

1.1 Background

Competition law become evident an ear where competition in the marketplace was considered as a national culture.¹ It refers to the statutory provisions that are directed at ensuring and sustaining free and fair competition.² Competition policy refers to measures implemented by a government aimed at encouraging competitive business practices, such as trade policy, deregulation, privatisation and competition law.³ Therefore, the role of competition law is to promote and strengthen competition, by ensuring that restrictive practices, such as cartels and monopolies, are limited.⁴ Competition law is concerned with three categories of business practices: horizontal and vertical restraints; abuse of dominance and merger regulation.⁵

Initially, competition law was purely a domestic issue, where countries' economies had to monitor and control competition of private enterprises within the domestic market.⁶ However, due to globalisation that has made countries to be interlinked by comprehensive trade liberalisation, regulatory reform, technological advancements and rapid transportation, now competition has spill over effects in these trade agreements.⁷ Therefore, domestic economies are now highly interdependent and business conduct occurring in one state have profound effects in other states.⁸

Competition law has a crucial impact in the free markets because it ensures that the availability of the same or similar products from different sources, results in the public paying a reasonable price.⁹ The basic aim of regulating competition law is that free markets are the most efficient and fairest

¹ KJ Hopt & Von Friedrich Kfibler ed *Wetbewerbsbeschränkungen Und Verrechtlichung* (1985) in Weiss F 'From World Trade Law to World Competition' *Law* (1999) 23 *Fordham International Law Journal* S250.

² M Neuhoff et al. *A Practical Guide to the South African Competition Act* (2006) 11.

³ M Taylor 'International Competition Law: A New Dimension for the WTO?' (2006) 28 30.

⁴ Van Heerden (n 6).

⁵ P Sutherland & K Kemp *Competition Law of South Africa* (2014) 2 2.

⁶ K Kennedy *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (2001) London: Sweet & Maxwell.

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

⁸ Sweeney B 'International Competition Law and Policy: A Work in Progress' 200910 *MelbJIL* 58.

⁹ *Taylor & Horne (Pty) Ltd v Dental (Pty) Ltd* 1991 1 SA 412 (A) 421 422.

organisation.¹⁰ Article 1 of the Competition Regulations of 2004 of the Common Market for Eastern and Southern Africa (COMESA), which describes ‘competition’ as “the striving or potential striving of two or more persons or organisations, engaged in production, distribution, supply, purchase or consumption of goods and services in a given market against one another, which results in greater efficiency, high economic growth, increasing employment opportunities, lower prices and improved choice for consumers.”

However, competition law has its own disadvantages, it creates the environment and opportunity for cartels and monopolies.¹¹ In the free market where businesses are not supervised, they may abuse the policy space and the market may fail to produce the expected results.¹² Thus competition law protects the public from failures within markets and ensures that competition among businesses is fostered, so that enterprise development is enhanced.¹³

Horizontal restraints involve businesses that are in a horizontal relationship, supplying supplementary products or services.¹⁴ With regards to horizontal restraints, competing businesses conclude agreements to prevent or lessen, competition in a market.¹⁵ This is called a cartel. A cartel is a species of restrictive horizontal practices, and in free markets are prohibited.¹⁶ It must be noted that the collaboration within competitors, may be accepted, if it promotes the competition process by creating new and improved products, expands research and development.¹⁷ However, collaborations of such might have negative effects, such as mergers and provide for a fertile ground to engage in collusive practices.¹⁸ Therefore, Competition Authorities (CAs) have to examine joint ventures, critically. The collusion among the companies is solely directed towards maximising

¹⁰ JM Clark ‘Toward a concept of workable competition’ (1940) 30.

¹¹ HJO Van Heerden & J Neethling *Unlawful Competition* (1994) 12.

¹² P Brusick & others (eds.) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) 213.

¹³ Brusick (n 7) 323 331.

¹⁴ P Sutherland & K Kemp (n 4) para 5.3.

¹⁵ Competition Act 89 of 1998 secs 4(1)(a), 1(1)(xiii) & 1(1)(c); *JD Group Ltd v Ellerrine Holdings Ltd* [2000] ZACT 35 para 4.2.

¹⁶ AB Lipsky ‘Deterring cartel behaviour: Harmonies and disharmonies, problems and solutions’ (1992) *Antitrust Law Journal* 563

¹⁷ K Moodaliyar & K Weeks ‘Characterising price fixing: A journey through the looking glass with ANSAC’ (2008) 11. *South African Journal of Economic & Management Sciences* 338 339.

¹⁸ Sutherland (n 4) 5.8.

profits, bid rigging and a division of markets. Thus, cartels affect companies in the free markets because companies no longer act independently.¹⁹

Since we live in the ‘cartel laced world’,²⁰ many economists, competition lawyers and CAs, implement laws to eradicate cartels.²¹ South Africa’s Competition Act of 1998 requires the imposition of administrative fines on companies that engage in cartel conduct for the first time and it is regarded as a criminal offence.²²

In the SADC region, enforcement mechanism directed at cartels are commendable, however, they are still insufficient. Most countries are hesitant to enforce action against domestic cartels hence of their weak institutional capacities.²³ Due to this CAs are faces with jurisdictional hurdles and political pressure, when dealing with export cartels.²⁴ The impact of cartels is severe; as cartelised goods become unnecessarily expensive, product choices are reduced, and innovation is eliminated because cartel members are no longer spurred on to innovate, since the cartel shields them from rigorous competition.²⁵

As mention due to the international concern about the negative effects of cartels, developing countries included competition law provisions in their Regional Trade Agreements (RTAs). Members of the Southern African Development Community (SADC) are obliged to implement measures that prohibit unfair business practices and promote competition in the Community.²⁶ SADC members also have a cooperation mechanism in the enforcement of the competition laws

¹⁹ PZ Grossman & C Efrogmson (eds.) *How Cartels Endure and How They Fail: Studies of Industrial Collusion* (2004)144

²⁰ Sutherland (n 12) para 6.6.

²¹R Whish *Competition Law* (5th ed.) (2005) 454, points out that, ‘[a] particularly noticeable feature of competition policy in recent years...has been that competition authorities generally are taking a much keener interest in the eradication of hardcore cartels. There have been and continue to be fierce debates about many issues in competition policy: for example, the appropriate treatment of vertical agreements, abusive pricing by dominant firms, refusals to supply ...However if competition policy is about one thing, it is surely about the condemnation of horizontal price fixing, market sharing and analogous practices.’

²² Act 89 of 1998 sec 73A.

²³ T Kunene ‘Challenges faced by new younger competition agencies in the investigation of cartels’ International Competition Network (2006)<http://www.internationalcompetitionnetwork.org/uploads/library/doc704.pdf> [Accessed 17 May 2019].

²⁴ M Levenstein & V Suslow ‘Contemporary international cartels and developing countries: Economic effects and implementation of competition policy’ (2004) *Antitrust Law Journal* 803.

²⁵ J Chowdury ‘Private international cartels - An overview’ Consumer Unity Trust Society International Briefing Paper (2006) 2.

²⁶ Article 1(c)(d) of SADC Declaration on Regional Co-operation in Competition and Consumer Policies of 2009.

of the individual States, in terms of the Declaration on Regional Co-operation on Competition and Consumer Policies of 2009.²⁷

However, when examining the competition law provisions in the SADC, it seems that they are not ready to implement their commitments.²⁸ In case of cross border competition issues, it uses friendly consultation, information sharing and best endeavour clauses. It does not have a supranational competition authority. In 2016 SADC region adopted Memorandum Of Understanding(MOU) on cooperation on competition policy, to collaborate on evidence gathering, remedy design and implementation when conducting merger reviews. It has developed a cartel working group with subgroup concerning legal framework and investigate techniques.

Due to the absence of supranational procedures for dispute settlement and enforcement, it poses a huge hindrance to curb cross border anticompetitive in SADC. This paper recommends that if this competition law provisions, specifically dealing with export cartels, are properly drafted and implemented because the importing country are protectionist to exempted export cartels. Furthermore, RTAs provide a viable platform for enforcement collaborations.²⁹

1.2 Research objectives

The comprehensive aim of this research projects is to investigate the effectiveness of SADC cooperation in implementing a Regional Competition authority law, as a vehicle of enforcement against export cartels. The specific objectives of the research are to:

- Investigate the intersection between international trade and competition law.
- Examine the impact of export cartels on the developing countries.
- Examine the existing SADC cooperation model.
- Investigate the extent of enforcement of cartels in SADC concerning cross border cartels and
- Make recommendations on how to deal with export cartels, drawing experiences from COMESA.

²⁷ Article 2(a) of SADC Declaration on Regional Co-operation in Competition and Consumer Policies of 2009.

²⁸ D Sokol 'Order without (enforceable) law: Why countries enter into non-enforceable competition policy chapters in free trade agreements' (2008) 83 Chicago Kent Law Review 231 292.

²⁹ PN Ndlovu 'Competition law and Cartel enforcement regimes in the global South: Examining the effectiveness of cooperation in South-South Regional Trade Agreements' PhD thesis University of western Cape 2017 254.

1.3 Problem statement

Globalisation has resulted in the interdependence of national economies,³⁰ Which has caused the discussion of competition law and cartels, at international level to gain traction.³¹ It was discussed that liberalisation of trade and competition law are complementary, that they are ‘two side of the same coin’.³² Fair competition in a free trade is important for the economic development of a region, promoting growth, efficiency and the alleviation of poverty.³³ Anticompetitive practices such as export cartels have the effect of distorting this free trade between and among developing countries.

South Africa has exempted export cartels from the domestic competition law because they are directed at export activities and they promote historically disadvantaged persons.³⁴ These, export cartels may have spill-over effects in the market of origin because it promotes a ‘beggar-thy neighbour’ effect on the importing countries. They are contrary to countries’ international trade obligations, and they amount to the differential treatment of cartel conduct, which, although deemed illegal within the country of origin, are nonetheless, allowed in another jurisdiction.³⁵

Export cartels allows for collaboration within the RECs to be utilised effectively. For instance, an exempted export cartel in South Africa penetrates the market of SADC, since it’s a free trade area. Therefore, regional trade agreements have a great potential for overcoming enforcement problems with regards to developing jurisdictions.³⁶ However, SADC does not have substantive rules regarding competition law.

³⁰ Organisation for Economic Co-operation and Development Globalisation: What opportunities and challenges for governments (1996) 3 4; Organisation for Economic Co-operation and Development The policy challenge of globalisation and regionalisation (1996).

³¹ Article 46 (1) of the Havana Charter; EM Fox ‘The WTO’s first antitrust case- Mexican Telecoms: A sleeping victory for trade and competition’ (2006) 9 Journal of International Economic Law 275.

³² BM Hoekman ‘Competition policy and the global trading system: A developing country perspective’ World Bank Policy Research Working Paper (1997) 1 5.

³³SADC ‘Competition Policy’ (2012).

³⁴ B Sweeney ‘The Internationalisation of Competition Policy’ (2010) 56.

³⁵ A Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Book IV Chapter II Part II.

³⁶ MS Gal & IF Wassmer ‘Regional Agreements of Developing Jurisdictions: Unleashing the Potential in Competition Policy and Regional Integration in Developing Countries’ (2012) M Bakhom & others (eds) <http://ssrn.com/abstract=1920290> (accessed on 24 May 2019).

1.4 Research hypothesis

This research seeks to examine the regulation of export cartels in the developing countries, more specifically South Africa. Since we are dealing with developing countries, the low levels of economic development, institutional problems and complicated government regulation, all have a considerable bearing on the enforcement of competition law and their economic development. Furthermore, it examines the current cooperation model adopted by SADC.

1.5 Research questions

The main question is what are legal benefits and challenges of creating a regional competition regulatory framework in SADC in a case of export cartels? To answer this question, the following sub-questions will be addressed.

- What is the interaction between competition law and international trade?
- What is the theoretical regulatory framework of competition law?
- What is export cartel and why they are exempted in South Africa?
- What are the challenges of the adopted cooperation model with regards to regulating export cartels in SADC?
- What are the legal implications of the establishment of a regional competition regulatory framework in SADC?

1.6 Literature review

Interdependence of national economies is the fruit of globalisation,³⁷ which has resulted in international trade and competition law discussions.³⁸ It has been agreed that liberalisation of trade and competition law are complementary and cartels pose a huge threat to the multilateral trading system.³⁹ The WTO noted that cartels were the ‘most pernicious’ anticompetitive practice, as they negatively impact on consumer welfare, affected the development prospects of poor countries, and, most importantly, gravitated towards countries that lacked legislative and other mechanisms to

³⁷ T Friedman ‘The Lexus and the Olive Tree: Understanding Globalization’ (2000) 9.

³⁸ Article 46 (1) of the Havana Charter; EM Fox ‘The WTO’s first antitrust case- Mexican Telecoms: A sleeping victory for trade and competition’ (2006) 9 Journal of International Economic Law 275.

³⁹ ‘Provisions on hardcore cartels’ World Trade Organisation Working Group on the Interaction between Trade and Competition Policy WT/WGTCP/W/191 20 June 2002 para 7 8 and 9 Competition Policy WT/WGTCP/W/191 20 June 2002.

deal with them.⁴⁰ Cartels are encouraged by the absence of a coordinated competition law framework, legislation in place regarding anticompetitive conduct, weak enforcement mechanisms and government policies.

With trade liberalisation many RECs have implemented rules to govern cross border anticompetition. In SADC members are obliged to implement measures that prohibit unfair business practices and promote competition in the community.⁴¹ In terms of the Declaration on Regional Co-operation on Competition Laws and Consumer Policies of 2009, members have a cooperation mechanism in the enforcement of the Competition laws of individual states.⁴² This is illustrated by the South African Competition Act of 1998. However, when examining the competition law in SADC, there is an effort to regulate cartels but there is no commitment.⁴³

In 2005 SADC protocol on trade was amended, to include a Free Trade Area in 2008 (FTA).⁴⁴ The additional objectives of the protocol were to liberalise intra-regional trade in goods and services, efficient production, cross border and foreign investment and enhance economic development.⁴⁵ The FTA means where two or more States custom territories in which duties and other restrictive regulations are eliminated on all trade between the constituent territories in products originating in such territories.⁴⁶ Due to this, there has been an increase in cross border business activities and enhanced competition in SADC.⁴⁷ In the discussion of anticompetitive practices in international trade, SADC uses the cooperation model to prohibit unfair business activities and to promote competition and cooperation in the region.⁴⁸

As it has been mentioned above, SADC does not have substantive rules governing cartels, thus South African rules will be used to elaborate on this point and provide a guideline. In Competition

⁴⁰ 'Provisions on hardcore cartels' World Trade Organisation Working Group on the Interaction between Trade and Competition Policy WT/WGTCP/W/191 20 June 2002 para 7 8 and 9.

⁴¹ Article 1(a) of SADC Declaration on Regional Co-operation in Competition and Consumer Policies of 2009.

⁴² Article 1 (a), (b) of SADC Declaration on Regional Co-operation in Competition and Consumer Policies of 2009.

⁴³ L Cernat 'Eager to ink, but ready to act? RTA proliferation and international cooperation on competition policy.'

⁴⁴ SADC Overview: History and Treaty <http://www.sadc.int/about-sadc/overview/history-and-treaty/> (accessed on 17 May 2019)

⁴⁵ SADC Documents and Publications: Protocol on Trade (1996) <http://www.sadc.int/documentspublications/show/Protocol%20on%20Trade%20> (accessed on 17 March 2019).

⁴⁶ Article XXIV (5) of GATT 1994.

⁴⁷ Ndlovu (n31).

⁴⁸ SADC Declaration on Regional Cooperation in Competition and Consumer Policies.

law substantive rules prohibit collusion among competitors.⁴⁹ Cartels are regarded as *per se* illegal under the competition Act 89 of 1998.⁵⁰ Section 4(1)(b) state that an agreement, or concerted practices, or business relationship and it involves direct or indirect price fixing, or division of markets by allocating customers suppliers, territories or specific types of goods and services or collusive tendering.⁵¹ It is regarded as per se prohibition of cartel practices.⁵² Therefore for a cartel to exist there must be an agreement, a concerted practice or a decision by an organisation of firms.⁵³

The term ‘agreement’ in cartels, is very broad and it includes a contract, an arrangement, whether it is legally enforceable or not, and need not be put down in writing.⁵⁴ In terms of the decision in Netstar (Pty) Ltd & Others v Competition Commission & Another, an agreement can be a contract between parties, as evidenced by a meeting of the minds, that is, consensus *ad idem*, in that the parties to the contract are clear about the rights accruing to them and obligations expected from them.⁵⁵ In South Africa agreements prohibited by the Competition Act, are enforceable upon a declaration form either the Competition Tribunal or the Competition Appeal Court.⁵⁶

Decisions by associated firms are prohibited because an association is a way in which firms seek to protect their mutual interest and expand on opportunities for collusion.⁵⁷ The Competition Act does not define ‘association of firms’, however Sutherland and Kemp state it means more than a voluntary association in the strict legal sense.⁵⁸ Therefore even though the association of firms is not legally constituted nor does it have a legal personality, it does not absolve cartel participants from competition law liability.⁵⁹

The above mentioned serve as forms of collusion and in absent of an agreement or association of firms, they may be ‘concerted practice’.⁶⁰ According to the Competition Act of 1998 concerted

⁴⁹ SA Metal & Machinery Co Ltd v Cape Town Iron and Steel Works (Pty) Ltd & Others 1997 (1) SA 319 (A) 326D-E.

⁵⁰ Competition Appeal Court’s ruling in Federal Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission 33/CAC/Sep03.

⁵¹ Southern Africa(pty) Ltd case (n 51).

⁵² Southern Africa(pty) Ltd case (n 51).

⁵³ Venter v Law Society of the Cape of Good Hope & Others 24/CR/Mar12 para 26.

⁵⁴ Act 89 of 1998 section 1(1)(ii).

⁵⁵ (2011) ZACAC 1 para 24 25.

