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COMPETITION POLICY, TRADE AND DEVELOPMENT IN THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA)

THE RELEVANCE OF REGIONAL INTEGRATION,
INTERNATIONAL COOPERATION AND
THE CONTRIBUTION OF COMPETITION POLICY
TO DEVELOPMENT IN COMESA COUNTRIES

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REGIONAL SEMINAR OF COMPETITION POLICY, TRADE AND DEVELOPMENT

***The Relevance of Regional Integration, International Cooperation and the Contribution of Competition Policy to Development in the Common Market for Eastern and Southern African Countries* (COMESA)**

Papers presented at the Regional COMESA Seminar
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A. SUBSTANTIVE CONTRIBUTIONS

Trade and competition policy in the framework of African Countries

By the Economic Commission for Africa

Background Pape

SECTION I

Introduction

The globalization and liberalization of the world economy have brought to the forefront the debate on the issues of fair competition in international trade. The opening up of economies and markets to inward foreign direct (FDI) and other forms of participation by transnational corporations (TNCs) can contribute directly towards increasing the of host country markets in that these markets can now be entered by firms from other countries by establishing affiliates that produce goods and services for sale within the host country and thereby compete with domestic firms[1]. Furthermore, TNCs may be better able than domestic firms in a host country to overcome some of the cost-related barriers to entry that limit the number of firms in some industries and thereby result in the collapse of the domestic based industries.

The liberalization of foreign direct investment regimes can lead to contestability of national markets for goods and services, since it means that foreign firms are now free to establish operations in the host country and compete at a level playing field with domestic firms. The entry of TNCs can therefore influence the structure of host country markets that evolve for the products in which they operate. The rise of transnational corporations in international production and trade has given rise to fears of possible concentration of market power in the hands of these entities and also the possibility of formation of "international cartels." Furthermore, the globalization and liberalization of world trade has also given rise to a new problem for developing countries: that of dumping excess outputs of subsidized products produced in the developed countries on the markets of developing countries. This development threatens to kill basic manufacturing in developing countries.

Foreign direct investment into developing countries and transitional economies has usually had extensive effects in either increasing or reducing competition, as well as in increasing efficiency, in those product markets where it concentrates. The need, therefore, to control "restrictive business practices" is generally acknowledged. Countries have often adopted competition laws in order to avoid the development of concentrated market structures and to promote consumer welfare. Nonetheless, it is acknowledged that while adhering to universally valid principles, competition policy should be applied with flexibility in the light of specific circumstances of individual countries, and taking into account the need to balance "consumer welfare" and "efficiency considerations" as well as the need to win the confidence of the public and the business community.

There is growing realization that anti-competitive practices can have a negative influence on international trade. The challenge faced by developed and developing countries alike is to introduce national policies that will promote competition. A firm's competitiveness is essentially a function of the domestic economic environment in which it operates. However, the deepening structural integration of the world economy and the burgeoning of alliance capitalism are widening the geographical scope for creating or augmenting firm-specific competencies and learning experiences[2] Several case studies from both developed and developing countries indicate that trade competition is the prime motivation for enterprises to cut waste, improve production parameters through research and development (R&D) and innovation, and allocate resources more efficiently in response to market opportunities or threats. The other market structures that may exist in a country include: monopoly, monopolistic competition and oligopoly.[3]

The basic premise for a country adopting competition policy and law is that it will give rise to a more efficient allocation and utilization of resources and promote consumer welfare through "competitive price" for goods and services. In a "perfectly competitive market structure" there are many, many buyers and sellers and each firm produces a good that is identical to that produced by other firms (Alan Hochstein, 1993). The conditions needed for

[1] United Nations Conference on Trade and Development (UNCTAD): World Investment Report: Transnational Corporations, Market Structure and Competition, 1997, pp. 134-135

[2] John H. Dunning, the Geographical Sources of the Competitiveness of Firms; TNC, December 1996.

[3] A monopoly market structure is one in which there are many, many buyers, but only firm selling the product that has very few close subsidies; an oligopolistic market structure is one in which there are many, many buyers, but only a few sellers and if the firms in the industry produces a standardized (homogenous) product the market is called "pure oligopoly" and if their product is more heterogeneous, it is called a " differentiated oligopoly". See Alan Hochstein: Microeconomics, An Advanced Introduction, Thomposon Educational Publishing Inc., 1993. It is the desire by countries to minimize monopolistic and oligopolistic market structures that provides the impetus for adopting competition policy and law.

such a market structure to prevail include: the existence of a market price that is charged by all firms in the market; every buyer has to be perfectly knowledgeable as to the products produced by each firm and the selling price of each firm's output; entry and exit from the market should not be restricted; and any firm considering entry can do so and should be able to sell as much as it can at the going market price. This is indeed, the ideal situation that would ensure that "competitive prices" prevail.

In order to improve competitiveness of their economies, many African countries have embarked on economic reforms, and in many cases this has entailed a shift towards a "market eocnomy". These reforms have often not only involved decontrol of prices, but also liberalization of foreign exchange markets and movement towards market determined exchange rates and interest rates, privatization of state owned enterprises, and reduced government intervention in private sector economic activity.

The need for African countries to improve competitiveness of their economies in order to effectively participate in a globalizing and liberalizing world economy is now fully recognized. However, over-facile assumptions that deregulation, particularly trade liberalization, will always lead to more competition should be avoided. Trade liberalization does indeed often lead to greater competition, but not always because products in some sectors may not be tradeable (particularly, services). The reasons some commodities may not be tradeable may include: high -transport costs, shortage of foreign exchange, foreclosure of distribution channels, and anti-competitive practices by foreign exporters.

The aim of competition policy should be to ensure that the benefits of the removal of governmental restrictions are not reduced by private restriction upon competition.

Countries can promote competitiveness of their national economics by ensuring that firms do not indulge in "restrictive business practices", public enterprises do not crowd out the private sector, and government policies do not bestow monopolistic or oligopolistic powers on certain firms and also do not reward rent-seeking enterprises at the expense of productive investment. Government policies which may contribute to anti-competitive behaviour by firms may include: restrictive entry to certain industries; bestowing monopoly rights to certain firms; selective allocation of foreign exchange and credit rationing; multiple exchange rates and interest rates; and restrictive marketing arrangements for certain products and inputs, especially through the creation of marketing boards.

African countries have made significant progress to liberalize their economies and improve competitiveness of these economies. Many have eliminated and/or reduced price controls on a range of products and inputs, except in some cases for strategic commodities such as fuel. A number have also liberalized their foreign exchange markets and moved to remove exchange controls for current account transactions and shifted to market-based exchange rate regimes. Credit rationing and allocation have also been eliminated in a number of countries and some African countries have moved to market-determined interest rates.

A number of African countries have also made significant efforts in the more difficult areas of "privatization of public enterprises" and in dismantling monopoly power of "marketing boards" in the purchase and marketing of agricultural products and inputs. The belief of many African countries at the advent of independence was that public enterprises were an important channel for African Governments to "carve a stake" in African economies and to ensure some form of ownership of their economies. Accordingly, these enterprises were designed to play a pivotal role in the development process of African countries. Experience has shown that these good intentions have not been satisfactorily fulfilled as public enterprises became a serious burden on budgets of many African Governments and were crowding-out the private sector. Instead of contributing to development, many became centers of concentration of market power, with disastrous effects on competitiveness—of African economies. Privatization of public enterprises in Africa is therefore designed not only to improve efficiency of operation of these entities, but more importantly to unleash market forces which will result in a more efficient allocation and utilization of resources.

African countries in deciding on their competition policy and law ought to avoid over-emphasis on deregulation as a panacea to all the problems of African economies. It is essential also to emphasize "regulatory reform." African governments need indeed to disengage from direct intervention in economic activity and. from distorting competition, through the granting of exclusive rights, etc. Nonetheless, disengaging from direct intervention in economic activity does not absorb the government from its responsibility to act as the referee to ensure liberalized markets work properly and to assist enterprises through, information, training, and infrastructural development. Competition policy itself is a form of regulation.

The purpose of this paper is to contribute to the ongoing debate on competition policy and law, with particular focus on African economies. Section II will deal with the "conceptual framework of competition policy." Section III will highlight the 1mportance and the role of competition policy". Section IV will review both, the "evolution of competition policy and law" as it has emerged at the nation region and multilateral levels and "some African country experiences". Section V will deal with the "constraints on competition in Africa" and Section VI contains "concluding remarks".

A better understanding of existing competition policy and law in African countries will not only assist African countries to be better informed of the discussions taking place at the multilateral level, such as within the framework of UNCTAD and the WTO, but more importantly assist those countries that are in the process of adopting competition policy and law. The study is also intended to assist African countries in appreciating the importance of developing "open market structures" and avoiding "anti-competitive practices", elements essential for the development of a dynamic private sector.

SECTION II

The conceptual framework of competition policy

Competition in a market refers to rivalry among sellers and among buyers of goods or services; the sellers and buyers that can enter the contest constitute the market. The extent and nature of market competition is considered important in determining the performance of economic systems and under "static conditions" performance is judged in terms of efficiency which has two elements: technical efficiency which exists when the production and distribution of goods take place with minimum inputs, given technological constraints; and allocative efficiency, which exists when resources are allocated in the optimal manner.[4] The great majority of real world situations fall between "perfect competition" and "monopoly" and involve imperfect, but workable competition.[5]

Competition policy seeks to promote competition through the liberalization of governmental policies and measures where they unduly distort competition. Competition policy is also concerned with the enforcement of rules of the game to ensure that enterprises do not undertake restrictive business practices and many Governments have attempted to ensure incumbent firms do not take advantage of liberalization to "privatize" governmental restraints and bloc market entry.[6] Competition allows the market to reward good performance and penalize poor performance by producers. It encourages entrepreneurial activity, stimulates efficiency and market entry by new firms, and encourages production of a greater variety of products of good quality. Many governments have taken into account to ensure that the principles of competition policy are taken into account when developing and implementing other governmental policies.

Confusion may exist between "trade policy" and "competition policy", although competition policy may aim at making trade policy work better in a framework in which the principles of competition policy are adhered to. Competition policy authorities may have an advocacy role vis-à-vis trade authorities. This does not nonetheless, imply that the two policies are the same. Competition policy can make a substantial contribution to improved trading environment. In Africa, a major handicap for the development of African economies has been the poor infrastructure which has heightened the cost of both imports and exports. An inevitable solution to this problem is to try and find ways of reducing these transport costs. A possible solution would be to inject some form of competitiveness in this sector, through granting of concessions or selling off to the private sector ports, construction of roads, utilities, etc. Competition policy can help to work out what would be the best method of going about this, and also ensure that the private firms do not subsequently abuse their dominant positions and charge unduly high prices.

Discussions on Competition Policy and Law have tended to center on: identifying "common ground" in the approaches followed on different competition questions by Governments; exchange of views in areas where "identification of common ground" is more difficult, such as the role competition policy should play in the strengthening and improvement of economies of developing countries and countries in transition. The discussions in this regard have focused on, the development of the business community in those countries; identification and adoption of appropriate measures to help those countries that might be hampered by restrictive business practices (RBPs); the interface between competition policy, technological innovation and efficiency, the competition policy treatment of vertical restraints and abuses of dominant position; the competition policy treatment of exercise of intellectual property rights and of licenses of intellectual property rights and know-how. Furthermore, focus has also centred on analysis of differences in the scope of competition laws in individual sectors, in the light of the process of economic globalization and liberalization; and analysis of the effectiveness of enforcement of competition laws, including enforcement in cases of RBPs having effects in more than one country.[7]

(a) *National and international competitiveness*

Competition policy can be analyzed at two levels: the country level (firm competitiveness) and, at international level (cross-country competitiveness). Issues that are addressed in this paper are drawn from the notion of international competitiveness. As defined by the American Commission on Industrial Competitiveness, a country's competitiveness is the ability to produce goods and services that meet the test of international markets and simultaneously to maintain and expand the real income of its citizens (Tyson 1992; Ostry 1991).[8]

From the above definition, a country's competitiveness must be judged not only against its performance in the world market but also in terms of its capacity to sustain economic growth over a period of time. This is the reason why such countries as Germany, Japan, Korea, and several other East Asian economies appear as strong competitors.[9]At firm level, a firm is considered competitive if it is able to sustain earnings over time and can be viewed as a strong competitor if it is able to increase both its market share and. its earnings.[10]

Although to a large extent firm performance in the market place is what determines a country's overall economic strength, nonetheless, it also appears that certain national characteristics, such as: how human capital is used, the technical skills of the labour force, managerial

[4] United Nations Conference on Trade and Development (UNCTAD): Transnational Corporations, Market Structure and Competition, 1997.

[5] The 2 extremes of Perfect Competition and Monopolistic markets are respectively explained in para. 5 footnote 3.

[6] United Nations Conference on Trade and Development (UNCTAD): op cit.

[7] UNCTAD: "Review of All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restirctive Busness Practices: Strengthening the Implementation of the Set", document TD/RBP/CONF.4/2, May 1995.

[8] The World Bank, Trade, Technology and Competitiveness, (IDE Development Studies).

[9] The World Bank, Trade, Technology and Competitiveness.

[10] The World Bank, op. cit.

practices and government policies, do influence firms' ability to compete.[11]

In any given market, enterprises have a natural tendency to compete with each other. Under the incentive of competition, firms will be obliged to perform the best they can, in order to satisfy consumer needs. They will constantly try to guess those needs of the consumer through R&D and innovation. However, the preferred situation of any supplier in any market is to have a monopoly in order to maximize profits, using RBPs. Accordingly, through competition policy and competition law, governments; can ensure that these monopolistic tendencies do not translate into actual situations that retard competition in an economy.