⁵⁶ Section 65(1) of the Competition Act 89 of 1998.

⁵⁷ P Sutherland & K Kemp (n 4) 5.4.2.

⁵⁸ P Sutherland & K Kemp (n 4) 5.4.2.

⁵⁹ Compagnie Maritime Belge v Commission Case 395/ 96 para 32.

⁶⁰ United States v General Motors Corp 383 US 127 142 143 (1996).

practices are “cooperative, or co-ordinated conduct between firms, achieved through direct or indirect contact that replaces their independent action, but which does not amount to an agreement.”⁶¹ This substantive laws govern market allocation cartels, price-fixing cartels and collusive-bidding cartels in the South African territory. However, there are institutional enforcement of competition law.

Chapter 4 of the Competition Act of 1998 has three principal institutions involved in the interpretation, application and enforcement of the Act. These institutions are Competition Commission,⁶² the Competition Tribunal,⁶³ and the Competition Appeal Court.⁶⁴ The Act clearly states the separation of powers between these three institutions. They also have the same status of a High Court with regards to decisions, judgements or orders.⁶⁵

In conclusion South African Competition Act of 1998 is very comprehensive and can regulate anti-competitive practices. However, the SADC does not have substantive laws with regards to competition law and their institutional mechanism is not effective. According to the Declaration on Regional Co-operation in Competition and Consumer Policies of 2009, the Secretariat is required to establish a standing Competition and Consumer Policy and Law Committee (CCOPOLC) to implement the system of competition among members.⁶⁶ Its main aim is to foster collaboration with information sharing among NCAs of member states, collaborating on measures dealing with regional and international effects on anticompetitive conduct and offering technical assistance.⁶⁷ With the mentioned above, it is clearly evident that SADC needs to implement a Regional Regulatory Framework to foster the mentioned collaborations among member states. Cross border Cartels are increasing becoming a huge hindrance on free trade areas and SADC can use the South African Competition law as a guideline to implement, to sufficiently deal with cartels.

The main hindrance in trade liberalisation are export cartels. Smith refers to export cartels as ‘Merchants and manufacturers are not contented with the monopoly of the home market, but desire

⁶¹ Act 89 of 1998 Section 1(1)(vi).

⁶² Act 89 of 1998 Section 19 & 25.

⁶³ Act 89 of 1998 Section 26 & 35.

⁶⁴ Act 89 of 1998 Section 36 & 39.

⁶⁵ Act 89 of 1998 Section 64(1).

⁶⁶ Article 2(a) of SADC Declaration on Regional Co-operation in Competition and Consumer Policies of 2009.

⁶⁷ Article 2(b)(i) & (viii) of SADC Declaration on Regional Co-operation in Competition and Consumer Policies of 2009.

likewise the most extensive foreign sale for their goods. Their country has no jurisdiction in foreign nations, and therefore can seldom procure them a monopoly there. They are generally obliged, therefore, to content themselves with petitioning for certain encouragements to exportation.⁶⁸ Export cartels involves different collusion of firms about their export activities.⁶⁹ The collusion is concluded, to transfer income from foreign consumers to cartel's participants, to attain a favourable balance of trade.⁷⁰ The cooperation is in a form of export market.⁷¹ South Africa Competition Tribunal has described export cartels as 'a cynical policy which allows firms to do in someone else's backyard what they could not do at home.'⁷² Therefore these cartels are excluded according to the domestic laws.

In South Africa, section 10 of the Competition Act governs the exemption applications. Anticompetitive practices, as prohibited by Chapter 2 of the Competition Act can be exempted by the Competition Commission for attaining specific objectives.⁷³ These specific objectives are as follows:

- to maintain, or promote exports;
- to promote the competitiveness of small businesses, or businesses controlled, or owned by historically disadvantaged persons;
- to address changes in the productive capacity, to prevent decline in an industry; or
- to bring economic stability in an industry designated by the Minister of Trade, in consultation with the Minister responsible for that industry.⁷⁴

Therefore, it is possible for competitors, wanting to penetrate export markets, to seek exemption based on promoting or maintaining South African exports.⁷⁵ This was shown by the following

⁶⁸ Merchants and manufacturers are not contented with the monopoly of the home market, but desire likewise the most extensive foreign sale for their goods. Their country has no jurisdiction in foreign nations, and therefore can seldom procure them a monopoly there. They are generally obliged, therefore, to content themselves with petitioning for certain encouragements to exportation.

⁶⁹ B Sweeney *The Internationalisation of Competition Policy* (2010) 56.

⁷⁰ Glossary of industrial organisation economics and competition law Organisation for Economic Cooperation and Development (1993) 43.

⁷¹ P Eaton 'CANPOTEX: Potash's biggest marketer Eaton marks 40 years in business' (2013) 1 Saskatchewan Mining Journal 7.

⁷² *Botswana Ash (Pty) Ltd and Chemserve Technical Products v American Soda Ash Corporation and CHC Global (Pty) Ltd* 49 26 Competition Commission.

⁷³ Act 89 of 1998 Section 10(3)(b).

⁷⁴ Act 89 of 1998 Section 10(3)(b)(i) &(iv).

⁷⁵ Ndlovu (n 31) 213.

examples: The lobster export exemption⁷⁶ and the squid export exemption were granted to the South African Squid Exporters Association, anticipating that these exemptions would promote exports and small businesses, as well as firms, controlled by historically disadvantaged persons.⁷⁷

Due to the domestic objectives in the competition laws, export cartels have received a subdued treatment.⁷⁸ Most export cartels have no impact in their country of origin, implying that the NCAs of their home country do not have the reason to investigate and prosecute them.⁷⁹ Secondly the country of origin may have difficulties in finding jurisdictions over the cartel and gathering information abroad.⁸⁰ Finally political pressure plays a huge role in dissuading the NCAs of the importing country to investigate.⁸¹ This shows the difficulties in regulating export cartels using the importing country domestic competition laws. This legal issue seeks for a substantive regional regulatory framework that will deal with export cartels at the regional level.

1.7 Research methodology

The study will be based on a desktop and library study. The primary sources of information will be case law, treaties, protocols, memorandum of understanding agreements, and articles written

⁷⁶ The firms sought exemption from the Competition Act's prohibitions on price fixing and market allocation. After conducting its own inquiry, the Commission granted the exemption, on the basis that it would indeed contribute to the promotion and maintenance of exports, by way of creating information symmetry between South African exporters and their foreign buyers, allowing the South African exporters leverage, when negotiating with foreign buyers, which would allow them to obtain the best possible price, contribute to the tax revenue base, and ultimately the growth of the South African economy. The exemption was granted for a period of 5 years (the parties had sought a 10-year period exemption).http://www.compcom.co.za/wp-content/uploads/2014/10/Gazette-Notice-Lobster-Revised_221014.pdf (Accessed 11 May 2019).

⁷⁷ The Association made the application on the basis that they were sharing commercially sensitive information, for example, information on pricing and quantity information relating to international competitors and international market conditions. The Commission, while finding that this amounted to price fixing and market allocation, granted the exemption for a period of 5 years (although the parties sought a 10-year period exemption). The Commission also indicated, as with the lobster exemption, that the exemption would indeed contribute to the promotion and maintenance of exports, by way of creating information symmetry between South African exporters and their foreign buyers, allow the South African exporters leverage when negotiating with foreign buyers, would allow them to obtain the best possible price, contribute to the tax revenue base and ultimately the growth of the South African economy http://www.compcom.co.za/wpcontent/uploads/2014/10/Squid-Exemption-GG-Notice-Final_29102014.pdf (Accessed 17 May 2019).

⁷⁸ Ndlovu (n 31) 232.

⁷⁹ Ndlovu (n 31) 233.

⁸⁰ JR Atwood 'Conflicts of jurisdiction in the antitrust field: The example of export cartels' (1988) 50. *Law and Contemporary Problems* 154.

⁸¹ U Immenga 'Export cartels and voluntary export restraints between trade and competition policy' (1995) 4 *Pacific Rim Law and Policy Journal* 125 126.

by experts and organisations in the field. The secondary sources will include textbooks and information available from electronic resources and databases.

1.8 Chapter synopsis

The topic under examination will be discussed in six chapters.

Chapter one

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

Chapter two

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

Chapter three

This chapter discuss in detail what is export cartels and the need for regional collaboration in SADC.

Chapter four

This chapter focuses on the prospective benefits and challenges of developing a regional competition regulatory framework in SADC

Chapter five

It a discusses the legal implications of developing a regional competition regulatory framework in SADC.

Chapter six

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

1.9 Conclusion

Trade liberalisation has expanded competition law and policy from being a domestic issue to regional concerns. National competition law has proved to be insufficient for regulating cross border anticompetitive practices. Export cartels continues to receive special treatment under the domestic competition law, as it has been noted that in South Africa it is exempted. Thus, there is a need for a Regional Regulatory Framework that deals with cross border cartels in the SADC region.

CHAPTER TWO

THEORIES OF COMPETITION REGULATION AND THE INTERSECTION BETWEEN INTERNATIONAL TRADE AND COMPETITION LAW

2.1 Introduction

Competition law is the complex field of law and it requires theoretical framework of the subject matter to be critically analysed. The researcher reflects on the economic doctrine and its influence on competition law. Thus, the competition authorities and courts are exposed to numerous fields of economics and the complexity in its application. This problem can be answered by discussing the following schools of economic thought in order to develop an intellectual foundation and a conceptual framework for analysing competition law. Which include the Classical theory, the Neo-Classical theory, the Harvard School, Chicago School and the Post Chicago thinking. This interdisciplinary of competition law and economics has reformed the legal analysis in cases of prohibited practices, such as cartels in order to have a substantive judgment. Furthermore, it shows the intersection of international trade and competition law and this is stimulated by globalisation.

Globalisation has brought the interdisciplinary of competition law, international trade and economics. Competition law exist when trade policies are made to attain open and accessible market. On the other side having an open market has an impact on competition law. Therefore, this chapter seeks to analyse the interaction between international trade and competition law. In that it will further discuss competition law under the WTO. Lastly the researcher will discuss the objectives of competition law.

2.2 The Classical theory and Adam Smith's 'An Inquiry into the Nature and Causes of the Wealth of Nations'

The Classical theory became evident in 1750 and during that period Adam Smith advocated for a free market economy which brings the principles of competition law to be linked to economics. In 1776 Adam Smith published 'An inquiry into the Nature and Causes of the Wealth of Nations' and he 'systematised earlier thinking on the subject and elevated competition to the level of a general organising principle of economic society.'⁸²

⁸² PJ McNulty 'A note on the history of perfect competition' Journal of Political Economy (1967) 396.

He views the market as an automatic mechanism which is self-regulating, self-correcting and efficiently allocates resources however it create a vacuum for participates to collude.⁸³ According to Smith: ‘Every individual... neither intends to promote the public interest, nor knows how much he is promoting it... he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.’⁸⁴ He explains this as an ‘invisible hand’ theory and equate competition which forces and promote economies to achieve the best outcomes. when people pursue their own interest, they implicitly promote the public interest. Therefore, invisible hand theory shows the connection between self-interest and economic welfare.

2.2.1 The Classical theory and free markets

Classical theories advocate for markets without a central government intervention because it is predictable and self-regulating, in that sellers produce according to the demand and where prices are high.⁸⁵ In the effort to dominate the market and make profit, competitors would innovate better products and charge less prices and avoid colluding with each other.⁸⁶ Therefore the main argument for classical economist is that freedom of trade results in a healthy competition without government intervention.⁸⁷ Classical economists believed that enterprises ‘would be driven by the winds of competition to follow efficient and competitive paths.’⁸⁸ This meant that, with freedom of trade,

‘Markets work well; the forces of competition or potential competition are strong; businesses act in the interests of consumers; government intervention is generally clumsy, inefficient, and misinformed, and ‘free markets’ will always cure a market problem faster and better than antitrust intervention.’⁸⁹

⁸³ E Butler ‘The Condensed Wealth of Nations and the Incredibly Condensed Theory of Moral Sentiments Adam Smith’ (2011) 4.

⁸⁴ A Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* Vol. 1(1776) Book I Chapter II para 26

⁸⁵ E Butler (n 79).

⁸⁶ GJ Stigler ‘Perfect competition, historically contemplated’ *Journal of Political Economy* (1967) 65 1 2.

⁸⁷ ME Stucke ‘Behavioural economists at the gate: Antitrust in the twenty-first century’ (2007) 38 *Loyola University Chicago Law Journal* 513 591.

⁸⁸M Fox ‘Against goals’ (2013) 81 *Fordham Law Review* 2158.

⁸⁹ Fox (n 84) 2160.

Due to competition being a self-regulating process, where business compete to gain market dominance has influence court cases. This was seen when American judges held that restraint of trade agreements would be recognised if they had been sufficient consideration to make it a proper and a useful contract.⁹⁰ During this era market dominance it was allowed by firms because it shows their competent skills to capture the market, innovation and technology. In that where a dominant firm seeks to raise their prices, a competitor which prices are cheaper will utilise on that opportunity. the market will regulate itself because they will be competition among firms and a lack of dominating firms.⁹¹ Therefore classical economist was not against market dominance through healthy competition such as innovation and technology however, market dominance through state sanctioned monopolies. Smith criticise these monopolies by saying;

‘There must be freedom of trade; the economic unit must be free to enter or leave any trade. The exclusive privileges or corporations which exclude men from trades, and the restrictions imposed on mobility by the settlement of provisions are examples of such interferences with free competition.’⁹² Furthermore, the price of monopolies are high and cannot be negotiated, however the natural price of free competition is the lowest.⁹³

Classical theory made an exception for the non-government intervention rule in free markets.⁹⁴ It admitted that, in certain sectors, the involvement and regulation by the government was necessary. Thus, they advocated for non-government interference because they viewed the market as self-regulating and it was good for the public. However, the following school of thought criticised the perfect competition advocated by classical economist.

2.3 The Neo-Classical theory

They criticised the classical economist for viewing the market as business behavioural approach. The main argument they presented is that the market price does not always reflect the true value of a product because people pay more for a product than its worth.⁹⁵ They defined the market as,

⁹⁰ H Hovenkamp ‘The Sherman Act and the classical theory of competition’ (1989) 74 Iowa Law Review 1027.

⁹¹ CR McConnell & Others, *Economics: Principles, Problems, and Policies* (18th ed) (2009) 4 197.

⁹² A Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Vol. 1, Book I, Chapter II, para 146.

⁹³ A Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (n 79) para 26-27.

⁹⁴ E Butler (n 79) 59 67.

⁹⁵ ER Weintraub ‘Neoclassical Economics’ *The Concise Encyclopaedia of Economics* <http://www.econlib.org/library/Enc1/NeoclassicalEconomics.html> (Accessed 19 August 2019).

the place where commodities are exchanged.⁹⁶ Thus, it was based on the following assumptions: individuals have rational choices among outcomes; individuals maximise utility, while firms maximise profits; and individuals act independently, based on full and relevant information.⁹⁷ Consequently, Neo-Classical economists developed the ‘price theory’, in terms of which they argued that the market price of a product is a result of the interface between supply and demand.⁹⁸ Thus, they created a model of perfect competition.

2.3.1. The model of perfect competition

Perfect competition is a market where there is a large number of firms, each holding a relatively small share of the market, the product is homogeneous, there is perfect information among buyers about the product and the price each firm charges.⁹⁹ In a perfectly competitive market there is an absence of barriers to entry, which means firms hold the power to enter and exist anytime and they are price takers. This market is influenced by consumers’ needs in that there is an effective allocation of resources. Every firm will produce a product for as long as the cost of producing a single unit (marginal cost) is equal to the revenue that will be realised from the sale of an additional unit (marginal revenue).¹⁰⁰

Jevons presents the theory of community of knowledge, which means a perfect competition exists when traders have perfect knowledge of the conditions relating to price, output and other crucial information relating to market conditions.¹⁰¹

2.3.2 Criticism of the Neo-Classical theory

The main criticism about this theory is the idea of perfect competition, in that it does not exist in the real world. This was criticised by Marshall in *Industry and Trade* saying that in real world markets, perfect competition does not exist instead they are characterised by monopoly elements:

⁹⁶ J High ‘Neo-classical period’ In High J (eds) *Competition* (2001) 87.

⁹⁷ Weintraub (n 91).

⁹⁸ JA Kregel ‘Neoclassical price theory institutions and the evolution of the securities market organisation’ (1995) *Economic Journal* 459 470.

⁹⁹ H Hovenkamp (2nd ed) *Federal Antitrust Policy: The Law of Competition and its Practice* (1999) 39 42.

¹⁰⁰ E Screpanti & S Zamagni (2nd ed) *An Outline of the History of Economic Thought* (2005) 183.

¹⁰¹ WS Jevons (5th ed) *The Theory of Political Economy* (1957) 85-87.

‘Though monopoly and free competition are ideally wide apart, yet in practice they shade into one another by imperceptible degree.’¹⁰² He further criticised the concept of perfect knowledge assumption because the sellers and buyers have no perfect information about the market.¹⁰³ Firms also in the perfect competition do not share all the information about market entry and the reasonable producers to buy from, a new firm.

Secondly the element of perfect competition depending on a large number of small firms was problematic because in the real world efficient markets involve large firms due to economies of scale, thus they are oligopolistic markets.¹⁰⁴ Thirdly the homogeneity element of product is problematic because in the real world markets products are always differentiated from each other, meaning producers, or manufacturers seek to differentiate, or separate their products from those of their competitors.¹⁰⁵ Fourthly, barriers to entry are always present.¹⁰⁶ This is evident because market participants do not always have perfect information about price, output or other crucial information relating to the market due to prohibitive cost in obtaining such information. Finally, the market cannot operate without monopoly elements.¹⁰⁷ Therefore, according to the above-mentioned criticism, perfect competition can only exist in the real world imperfectly.¹⁰⁸

2.4 The Harvard school

Most schoolers were dissatisfied with the Neo-Classical theory of the perfect competition model because it was far reaching and simply assumptions about human nature.¹⁰⁹ The Harvard school focus was on the regulation of competition and over a period it influenced antitrust decisions in the United States.¹¹⁰

¹⁰² A Marshall (4th ed) *Industry and Trade* (1923) 396-398.