Monopoly can exist for a number of reasons. It may arise as a result of investments requiring large outlays such those in electricity, water and telecommunications. These investments often huge investment resources that cannot be mobilized by require average individuals. Accordingly, in these sectors monopolies have often prevailed, although in recent years the private sector has been allowed to play a role. In other cases, monopolies have often emerged as a result of the State regulating entry into such sectors, the reasons often cited are strategic importance and security. However, by so doing, the State has tended to reduce or eliminate competition in such sectors.

Competitiveness should not simply be viewed as a country's ability to export or generate trade surpluses, as this can be brought about at least temporarily by means of artificially lowering the exchange rate and/or compressing domestic expenditures. Nor does it arise out of abundant cheap labour or natural resources. In summary, no simple definition of competitiveness would suffice. It also does not seem to depend on the level of productivity. Competitiveness is in fact, a multidimensional concept that embraces the ability to export, efficient use of factors of production and natural resources, and increasing productivity that ensures rising living standards of a nation.

SECTION III

The importance and role of competition policy

(a) *The importance of competition policy*

As traditional trade barriers are reduced and globalization progresses, markets tend to become more integrated and competition stiffer. The conclusion of the Uruguay Round (UR) trade negotiation reflects a willingness to adjust the multilateral trading system to these new realities of doing business globally. African countries are now compelled to face these realities and develop urgent responses to the great challenges posed by current global developments. The central feature of Africa's response must be the strengthening of national policies for increased international competitiveness and improved attractiveness to foreign direct investment (FDI).

The aim of a law concerning Competition is to promote economic efficiency and to protect freedom of competition and the competitive process. In a monopoly market the quantity of a good or service supplied will be less than that available in a market governed by freedom of competition and the competitive process, and the price charged may be higher than in a competitive market, or same but for product of inferior quality. In addition, since the level of production is lower than that observed where competition prevails, adverse effects on the level of employment ensue. From this standpoint monopolies are inefficient and detract from social well-being.[12]

The international trade system is nowadays concerned as much with domestic policies and measures of countries as with border measures. The effective application of competition policy would put African countries in a better position to fulfil their trading obligations under various bilateral and multilateral agreements, such as those of General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). However, a word of caution is necessary as regards adoption of competition policy and law by African countries. Wisdom would have it that African countries should opt for "*gradualism*" because of the "uncertainty" surrounding the possible impact implementation of "competition policy" at an international level would have on African economies. These concerns pertain to: the possibility that although trade competition could certainly lead to industrial restructuring and efficiency, there is also the possibility that it, could wipe out domestic industry in some African countries; and concerns that advanced countries may not necessarily be following the logic of competition, as has been the case of the Common Agricultural Policy of the European Union.

The importance of international trade and competition in the world market has progressively come to be acknowledged. There is hardly a country today that does not seek to be more closely integrated into the global economy, where the mobility of goods, services and capital has increased to a point unforeseen only two decades ago. However, it is also becoming clear that the ability to compete in the world market differs widely-across countries, industrial as well as developing. Notwithstanding the various disagreements, the competitiveness debate has had one important outcome: there is now a much greater appreciation of the critical role innovation and technological improvements play in the relative economic performance of countries.[13]

Competition policy encompasses the area commonly known as anti-trust or anti-monopoly law and practice as well as various micro-industrial policies affecting markets. Competition laws address essentially two areas: the conduct of business and the structure of economic markets (The World Bank, 1994). Competition policy prohibits conduct that either unfairly diminishes trade, reduces competition, or abuses a market-dominating position.

[11] The World Bank, op. cit.

[12] UNCTAD, Review of All Aspects of the Set of Multilaterally Agreed Equitable Principles for the Control of Restrictive Business Practices, TD/RBP/CONF.4/3, June 1995.

[13] The World Bank, Trade, Technology and Competitiveness.

Competition laws are essentially intended to counter both conduct policies, structural policies, and performance policies.

As for conduct policies, Competition law is intended to counter a number of elements, including:

(i) Horizontal restraints: That is, unilateral or collective actions weakening or restraining competition among firms in the same market;

(ii) Vertical restraints: That is, provisions in contracts between suppliers and their distributors (and retailers);

(iii) Enforcement standards. The existence of law is necessary, but not sufficient, to achieve the objectives of competition policy.

As regards, structural policies, competition laws aim to prevent transactions that would reduce the interdependence of competing suppliers (vertical integration) and increase concentration in market (horizontal integration). It deals specifically with:

(i) Merger control regulation: selectively prohibiting mergers that would substantially increase concentration in the market or restrain trade among suppliers;

(ii) Pre-merger notification: allows authorities to review proposed mergers prior to actualization, thereby making merger control administration more efficient;

(iii) Enforcement and remedial measures under merger control: designed to preventing the negative increased concentration effects of the merger.

Performance policies, which include basically administrative pricing by anti-trust authority, whereby the state compensates for lack of competition by dictating prices or output.This is usually applied to sectors that display significant natural monopoly characteristics.

Competition policy can also help to ensure that privatization of state-owned enterprises or government procurement are conducted in a pro-competitive manner, that granting of exclusive rights or subsidies are subjected to competition criteria, that intellectual property rights are not abused, and that the effects of trade liberalization are not reduced by foreclosure of distribution channels. The basic objective of competition policy in Africa should be to inculcate enterprises and the general public with a dynamic “competition culture.”

(b) *The role of competition policy in economic reforms*

Although there is broad consensus on the general direction institutional and policy reforms should take. The poor economic recovery in many Africa countries has to a large extent been attributed to “poor macroeconomic environment”, including the environment in which firms operate. Accordingly, calls have been made for African countries to intensify macroeconomic reforms in order to stimulate economic growth and promote international competitiveness (Williamson 1990).[14]

In most of the East Asian economies that are part of the “East Asian Miracle” (Hong Kong, Indonesia, Japan, the Republic of Korea, Malaysia, Singapore, Taiwan-China, and Thailand) government undertook a package of measures designed to promote economic growth. The East Asian countries success was based on a combination of factors, particularly the high saving rate, interacting with high levels of human capital accumulation, in a stable, market-oriented environment—but one with active government intervention—that was conducive to the transfer of technology (Joseph E. Stiglitz, 1996). The combinations of these policies, led those countries to accomplish three functions of growth: accumulation, efficient allocation, and rapid technological catch-up (Joseph E. Stiglitz, 1996).

The general aim from various country competition legislation is to control or eliminate restrictive agreements or arrangements among enterprises, or acquisition and/or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.

In most countries restrictive trade practices, on the one hand, generally refers to cooperation agreements between enterprises, monopolies and concentrations, mergers and takeovers, collusive tendering, and abuses of dominant, which are the practices set out in section C and D of the United Nations Restrictive Business Practices Set. Agreements fixing prices is among the most common forms of restrictive business practices, and irrespective of whether it involves goods or services, imports 1 or exports, is considered as *outright prohibition* in many countries.[15] On the other hand, certain cooperation agreements between enterprises can be authorized under particular circumstances. This apply particularly where such arrangement are designed to promote overall economic efficiency and/or the competitiveness of such enterprises vis-à-vis large enterprises, or to promote consumer welfare. In any event, it would be up to the Competition Authority to decide on the basis of an evaluation of agreements or arrangements. This is the case in Algeria (Article 9), Gabon (Article 10), Morocco (Article 7) and Kenya (Part II.5).

Competition issues are closely inter-related to the protection of consumer interests. Restrictive business practices affect the consumer either by way of higher prices or limitations on availability or choice of goods or services. In Africa most countries recognise the close interrelationship between competition policy and consumer protection and in some cases include sections covering unfair trade practices within their competition policy legislation.[16] This is in line with the United Nations General Assembly resolution on Consumer Protection in which comprehen-

[14] The World Bank, The East Asian miracle, 1993.

[15] This is the case of Algeria, Kenya, Gabon, Côte d’Ivoire, Morocco, South Africa and Tunisia.

[16] See for example Competition Policies of Côte d’Ivoire, Gabon and the Competition Framework in Malawi.

sive guidelines on this issue were adopted and distributed to appropriate bodies of individual States.[17]

In Gabon, for instance, competition law lays down measures devoted to the promotion and protection of consumed economic interest, along with standards for the safety and quality of consumer goods and services, distribution facilities for essential consumer goods and services.[18]

Entry of foreign firms as a consequence of the overall economic reform policy can inject competition into a host country market, particularly if the market has a limited number of domestic suppliers relative to its size prior to the foreign firm's entry. In such a situation, the process of competition could involve lower prices (especially if the foreign firm is more cost-efficient than local firms) or, as is more likely, product differentiation and advertising.[19] This could in turn involve the introduction of new products based on innovatory activity by the foreign firm involved. Entry of foreign firms can then be expected to improve the performance of the concerned industry and increase consumer welfare by lowering prices, improving product quality, increasing variety and introducing new products, and ultimately provide the development of the country, provided that the overall local market continue to function efficiently.

Foreign investment and ownership regimes are also important complement to trade policy and an element of the import competition framework. Import competition (free trade) provides for market access while foreign investment and ownership provides for market presence (foreign-owned domestic production). Indeed both increase competition. Direct market participation from foreign entities can be a powerful competition devise. Thus, it adds heterogeneity, brings newer technologies and vision, and it limits domestic advantages based on transportation and border related transactions costs and non-tradable factors. In addition, direct foreign investment allows the home country to retain most of the benefits of trade liberalization. Clear legislation, opening domestic market to foreign participation, recovery of foreign investment, and the absence of ownership restrictions, are all essential for an effective competition policy.[20] The objective is to facilitate the development of technological infrastructure and access to, and transfer of, foreign technology and to foster innovation.

In a broad sense, all the provisions of the Uruguay Round Agreements have a bearing upon competition since the encouragement of international competition is the basic rationale of trade liberalization. Since its birth in 1947 the General Agreement on Tariffs and Trade (GATT) has sought to liberalise world trade and provide a secure world trading system by preventing countries adopting protectionist policies as was the case during the inter-war period. This were achieved over the years through a series of rounds of complex negotiations aimed at strengthening the rules of international trade, lowering trade barriers, and expanding the sectoral coverage of the GATT's rules. The success of the GATT in lowering trade barriers and hence, increasing world trade can be seen from the fact that on the one hand, world trade (both export and imports) grew at an annual average rate of 6.5 per cent in the 1950s, 9.2 per cent in the 1960s, and reached phenomenal growth (expanding by over 20 per cent) during the 1970s.[21] The basic causes were a general economic upsurge as a result of the lowering of tariffs by the developed countries either unilaterally or through multilateral trade negotiations (MTNs) carried out under the auspices of the GATT.

On the other hand, the growth of trade decelerated significantly during the 1980s (6.0 per cent per annum) due to the so-called "new protectionism" in the developed countries. This was due to the slow down in economic growth and raise in unemployment since the mid-1970s. This gave rise to new forms of discriminatory trade practices, which often fell outside of the regular boundaries of the GATT. Important examples of this discriminatory trade practices are the non-tariff barriers (NTBs), which are not transparent in nature, the Multifibre Arrangement (MFA) which exclude textile and clothing from the gamut of the GATT, the evasion of the most-favoured-nation (MFN) treatment by formation of regional trading blocs and the unilateral granting of preferences by the OECD countries to the developing countries. These practices undermined GATT's basic objectives. Even worse, the system of "tariffs escalation" adopted by the developed countries according to the degree and the stage of processing (referred to as phenomenon of "cascading") has been harmful for the developing countries trying to diversify their exports.[22]

Section IV

The evolution of competition policy: some african country experiences

African countries have made significant strides to liberalize their trade regimes, although much still needs to be done in order for their economies to be effectively integrated into the global economy. The dilemma that continues to face these countries is to respond to the inherent inequities of the world trading system which basically arise from an asymmetrical distribution of economic power between the developed and developing countries.

(a) *The Legislative and Regulatory Framework for Competition Policy and Law*

There is no common rule for the elements of competition law that a country should adopt. The different com-

[17] General Assembly resolution 39/248 of 9 April 1985 on Consumer Protection.

[18] Règlement de la Concurrence au Gabon, Loi no. 5/89 du 6 juillet, 1989, Titre III, Articles 12-15.

[19] UNCTAD, World Investment Report 1997.

[20] The World Bank, The Interface of Trade, Investment and Competition Policies, Policy Research Working Paper no. 1393, December 1994.

[21] The World Bank, the Interface of Trade, Investment and Competition Policies, Policy Research Working Paper No. 1393, December 1994.

[22] The World Bank, op. cit.

petition laws enacted by African countries generally reflect the objectives such competition law is intended to achieve as well as the legal traditions of the countries concerned. Furthermore, such laws come under various titles such as: "Ordinance on Competition" in Algeria; "The Restrictive Trade Practices, Monopolies and Price Control Act" in Kenya, "Maintenance and Promotion of Competition Act" in South Africa, "Decree on the Regulation and Control of Prices and Merchandise Supply and Sells" in Morocco, "The Competition and Fair Trading Act" in Zambia, "Law on Consumer Protection" in Tunisia, "Law on Competition" in Côte d'Ivoire and "Competition Regulation" in Gabon.