¹⁰³ A Marshall (8th ed) *Principles of Economics* (1920) 540.

¹⁰⁴ P Sutherland & K Kemp ‘Competition Law in South Africa’ (2000) 20. (an oligopolistic market is one dominated by relatively few sellers, high barriers to entry, little product differentiation and price transparency, so that changes in prices among competitors is easily observable).

¹⁰⁵ H Hovenkamp (n 95) 36 37.

¹⁰⁶ H Hovenkamp (n 95) 39 42.

¹⁰⁷ E Chamberlin ‘The Theory of Monopolistic Competition’ (1933) 5.

¹⁰⁸ RG Lipsey & K Lancaster ‘The general theory of second best’ (1956-1957) 24 *Review of Economic Studies* 11 32.

¹⁰⁹ ME Stucke ‘Behavioural economists at the gate: Antitrust in the Twenty-First Century’ (2007) 38 *Loyola University Chicago Law Journal* 513 514.

¹¹⁰ E Elhauge ‘Harvard, not Chicago: Which antitrust school drives recent U.S. Supreme Court decisions?’ (2007) 3. *Competition Policy International* 59 77.

This school contrast with Smith theory of Markets being self-regulating but rather it advocates for the process of competition, which serves as a control mechanism within a market, to minimise the increase of unchecked private economic power.¹¹¹ It was credited for developing the structure-conduct-performance (SCP) test, which shows a connection between market structure and its consequences.¹¹² Structure refers to the composition of a market; conduct means the results of the firms actions in the market and performance refers to the economic results in a market.¹¹³ The SCP test is based on the understanding that the performance of a market, is a direct result of the conduct of market participants (sellers and buyers), and, in turn, their conduct is determined by market structure.¹¹⁴ Mason views effective competition if it has the ability to act as a mechanism for controlling the power a single firm exercises.¹¹⁵

The SCP test is the Harvard School distinguishing feature because it can predict certain types of business practices and their effects based on the structure of the market.¹¹⁶ Thus, firms, in markets characterised by high concentration and high barriers to entry, will be more prone to engage in oligopolistic practices, which results in economic inefficiency, in the form of output restriction and monopolistic pricing.¹¹⁷ Thus, the SCP test seeks for the regulation of the market instead of the conduct because the characteristics of the market leads to the uncompetitive behaviour by firms.

¹¹¹ C Kaysen & DF Turner 'Antitrust Policy: An Economic and Legal Analysis' (1959) 4 5 11 23.

¹¹² E Mason 'The current status of the monopoly problem in the United States' (1949) 62 Harvard Law Review 1265-1285. While it has been credited to Mason, the SCP paradigm can be traced to Cournot's *Researches in Mathematical Principles of the Theory of Wealth* (1838). In this work, Cournot expounded on the theory of oligopolistic pricing, in which firms would seek to coordinate their behaviour within a given market.

¹¹³ E Mason 'The current status of the monopoly problem in the United States' (1949) 62 Harvard Law Review 1265-1285. While it has been credited to Mason, the SCP paradigm can be traced to Cournot's *Researches in Mathematical Principles of the Theory of Wealth* (1838). In this work, Cournot expounded on the theory of oligopolistic pricing, in which firms would seek to coordinate their behaviour within a given market.

¹¹⁴ P Van Cayseele & R Van den Bergh(eds) 'Antitrust law' Bouchaert & De Geest G *Encyclopaedia of Law and Economics* (1999) 473.

¹¹⁵ E Mason 'The current status of the monopoly problem in the United States' (1949) 62 Harvard Law Review 1266; JS Bain 'Workable competition in oligopoly: Theoretical considerations and some empirical evidence' (1950) 40 The American Economic Review 46.

¹¹⁶ Ndlovu (n 31) 46.

¹¹⁷ H Hovenkamp (n 95).

This school influenced the South African Mouton Commission because it looks at the structure behaviour and performance, when determine the impact of markets in the public interest.¹¹⁸ Thus, the SCP test evaluates the foundation, which is the market structure because if it is regulated in that there no high barriers to entry, there will be no economic inefficiently and anticompetitive practices.

2.4.1 The critics to the SCP paradigm

The SCP paradigm being a distinguishing feature of the Harvard School, it also received a lot of criticism. The main critic revolved around its definition of a market structure, in that is vague because it does not clearly state the constituent parts of it, such as the number of firms, their relative size, the possibility of a dominant firm, and mobility of resources, are not addressed.¹¹⁹ Furthermore, markets characterised by high concentration, are a result of economies of scale, and altering such market structures will only do more harm than good.¹²⁰ Sosnick disagrees with the SCP hypothesis on the basis that performance cannot be judged by exploring structure and conduct only, as there are other market forces in operation, and the SCP hypothesis seems to be ignorant of the fact that monopolies affect all markets.¹²¹

2.5 The Chicago school

The economist in this were the main critics of Harvard school, in that it developed into a general theory in competition law analysis.¹²² They were against the notion that firms in a highly concentrated are not ‘unmitigated evil’.¹²³ Their argument was that the ‘goal of antitrust is to perfect the operation of competitive markets’, to promote both productive and allocative efficiency and that, since business interactions require some level of cooperation, courts must not penalise all such cooperation. Instead, they must seek to find a balance between competition and collaboration.¹²⁴

¹¹⁸ D Mouton (et al) ‘Report of the Commission of Enquiry into the Regulation of Monopolistic Conditions Act, 1955’ (1977) para 199.

¹¹⁹ GJ Stigler ‘Report on antitrust: Discussion’ (1956) 46 American Economic Review 504 506.

¹²⁰ H Hovenkamp (n 95).

¹²¹ SH Sosnick ‘A critique of concepts of workable competition’ (1958) 72 Quarterly Journal of Economics 396 399.

¹²² RA Posnr ‘The Chicago School of antitrust analysis’ (1979) 127 University of Pennsylvania Law Review 926.

¹²³ H Hovenkamp ‘Chicago and its alternatives: After Chicago’ (1986) Duke Law Journal 1021.

¹²⁴ F Easterbrook ‘The limits of antitrust’ (1984) 63 Texas Law Review 1 4.

The similarity they have with the classical school is that markets can correct themselves without government intervention. Thus, they criticise the judiciary on viewing mergers as *per se* illegal.¹²⁵ Their criticism is based on the understanding that, if a restrictive practice results in efficiency gains, then it should not be declared illegal and at the later stage the market will correct the monopoly. Cooperation among firms is beneficial and even necessary for firms to survive.¹²⁶ Therefore, such co-operation need not be penalised.

2.5.1 The critics of the Chicago School

The Chicago School is criticised for ignoring the possibility of collusion between firms in the highly concentrated.¹²⁷ The objective of efficiency being the principal goal of Competition law is criticised based on the facts that it ignored consumer welfare¹²⁸ and the promotion of innovation.¹²⁹ Thus, firms cannot be allowed to form collusive due to the fact that they will be efficiency in the market and less complication.

2.6 Economic theory Post Chicago

Economist after the Post Chicago disagreed with the Classical theory that markets are self-regulating but rather seeks for government intervention.¹³⁰ They acknowledge that some market structures and collaborative practices among firms could have anti-competitive consequences.¹³¹ Thus collusive agreement allowed in the high concentrated market in the Chicago school, will not be allowed under the Post Chicago theory.¹³² There have been great improvements in the Post Chicago school with regards to competition laws.

¹²⁵ A Director & EH Levi 'Law and the future: Trade regulation' (1956) 51 Northwestern University Law Review 296. RA Posner 'The rule of reason and the economic approach: Reflections on the Sylvania decision' (1977) 45 University of Chicago Law Review 20.

¹²⁶ F Easterbrook 'Workable antitrust policy' (1986) 84 Michigan Law Review 1700.

¹²⁷ R Pitofsky 'How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis in U.S. Antitrust' (2008) 52.

¹²⁸ EM Fox 'Consumer beware Chicago' (1985) 84 Michigan Law Review 1714.

¹²⁹ EM Fox 'Antitrust Welfare: The Brodley Synthesis' (2010) 90 Boston University Law Review 1375.

¹³⁰ H Hovenkamp 'Post-Chicago Antitrust: A review and critique' (2001) Columbia Business Law Review 267.

¹³¹ MA Salinger 'Vertical mergers and market foreclosure' (1988) 103 Quarterly Journal of Economics 345 356. M Waterson 'Vertical integration, variable proportions and oligopoly' (1982) 92 Economic Journal 129 144.

¹³² LA Sullivan 'Post-Chicago economics: Economists, lawyers, judges, and enforcement officials in a less determinate theoretical world' (199) 63 Antitrust Law Journal 680 681.

The was transformation to the SCP paradigm with regard to the highly concentrated markets, that they do not automatically reflect lack of competition.¹³³ These economists have developed the economics of competition with the theory of contestable markets, which investigates potential competition and the entry of new firms into the market.¹³⁴ It uses ‘network effects’ on markets to explore the effect a single person using a good or service, it has on the perceived value of that good or services for others.¹³⁵ the product value increases when is being used by others.¹³⁶ Thus, many firms exploit this by attracting ‘early adopter’ consumers, who will further attract other consumers to the product or service.

Despite the improvements it has brought to competition law, it was criticised. Sutherland & Kemp assert that, most of the time, post-Chicago thinking is quite complex, so that its application tends to depend on the circumstances of the case, making it difficult it to predict what the result will be, especially in contested antitrust proceedings.¹³⁷

2.7 Conclusion on economic theories

The abovementioned illustrate the development of competition law within the years. These theories reflect on the competition interest of regulating competition law and in contrast free competition. Thus, in order to regulate market sufficiently from anticompetitive behaviour, it is shown that regulation is required.

If a market operates like the classical theory that it should be self-regulating, self-disciplining and self-correcting, it is bound to breakdown from the lack of regulation. The idea of perfect market is idealistic and based on a mathematical accuracy which is unlikely to be achieved in practice. Competition law is required in a perfect market to prevent free market system breaks down.

These theories agreed that there must be a level of government regulation, in order to balance competition law and collaboration. In it is evident in the Chicago school of thought that

¹³³ JBBaker ‘A preface to post-Chicago antitrust’ Cucinotta et al (eds) Post-Chicago Developments in Antitrust Law (2002) 71, who highlights that ‘[d]uring the 1970s and 1980s, the decades in which the courts were adopting the Chicago Bible, chapter and verse, economists were developing new theoretical insights and empirical tools that are now presenting a challenge to those received doctrines.’

¹³⁴ P Sutherland & K Kemp (n 4) para 1.9.

¹³⁵ ML Katz & C Shapiro ‘Network externalities competition and compatibility’ (1985) 75 The American Economic Review 424 440.

¹³⁶ P Sutherland & K Kemp (n 4).

¹³⁷ P Sutherland & K Kemp (n 4).

government should allow some level of cooperation because they promote competition and it is not always anticompetitive. Thus, it shows the link between competition and economies.

The idea of perfect market and no government interventions, it is mainly based on consumer welfare. In a way that if there is freedom of entry, more firms in a certain industry, consumers have variety to choose from and prices will be swayed by them. This speaks to both economies and competition law. Economics is concern about consumers because they form part of factors of production, in contrast in competition law, consumer welfare is one of the objectives. Thus, this shows the interdisciplinary of these two components because economics is concern about how business sell their goods and consumer spending, while competition law sets regulation in the market and increase consumer welfare.

2.8 Interaction between international trade and competition law

Globalisation have led to the interdisciplinary of disciplines and this is evident by the interaction of competition law and international trade. It is recognised that Competition law can complement the trade benefits made by trade policies in achieving open and accessible markets.¹³⁸ At the same time opening markets has a significant impact on competition law.¹³⁹ This relationship is founded based on similarities and differences.

2.8.1 Similarities of competition law and Trade

These both disciplines have the same objective of enhancing welfare through the provision of better allocation of resources, which can be through promoting competition among firms or by lowering government trade barriers.¹⁴⁰

As it has been mentioned in the theories of competition law, Market is an essential element of competition law in that there must be free entry and exist to it, also international trade advocates for access to markets.¹⁴¹ Therefore they both concern with markets being accessible, which they seek to eliminate market distortions and barriers to market entry to promote effectiveness and

¹³⁸ J Epstein 'The other side of harmony: Can trade and competition laws work together in the international marketplace?' (2002) 17 American University ILR 343.

¹³⁹ DA Kelly 'Should the WTO have a role to play in the internationalisation of competition law?' (2007) 7 Hibernian LJ 17.

¹⁴⁰ F Weiss 'From world trade law to world competition law' (1999) 23 Fordham International Law Journal 250.

¹⁴¹ A Piilola 'Is there a need for multinational competition rules?' (1999) 10 Finnish YB Int'l L 263.

contribute to consumer welfare.¹⁴² This attained by government removing trade barriers to facilitate market entry and the control of anticompetitive conduct by market operators opens access to competitive markets.¹⁴³ Therefore the goal of consumer welfare is achieved through comparative advantage.¹⁴⁴

Liberal trade is formulated on the principle of comparative advantage, which means countries focus on goods and services which they produce best and trade these products in exchange for product that other countries produce best.¹⁴⁵ Liberal trade according to the General Agreement on Tariffs and Trade(GATT) means open trade, it permits the unrestricted cross border flow of the highest quality goods and services at the lowest price.¹⁴⁶ It make countries to be more innovative and produces their products at a lesser price. Thus, Liberal trade policies is like competition law because it also helps to sharpen competition and motivate innovation.¹⁴⁷

2.8.2 Differences of trade and competition law

Competition law and trade have differences despite them being interlinked.¹⁴⁸ Traditionally competition law was used by the government to regulate anticompetitive behaviour carried out by private firms within its national borders.¹⁴⁹ Furthermore, it is engrossed on national issues and domestic legal principles to increase economic proficiencies.¹⁵⁰ In divergence, trade laws regulate comportment by government or public bodies that detain the free flow of goods and services among countries.¹⁵¹

¹⁴² OECD Complementarities between Trade and Competition Policies, (1999) 12 Unclassified COM/TD/DAFFE/CLP (98)98/FINAL.

¹⁴³ F Weiss 'From world trade law to world competition law' (1999) 23 Fordham International Law Journal 250.

¹⁴⁴ F Weiss 'From world trade law to world competition law' (1999) 23 Fordham International Law Journal 250.

¹⁴⁵ WTO The Case for Open Trade (2015)https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm accessed on (30 August 2019).

¹⁴⁶ K Kennedy 'Competition Law and the World Trade Organisation: The Limits of Multilateralism' (2001) London: Sweet & Maxwell 1.

¹⁴⁷ K Kennedy 'Competition Law and the World Trade Organisation: The Limits of Multilateralism' (2001) London: Sweet & Maxwell 1.

¹⁴⁸ B Sweeney 'Globalisation of competition law and policy: Some aspects of the interface between trade and competition (2004) MelbJIL 375.

¹⁴⁹ J Epstein 'The other side of harmony: Can trade and competition laws work together in the international marketplace?' (2002) 17 American University ILR 343.

¹⁵⁰ A Piilola 'Is there a need for multinational competition rules?' (1999) 10 Finnish YB Int'l L 263.

¹⁵¹ K Kennedy Competition Law and the World Trade Organisation: The Limits of Multilateralism (2001) London: Sweet & Maxwell.

Trade laws mainly concentrate on at the border issues, whereby governments create tariff and non-tariff market barriers in order to protect domestic producers from foreign competitors.¹⁵² It regulates the act of the government at the international level and seeks to achieve efficiency for the global perspective.¹⁵³ Thus, it aimed at opening markets to exporters and protecting domestic industries, instead of optimism market place efficiencies and consumer benefits.¹⁵⁴

2.8.3 Analysis of the interaction between trade and competition law

As mentioned above, trade and competition law have similarities and differences, which cause a lot of critics to comment on the relationship. Nkomo and Van Wyk describes this relationship as ‘frenemies’, friendly towards each other despite their rivalry.¹⁵⁵ This is shown by the different processes they use to reach their main goals on increasing efficiency and encouraging market access. Thus, trade law may have adverse effect on competition and competition law may impede trade.

As discussed, earlier trade law main aim is to increase aggregate world wealth and to achieve global productive efficiency.¹⁵⁶ In contrast, competition law is focused on enhancing consumer welfare within national markets.¹⁵⁷ Therefore national trade policy makers are faced with contrasting views, of whether to increase trade liberalisation or sacrifice consumer welfare. The South African trade policy makers were faced with a situation of whether to sacrifice consumer welfare to protect producers within an industry threatened by import competition.¹⁵⁸ It was reflected in the issue of import tariff hike on frozen poultry when the International Trade Administration Commission of South Africa(ITAC) found out that three Brazilian exporters sold their chicken meat in the Southern African Customs Union(SACU) market at lower prices¹⁵⁹

¹⁵² F Weiss ‘From world trade law to world competition law’ (1999) 23 Fordham International Law Journal 250.

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

¹⁵⁴ B Sweeney ‘Globalisation of competition law and policy: Some aspects of the interface between trade and competition (2004) MelbJIL 375.

¹⁵⁵ N Marumo & M Van Wyk ‘Competition and trade policy - Frenemies?’ Competition Commission.

¹⁵⁶ DA Kelly ‘Should the WTO have a role to play in the internationalisation of competition law?’(2007) 7 Hibernian LJ 17.

¹⁵⁷ DA Kelly ‘Should the WTO have a role to play in the internationalisation of competition law?’(2007) 7 Hibernian LJ 17.

¹⁵⁸ K Kennedy ‘Competition Law and the World Trade Organisation: The Limits of Multilateralism’ (2001) London: Sweet & Maxwell 1.