Nonetheless, the "main objectives" of competition policy and law in African countries appear to be similar, although stated differently. In Algeria, the objectives of this law have been stated as: to organize and promote free and fear markets; to promote economic efficiency, to maximize consumer welfare; and to encourage transparency in trade practices. In Kenya, they have been stated as: to encourage competition; prohibiting restrictive trade practices; controlling/regulating the activities of monopolies; controlling the concentration of economic power; controlling of prices of some commodities believed to be essential to the economic development and the welfare of low income consumers. In South Africa, the objectives of competition policy and law have been stated as: to provide for the maintenance and promotion of competition in the economy; to prevent or control restrictive practices, acquisitions and monopoly situations, and for matters connected therewith (see Annex).

The "main elements and focus" of competition policy and law in African countries relate to: restrictive business practices; monopolies and concentration of economic power; mergers and takeovers; enforcement machinery; and extra-territorial coverage. As regards "restrictive business practices" competition policy and law has tended to focus on issues of limitation of access to markets; limitations to free pricing; market allocation; collusive tendering; customer discrimination; discriminatory discounting; vertical price collusion; horizontal collusion on conditions of supply; and horizontal collusion on market sharing. (see Annex). In respect of "monopolies and concentration of economic power" the competition laws enacted in African countries have focused on: unjustified actions to sell; customer discrimination; tied purchasing conditions; resale price maintenance; abusing dominant market position; and unwarranted concentration of economic power.

On the issue of "mergers and takeovers", in Côte d'Ivoire mergers and takeovers require prior consultation with the Competition Authority and in Kenya and South Africa. such mergers/takeovers are regulated/controlled on a case-by-case basis. In Zambia, mergers between two or more independent enterprises engaged in manufacturing or distribution require approval. As regards "enforcement mechanisms" for non-compliance with competition policy and law, a number of African countries introduced into this legislation ways of exacting penalties for defaulters. Type of punitive measures include: fine, in proportion to gravity and clear-cut illegality of offence or in relation to the illicit gain achieved by the challenged activity; imprisonment, in cases of major violations involving flagrant and intentional breach of the law, or of an enforcement decree, by a natural person; restitution to injured consumer; and suspension and/or termination, in regard to certain mergers, acquisitions or restrictive contract.[23] As regards "extra-territorial coverage" of these laws, in a number of African countries these relate to restrictive business practices committed in the country concerned. However, in Côte d'Ivoire, the law has taken into account the impact of globalization of the world economy as well as regional arrangements on the behaviour of firms.

Since the mid 1980s, most of the African economies have been undertaking trade liberalization initiatives in order to benefit from the rapidly globalizing market. This wave of liberalization represents an effective shift in development strategy from an inward-oriented, import-substituting, framework designed strategically to reduce dependence on the outer world, to an outward-oriented export-promoting framework designed to create a virtuous cycle of higher, integration and faster growth with expanded opportunities. Before 1985, trade regimes in sub-Saharan Africa were characterized by the severity of quantitative restrictions covering virtually all categories of commodities and by high tariff rates. Most countries including Ghana, Nigeria and Tanzania, initiated their liberalization by attempting to reform the foreign exchange markets to correct highly overvalued currencies, as manifested in high black market premia. These countries accomplished sustained real devaluation of their currencies by the mid 1980s (see e. g., World Bank, 1996) and both the rate of improvement in price distortions and the rate of trade integration were positive. CFA members, however, failed to devalue their currency during the 1980s or to carry out other trade reforms, only to realize the need for a substantial devaluation in 1994.

(b) *Some Country Experiences*

As part of the general trend towards the adoption or reform of competition legislation, several African countries including Algeria, Cameroon, Côte d'Ivoire, Gabon, Kenya, Morocco, Senegal, South Africa, Tunisia, Zambia, and Zimbabwe have become relatively open trade regimes whereby introducing competition law and establishing competition authority. In other countries such as Ghana, Egypt and Malawi competition legislation are in preparation.

In Kenya, the Restrictive Trade Practices, Monopolies and Price Control Act was introduced in 1988. This law was introduced to curb unfair market prices, ensure that consumer welfare is not violated and reduce direct Government controls and regulations in all economic activities within the country.[24] The main objective of the Act is to, encourage competition in Kenyan economy by: prohibiting Restrictive Trade Practices; controlling/regulating the activities of monopolies controlling the concentration of economic power; controlling of prices of some commodities believed to be essential to economic development and the welfare of low income consumers.

[23] See for example Competition Policy of Algeria, Côte d'Ivoire, Gabon, Kenya, South Africa and Zambia.

[24] Kenya, The Restrictive Trade Practices, Monopolies and Price Control Act, 1988.

In Malawi, the Government has adopted a Competition Policy Framework. By this Framework, the Government is trying to adopt a competition policy and law aimed at further economic liberalisation, leading to greater competitiveness in domestic markets. The Government also intends, by this law, to relinquish a number of means by which it previously influenced private sector operators, notably business licensing, price controls, and exchange controls on current account items. The major goals of competition policy include the protection of consumer interests and the promotion of economic efficiency. The Government envisages to achieve these goals essentially through lowering barriers to entry and eliminating restrictive business practices. Three primary areas have been targeted including business behaviour calculated to eliminate or reduce competition; market structure which permit abuse by an entity in a position of market power; and government legislation, both existing and proposed, which may impact on the operation of the free market in the country. In addition, a Competition Policy Tribunal is expected to be established to resolve contentious issues in certain specific fields. The major components of economic liberalisation which are expected to contribute to increased competitiveness in the economy are:

(i) the removal of regulatory controls and business licensing legislation which inhibited entry of new firms into the market;

(ii) the liberalisation of the financial sector through introduction of market-based interest and exchange rates and foreign exchange allocations. Barriers to entry into the banking system have been relaxed so as to increase competition in the provision of financial services;

(iii) the removal of import licensing and the rationalisation of the custom tariff as well as the removal of domestic price controls;

(iv) the review of investment incentives to encourage new market entrants; and

(v) the privatisation of public enterprises with among other, the objectives of promoting economic efficiency, the encouragement of competition and the reduction of monopoly power.

In the Republic of Zambia, the Competition and Fair Trading Act (Act No. 18 of 1994), is the only legislation in Zambia giving the courts jurisdiction to review a code of conduct which is “anti-competitive” or “unfair”. The Act considers anti-competitive trade practices as “any category of agreements, decisions and practices which have as their object the prevention, restriction or distortion of competition to an appreciable extent in Zambia”. Part II of the Act establishes an enforcement machinery: The Zambian Competition Commission. This Commission is responsible for monitoring; controlling and prohibiting acts or behaviour which are likely to adversely affect competition and fair trading in the country. The Commission has power to carry out, on its own initiative or at the request any person investigations in relation to the conduct proscribed by the Act.

The Commission has an Executive Director who has powers to seek from a court a warrant granting: authority to enter any premises; and access to or production of any books, accounts or other documents relating to the trade or business of any person and the taking of copies of any such books account or other documents.[25]

The Republic of South Africa has a long history on Competition Legislation going as far back as 1949. While consumer protection is not a facet of the current (1997) competition law, however, other Acts (e.g. The Harmful Business Practices Act, 1988) supply a framework similar in scope and application to the current Competition Act to address consumer related business practices. The main objectives of the current competition legislation are: to provide for the maintenance and promotion of competition in the economy for the prevention or control of restrictive practices, acquisitions and monopoly situations; and for matters connected therewith.[26]

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[25] Zambia, The Competition and Fair Trading Act, 1994: Part IV, 14 (1)

[26] South Africa, Maintenance and Promotion of Competition Act No. 96 of 1979

ECONOMIC LIBERALIZATION IN EGYPT

Prior to the Uruguay Round (UR), Egypt embarked on a comprehensive shift away from a centralized state toward a market-based, outward-oriented economy, under the guidance of the High Ministerial Economic Reform Committee. These reforms focused essentially on the following area, macroeconomic stabilization, trade liberalization, deregulation of price controls and other administrative practices, reorganization of public enterprises and privatization, and the creation of a Social Fund for Development.

As a main exporter of cotton, rice, citrus fruits, onions and potatoes, a strategy for agriculture was also worked out together with the government, the FAO, the UNDP, UNEP and the WFP. The main objectives of the strategy includes to:

- further deepen the liberalization and privatization of the agricultural sector;
- take into consideration the local, regional and international environment;
- conserve, improve and develop resources with optimal utilization;

achieve efficiency, equity combined wit environmental awareness;

- expand exports where there is a comparative advantage and import products where there is no comparative advantage;
- improve opportunities for gainful employment in the agricultural sector.

At the time of the finalization of Uruguay Round negotiations, Egypt committed to bind tariff rates on all items and tariff non-tariff measures on agricultural products according to the terms of the UR, with a compensation mechanism. Egypt has also undertaken tremendous effort to strengthen and modernize legislation in the intellectual property rights area. A new law has been drafted to amend the old paten law of 1954 to conform to the terms of the TRIPs agreement, in particular to ensure protection for rights holders. Progresses are also been made in improving copyright protection. Importantly, computer programs are now considered as literary works with a period of protection of 50 years. This conforms to the UR agreement.

Source: CIDA, Africa and the Uruguay Round, January 1996

SECTION V

Constraints on competition policy in Africa

Responding to the challenges posed by globalization and liberalization requires major adjustments in economic policies, resource allocation and production structure in African countries. The world economy is increasingly being shaped by the processes of globalization and liberalization. These are interrelated and multifaceted processes encompassing the growth of international trade in goods and services and capital flows, the global integration of production processes, the dominance of market-oriented economic policies throughout the world, and a significant degree of institutional harmonization between countries in respect of trade, investment and other policies mediated through multilateral and regional institutions. Globalization and liberalization are processes that are unlikely to be reversed in the foreseeable future and have profound implications for developing countries, including African countries, in terms of their in the world economy, their development prospects and the nature of their economic policies (Onitiri, 1995). With the new trends towards globalization and liberalization, many developing countries risk being marginalized unless they can adapt and adjust to the new competitive international environment.

(a) *Low participation in multilateral trading negotiations*

Africa’s participation at Multilateral Trade Negotiations (MTNs) that have constituted the landmark of international trade relations has been marginal. Africa's participation in the Uruguay Round of negotiations leading up to the establishment of the World Trade Organization was peripheral. Many African countries have as yet to join the World Trade Organization (only thirty-two countries had joined by the beginning of 1997). Furthermore, even those that have joined very few maintain delegations at the Headquarters of the GATT/WTO in Geneva to be able to effectively follow the discussions held on a daily basis within the framework of the WTO. As a consequence very few sub-Saharan African countries participated in the Uruguay Round of Multilateral Trade Negotiations (UR), or paid attention to the formal negotiating process. The bargaining power of the African countries as a group was therefore not strong.[27]

For many African countries, the concepts of competition are not only new, but also very complex. Introduction mechanisms for enforcement of competition policy, legislation and Competition Authority, has associated costs, which cannot be born by many African countries particularly at this stage of budgetary austerity and implementation of public sector reforms by many of these countries.

The correct application of such new and complex concepts needs some time. First, a learning process with respect to business and consumer behaviour is essential. Second, training to change mentalities and to create a "culture of competition" is also necessary. Moreover, the legislative process itself is, by definition, an. evolutionary one, therefore African countries need to go through an evolutionary process of amending and improving their legislation in general and their competition laws, in particular.

(b) *Lack of resources*

African countries, in parallel with the liberalization of their trade regimes under structural adjustment programmes, are faced with the difficult and challenging task of institutionalizing and upgrading their trade legislation aimed at implementing the WTO Agreements, and developing a regulatory framework that will ensure evolution of market-based economies. In addition, national laws and regulations in several African countries may not yet have been synchronized with basic provisions of the WTO Agreements.

African countries have been implementing reform programmes with a view to liberalizing their economies and in order to integrate these economies into the world economy. Many of these countries hope to benefit from the strengthening of the multilateral trading system and expansion of world trade. A number of these countries are now in the process of trying to bring their trade policies in line with demands of a globalizing and liberalizing world economy. Nevertheless, translating trade rights and obligations under multilateral agreements into concrete trade advantages requires coordinated actions at the country, sub-regional and regional levels between African governments, the private sector and business community as well as regional organizations.

It can be observed that in industrialized and some advanced developing countries preparations for international trade negotiations is an interactive process between government, the private sector, intergovernmental and non-governmental institutions as well as specialized research institutions. This is done in order to arrive at consensus on the issues to be discussed and more importantly to arrive at a country position.

In many African countries, this culture and process of consultation in advance of important international negotiations has still to develop and lack of resources also imposes constraints on developing appropriate institutional mechanisms needed to advance the process. Many of these countries find themselves poorly equipped in terms of human and financial resources to enable them to adequately prepare technical background studies and establish peer working Groups needed to prepare them for international trade negotiations.[28]

(c) *Persistence of natural monopolies*

In most economies, there is a set of monopolies that have emerged as result of economies of scale and the huge sunk-in costs needed to operate in such industries. In African countries such monopolies, often called "natural monopolies" are prevalent and concentrated in a number of important sectors. There is a grouping of "strategic industries" for which arguments are made for the need direct or indirect state intervention. This category often includes water supply, the electricity power, primary health care, primary education, postal service, etc. Technological change and the advance of the private sector have reduced the irrelevancy of the arguments for government intervention in what are called "natural monopolies". The private sector has been found to operate as efficiently as the public sector in some of the sectors, and in some cases even better. However, political patronage that control of public enterprises gives to governments in power has proven a major stumbling bloc to privatization of public enterprises in Africa as well as to the elimination of natural monopolies.