¹⁵⁹ Aurora Alimentos Sao Paulo-based Brazil Foods, and Palotina-based C Vale, exported at prices that were 6.3 %, 62.9% and 46.6% lower respectively.

compared to the Brazilian market.¹⁶⁰ It imposed provisional anti-dumping duties on Brazil's chicken imports. In conclusion, ITAC held that the SACU chicken producers had suffered material injury from the increased chicken imports as they experienced a substantial decline in profits, price under-cutting, reduced market share, decrease in growth of revenue, and under-utilisation of production capacity.¹⁶¹

In January 2013 the SA Department of Trade and Industry raised import tariffs on five types of chicken, which increase from 27% to 82%.¹⁶² This resulted in the policy debate between the trade and competition policy makers because they rejected ITAC'S bid to impose definitive anti-dumping duties on Brazilian poultry.¹⁶³

The South African Poultry Association (SAPA), representing domestic producers viewed the tariff hike as an opportunity to set the local and foreign producers at the equal competitive footing rather than reducing volumes of imports.¹⁶⁴ They acquiesced that the domestic poultry industry was struggling due to dumped imports and therefore required protection from the massive increase in imports, which had repressed prices.¹⁶⁵

In contrast, the Competition Commission were worried about consumer welfare.¹⁶⁶ From a competition viewpoint, imports might force domestic producers to compete, subsequent to lower prices for consumers and more product choices.¹⁶⁷ Furthermore, increasing import tariffs mean the sustainability of poultry producers with poor operational performance at the expense of consumers,

¹⁶⁰ P Ndlovu 'South African trade: Too chicken to definitively challenge Brazilian poultry imports?' <http://www.polity.org.za/article/south-african-trade-too-chicken-to-definitively-challenge-brazilian-poultry-imports-2013-09-17> accessed on (11 September 2019).

¹⁶¹ P Ndlovu 'South African trade: Too chicken to definitively challenge Brazilian poultry imports?' <http://www.polity.org.za/article/south-african-trade-too-chicken-to-definitively-challenge-brazilian-poultry-imports-2013-09-17> accessed on (11 September 2019).

¹⁶² FSP Invest 'Will raising the tariffs on chicken imports have the desired effect?' <http://fspinvest.co.za/articles/south-africa/will-raising-the-tariffs-on-chicken-imports-have-the-desired-effect-1708.html> accessed on (12 September 2019).

¹⁶³ P Ndlovu 'South African trade: Too chicken to definitively challenge Brazilian poultry imports?' <http://www.polity.org.za/article/south-african-trade-too-chicken-to-definitively-challenge-brazilian-poultry-imports-2013-09-17> accessed on (11 September 2019).

¹⁶⁴ N Marumo & M Van Wyk 'Competition and trade policy - Frenemies?' Competition Commission.

¹⁶⁵ N Marumo & M Van Wyk 'Competition and trade policy - Frenemies?' Competition Commission.

¹⁶⁶ Competition Commission of South Africa The Impact of Poultry Tariffs on Competition (2013) available at <http://pmgassets.s3-website-eu-west-1.amazonaws.com/130910impact.pdf> accessed on (12 September 2019).

¹⁶⁷ Competition Commission of South Africa The Impact of Poultry Tariffs on Competition (2013) available at <http://pmgassets.s3-website-eu-west-1.amazonaws.com/130910impact.pdf> accessed on (12 September 2019).

less product choice and high prices, which impacts on food security.¹⁶⁸ However, the national trade legators chose to protect the local producers from import competition and sacrifice consumer welfare.

As Nkomo and Van Wyk described this relationship as ‘frenemies’, it is quite clear there is interdependence between trade and competition law. In the globalised world competition law helps international trade to prevent private restraints from preventing access to foreign goods and services. Furthermore, as mentioned above it encourage countries to use their comparative advantage to trade among one another and to achieve globalisation. In contrast, trade law helps competition law to promote the contestability of markets because trade liberation open access to pro-competitive foreign goods and producers.

2.9 Objectives of Competition law

The objective of competition law plays a crucial role in providing guidance on the interpretation and application of competition law. Traditional objectives were formulated due to disagreement between economics and competition lawyers about these objectives. They are prejudiced by social, political and historical considerations.¹⁶⁹

The OECD distinguishes between three categories of objectives; the first being “core-competition” objectives, which include protecting the competition process, promoting economic efficiency and consumer welfare. The second is ‘public interest’ or ‘populist’ objectives, for example, promoting employment, social welfare, specific sectors in the economy, national ownership and the economic participation of previously excluded persons; and thirdly, the so-called “grey-zone” objectives, such as curbing the concentration of market power.¹⁷⁰

South African uses the multifarious purpose approach because in terms of the Competition Act of 1998 it includes all the traditional objectives. Section 2 of the Competition Act state, the principal goals of the statute are as follows: to promote and maintain competition, in order to promote

¹⁶⁸ Competition Commission of South Africa The Impact of Poultry Tariffs on Competition (2013) available at <http://pmgassets.s3-website-eu-west-1.amazonaws.com/130910impact.pdf> accessed on (12 September 2019).

¹⁶⁹ L Parret ‘Shouldn’t we know what we are promoting? Yes, we should! A plea for solid and comprehensive debate about the objectives of EU competition law and policy’ European Competition Journal (2010) 340.

¹⁷⁰ ‘The objectives of competition law and policy and the optimal design of a competition agency’ (2003) Organisation for Economic Co-operation and Development Journal of Competition Law and Policy 2-4.

efficiency and the development of the domestic economy;¹⁷¹ to promote consumer welfare in the way of competitive prices and product choices;¹⁷² to promote employment and advance citizens' social and economic welfare;¹⁷³ to enhance the country's competitiveness in global markets;¹⁷⁴ to safeguard the economic participation of small and medium-sized enterprises (SMEs);¹⁷⁵ and to increase the economic participation of historically excluded persons.¹⁷⁶

The 2009 Amendment to the Competition Act added two more objectives, namely, the need to address business practices that interfere with the competitive process,¹⁷⁷ and to ensure the uniform implementation of competition law principles within all sectors of the economy.¹⁷⁸

2.9.1 Protecting the competition process

This objective is connected to the primary question of competition law, that is “what is competition law?”, Competition is a feature of free markets that ensures the availability of products from more than one firm, at a realistic price.¹⁷⁹ The main goal of competition law is to promote and protect the competition process.¹⁸⁰ Thus, to maintain free entry to markets and prevent monopolistic practices.¹⁸¹ Therefore, all other objectives are hinged on this primary goal.

2.9.2 Promoting economic efficiency

Economists recognise three forms of efficiency – allocative efficiency, productive efficiency, and dynamic efficiency. Allocative efficiency refers to resources which are assigned to areas where they will be entirely used,¹⁸² in a way ‘it is not possible to make anyone better off without making someone worse off’, in what is referred to as ‘Pareto’ optimality.¹⁸³ Productive efficiency state the

¹⁷¹ Section 2(a).

¹⁷² Section 2 (b).

¹⁷³ Section 2 (c).

¹⁷⁴ Section 2 (d).

¹⁷⁵ Section 2 (e).

¹⁷⁶ Section 2 (f) and section 3(2).

¹⁷⁷ Section 2 (g).

¹⁷⁸ Section 2 (h).

¹⁷⁹ Taylor & and Horne (Pty) Ltd v Dental (Pty) Ltd 1991 1 SA 412 (A) 421 422.

¹⁸⁰ C Kaysen & DF Turner ‘Antitrust Policy: An Economic and Legal Analysis’ (1959) 14 167

¹⁸¹ Pretoria Portland Cement Company Ltd & Another v Competition Commission and Others [2002] ZASCA 63 para 54.

¹⁸² H Hovenkamp ‘Economics and Federal Antitrust Law’ (1985) 45 49.

¹⁸³ R Whish ‘Competition Law’ (5th ed) (2005) 2 4. It should be noted that ‘dynamic efficiency’ did not originate with the Neo-Classical School. Instead, it can be traced to another economic school of thought, the Austrian School of Economics, whose genesis can be traced back to 1871, when one of its proponents, Carl Menger, published his work,

production of goods must be at the lowest cost possible.¹⁸⁴ The effect of competition in a market is that producers will not sell above cost and they will not sell below cost. The result is that competition compels producers to acquire the minimum possible costs, in order to earn profits and, eventually, attain equilibrium. Finally, dynamic efficiency refers to the development of improved goods and services through innovation because of free and unconstrained competition.¹⁸⁵

2.9.3 Promoting innovation

In this objective, competition is an ‘evolutionary process of variation and selection of new ideas’, therefore the existence of large independent firms creates innovations through the introduction of new products and services.¹⁸⁶ Joseph Schumpeter describe the relationship between competition and innovation as ‘the perennial gale of creative destruction’, which ‘incessantly revolutionises the economic structures from within, incessantly destroying the old one, and incessantly creating a new one’.¹⁸⁷ Therefore, he viewed competition as a dynamic process. He deviated from viewing competition with the price theory¹⁸⁸ and focus on innovation, which he referred to as quality competition.¹⁸⁹ Thus innovation was the real drive of competition and it must concern: “[T]he new commodity, the new technology, the new source of supply, the new type of organisation...competition which commands a decisive costs or quality advantage, and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives”¹⁹⁰ Thus, the presence of a large number of independent firms in a market allows for innovation through the development of new products and services.¹⁹¹

Principles of Economics. Other proponents of the Austrian School include, Ludqig von Mises, Friedrich Hayek and Joseph Schumpeter.

¹⁸⁴ H Hovenkamp ‘Economics and Federal Antitrust Law’ (1985) 45 49.

¹⁸⁵ <http://www.economicshelp.org/microessays/costs/dynamic-efficiency/> [Accessed 16 September 2019].

¹⁸⁶ H Hovenkamp ‘Competition for innovation’ (2012) Columbia Business Law Review 799 833; H Hovenkamp ‘Antitrust and the movement of technology’ (2012) 19 George Mason Law Review 1119 1146; H Hovenkamp ‘Antitrust and innovation: Where we are and where we should be going’ (2011) 77 Antitrust Law Journal 749 756.

¹⁸⁷ J Schumpeter *Capitalism Socialism and Democracy* (3rd ed) (1942) 83.

¹⁸⁸ J Schumpeter *Capitalism Socialism and Democracy* (3rd ed) (1942) 84.

¹⁸⁹ J Schumpeter *Capitalism Socialism and Democracy* (3rd ed) (1942) 84.

¹⁹⁰ J Schumpeter *Capitalism Socialism and Democracy* (3rd ed) (1942) 84.

¹⁹¹ M Clark ‘Competition as a Dynamic Process’ (1961) 178 211.

2.9.4 Promoting consumer welfare

Consumer welfare consists of lowering prices, increasing output, and providing a variety of choice and quality of goods and services for the consumer, by creating an atmosphere that enhances technological advancements and innovation.¹⁹²

South African competition law cases adopted the position that competition law must be concerned with consumer welfare. In *Competition Commission v Pioneer Foods (Pty) Ltd*, the Competition Tribunal was clear in condemning the bread cartel on the basis that cartels were not only per se illegal, but that in this particular case, the cartel practices were particularly unacceptable and reprehensible, because they affected the poorest of the poor, for whom standard bread was the staple food.¹⁹³ Thus competition law best serves consumer welfare by intervening in the market, when anticompetitive practices undermine the competition process, and not when the process merely fails to maximise consumer welfare.¹⁹⁴

2.9.5 Promoting small and medium enterprises

The promotion of small and medium enterprise (SMEs) in competition law plays a huge role because it increases citizens' participation in the economy, decreases unemployment levels and adds value to local raw materials.¹⁹⁵ SMEs are given special attention because they often struggle to compete against established conglomerates that have created vertical linkage over the years, which automatically act as barriers to entry.¹⁹⁶ Thus, jurisdiction surpasses these efforts and confers some level of protection.

In the South African context, issues pertaining to SMEs are significant, particularly when considering the historical structure of the South African economy, formerly characterised by highly concentrated markets owing to the country's exclusion from world markets, which resulted

¹⁹² Sixth United Nations Conference to Review All Aspects of the Set Principles and Rules for the Control of Restrictive Business Practices United Nations Conference on Trade and Development (2010) 3.

¹⁹³ *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 para 158.

¹⁹⁴ G Werden 'Consumer welfare and competition policy' In J Drexler & Others [eds.] *Competition Policy and the Economic Approach: Foundations and Limitations* (2011) 36.

¹⁹⁵ T Kaira 'The role of SMMEs in the formal and informal economy in Zambia: The challenges involved in promoting them and including them in competition regulation' Lewis, D. (ed) *Building New Competition Regimes* (2013) 142-143.

¹⁹⁶ P Ndlovu 'South African trade: Too chicken to definitively challenge Brazilian poultry imports?' <http://www.polity.org.za/article/south-african-trade-too-chicken-to-definitively-challenge-brazilian-poultry-imports-2013-09-17> accessed on (11 September 2019) 41.

in an overly protected economy.¹⁹⁷ This is stated in the act, where competition is promoted and maintained in order to enhance the participation of SMEs in the south African economy.¹⁹⁸ Therefore, this is achieved by the exemption granted in section 10 of the Act, if it enhances the competitiveness of SMEs or firms controlled by historically disadvantaged persons.¹⁹⁹

when the interest of SMEs is mentioned in other parts of Competition Act, other than in the objectives. In section 2 of the Act the interest of SMEs is seen as promoting and protecting the competition process.²⁰⁰ However when used in the merger regulation or exemption, the interest of the SMEs is protected against the competitive conduct, which the Act primarily aim to promote and maintain.²⁰¹ Therefore the must be proper analysis of competition law in case of SMEs.

2.10 Conclusion

Economic doctrine plays a crucial role in the interpretation of competition law. However, economic theory is not static. It is always evolving, and it is shows by the criticism each school of thought. The main aim of these theories is to show the interdisciplinary of competition law and economies and how competition law has developed over years. Furthermore, the link between international trade and competition law was discussed.

The competition law objectives state how the SADC region can tailor its regional competition law. There is also a connection between the objectives of competition law and cartels. The main of this objective it to promote competition, however cartels affect them negatively because innovation is reducing, consumer welfare is harmed, and economic efficiency is not realised. Thus, it also negatively affects it with exemption of export cartels because domestic move from protecting public interest to protecting interest of a firm against competition law. The following chapter discuss in detail export cartels in South Africa and the reason they are exempted. Furthermore. It discussed the cases regarding to this exemption.

¹⁹⁷ The Reconstruction and Development Programme (1994) 93; Ministry in the Office of the President for General Information White Paper on Reconstruction and Development (1994) 4 82; T Hartzenburg ‘Competition policy and enterprise development: the role of public interest objectives in South Africa’s competition policy’ L Cook & others (eds) Competitive Advantage and Competition Policy in Developing Countries (2007) 14.

¹⁹⁸ Section 2(e) of the Competition Act of 1998.

¹⁹⁹ Section 10(3)(b)(ii) of the Competition Act of 1998.

²⁰⁰ P Sutherland & K Kemp (n 4) 1.10 10.4.

²⁰¹ P Sutherland & K Kemp (n 4) 1.10 10.4.

CHAPTER THREE

EXPORT CARTELS

3.1 Introduction

The researcher analyses aspect of export cartels, by examining the nature, prevalence and legal treatment of export cartels in competition law. It will include cases from the CAs and courts in South Africa. The aim of the chapter is to show the imbalance of socio-economic issues and its influence it has on the SADC region. The main aim of the chapter is to call for an amendment in section 10 of the South African Competition Act and possible cooperation within SADC members.

3.2 The nature of export cartels and their legal treatment

Export cartel means collusion among firms concerning their export activities. A collusive agreement is concluded to transfer income from foreign consumers to the cartel's participants, in a bid to achieve a favourable balance of trade.²⁰² South Africa's Competition Tribunal has defined export cartels as 'a cynical policy which allows firms to do in someone's else's backyard what they could not do at home.'²⁰³ Thus, it allows export cartels to be exempted, while it is against domestic cartels.²⁰⁴ Export cartels gain international attention and were explored in different countries and organisation.

In 1998, the Working Group on the interaction between Trade and Competition Policy (WCTCP) viewed export cartels as anticompetitive practices and having a differential impact on the national markets of countries.²⁰⁵ It was concluded that export cartels affects the development of importing countries and have a distortionary effect on international trade.²⁰⁶ Thus, the WCTCP categorised

²⁰² B Sweeney 'The Internationalisation of Competition Policy' (2010) 56.

²⁰³ Competition Commission, Botswana Ash (Pty) Ltd and Chemsolve Technical Products v American Soda Ash Corporation and CHC Global (Pty) Ltd Case No. 49/CR/Apr00 and 87/CR/Sep00 26

²⁰⁴ E Fox & Others 'The past and future of international antitrust gaps, overlaps and the institutional challenge' Lewis, D (eds) *Building New Competition Regimes* (2013) 179.

²⁰⁵ Report of the Working Group on the Interaction Between Trade and Competition Policy (1998) to the General Council, 8 December 1998 WT/WGTCP/2 para 83.

²⁰⁶ Minutes of the Working Group on the Interaction Between Trade and Competition Policy Meeting of 2-3 October 2000 WT/WGTCP/M/12 para 10 and 25; WT/WGTCP/W/156 Communication from Japan, 19 December 2000.

export cartels as discipline of competition law for which global rule are necessary.²⁰⁷ This is due to the fact that the impact of export cartels may be worse, as most countries, within borders export cartels originate, explicitly condone them.²⁰⁸ Thus, this call for export cartels to be regulated at a regional level to avoid conflict of laws and jurisdiction.