SECTION VI

Concluding Remarks

The globalization and liberalization of the world economy, in terms of production processes, marketing and distribution as we'd as technological advances, has not only opened up opportunities but also brought along tremendous challenges in terms of ensuring "fair competition" in such liberalized markets. Furthermore, the end of the cold war and the shift to market-oriented type of economic structures, not only in the formerly central planned economies, but also in many others, has also heightened the debate on the possibility of "state monopolies" giving way to "private monopolies" as many governments reduce their direct intervention in economic activity in the context of "economic reforms."

The challenges that face the global economy is how to ensure that globalization and liberalization produces a "Pareto optimal" situation in terms of increasing global welfare. In such a situation promoting competition and a "level playing field" in international production and trade becomes an imperative. Reducing restrictive business practices, ensuring that mergers and takeovers do not result in undue concentration of economic power, and minimizing dumping practices are some of the objectives and targets of competition policy and law.

[27] The World Bank, the Impact of the Uruguay Round on Africa, Discussion Papers no. 311.

[28] The World Bank, Trade, Technology and Competitiveness.

Competition in a market refers to rivalry among sellers and among buyers of goods or services. It also refers to a firm's ability to produce goods and services that meet the test of international markets and simultaneously increase its earnings and market share over time. Competition can be analyzed at national and international levels.

At national level (firm competitiveness), competition deals mainly with such government actions as: adoption of competition policy and law and/or its improvement, effective enforcement of appropriate legislation, and the implementation of judicial and administrative procedures for the control of Restrictive Business Practices (RBPs). This involves basically issues of monopolies and concentration of economic power; acquisitions, mergers and takeover, the enforcement mechanism and extra-territorial coverage.

At international level, competition is related to a code of conduct designed to promote competitiveness in various markets: the set of multilaterally agreed principles for the control of RBPs. This calls basically for the establishment of consultation procedures whereby a State may request consultation with other States in regard to issues concerning the control of RBPs. The main issues of competition policy and law at international level and within the framework of GATT/WTO are related to: safeguards agreements, subsidies, antidumping, antitrust, trade-related aspects of intellectual property rights (TRIPS), and trade-related investment measures (TRIMS).

Lessons derived from available African country case studies suggest that as of 31 December 1996, only 17 per cent of African countries had adopted Competition Policy and Law.[29] The main stated objectives of these Competition Policies and Laws are basically similar, although they are stated differently. In most of these legislations, extra-territorial approach is not properly reflected and virtually all of them do not include such aspects as antidumping, antitrust, subsidies on production, and non-tariff barriers to competition and trade. These are indeed some of the issues that are likely to be at the center of the debate on a possible multilateral agreement on competition policy and law. Furthermore, all these aspects affect considerably prices of traded and non-traded goods and thereby the competitiveness of products.

It has been noted that many of the competition policy and laws enacted by African countries tend to emphasize competition on product markets (goods and services) and not on factor markets (labour, technology, capital). Furthermore, issues of competition in the context of privatization of state-owned enterprises which is currently taking place in the framework of "economic reforms" has not been given due consideration, and its implications on economic concentration.

Given the current stage of development of trade in Africa, the challenges of adopting an appropriate competition policy and law are indeed formidable because of the dangers inherent in opening up economies which have hitherto been relatively closed. The need for African economies to be integrated into the world economy is not any more an issue. However, the pace at which this should be done is. Some have called for African countries to adopt a gradualistic approach in the implementation of Competition Policy and Law. The choice for each country will be dictated by the state and structure of development of the economy, the institutional infrastructure available as well as the administrative machinery for enforcement of the legislation enacted to promote competition.

In the context of developing a multilateral agreement on competition policy and law, the extent to which the final agreement will reflect African countries views on the issue will to a large extent depend on their active participation in the WTO activities. This is essential if Africa is to benefit from the strengthening of the WTO. This requires constant involvement by these countries in the work of WTO councils, committees, and working groups, as well as in the day-to-day negotiations that take place on some of these issues. This, in turn, requires more resources being allocated by African countries to follow-up on WTO issues, professional back-up and improved coordination between different governmental agencies.

This study has tried to provide African countries with some understanding of the issues of Competition Policy and Law within the framework of the international debate currently taking place. More importantly, the study has been undertaken to assist those countries that are in the process of adopting competition policy and law with some insights and lessons that can be derived from other African countries. Furthermore, as the debate on the issue of how to promote competition in the world economy within the framework of the increased momentum towards globalization and liberalization intensifies, African countries need to be abreast of the issues that are likely to occupy center stage in this debate. Indeed these issues will include: safeguards agreements, subsidies, antidumping, antitrust, trade-related aspects of intellectual property fights (TRIPS), and trade-related investment measures (TRIMS).

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[29] Algeria, Cameroon, Côte d'Ivoire, Gabon, Kenya, Morocco, Senegal, South Africa, Runisia and Zambia.

ANNEX

Main features of African competition Policy and Law

	Algeria	*Côte d'Ivoire*	*Gabon*	*Kenya*	*South Africa*	*Zambia*
1. Main objectives of competition law and policy			—To organize and promote free and fear competition exercise; —To maximize consumer welfare; —To encourage transparency in trade practices.	—To improve enterprise's institutional environment; —To encourage and promote free trade and transparency; —To create conditions for the development of national enterprises.	—To provide for the maintenance and promotion of competition in the economy; —To prevent or control restrictive practices, acquisitions and monopoly situations, and for matters connected therewith.	—To encourage competition in the economy by prohibiting anticompetitive trade practices: —To regulate monopolies and concentrations of economic power; —To protect consumer welfare; —To strengthen the efficiency of production and distribution of goods and services; —To secure the best possible conditions for the freedom of trade; —To expand the base of enterpreneurship; —To provide for matters connected with or incidental to the foregoing.
2. Main elements of the competition						
2.1 Restrictive Business Practices	—Limitation of access to markets; —Limition and/or control of producers, suppliers or investors; —Market allocation; —Limitations on free pricing	—Coordinated activities among economic entities which restrict or impede competition; —Collusive tendering; —Refusal or discrimination in supply; —Limiting or restricting the terms and conditions of sale or supply of goods and services	—Limitation of access to market of restrictions on fee competition; —Market or customer allocation agreement; —Limitations of free pricing; —Limitations or controls of suppliers or investors	—Price cooperation or collusion; —Resale price maintenance; —Refusal to sell/deal; —Discriminatory discountring; —Customer discrimination; —Market allocation	—Resale price maintenance; —Vertical price collusion; —Horizontal price collusion; —Horizontal collusion on conditions of supply; —Horizontal collusion on market sharing	—Trade agreement fixing prices; —Collusive tendering; —Market customer allocation; —Collective actions to enforce agreements; —Concerted refusal to supply goods and services to potential purchasers.
2.2 Monopolies and cencerntration of economic power	—Unjustified action to sell; —Customer discrimination —Tied-purchasing condition; —Resale price maintenance.	—Abusing dominant position; —Concentration of economic power; —Limitations of access to market or restrictions on free competition.	No clear definition, but the law refers to "Any agreement, arrangement, explicit or implicit understanding or method of trading which: —limits access to the market or restricts competition;	—Unwarranted concentration of economic power	No specified	No specified.