In South Africa, section 10 of the Competition Act is the general provision that governs exemption applications. Restrictive practices, or agreements, as prohibited by Chapter 2 of the Competition Act, namely restrictive horizontal practices, restrictive vertical practices and abuse of dominance, can be exempted by the Competition Commission for the purposes of attaining specific objectives.²⁰⁹ These objectives are as follows: to maintain, or promote exports; to promote the competitiveness of small businesses, or businesses controlled, or owned by historically disadvantaged persons; to address changes in the productive capacity, in order to prevent decline in an industry; or to bring economic stability in an industry designated by the Minister of Trade, in consultation with the Minister responsible for that industry.²¹⁰

Therefore, according to the South African competition law is possible for competitors, wanting to infiltrate export markets, to seek exemption based on promoting exports. These exemptions are granted for a specified period.²¹¹ The Competition Commission has granted several exemptions to South African firms, seeking to enter the export markets. This include the citrus fruit export exemption which was granted to the Western Cape Citrus Producers Forum (WCCPF), and citrus fruit producers, to collectively export their products to the United States.²¹² The second one is the lobster export exemption²¹³ and the squid export exemption were granted to the South African

²⁰⁷ Report of the Working Group on the Interaction between Trade and Competition Policy. World Trade Organisation (1998) para 89.

²⁰⁸ ²⁰⁸ Report of the Working Group on the Interaction between Trade and Competition Policy. World Trade Organisation (1998) para 89.

²⁰⁹ Section 10(3)(b).

²¹⁰ Section 10(3)(b)(i)-(iv)

²¹¹ Section 10(2)(a).

²¹² Competition Commission Notice in terms of section 10(7) of the Competition Act 89 of 1998 (as amended): Western Cape Citrus Fruit Producers granted unconditional exemption. Government Gazette No. 34562 Notice 597 of 2011. The exemption covered all activities by members of the WCCFP, which were considered by the Commission to be a violation of the section 4(1)(b)(ii) prohibition on market allocation cartels. The Commission based its decision on the basis that the exemption would not have an impact on competition in the domestic market for citrus fruit.

²¹³ The firms sought exemption from the Competition Act's prohibitions on price fixing and market allocation. After conducting its own inquiry, the Commission granted the exemption, on the basis that it would indeed contribute to the promotion and maintenance of exports, by way of creating information symmetry between South African exporters and their foreign buyers, allowing the South African exporters leverage, when negotiating with foreign buyers, which would allow them to obtain the best possible price, contribute to the tax revenue base, and ultimately the growth of

Squid Exporters Association because these exemption would promote exports and small businesses and firms controlled by historically disadvantage persons.²¹⁴ However, these exempted were grated for a specific period.

The Commission have the power to revoke these exemptions if it was granted fraudulently or the reason for granting the exemption no longer exists.²¹⁵ The notice is given in the Government Gazette and parties with an interest must be given time to make representations, whether the exemption must be granted or revoked.²¹⁶ The Commission investigate before granting or revoking the exemption. The problem is there is no requirement for the registration of exemptions, specifically those granted for export activities, the Commission is required to publish in the Government Gazette.²¹⁷

3.3 A classification of export cartels

There are two types of export cartels, which are ‘pure private’ export cartels and ‘mixed’ export cartels. Pure private export cartels involve firm in one country colluding for the sole purpose of penetrating foreign markets and those no affect domestic market.²¹⁸ Mixed export cartels they are entered with a purpose to penetrate export markets but inadvertently affect the domestic market as well.²¹⁹ Thus in South Africa they exempt pure private cartels, however such exemption inevitably

the South African economy. The exemption was granted for a period of 5 years (the parties had sought a 10-year period exemption).

²¹⁴ The Association made the application on the basis that they were sharing commercially sensitive information, for example, information on pricing and quantity information relating to international competitors and international market conditions. The Commission, while finding that this amounted to price fixing and market allocation, granted the exemption for a period of 5 years (although the parties sought a 10-year period exemption). The Commission also indicated, as with the lobster exemption, that the exemption would indeed contribute to the promotion and maintenance of exports, by way of creating information symmetry between South African exporters and their foreign buyers, allow the South African exporters leverage when negotiating with foreign buyers, would allow them to obtain the best possible price, contribute to the tax revenue base and ultimately the growth of the South African economy. http://www.compcom.co.za/wpcontent/uploads/2014/10/Squid-Exemption-GG-Notice-Final_29102014.pdf (Accessed 18 September 2019).

²¹⁵ Section 10(5)(a)-(c).

²¹⁶Section 10(6)(a)-(b).

²¹⁷ Section 10(7).

²¹⁸ F Jenny ‘Export cartels in primary products: the Potash case in perspective’ In Evenett & others (eds) Trade, Competition and the Pricing of Commodities (2012) 99; Case 17/84 Bulk Oil v Sun International [1986] E.C.R. 589 para 44

²¹⁹ JR Atwood ‘Conflicts of jurisdiction in the antitrust field: The example of export cartels’ (1988) 50 Law and Contemporary Problems 154; Jenny, F. “Export cartels in primary products: the Potash case in perspective’. In Evenett & Others (eds) Trade Competition and the Pricing of Commodities (2012) 99.

affect domestic supplies and prices due to the allowed agreement to collude in prices, costs and sale policies.²²⁰ However, export cartels have advantages and disadvantage.

3.4 Export cartel proponents

Export cartels were supported because of strategic trade policy, which mean export cartel exemptions allow participating firms to penetrate foreign markets.²²¹ It facilitate the penetration of foreign markets, transfer income from foreign consumers to domestic producers and result in a favourable trade balance.²²² Furthermore, it achieve efficiency gains because it reduce costs that are associated with export trade through collaborations in centralisation of export sales activities, avoid duplication of services and generated economies of scale.²²³ However, it was critics and the following paragraph discuss it.

3.5 Export cartel opponents

Many scholars criticise the exemption of export cartels from the application of competition law because, while they are treated with indifference in their countries of origin, they may nonetheless have anti-competitive spill over effects in the domestic market, due to tacit collusion among cartel members.²²⁴ The nature of export cartel is that they collude in information sharing on prices and output, which make it impossible for exporters to dissociate their export cartel activities from those

²²⁰ U Immenga 'Export cartels and voluntary export restraints between trade and competition policy' (1995) 4 Pacific Rim Law and Policy Journal 125 126; AP Victor 'Export cartels: An idea whose time has passed' (1991) 60 Antitrust Law Journal 571.

²²¹ W Ehrlich & P Sharma The case of export cartels. Policy Staff Paper Canada Department of Foreign Affairs and International Trade (1994) 3; Glossary of industrial organisation economics and competition law. Organisation and Economic Co-operation and Development (1993) 44; MC Levenstein & VY Suslow 'The changing international status of export cartels' (2005). American University International Law Review 792; Article 10 (7) of Israel Restrictive Trade Practices Law, 5748 1988.

²²² RS Khemani & DM Shapiro 'Glossary of Industrial Organisation Economics and Competition Law' OECD (1993) 44.

²²³ F Desmarais 'Export cartels in the Americas and the OAS: Is the harmonisation of national competition law the solution?' University of Manitoba (2009) 8; A Bhattacharjea 'Export cartels: A developing country perspective' (2004) 38 Journal of World Trade 348; Magnus JR 'Joint export trade provisions in antitrust laws: A supporter's perspective' (2005) 39 Journal of World Trade 181; A Dick 'Are export cartels efficiency enhancing or monopoly promoting?: Evidence from the Webb Pomerene Experience' (1992) 15 Research in Law & Economics 94; DS Sokol 'What do we really know about export cartels and what is the appropriate solution?' (2008) 4 Journal of Competition Law and Economics 974.

²²⁴ C Schultz 'Export cartels and domestic markets' (2002) 2 Journal of Industry Competition and Trade 233; M Martynisyzn 'Is it legal to target your neighbour? Analysis in light of recent case law' (2012) 15 Journal of International Economic Law 182 222.

of the domestic market.²²⁵ This shows that, they are no pure private export cartel because they end up having collusive agreement in the country of origin.

They have been viewed as ‘myopic’ because even though they increase a country’s balance of payments, they promote a ‘downward spiral or beggar-thy-neighbour dynamic through measures that, in the long run, reduce national and global welfare.’²²⁶ Export associations are also inimical to countries’ international trade obligations that seek to promote free trade and enhance market integration.²²⁷ Thus, this answers the research question about the conflict between socio-economic objectives and regional commitments. As South Africa allows for exemption of export cartels it contradict with the country’s regional commitment.

3.6 International Trade in Natural soda – The Case of American Natural Soda Ash Corporation

The case was about the Natural soda ash, which is an crucial raw substance used for production of glass, chemicals, soaps and detergents, water treatment, fuel gas desulphurisation.²²⁸ The American Natural Soda Ash Corporation (ANSAC) is a Webb-Pomerene registered export association, consisting of six United States natural soda ash producers.²²⁹ This company was brought to question under the South African competition law in 1999 on the basis that ANSAC had engaged in price fixing and market allocation in violation of section 4(1)(b) of the Competition Act of 1998.²³⁰

3.6.1 ANSAC before the Competition Tribunal

The main argument by ANSAC was the application of section 3(1) of the Competition Act, with regards to the Acts extra-territorial application. It provides that the Act ‘applies to all economic activity within or having an effect within’ South Africa.²³¹ First, ANSAC argues that this

²²⁵ C Schultz (n 220)235 237.

²²⁶ M Trebilcock & Others ‘The Law and Economics of Canadian Competition Policy’ (2002) 2.

²²⁷ AP Victor ‘Export cartels: An idea whose time has passed’ (1992) 60 Antitrust Law Journal 581; Working Group on the Interaction between Trade and Competition Policy Report World Trade Organisation (2003) para 15.

²²⁸ Information available online at <http://www.ansac.com/products/about-soda-ash/> [Accessed 21 December 2012].

²²⁹ <http://www.ftc.gov/os/statutes/webbpomerene/index.shtm> (Accessed 18 September 2019) The members of the association are American Soda LLP, MFC Wyoming Corporation, General Chemical (Soda Ash) Partners, IMC Chemicals INC., OCI Chemical Corporation, and Solvay Soda Ash Joint Venture.

²³¹ According to section 1(2) of the Competition Act of 1998, the interpretation of the Act, in general, must be done in a manner that is in line with the Constitution, upholds the Act’s objectives and is consistent with South Africa’s international obligations. Furthermore, section 1(3) of the Act allows for the possibility of considering foreign and

‘economic activity’ was caused by the agreement between ANSAC members, which was concluded in the United States of America.²³² They argued that the Competition Commission would have to provide evidence to prove that ANSAC activity had an ‘effect within’ South Africa. They stated that the meaning of the word ‘effect’ must be determined by considering the purpose of the Act, which is to deal with practices that negatively impact competition.²³³ Furthermore, it argued that violation of section 4(1)(b) can only be sustained if the conduct in question had anticompetitive effects and the burden of proof will shift to ANSAC to provide evidence that the conduct generated efficiency benefits that outweighs the anticompetitive conduct.²³⁴

The Competition Tribunal held that section 3(1) of the Competition Act can be interpreted in two ways, in which the ACT finds application. It applies where economic activity has been undertaken ‘within’ South Africa or where the economic activity has an ‘effect within’ SA, irrespective of where the economic activity takes place.²³⁵ Thus, in this case both requirements were met because the alleged export cartel conduct took place in South Africa and the effects were felt within SA.

With regards to ANSAC’s argument for the textual approach, an ordinary interpretation of effect is used in section 3(1) and is not limited to adverse effects.²³⁶ Jurisdiction according to section 3(1) can be based on any effect within South Africa, irrespective whether that effect is procompetitive or anticompetitive. Thus, according to the Competition Act, any agreement that includes price fixing, or allocation of markets is per se illegal, regardless whether it is a joint venture.²³⁷ Lastly, section 4(1)(b) does not require proof of anticompetitive effects and ANSAC’s argument did ‘not justify re-engineering the interpretation of the Act to admit through a side door a defence of justification which the legislature has pertinently banned from entering through the front door.’²³⁸

international law. On this point, section 232 and section 233 of the Constitution of the Republic 1996 respectively, provide that “customary international law, is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”, and that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any other alternative interpretation that is inconsistent with international law.”

²³² Competition Commission, *Botswana Ash (Pty) Ltd and Chemserve Technical Products v American Soda Ash Corporation and CHC Global (Pty) Ltd* Case No. 49/CR/Apr00 and 87/CR/Sep00 page 5-6.

²³³ ANSAC case 6 9 11.

²³⁴ ANSAC case 6 9 11.

²³⁵ Competition Commission Corporate Leniency Policy of 2008 para 5.2.

²³⁶ ANSAC case 30.

²³⁷ ANSAC case 30.

²³⁸ ANSAC case 30.

International law state that a country can regulate conduct occurring outside its borders, which has effects within its territory.²³⁹ Fox state that ‘competition law is national, markets are global and there is the rub.’²⁴⁰ According to the Competition Tribunal, the country, in whose territory the effects of an export cartel are felt, must prosecute it, even if the country of origin has exempted it.²⁴¹

3.6. 2 ANSAC before the Competition Appeal Court

ANSAC lodged an appeal before the Competition Appeal Court. Rejecting the purposive approach in defining the word ‘effect’, the Competition Appeal Court opted to assign the word its ordinary meaning²⁴² because including words such as ‘anticompetitive’ to section 3(1), contradicts the purpose of the Act, which as a regulatory net is also concern with other practices besides anticompetitive practices, the impact of which, would still have to be determined.²⁴³ It concluded that the preferable approach is to assign the word ‘effect’ its ordinary grammatical meaning because is in line with the principles of international customary law.²⁴⁴

²³⁹ According to *United States v Aluminium Company of America* (1945) 148 F 2d 416. it is “settled law that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its border that has consequences within its borders which the State reprehends, and those liabilities other states will ordinarily recognise.”

²⁴⁰ EM Fox ‘National law, global markets, and Hartford: Eyes wide shut’ (2000) 68 *Antitrust Law Journal* 73.

²⁴¹ Page 29-30, according to the Tribunal, “there are sound reasons in competition law for adopting the ‘effects’ based jurisdiction as our legislature has done in section 3(1). Without such a doctrine one can easily have a situation where the offenders reside in country A and plot to affect the market of country B. If we require the restrictive practice has to have some element in country B before we can find jurisdiction there, we would fail, but the anti-competitive effect would still be felt there leaving only country A to exercise jurisdiction. There is no reason why it should do so when it has no interest prosecuting conduct not affecting its markets. The ‘effects test’ seeks to avoid a juristic lacuna where restrictive practices cross borders. We accept the doctrine is open to abuse by states exercising jurisdiction when their connection to the conduct is only tangential. This does not mean throwing it out. It means limiting it sensibly to avoid the de minimis case. Not only is there no basis in international law to support ANSAC’s reading, but also, there is no practical foundation for it either. In effect it leads to double inquiry. First, one will have to inquire into whether the Tribunal has jurisdiction. This entails a net balancing of pro-and anti- competitive effects. Then if a net harm is shown one proceeds with the substantive enquiry, which might in a rule of reason case involve extensive duplication of the evidence. In a per se contravention it would mean the leading of evidence in the jurisdiction, which is then inadmissible in the substantive enquiry.” D.P. ‘International jurisdiction in national legal systems: The case of antitrust’ *Northwestern Journal of International Law & Business* 10 (1989) 72.

²⁴² ANSAC case para 13.

²⁴³ Para 18, where Malan AJA, pointed out that section 3(1) ‘does not involve a consideration of the positive or negative effects on competition in the regulating country, but merely whether there are sufficient jurisdictional links between the conduct and the consequences. ... The question is ... one relating to the ambit of the legislation: the Act in the matter under consideration, its regulatory “net”, concerns not only anti-competitive conduct but also conduct the import of which still has to be determined.’

²⁴⁴ ANSAC case para 17.

Therefore, the question before the Competition Appeal court was whether ANSAC's conduct had 'direct and foreseeable' substantial consequences in the regulating country.²⁴⁵ Therefore, the effects must fall within the ambit of the Competition Act's regulatory framework irrespective of their pro-competitiveness. Hence, the Tribunal's interpretation of section 3(1) did not violate any international comity principle because it is 'more an aspiration than a fixed rule, more a matter of grace than a matter of obligation.'²⁴⁶ Furthermore, according to the Webb-Pomerene Act, ANSAC as an export cartel does not have immunity from prosecution under foreign competition laws.²⁴⁷

3.6.3 ANSAC before the Supreme Court of Appeal

The Supreme Court of appeal confirmed the reasoning of the Competition Appeal Court that section 3(1) does not include the positive or negative effects on competition in the regulatory country but whether there are sufficient jurisdictional links between the practice and its consequences.²⁴⁸ They also held that section 4(1)(b) adopts a per se illegal principle, meaning its violation are inimical to competition and the efficiency defence under section 4(1)(a) cannot be raised.²⁴⁹

The Supreme Court of Appeal further held that evidence to determine the nature of the conduct should have been admitted. It stated that both courts mentioned above erred in prematurely inquiring whether efficiency gains could be raised as per se illegal violations without determining whether the conduct, has actually occurred.²⁵⁰ This is referred to characterisation meaning once conduct has been identified as price fixing, any evidence relating to procompetitive gains is ignored.

²⁴⁵ ANSAC case para 18.

²⁴⁶ *United States v Nippon Paper Industries Co Limited* 109 F 3D 1 (1997).

²⁴⁷ As above para 26.

²⁴⁸ *American Soda Ash Corporation & CHC Global (Pty) Ltd v Competition Commission of South Africa, Botswana Ash (Pty) Ltd, Chemserve Technical Products (Pty) Ltd & Minister of Trade and Industry* (2005) 3 All SA 1 (SCA) para 6 24 25.

²⁴⁹ *American Soda Ash Corporation* case para 37.

²⁵⁰ *American Soda Ash Corporation* case 41-55.

ANSAC finally negotiated a settlement agreement with the Competition Commission and promised to terminate its group soda ash exports to South Africa, also amend its membership agreement to allow its individual members to negotiate exporting into SA independently.²⁵¹

3.7 Conclusion

Export cartels are another area in which enforcement collaboration can be done in SADC. A distinction must be drawn between types of export cartels. They may involve export cartel which originate from firms outside the SADC, Like ANSAC. Which means enforcement collaborations within the SADC will be possible. However, it will be difficult if the export cartel originates among the member states of SADC. Like in SADC, if an export cartel is exempted in terms of section 10 of the South Africa Competition ACT of 1998, it is not possible that the South African Competition Commission will cooperate with the NCAs of other SADC members in the investigation of such a cartel. It will not have the motivation to cooperate because it is exempted, and they will not be motivated. It also involves a conflict between national laws and SADC commitment. Thus, enforcement collaboration with regards to export cartels can be realised if member countries establish rules and notifying other member states if there is an exemption for the export cartel in one member states. This means export cartels are allowed and lawful and if they affect the member state must be dealt according to the domestic competition law. However, what about countries who do not have the effective competition laws. This is evident in the SADC because some countries, like Lesotho do not have competition laws.

Thus, this shows the important of regulating export cartel at a regional level hence exports form part of international trade and they are outside the country's domestic law. The following discusses this issue by examining the SADC competition law.

²⁵¹ Competition Commission & Others v American Natural Soda Ash Corporation & Another [2008] ZACT 92 para 6.I Venter 'ANSAC member in independent move to supply the South African market' Engineering News 15 April 2009.

CHAPTER FOUR

OVERVIEW OF COMPETITION LAW OF SADC

4.1 Introduction

The researcher analyses the SADC competition law. As mentioned above, the effects of export cartels are felt by neighbouring countries and South Africa being a major economic player in Africa, its exempted export cartels affect the neighbouring countries, and this calls for such cartels to be regulated at the regional level. The SADC has no comprehensive regional competition laws and such cross-border cartels are regulated at the national level. In addition, SADC developed a Declaration on Regional Cooperation in Competition and Consumer Policies, which sets out a cooperation framework on competition policy in the region.

Therefore, in this chapter a researcher seeks to show the interdisciplinary of international trade and competition law with moving away from the domestic law of South Africa and seeking to regulate exempted export cartels at the regional level. The cooperation model adopted by SADC will be analysed and weighing whether a regional regulatory framework should be implemented as SADC intends doing so in 2020.

4.2 A brief overview of SADC

SADC is an intergovernmental organisation composed of fifteen Southern African states, namely: Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Malawi, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.²⁵² It was established in 1980 in Lusaka, Zambia as Southern African Development Co-ordination Conference (SADCC), to advance national political liberation in Southern Africa.²⁵³

In 17 August 1992 SADCC was transformed into SADC AND established a treaty. The SADC treaty sets out the main objectives of SADC- to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration. These objectives are to be

²⁵² SADC Overview: History and Treaty available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/> accessed on (20 September 2019).

²⁵³ SADC Overview: History and Treaty available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/> accessed on (20 September 2019).

achieved through increased regional integration, built on democratic principles, and equitable and sustainable development.²⁵⁴

In 2008 SADC protocol on trade established a Free Trade Area.²⁵⁵ It was notified to the World Trade Organisation (WTO) under General Agreement on Tariffs and Trade article XXIV (7) (a) 1947 (GATT).²⁵⁶ As per art XXIV (8) of GATT, a FTA is understood to mean ‘a group of two or more customs territories in which the duties and other restrictive regulations are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

It included further objectives of the protocol, which are: to further liberalise intra-regional trade in goods and services; ensure efficient production; contribute towards the improvement of the climate for domestic, cross-border and foreign investment; and enhance economic development, diversification and industrialisation of the region.²⁵⁷

Due to the FTA of SADC in 2008, there has been an increase of liberalised trade, there is a crucial amount of cross border business activities and enhanced competition in SADC. However, SADC uses the cooperation model to prohibit unfair business practices and to promote competition in the region.²⁵⁸

4.3 Analysing the concept of cooperation model

In the plain language, cooperation is the act of doing something together.²⁵⁹ The United Nations Conference on Trade and Development(UNCTAD), had defined cooperation as ‘collaboration between competition authorities aimed at creating synergies as well as partnerships for mutual assistance and reciprocity in enforcing their respective competition rules.’²⁶⁰ Furthermore, it can

²⁵⁴ SADC Overview: History and Treaty available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/> accessed on (20 September 2019).

²⁵⁵ R Sandrey ‘An analysis of the SADC Free Trade Area’ (2013) Tralac Trade Brief. No. D13TB01/2013.

²⁵⁶ ‘Any Contracting party deciding to enter into a customs union or free trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the contracting parties and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they deem appropriate.’

²⁵⁷ SADC Documents and Publications: Protocol on Trade (1996).

²⁵⁸ The SADC Declaration on Regional Cooperation in Competition and Consumer Policies.

²⁵⁹ Oxford Learners Dictionary Definition of Cooperation <http://www.oxfordlearnersdictionaries.com/definition/english/cooperation> accessed on (20 September 2019).

²⁶⁰ UNCTAD Informal cooperation among competition agencies in specific cases (2014) TD/B/C.I/CLP/29.

involve countries without competition laws or those in a process of implementing competition laws, by offering them technical assistance to develop their own competition laws.²⁶¹

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

Informal cooperation based on the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980)- The UN Set is a universally applicable multilateral competition instrument. It is voluntary and its main aim is to eliminate and control restrictive business practices that have a negative impact on international trade liberalisation.²⁶²

Informal cooperation based on the 1995 OECD Recommendation on Cooperation or other similar soft law instruments with no particular legal basis- in 1995 it revised its Recommendation made in 1967, stating that investigation by one country may affect crucial interest of other OECD member countries.²⁶³ Thus, it encouraged closer cooperation between member countries in the form of notification, exchange of information and consultation and conciliation on a fully voluntary basis.²⁶⁴

Cooperation based on provisions in national law- The provision within the national laws facilitate and promote cooperation between agencies. The South African competition law act as a mandate for the conclusion of competition specific cooperation agreements with another jurisdiction.²⁶⁵

The Zambian competition law, directly authorise the CAs to cooperate with other agencies of other jurisdiction.²⁶⁶

Cooperation based on waivers- A waiver of confidentiality is consent from an immunity/amnesty applicant to waive, within the limits set out in the consent, the confidentiality protections afforded to it by the applicable confidentiality rules in the jurisdiction of the investigating competition agency.²⁶⁷ In the perspective of the immunity/amnesty applicant, the waiver enables better

²⁶¹ Paragraph 2(b)(iii) of the SADC Declaration on Cooperation in Competition and Consumer Policies.

²⁶² Section A of the UN set.

²⁶³ Preamble to the OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings.

²⁶⁴ The OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings.

²⁶⁵ Section 82(4) of the South African Competition Act 89 of 1998.

²⁶⁶ section 5(i) of the Zambian Competition and Consumer Protection Act No. 24 of 2010 permits the commission to exchange information with other agencies. Further, Section 65 permits the commission to enforce competition law at the requests of foreign competition authority belonging to either SADC or COMESA countries.

²⁶⁷ International Competition Network Co-operation between Competition Agencies in Cartel Investigations (2007) Report to the ICN Annual Conference: Moscow.

coordination of investigatory measures, expediting the review and decision making process, whilst minimising the risks of conflicting outcomes.

Regional cooperation instruments- These can be in the form of legally binding competition rules such as the 2004 COMESA Competition Regulations or nonbinding principles such as the SADC Declaration on regional cooperation in competition and consumer policies.

The abovementioned forms of cooperation are not the exhaustive list and fell under informal and formal cooperation. The SADC cooperation model forms under informal because it is not binding and involves friendly voluntary collaboration between CAs.

4.4 Modalities of cooperation in SADC

The SADC Treaty (1992) does not contain competition provisions. However, section 25 of the SADC Trade Protocol requires member states to adopt comprehensive trade development measures within the community which prohibit unfair trade practices and promote competition. Accordingly, in 2007, a SADC ministerial conference directed the secretariat to develop cooperation mechanisms between member States in enforcing their competition and consumer protection laws.²⁶⁸ However, member states opted for the soft approach of informal cooperation.

In 2007, a Competition and Consumer Policies Committee was set up, which is use for consultation and cooperation on competition and consumer protection issues.²⁶⁹ The committee is a forum that fosters cooperation and dialogue among competition authorities aimed at encouraging convergence of laws, analysis and common understanding.²⁷⁰ It meets once a year and it is attended by all national competition agencies and other competition officials.²⁷¹ The Committee has due regard to the UN Set as a basis for consensus building in international cooperation in competition policy.²⁷²

²⁶⁸ UNCTAD Modalities and procedures for international cooperation in competition cases involving more than one country (2013) TD/B/C.I/CLP/21 available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd21_en.pdf accessed on (20 September 2019).

²⁶⁹ UNCTAD Modalities and procedures for international cooperation in competition cases involving more than one country (2013) TD/B/C.I/CLP/21 available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd21_en.pdf accessed on (20 September 2019).

²⁷⁰SADC Competition Policy Competition.

In September 2009, SADC signed a Declaration on Regional Cooperation in Competition and Consumer policies (SADC Declaration).²⁷³ It is aimed at prohibiting unfair business practices in pursuance to Article 20 of the SADC Trade Protocol.²⁷⁴ It provides a cooperation framework in the application of member states national laws. The framework includes friendly consultation, information sharing and best endeavour clauses. Furthermore, it provides a transparent framework that contains appropriate safeguards to protect confidential information of the parties and appropriate national judicial review.²⁷⁵

In 2012, SADC established an online competition case management database, which its aimed at enhancing cooperation and exchange of case information.²⁷⁶ Member States agreed that some of the key objectives of the database are that the system will: ‘Act as a central repository of information on both on-going and resolved competition cases, especially cases of interest, Promote collaboration and cooperation on cross-border cases, e.g. making it easier to find out if the same parties/cases are being investigated by different authorities, repeat offenders, etc., and Provide easy access to case information and best practices in a user-friendly fashion with search capability.’²⁷⁷

The online database is hosted on the SADC platform and the system is up and running and countries have already started posting case information.²⁷⁸

4.5 Challenges of the cooperation model in SADC

With the soft approach the SADC members have adopted, it has experienced many challenges in addressing cross border anticompetitive and mostly export cartels. The cooperation model will not

²⁷³ SADC Review of the experience gained in the implementation of the UN Set, including voluntary peer reviews (2010) Geneva http://unctad.org/sections/wcmu/docs/tdrbpconf7_s2_SADC.pdf accessed on (20 September 2019).

²⁷⁴ Preamble to the SADC Declaration on Regional Cooperation in Competition and Consumer Policies.

²⁷⁵ Paragraph 1(e) SADC Declaration on Regional Cooperation in Competition and Consumer Policies.

²⁷⁶ UNCTAD Modalities and procedures for international cooperation in competition cases involving more than one country (2013) TD/B/C.I/CLP/21 http://unctad.org/meetings/en/SessionalDocuments/ciclpd21_en.pdf (accessed on 20 September 2019).

²⁷⁷ Africa Competition Forum Newsletter July 2013 available at http://www.africancompetitionforum.org/sites/default/files/docs/ACF_First_Newsletter_English_0.pdf accessed on (20 September 2019).

²⁷⁸ Africa Competition Forum Newsletter July 2013 available at http://www.africancompetitionforum.org/sites/default/files/docs/ACF_First_Newsletter_English_0.pdf accessed on (20 September 2019).

be able to regulate export cartels because it is voluntary, and the importing will not cooperate in such a matter. The following challenges have been identified as particularly affecting SADC:

4.5.1 Absence of competition laws in some countries

Competition law in most SADC countries is a relatively a new discipline of law and some countries are yet to established it. The competition laws of South Africa, Zambia, Zimbabwe and Malawi were the first to be enacted in the region in the mid or late 1990s.²⁷⁹ Competition laws for Tanzania and Namibia were adopted in 2003,²⁸⁰ Botswana and Seychelles in 2009,²⁸¹ and Madagascar in 2005.²⁸² However, Angola, DRC, Lesotho and Mozambique are in a process of adopting competition laws and policies.²⁸³

A research carried out by SADC, showed that countries without proper competition enforcement mechanism tend to invite anticompetitive practices in their market structures.²⁸⁴ This was reflected in the 2001 acquisitions by Lafarge of France of major cement companies in Zambia, Zimbabwe, Tanzania and Malawi. At that time only Zambia and Zimbabwe had competition laws enacted. Both Zambia and Zimbabwe held that Lafarge if not regulated properly, it will foreclose enterprise development in the sector. In Zambia it was held that Lafarge increase production by rehabilitating plant and machinery in their respective countries.²⁸⁵ However, Lafarge managed to takeover of cement plants in Tanzania and Malawi.

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

²⁷⁹Zambia Competition and Consumer Protection Act 24 of 2010 (which was initially the Competition and Fair Trading Act 18 of 1994); Zimbabwe Competition Act 7 of 1996, as amended; Malawi Competition and Fair Trading Act was enacted in 1998; South Africa Act 89 of 1998 was enacted in 1999.

²⁸⁰ Tanzania Fair Competition Act 8 of 2003 and Namibia Act no. 2 of 2003.

²⁸¹ Seychelles Fair Competition Act 18 of 2009 and Botswana Competition Act 17 of 2009.

²⁸² Competition Law No 2005-020 of 2005 and its implementing decree No 2008-771 of 28 July 2008.

²⁸³ Banc ABC Staying up to date with Local Laws in Africa <http://www.bancabc.co.mz/news/staying-up-to-date-with-local-laws-in-africa.aspx> accessed on (20 September 2019).

²⁸⁴ SADC Review of the experience gained in the implementation of the UN Set, including voluntary peer reviews (2010) Geneva http://unctad.org/sections/wcmu/docs/tdrbpconf7_s2_SADC.pdf accessed on (20 September 2019).

²⁸⁵ The Takeover of Chilanga Cement by Lafarge of France, Zambia Competition Commission and The takeover of Circle Cement by Lafarge of France, Zimbabwe Competition Commission.

4.5.2 Lack of capacity and resources

The implementation of competition laws in some SADC countries has contributed to fight against per se cartels and promoting consumer welfare. It is argued that the cooperation model is too weak to fight against cross border cartels at a regional level. This is because some countries in the SADC region lack the capacity and resources to participate in cross border cartel investigations. Thus, the institutional incapacities have a direct impact on the development of a competition law culture.²⁸⁶ This institutional incapacity affect the NCAs to fulfil their mandate, concerning the enforcement of competition law.²⁸⁷ Furthermore, it affects enforcement cooperation within SADC.

Institutional incapacities relate to, inter alia, the lack of independence of NCAs, insufficient investigatory powers, a judiciary that lacks competition law expertise, lack of synergies between NCAs and other law enforcement agencies, as well as inadequate financial and human resources.²⁸⁸ For example, in Zambia have managed to include leniency programmes in their laws but they are constrained by insufficient human and financial resources to fully implement these provisions.²⁸⁹ This result in multinational companies not making effort to apply for leniency in some SADC countries because there is not effective punishment pf cartels in some countries.

4.5.3 The absence of common procedural rules and investigatory tools in domestic competition laws

Beside institutional challenges faced by NCAs in the SADC, some NCAs have been quite successful in their enforcement actions. Such as, the Competition Commission of South Africa has prosecuted several cartels, through its Corporate Leniency Policy (CLP).²⁹⁰ The same cannot be

²⁸⁶ P Ndlovu (n)276.

²⁸⁷ H Jennings 'International cooperation in cartel investigations: The additional challenges faced by developing countries. Organisation for Economic Development and Co-operation' (2012) 6; AM Alvarez et al 'Anti-competitive practices and the attainment of the millennium development goals: Implications for competition law enforcement and inter-agency cooperation' In Related Provisions in Regional Trade Agreements: Is it Possible to Obtain Development Gains? (2007) 7782.

²⁸⁸ Chapter 4; Policy Roundtable: Improving international co-operation in cartel investigations. Organisation for Economic Development and Co-operation (2012) 46- 47; Promoting competition reforms for development: How to proceed in West Africa? Consumer Unity Trust Society Centre for Competition, Investment and Economic Regulation (2011) 4.

²⁸⁹ Modalities Competition, Competitiveness and Development: Lessons From Developing Countries (2004) available at http://unctad.org/en/docs/ditccclp20041_en.pdf accessed on (20 September 2019).

²⁹⁰ Agri Wire (Pty) Limited & Another v Commissioner of the Competition Commission & Others (2011)ZAGPPHC 117 para 4. the High Court was faced with a review application concerning the granting of conditional immunity by the Competition Commission. The High Court ruled that, in light of the Competition Act's provisions on shared exclusive jurisdiction between the Competition Tribunal and the Competition Appeal Court (section 62(1), read with

said by other SADC members. The crucial question is “Why have firms readily confessed their cartel involvement before the Competition Commission in South Africa and not done the same to the NCAs of other SADC Members, where they have also engaged in cartel conduct?”.²⁹¹ The answer is because South Africa has CLP and guarantees applicants who fulfil all its conditions will receive total immunity. Furthermore, the CLPs terms guarantee the confidentiality of information submitted to it, pursuant to CLP applications.²⁹² This is very important because the success of immunity procedures depend on the confidentiality of immunity applications, and the adequate protection of confidential information.²⁹³ Therefore, deprived of such protection and guarantees, immunity procedures would not be successful.²⁹⁴

The absence of a common and functioning leniency policy among SADC Members has been stipulated as a contributory factor to the weaknesses of enforcement collaborations with regards to cross border cartel conduct.²⁹⁵ Also within the SADC region there is a problem with the legal definitions of what qualifies as confidential information and that make it more difficult to coordinate enforcement activities.²⁹⁶ The Recommendation of the OECD could be used to solve this problem. Members could use voluntary confidential waivers, where applicants waive their right to confidentiality and information divulged, only used for a specific purpose. Alternatively regional legal instruments could make provision for the exchange of information, in order to

the Competition Act’s provisions on the functions of the Competition Tribunal (section 27), it did not have jurisdiction on the matter, and that the tribunal has exclusive jurisdiction (which it shares with the Competition Appeal Court) to entertain the review application, para 44-47. However, the High Court was of the view that its ruling on the point of jurisdiction was ‘not beyond question’ and, for that reason, it went on to deal with the merits of the case, in case its ruling on jurisdiction was wrong, para 47.

²⁹¹ T Kaira ‘A cartel in South Africa is a cartel in a neighbouring country: Why has the successful cartel leniency policy in South Africa not resulted in automatic cartel confessions in economically interdependent neighbouring countries?’ Centre for Competition and Economic Development (2015) 1 22.

²⁹² Competition Commission Corporate Leniency Policy of 2008 para 6.2.

²⁹³ Anti-cartel enforcement manual: International co-operation and information sharing. International Competition Network (2013) para 3.3.

²⁹⁴ National Grid Electricity Transmission PLC v ABB Ltd & Others HC08C03243 para 7. Observations of the European Commission pursuant to Article 15(3) of Regulation 1 of 2003; SD Hammond ‘Dispelling the myths surrounding information sharing’ Antitrust Division, United States Department of Justice (2004) ; M Hansen & Others ‘Challenges to international cartel enforcement and multi-jurisdictional leniency applications - Disclosure of leniency applicant statements and materials. American Bar Association International Cartel Workshop’ (2012) 1 22.

²⁹⁵ Review of the experience gained so far in enforcement co-operation, including at the regional level. United Nations Conference on Trade and Development (2011) para 75; Policy Roundtable: Improving international co-operation in cartel investigations. Organisation for Economic Development and Co-operation (2012) 42.

²⁹⁶ Policy Roundtable: Improving international co-operation in cartel investigations Organisation for Economic Development and Co-operation (2012) 44.

eliminate the need to seek consent at every turn.²⁹⁷ However, in order for “information gateways” to be effective, and to enhance the effectiveness of enforcement collaborations, clear rules and safeguards should be in place to ensure the confidentiality of such information, nevertheless, and to limit the use of the information for any other purposes, save those for which it was given.²⁹⁸

The SADC Declaration on Regional Co-operation on Competition and Consumer Policies of 2009 recognises the need for a transparent system that provides adequate safeguards to protect the confidential information of the parties.²⁹⁹ However, it currently does not clarify such safeguards, which means that these safeguards need to be established, in terms of each member’s competition law. Thus, it poses a legal problem with regards to export cartels hence member states exempt such cartels and will not want to cooperate unless such regional law is binding.

4.5.4 Lack of political will and political interference

In most of the SADC countries, political interference plays a huge role on domestic enforcement efforts and enforcement collaboration across territorial borders.³⁰⁰ The absence of political commitment has affected many competition legislations to not be enacted.³⁰¹ Lack of political will and commitment has been cited as one of the reasons why the EAC’s Competition Authority has not been formally instituted to begin its work.³⁰² Another problem most SADC members are protectionist and they don’t want to cede their sovereignty to a supranational organisation, to regulate their economic policies and activities.³⁰³ However, RECs involves a transfer of some

²⁹⁷ Recommendation of the OECD Council concerning international co-operation on competition investigations and proceedings. Organisation for Economic Cooperation and Development (2014) 6-10.

²⁹⁸ Recommendation of the OECD Council concerning international cooperation on competition investigations and proceedings. Organisation for Economic Cooperation and Development (2014) 6-10.

²⁹⁹ Article 1(e) of SADC Declaration on Regional Co-operation on Competition and Consumer Policies of 2009.

³⁰⁰ WE Kovacic & AH David AH ‘Institutional design, agency life cycle, and the goals of competition law’ (2013) 81 Fordham Law Review 2163 2174; Baker JB ‘Economics and politics: Perspectives on the goals and future of antitrust’ (2013) 81 Fordham Law Review 2175 2196.

³⁰¹ Promoting competition reforms for development: How to proceed in West Africa? Consumer Unity Trust Society Centre for Competition Investment and Economic Regulation (2011) 3; T Buthe ‘The politics of market competition: Trade and antitrust in a global economy’ In Martin L (ed) Oxford Handbook of the Politics of International Trade (2014) 1 19; M Botta ‘The co-operation between the competition authorities of the developing countries: Why does it not work? Case study on Argentina and Brazil’ (2009) 5. Competition Law Review 153 178.

³⁰² A Brigot-Laperrousaz ‘East Africa and antitrust: Enforcement of the EAC Competition Act’ 2016 <http://africanantitrust.com/2016/01/14/the-big-picture-aat-east-africa-antitrust-enforcement/> (Accessed 20 September 2019).

³⁰³ GK Lipimile & E Gachuri ‘Allocation of competences between national and regional competition authorities: The case of COMESA’ P Brusick, P & Others (ed) Competition Provisions in Regional Trade Agreement: How to Assure Development Gains, United Nations Conference on Trade and Development (2005) 364.

sovereign competences of the Member States to a regional supranational organisation.³⁰⁴ In some cases, NCAs are faced with political pressures from interest groups that oppose the application of competition law, as they may be benefiting from uncompetitive markets through rent seeking, and would much prefer to maintain the status quo.³⁰⁵ For instance, in some jurisdictions it is common for firms, facing investigations by NCAs, to use their political connections to seek the termination of these investigations.³⁰⁶

4.5.5 Voluntary nature of cooperation

The SADC Declaration is a soft law instrument, which does not create legally binding obligations for the contracting parties. The voluntary nature of this legal instrument has weakened the cooperation in SADC because it does not override the existing domestic laws of Member States. This is reflected in the SADC Declaration with regards to confidentiality clause, friendly consultation and that Member States must develop their competition laws.

The SADC Declaration states that “Cooperation shall be enhanced by establishing a transparent framework that contains appropriate safeguards to protect the confidential information of the parties and appropriate national judicial review.”³⁰⁷ Thus it reflects on the countries national law on how the confidentiality clause should be treated. Thus, SADC countries are not at liberty to cooperate in information sharing with other member countries. This shows that the exemption of export cartels in South Africa will likely be prosecuted in the SADC region. Thus, lack of innovation with regards to products and high prices are felt by the consumers in the SADC region.

4.6 Conclusion

Cooperation in the regional level has an enough impact because cross border cartels can be regulated sufficiently. It avoids duplication in investing proceedings by different NCAs, allows economies of scale, creates synergies and ensures that cartel participants are prosecuted in more

³⁰⁴GK Lipimile & E Gachuri ‘Allocation of competences between national and regional competition authorities: The case of COMESA’ P Brusick, P & Others (ed) Competition Provisions in Regional Trade Agreement: How to Assure Development Gains, United Nations Conference on Trade and Development (2005) 364.

³⁰⁵MS Gal ‘The ecology of antitrust: Preconditions for competition law enforcement in developing countries’ United Nations Conference on Trade and Development (2004) 21 50.

³⁰⁶ P Mashego ‘Borders getting in the way of dawn raids, say lawyers’ Business day News 14 August 2015.

³⁰⁷ Paragraph 1(e) of the SADC Declaration on Cooperation in Competition and Consumer Policies.

than one territorial jurisdiction through Regional Competition Agencies. This will be advantageous in the SADC region because it ensures that there are pooling resources, sharing of expertise within Member States, where they are competition laws are still new and allows for individual NCAs to grow together. Furthermore, it results in the achievement of common principles, harmonisation of competition laws, with reference to the substantive rules governing cartels and enforcement thereof. However, the SADC cooperation have not been substantial in investigating cartel conduct. Instead, the cooperation has been in the form of training workshops, study tours and staff exchanges. Therefore, there is a need for competition law enforcement framework to be developed, especially that will also regulate export cartels. The current regional legal binding competition law like COMESA, they do not regulate export cartels but, rather refer them to domestic legislation, Thus, the SADC competition must not only focus on the narrow anticompetitive conduct but exempted practices as well, for the countries with new competition agencies and no law at all. Such cooperation will achieve the aim of the FTA which is to deepen regional integration.

The following chapter examine the advantages and disadvantages of developing a regional competition regulatory framework in SADC, in order to regulated anticompetition practices.

CHAPTER FIVE

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

5.1 Introduction

The researcher has analysed the SADC cooperation model and it has been shown that it is still insufficient to deal with cross border cartels, most specifically export cartels because of the lack of cooperation from the importing country. With the increased globalisation many south African firms operate across the SADC region and tend to have market power over these countries. Thus, if these firms are exempted and allowed to penetrate the export market, it will negatively affect consumer welfare and trade relations. Exemptions of export cartels are the core reason why they should be SADC competition regulatory framework and a shift from soft cooperation mechanism. Paul Godek states that: ‘Exporting antitrust is like giving a silk tie to a starving man. It is superfluous; a starving man has much more immediate needs. And if the tie is knotted too tightly, he will not be able to eat what little there is available to him.’³⁰⁸ Furthermore, Joseph Stiglitz emphasis the need for this framework by saying, ‘Strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies.’³⁰⁹

Therefore, this chapter is based on the importance of competition law. It discusses the prospective benefits and challenges of developing a regional competition regulatory framework in SADC. Thereafter it discusses the legal implications for developing a regional competition regulatory framework and highlights lessons to be learnt from COMESA as comparative.

³⁰⁸ P Godek ‘One US Export Eastern Europe Does Not Need’ (1992) 15 Regulation 20.

³⁰⁹ J Stiglitz ‘Competing over competition policy’ <http://www.project-syndicate.org/commentary/competingover-competition-policy> accessed on (20 September 2019).

5.2 Benefits of developing a regional competition regulatory framework in SADC

A regional competition regulatory framework can minimise most of the significant problems that affect competition law enforcement in the developing countries.³¹⁰ This is because small countries with newly developed competition law can benefit from joint enforcement as well as collective resources and capabilities. Furthermore, it can contribute to transparency within the region, increase certainty, predictability and compatibility, broaden enforcement jurisdiction, secure and strengthen market integration and create a formal cooperation system.

5.2.1 Joint enforcement, resource and capacity

Institutional incapacity it was one of the problems with the enforcement of the SADC cooperation mechanism. Financial incapability is one of the reasons that prevent developing countries in SADC from monitoring export cartels due to expensive cost associated with investigations.³¹¹ However through joint enforcement and shared resources and capacity, it will help developing countries to investigate cross border cartel cases.

Due to the market power that multinational companies hold in small jurisdictions, that hinder the process of creating a credible threat to prohibit anticompetitive conduct. For instance, if a MNCs are faced with certain restriction that limit their trading power, they might choose to exist that jurisdiction. Thus, this will affect the consumers and certain producers if they rely on that specific company and in such a case a developing country will not implement its competition laws. However, a regional regulatory framework can create a credible threat by increasing influence through the combination of consumers across member states and creating a critical mass.³¹² Consequently, MNCs would be compelled to comply with the regional law, to maintain trade benefits and consumers.

A regional body can empower those countries with less capacity to deal with competition law matters. In this regard, COMESA is empowered to deal with national competition law issues, if requested by a member state due to its limited capacity.³¹³

³¹⁰MS Gal & IF Wassmer 'Regional agreements of developing jurisdictions: Unleashing the potential' in Competition Policy and Regional Integration in Developing Countries' (2012) M Bakhom& Others(eds).

³¹¹ Modalities Competition, Competitiveness and Development: Lessons From Developing Countries (2004).

³¹² MS Gal (n 307).

³¹³ Article 7(2) (e) COMESA Competition Regulations.

5.2.2 Increased transparency

The implementation of a legally binding authority at the regional level may be an efficient technique to minimise limitation of existing authorities, including corruption, inefficiency and bureaucratic obstacles.³¹⁴ A joint authority might work as a mechanism allowing members to create binding commitments of compliance that will be enforced beyond the term of the current government that signed the commitments.

It is submitted that for transparency in a regional body to be achieved, members should be prepared to enforce the law even if it goes against the interests of strong players in the region. This will be beneficial when it comes to regulating exempted export cartels in South Africa. In addition, the regional authority must be independent, free from political interference. Further, the institutions need to be sufficiently staffed with educated and trained personnel, the leaders and staff should not be corrupt and appellate channels should be provided.³¹⁵ Furthermore, the decisions and judgements of the institutions should be published and accessible to the public.

5.3.3 Increased certainty, predictability and compatibility

A regional competition regulatory framework would increase legal certainty and predictability of decisions. Due to this, SADC will bypass conflicting domestic competition laws and be effective. For example, SADC countries were affected by the Walmart/Massmart merger, but it was assessed individually.³¹⁶ Thus, countries reach conflicting decisions and remedies. However, this can be brought as a class action by different CAs at the regional level and it will be less burdensome and encourage foreign investors to enter and expand in the regional market.

A regional perspective in assessing a merger can benefit SADC countries greatly. For instance, SADC has experienced cross border mergers and it was assessed independently by affected countries and that reduced competition in the region greatly.³¹⁷ Thus, an integrated merger policy would have been able to limit the negative welfare effects of some of these mergers on the region

³¹⁴ MS Gal (n 307).

³¹⁵ EM Fox 'Antitrust, economic development and poverty: The other path' (1991) Harvard Institute for International Development.

³¹⁶ Walmart-Masmart merger, Rothmans of Pall Mall/British American Tobacco merger and the takeover of cement companies by Lafarge of France.

³¹⁷ Walmart-Masmart merger, Rothmans of Pall Mall/British American Tobacco merger and the takeover of cement companies by Lafarge of France.

and not just on individual countries.³¹⁸ In general, a regional merger control not only brings legal certainty but also allows the region itself to defend its territorial interests in the external competition policy arena.

5.2.4 Broaden enforcement jurisdiction

Traditionally, competition law is concerned within business activities on the national market. Thus, most countries only prosecute conduct that caused anticompetitive effects in the domestic market. However, this becomes a problem when business practices in one country have adverse effects on another country. A good example is the main problem of this research, which is export cartels. Ordinarily, the affected country here does not have jurisdiction to address the cartel activity. However, in a regional regulatory framework, a regional body would have jurisdiction to preside cases of export cartel; that is, if both the importer and exporter are from within the regional bloc.

5.2.5 Strengthen market integration

Regional competition law can function as a tool to secure and strengthen market integration. This is because of the reduction of entry barriers results in an increased ability of firms to operate in larger areas, thereby increasing their ability to enjoy economies of scale and increasing competition.³¹⁹

A regional competition law plays a role in ensuring that trade liberalisation within SADC is not hampered by anticompetitive practices. Furthermore, competition law is used to restrict trade barriers by private firms in a way that promote market integration because it prevents private firms for preventing goods entering the market.

5.2.6 Formal cooperation system

A regional competition law can benefit the SADC countries with the formalised cooperation that has a legal obligation on member states to cooperated with each other and with the regional

³¹⁸ undertakings imposed by South Africa in the Walmart-Masmart merger in South Africa Competition Annual Report 2012/12 <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-Commission-AnnualReport-web-base-Final.pdf> accessed on (20 September 2019).

³¹⁹ MS Gal (n 307).

authority.³²⁰ Thus, as mentioned above that countries that have exempted export cartels will be reluctant to cooperate, such mechanism can oblige them to share confidential information.

5.3 Challenges of developing a regional competition regulatory framework in SADC

Whilst developing a regional competition regulatory framework in SADC, will be an improvement in the SADC competition law, it also bears disadvantages. For instance, many countries in the SADC region are protectionist, they don't have political will, overlapping regional integration, lack of respect of rule of law, different levels of economic development and SADC's poor record regarding implementation of goals.

5.3.1 Protectionism by countries

One of the biggest obstacles to developing a regional competition law, is the unwillingness of governments to cede essential elements of sovereignty to regional institutions.³²¹ Political leaders and officials are protectionist and often caution against trade arrangements overstepping their boundaries.³²² Therefore, regional institutions cannot exercise their mandates effectively because governments are reluctant to comply with the rulings of regional courts in the name of state sovereignty.

Sutherland states that, 'Sovereignty is one of the most used and misused concepts of international affairs and international law. The word is often repeated more or less as a 'mantra' without much thought about its true significance.'³²³ Thus, many SADC countries hide behind state sovereignty and this was shown in 2015 when South Africa cancelled Bilateral Investment Treaties and regulated foreign investment with an Act.³²⁴ Therefore, developing a regional competition regulatory framework in SADC, the sovereignty of state will be affected and many countries might be reluctant to ratify it.

³²⁰ A cooperation provision signifying formal cooperation is seen in the COMESA Competition Regulation under Article 2(d).

³²¹ G Erasmus (2011) 'Is the SADC trade regime a rules-based system?' SADC Law Journal 1 21.

³²² G Erasmus (2011) 'Is the SADC trade regime a rules-based system?' SADC Law Journal 1 21.

³²³ WTO 2004 Sutherland Report.

³²⁴ Legal Protection of Investment Act 2015.

5.3.2 Lack of political will

The successful development of a regional competition regulatory framework in SADC requires genuine willingness on the part of the members to participate in the implementation of the idea. This entails that political members are willing to commit themselves to obeying the regional competition rules. However, according to the past experiences of SADC, there is no political will to enforce the provisions on sanctions against members who violate their obligations under the SADC Treaty. Therefore, before implementing a regional competition law, SADC must get support from the politicians and officials.

5.3.3 The Spaghetti bowl

The multiple and concurrent memberships of numerous Regional Economic Communities (REC) in Africa are a perfect illustration of what Jagdish Bhagwati describes as a Spaghetti bowl.³²⁵ The multiple member between RECs present a challenge in developing a regional competition regulatory framework in SADC.

A glimpse of African overlapping RECs can be seen from the eastern and southern countries alone. For example, South Africa, Botswana, Lesotho, Namibia and Swaziland are members of both the Southern African Customs Union (SACU) and the SADC; Swaziland is also a member of COMESA. Tanzania is a member of both SADC and the Eastern African Community (EAC). Further, of the 15 SADC member states, eight countries also belong to the COMESA whose total membership is 19.³²⁶ This multiplicity of membership can cause confusion, competition, duplication and overlapping competition regimes.

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

³²⁵ According to Bhagwati, the multiple and simultaneous participation by countries in trade agreements, at different levels and of a differentiated nature, and the proliferation of these agreements creates a 'spaghetti bowl' effect Bhagwati JN 'US Trade Policy: The Infatuation with FTAs' (1995).

³²⁶ SADC members who are also members of COMESA are: Democratic Republic of Congo, Madagascar, Malawi, Mauritius, Seychelles, Swaziland, Zambia and Zimbabwe. Whilst Angola, Botswana, Lesotho, Mozambique, Namibia, South Africa, Tanzania are not members of COMESA (Namibia, Tanzania and Angola were once members of COMESA but withdrew membership).

5.3.4 Lack of respect for rule of law

Rule of law in the context of regional integration means government should recognise the supremacy of the regional law as well as practice democratic principles.³²⁷ A successful regional competition law in SADC can be developed if all people in addition government officials are subject to and accountable to the regional law.

The case of *Mike Campbell (Pvt) Ltd et al. v. Republic of Zimbabwe*³²⁸ provides a good example of government's disregard of the rule of law within the SADC region. In that case, the SADC Tribunal held that the Zimbabwean government violated the organisation's treaty by denying access to the courts and engaging in racial discrimination against white farmers whose lands had been confiscated under the land reform program in Zimbabwe.³²⁹ Following the judgment, Zimbabwe withdrew from the Tribunal and blatantly refused to comply with the judgment arguing that the Tribunal did not have the jurisdiction to render a judgment in the case.

The failure of the SADC Tribunal to rally SADC member states against a renegade member state (Zimbabwe) has shown that without respect for the rule of law some strong member states can flout standing regulations and judgments with impunity and without reprimand.³³⁰ Without respect for the rule of law, the SADC competition regulatory framework will only be a beautiful law without any real legal effect.³³¹

5.4 Legal Implications for developing a regional competition regulatory framework

The legal implications for developing a regional competition regulatory framework vary depending on the legal and institutional design of the regional framework. There are two main approaches: namely centralised and decentralised regional competition law.

³²⁷ Common Wealth of Nations Rule of Law <http://www.commonwealthofnations.org/commonwealth-inaction/rule-of-law-2/> accessed on (20 September 2019)

³²⁸ (2008) SADCT 2 SADC Tribunal (SADC).

³²⁹ <http://www.saflii.org/sa/cases/SADCT/2008/2.html> accessed on (20 September 2019).

³³⁰ PN Ndlovu 'Campbell v Republic of Zimbabwe: A moment of truth for the SADC' SADC Law Journal (2011) 1 79.

³³¹ J Mapuva & L Muyengwa-Mapuva 'The SADC regional bloc: What challenges and prospects for regional integration?' in *Law, Democracy and Development* (2014) 18 349

A centralised approach includes of regional law and a centralised authority.³³² A regional competition law is created by a regional treaty, which include comprehensive provisions of competition law and establishes an independent law and a distinct regional jurisdictional scope.³³³ It also has institutional mechanism at regional level to conduct investigations, enforce actions and assess and levy penalties.³³⁴ COMESA is an example of a centralised approach to regional competition law.

Decentralised regional approach consists of a regional law only and it has no central authority. the independent regional law is expressed by treaty or protocol, but the application of the law is left entirely to the member states and enforcement is done through intergovernmental cooperation.³³⁵ This approach cases are brought by the national CAs and national courts may also receive private complaints for violations of regional law.³³⁶ The Mercado Común del Sur (MERCOSUR) competition protocol is an example of this approach where Member State authorities act together on an intergovernmental basis.

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

³³² The COMESA Competition Regulations and the COMESA Competition Commission for example form a centralised regional system.

³³³ As above.

³³⁴ COMESA Regulations.

³³⁵ In MERCOSUR regional competition law is enforced by two inter-governmental bodies: the MERCOSUR Trade Commission (MTC) which performs adjudicative functions and the Committee for the Defence of Competition (MCDC) which consists of representatives of signing countries' national competition authorities and is responsible for the investigation of cases in cooperation with the national authorities of the state in which the defendant is domiciled. See Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) Cambridge: Cambridge University Press p. 178.

³³⁶ According to the MERCOSUR Fortaleza Protocol for the Defence of Competition proceedings are initiated by the competition authorities of the member states either ex officio or following complaint by an interested party See Article 10 of the Protocol.

5.5 COMESA Competition Regulation

In this chapter the researcher explores the COMESA Competition Regulation as a comparative REC to SADC. It will discuss the background, statutory provisions, cartel enforcement and what specific lessons can be adopted by SADC. The 1994 COMESA Treaty replaced the former Preferential Trade Area for Eastern and Southern Africa Treaty of 1981.³³⁷ COMESA was created to fulfil the requirements contained in Article 29 of the PTA, which provides for the creation of a FTA, preceded by a Common Market (CM) and eventually an Economic Community for Eastern and Southern African States. The purpose of COMESA, as contained in the Preamble³³⁸ is:

‘to mark a new stage in the process of economic integration with the establishment of a Common Market for Eastern and Southern Africa and the consolidation of their economic co-operation through the implementation of common policies and programmes aimed at achieving sustainable growth and development’.³³⁹

Thus, the 21 COMESA members have agreed to promote regional integration through trade development as well as to develop their natural and human resources for the mutual benefit of all their people.

5.5.1 The statutory provisions in COMESA

In terms of the COMESA Treaty, agreements or concerted practices between undertakings that may affect trade between Member States, and have, as their objective, the prevention or restriction of competition in the Common Market, are prohibited and, consequently, void.³⁴⁰ It follows the *per se* illegal with regard to specific prohibited practices.³⁴¹ These prohibited practices include, price fixing, collusive tendering, and market allocation.³⁴² It established two institutions to be involved in the enforcement of the Common Market’s competition law; the COMESA

³³⁷ Article 4(4) of the PTAES.

³³⁸ Treaty Establishing a Common Market for Eastern and Southern Africa (COMESA Treaty) (1994).

³³⁹ Preamble to the COMESA Treaty.

³⁴⁰ Article 55(1) of the COMESA Treaty; Article 16 (1)-(3) of the COMESA Competition Regulations of 2004.

³⁴¹ Rule 31 of COMESA Competition Rules of 2004.

³⁴² Article 19(3)(a)- (c) of the COMESA Competition Regulations (2004).

Competition Commission³⁴³ and the COMESA Board of Commissioners.³⁴⁴ The decisions of both institutions are legally binding on firms, governments of Member States and their courts.³⁴⁵

- **The COMESA Competition Commission**

This division is headed by a director.³⁴⁶ Its primary function is to apply the Competition Regulations to practices that affect trade between Member States.³⁴⁷ To accomplish this, the Commission is required to monitor, investigate and make determinations regarding anti-competitive practices, such as, cartels within the Common Market. In addition, the Commission must review regional competition policy; provide technical assistance to NCAs with a view to harmonising competition law in the Common Market; cooperate with NCAs of Member States; and conduct research on competition policy and law among Member States.³⁴⁸

- **The Board of Commissioners**

The Board of Commissioners is the ‘supreme policy body’ in matters concerning the enforcement of regional competition law.³⁴⁹ The Board is empowered to decide on cases referred to it by the Competition Commission; to consider appeals from, or review any decision of the Commission, made in terms of the Regulations; and exercise any other powers that may be incidental to the operation of the Regulations.³⁵⁰

5.5.2 Cartel enforcement cooperation in COMESA

COMESA’s Competition Commission is the body tasked with enforcing regional competition law.³⁵¹ Members are enjoined to establish measures to ensure compliance with the Competition Regulations, by actively implementing the provisions of the Regulations, and abstaining from measures that conflict with the objectives of the Regulations.³⁵² Additionally, the Commission is

³⁴³ Article 6 of COMESA Competition Regulations of 2004.

³⁴⁴ Article 12 of COMESA Competition Regulations of 2004.

³⁴⁵ Rule 5(1)-(2) of COMESA Competition Rules of 2004

³⁴⁶ Article 9-11 of COMESA Competition Regulations of 2004; Rule 13(1), Rule 14 of COMESA Competition Rules of 2004; Article 7(1)(b) and Article 9(3) of COMESA Treaty of 1993.

³⁴⁷ Article 7 (1) of COMESA Competition Regulations of 2004; Rule 13(1) of COMESA Competition Rules of 2004.

³⁴⁸ Article 7 (2)(a)- (j) of COMESA Competition Regulations of 2004.

³⁴⁹ Article 12(1) of COMESA Competition Regulations of 2004; Rule 25 26 28 29 of COMESA Competition Rules of 2004.

³⁵⁰ Article 15 of COMESA Competition Regulations of 2004, Rule 47 of COMESA Competition Rules of 2004.

³⁵¹ Article 7 (2)(a)- (j) of COMESA Competition Regulations of 2004.

³⁵² Article 5(1) of COMESA Competition Regulations of 2004.

empowered to promote a competition culture among Member States; to carry out investigations to determine if a prohibited practice has occurred; to issue necessary orders; and to refer matters to the Board of Commissioners.³⁵³

Other than conducting investigations into alleged cartel practices, the COMESA Competition Commission is tasked with assisting Member States to harmonise their competition laws with the COMESA's Competition Regulations, to achieve uniformity in the interpretation and application of the Common Market's competition law.³⁵⁴ The Competition Commission is enjoined to cooperate with the NCAs of individual Member States; to cooperate with Member States in the enforcement of the Commission's decisions; to render assistance to Member States in the promotion and protection of consumer welfare; to aid the exchange of information and expertise between the Commission and the NCAs of Member States.³⁵⁵

5.5.3 Specific lessons for SADC

The COMESA Competition Regulation have implemented a jurisdiction overlap between regional and national authorities in competition matters which influence the Common Market but are occurring within one member state.³⁵⁶ Thus, it shows the cooperation between regional authorities and national authorities.

The legally binding of the COMESA Competition Regulation that any practices that involves price fixing, market allocation and collusive tendering are regarded as *per se* illegal. It promotes legal certainty because in case of export cartels, they can be regulated. Furthermore, it decreases the lack of political will among Member States because they are bound to their regional commitments.

Lastly the implementation of Board of Commissioners and Competition Commission because competition law are enforced among Member States and regulated properly. Contrast to SADC because it has formulated a working group alongside with then Secretariat. Thus, to develop a Regional Regulatory Competition Framework, SADC needs to use the COMESA Treaty on

³⁵³ Article 5(1) of COMESA Competition Regulations of 2004.

³⁵⁴ Article 7 (2)(c) of COMESA Competition Regulations of 2004.

³⁵⁵ Article 7(2)(d)- (g) of COMESA Competition Regulations of 2004.

³⁵⁶ Article 3 of the COMESA Regulations provides, *inter alia*, that the Regulations shall apply to all economic activities having an effect within the Common Market.

competition as a guideline because it had extra territorial application and the Competition Commission implement regional competition in every Member State.

5.5.6 Conclusion

As abovementioned the regional competition regulatory framework of SADC, will benefit Member States. Generally, the core rationale for a regional competition law extends to incorporate the detrimental impact of anti-competitive practices on the trade liberalization commitments made by the members to achieve free trade. Further, the formation of a common integrated market could be the member's goal in eliminating trade barriers. Apart from reducing cross-border anti-competitive practices, there are other benefits that come with a regional competition regulatory framework such as: joint enforcement and resources, legal certainty, broader jurisdiction and the formal cooperation of a regional competition regulatory framework.

As abovementioned the COMESA Competition Regulation is used a comparative to SADC because it is legally binding and can help SADC with the guideline to implement hard law to regulate export cartels. Mainly the extraterritorial jurisdiction can regulate export cartels more efficiently. The following chapter concludes the study and provide recommendations.

CHAPTER SIX

CONCLUSION

6.1 Recap of study objectives

Globalisation has caused the interdependence of disciplines because competition law is a combination between law and economics. The first objective was to show the link between trade and competition law. South Africa is one of the largest exports in SADC and an economic power, which means a cartel in SA will affect SADC countries. Thus, international trade is concerned about open market and deeper integration, while competition law facilitates for such to happen equally. This can be viewed as Most favoured nation rule according to GATT because it advocates for market access and reasonable prices.

The second objective is the effect of export cartels. Irrespective of South Africa always fighting against *per se* cartels, the allowed export cartels to be exempted as the main purpose to achieve the socio economic goals. This is criticised because competition law no longer fights against anticompetitive practices but, it protects those practices from the Act itself. South Africa has two cases of export cartels so far. Thus, the effects are felt by the neighbouring countries of which they have weak institutional capacities. For instance, in the Mining supply cartel, the CCSA uncovered this mining cartel of the following companies: e Aveng Africa's Duraset; RSC Ekusasa Mining; Dywidag-Systems International (DSI); and Videx Wire Products. They supplied mining roof bolts, which are used to prevent cave-ins in underground mines, and they supply throughout SADC. They admitted that they colluded on agreements to allocate customers, product and tenders. Thus, they applied for a leniency application on 26 September 2008. De Beers, Gold Fields, Harmony, Anglo Platinum, Lonmin and Sasol Mining were among the mining houses that bought roof bolts from the companies. However, none of the SADC countries investigated similar or related cartels. Botswana, Namibia, Zambia and Zimbabwe have mining and related industries, which import mining related components from or through South African agents. This shows that the consumers are the only ones left to suffer and promotes an unequal benefits fi being in a trade area. Furthermore, it shows that export cartels have spill over effects in the country of origin.

The third objective was to examine the SADC cooperation model, since export cartels, can be regulated effectively at the regional level. However, the voluntary nature of the cooperation model proves to be insufficient and calls for a supranational model.

6.2 Summary of study

SADC established a free trade area by eliminating trade barriers on substantially all trade. However, the more tariff wall has been removed, the more the importance of regional competition policy has become apparent. It is evident that trade liberalisation has broadened the scope of competition law and policy beyond national borders. Cartels are no longer a domestic issue but an international and regional concern. Such are referred to as export cartels.

These are cartels, exempted from the domestic competition law because they are directed at export activities. Other scholars believe that export cartels should exist due to strategic trade policy, it enables SMEs to compete, effectively against established MNCs. Well, others believe that export cartels may have spill over effects in the markets of origin, they promote a ‘beggar-thy-neighbour’ effect on the importing countries and amount to differential treatment of cartel conduct, which although deemed illegal within the country of origin, are nonetheless, allowed in another jurisdiction.

They receive a more subdued treatment because of the following reasons. Firstly, these export cartels have no impact in their country of origin, meaning that the NCAs of their home country will have to interest to investigate and prosecute them. Secondly, the target country that bear the adverse impact if export cartels may have difficulties in, assuming jurisdiction over the cartel and gathering evidence of the export cartel abroad. Thirdly, political pressure plays a role in dissuading NCAs of the importing from conducting investigations. Thus, export cartels call for possible collaboration within SADC.

In this research the call for collaborations to deal with export cartels effectively, the SADC region was used. It developed a SADC declaration to overcome cartels and other anticompetitive practices in the region. Unfortunately, the cooperation model has experienced several challenges due to the absence or inefficient competition laws in some countries. Furthermore, challenges of the cooperation model included: lack of coordination, lack of harmonised laws, constraints of the exchange confidential information and the voluntary and nonbinding nature of cooperation.

The informal cooperation model in SADC region it does not substantively regulate cartel because it is voluntary in nature and non-binding. It is proposed that SADC should develop a regional competition regulatory framework for a joint enforcement, capacity and resources.

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

The main recommendation at present is that SADC should establish a distinct substantive law for dealing with anticompetitive practices as they affect trade between Member States. In addition, a central authority should be empowered to conduct investigations, enforce actions and assess and levy penalties.

6.2 Recommendations

Leniency policies play a crucial role in the fight against cartels. As can be recalled, leniency policies are a process through which firms could approach CAs to “confess” their involvement in cartel conduct, by providing enough information that will enable a CA to launch an investigation, and/or make a positive finding of a cartel infringement. In exchange, the firm will be granted total immunity from administrative penalties, or a reduction thereof. It allows NCAs or even RCAs, to obtain insider evidence and information relating to cartel infringements, that they will have no access to if they didn’t confess. Thus, when SADC, implement the regional competition law must include leniency policy and further encourage all member states to include then in their domestic laws.

Settlement procedures are referred to as consent orders in South Africa, are utilised to being speedier conclusions to investigations, which are beneficial to CAs. They result in efficient allocation of resources in enforcement procedures, increase enforcement activities and ensure expedient outcomes. Thus, to avoid lengthy legal proceedings, which sometimes are influence by political pressure, SADC can make use of these when they develop a regional competition law. Currently to avoid conflict between member countries with regards to export cartels, they can enter to settlement procedures to avoid conflict with other countries who have exempted export cartel.

Criminalisation of cartel conduct in SADC will be a valuable solution because it increases the deterrent effect of enforcement mechanisms, to visit personal consequences on those corporate officers, or persons in management, who engage, or cause the firm to engage, in the prohibited conduct. However, SADC there is still a long way off from being regarded as capable of criminalising cartel conduct. This is due to members are still facing difficulties in administrative enforcement of their domestic and regional competition laws.

As it has been discussed, SADC uses decentralised approach of regional competition law, which is non-binding. Thus, a change to legally binding competition law, will remove many of the constraints to regulate export cartels. For instance, of a country prosecuting exempted export cartel, it can be brought to the regional competition agencies. They will be no jurisdictional hurdles and importing country will have to adhere to its regional commitment and provide information where necessary.

6.4 Conclusion

In the final analysis, one thing that is pertinent with an ever-increasing globalised economy, the effects of anticompetitive conduct in one jurisdiction may affect another jurisdiction. Thus, export cartels which are exempted in South Africa, in one way or another they do affect the South African economy. RECs make provisions for formal enforcement collaborations concerning cross border cartels; however, this has not been utilised. Thus, a regional regulatory competition framework in SADC is the solution to deal with cartels effectively.

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