Main Features of African Competition Policy and Law (*continued*)

	Algeria	*Côte d'Ivoire*	*Gabon*	*Kenya*	*South Africa*	*Zambia*
			—Encourages market sharing or supply distribution; —Limits free pricing; —Limits of controls suppliers of investors".			
2.3 Merges and takeovers	—No specified	—Prior consultation with the competition authority is required	—No specified	—Regulated/controlled on a case-by-case basis	—Handled on case-by-case basis	—Merger between two or more independent enterprises engaged manufacturing or distributing substantially similar goods or providing substantially similar services; —Take over of one or more such enterprises by another enterprise, or by a person who controls another such enterprise.
3. Enforcement machinery for competition policy and law						
3.1 Enforcement authority	Conseil de la Concurrence (Art. 16)	—Commission de la Concurrence (Art. 6)	—Commission de la Concurrence (Art. 2)	—Monopolies and Prices Commission (Part I, 3 (1))	—Competition Board (Art. 3 (1))	—Zambia Competition Commission (Art. 4)
3.2 Penalties for non-complicance	—Violation of the law: (1) price collusion: a fine from DA 5.000 to DA 500.000; (2) refusal to issue invoices: a fine from DA 5.000m to DA 1.000.000; or imprisonment from 1 month to 1 year, or any of the two. —Refusal to comply with decisions or orders of the competition authority; a fine from DA 5.000 to DA 100.000; imprisonment form 2 months to 2 years, or any of the two.	—Violation of the act and other regulations for its implementation: a fine between CFA 200.000 to CFA 5.000.000.	Violation of RBPs: (1) abusing economic power, coordinated activities which restrict or impede competition, collusion, refusal to sell/deal; imprisonment from 3 months to 3 years and/or a fine from CFA 50.000 to CFA 90.000.000 and a penalty of CFA 5.000 per each day after the time-limits; (2) price collusion: imprisonment form 1 to 6 months and/or a fine from CFA to 30.000 to CFA 30.000.000.	Violation of RBPs: losses of income or any damage: a fine of two times the value of the losses or damage: restitution to injured consumer; —Merger/Takeover: imprisonment for a term up to five years or a fine up two hundred thousand shillingts or to both	—Violation of RBPs: acquisitions, and monopoly situations: suspension and/ or termination of the membership of a member in regard to certain mergers acquisition of restrictive contract.	—Violation of the Act, any regulation made hereunder or any directive: a fine up to ten million kuacha or imprisonment for term up to five years of to both.

Main Features of African Competition Policy and law (*concluded*)

	Algeria	*Côte d'Ivoire*	*Gabon*	*Kenya*	*South Africa*	*Zambia*
			—Failure to supply information or documents required by the competition authority: imprisonment from 3 months to 3 years and/or a fine from CFA 50.000 to CFA 90.000 and a penalty of CFA 5.000 per each day after the time-limits			
4. Extra-territorial coverage	—No indicated	—Competition policy and law takes into account the concept of globalization of the world economy and the country's membership of the UEMOA.	—No indicated	—Restrictive trade practices committed within the country	—No indicated	—The anticompetitive trade practices provisions apply to all practices, acts or behaviour whether or not those are embodies in an agreement so long as their object i s to discourage competition in Zambia.

Source : ECA compilation.

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Integrating competition policy in the COMESA regional economic cooperation and integration process

By Hon. D. S. Mpamba

Minister of Commerce, Trade and Industry of Zambia

The growing emphasis on competition law and rationale

The implementation of competition policy has continued to be not an easy matter in the majority of developing countries. Until about a decade ago, well developed competition law systems were largely limited to developed countries. In recent years, however, a large and increasing number of developing countries and economies in transition have adopted new or substantially improved competition legislation as part of a drive to establish healthy market economies.

In general, the increasing importance of competition policy in developing countries and economies in transition reflects a growing appreciation of the relationship between the objectives of competition policy and those of market-oriented reforms, including both internal reforms and trade liberalisation. In particular, reforms adopted in the COMESA member states in recent years have the broad objective of improving the functioning of product, capital and factor markets domestically, while also facilitating adaptation to international competition. Competition policy is a tool that reinforces the beneficial effects of such are passed on to consumers, while also facilitating successful adaptation to international competition.

It is gratifying that today we witness the beginning of the long awaited process of employing competition policy as an instrument of regional economic integration. There have been requests from member states, especially those with established competition authorities, calling for co-operation in the implementation of competition policy in COMESA member states. Some have gone to the extent of calling for the establishment of a harmonized competition regime in the southern and eastern African regions under the auspices of COMESA. I am informed that this Seminar will among other topics explore this matter in much detail.

Towards the zero tariff structure—year 2000

As you are aware, the COMESA region is moving towards the zero tariff structure in the year 2000. As the common market approaches, businesses throughout the COMESA region have to gear themselves up to face new challenges and grasp new opportunities. A transformation is already taking place as companies adapt to new conditions and to the emerging reality of a common market of over 300 million consumers. Further impetus to this evolution has occurred with the member states of COMESA unanimously agreeing to the "zero tariff" regime by the year 2000. These initiatives give the COMESA countries the framework and direction for the 21st century.

The "zero tariff" regime sets out the completion of the common market by the year 2000. This will launch an ambitious programme for the abolition of the remaining barriers to the free movement of goods, services and capital in the COMESA region. The process of adaptation to this is now already well under way and is essential to the convergence of the various economies of COMESA countries.

A zero tariff structure for COMESA countries means that goods and services will freely be moved between borders without customs duties being levied on them unless otherwise justified as provided for under the treaty's safeguards in case of felt injury on the importing country.

Further the zero-tariff position to be obtained in the year 2000 will affect the regional governments directly in terms of loss of customs duty revenues. The business community in the respective countries will have to withstand intense and sometimes devastating competition on their market offerings vis-à-vis suppliers from other COMESA countries. These two likely consequences are seemingly bitter pills to swallow by individual member states. This is because you do not go into something that in turn hurts you. While these fears may be genuine, it has been empirically established that the government revenue losses are not significant (ranging from 0.1% to 11% of national budgets) and that in most cases they can be offset by revenue collections from the broadened domestic tax base due to the rising levels of tradable goods and services on the domestic markets.

In this situation both the local and COMESA suppliers will be subjected to the same domestic sales and excise duties. As regards the concerns of local suppliers, it is here assumed that anti-dumping policies in the exporting member states will be in force and the aggrieved importing countries would have recourse to article 51 of the Treaty which also provides for the levying of anti-dumping duties.

On the whole, intense competition amongst suppliers in the region is what we need to enhance efficiency and consumer welfare. Given the enlarged market, the suppliers will be able to achieve economies of scale. This will enable them compete efficiently in the common market.

Need for cooperation in implementing competition policy in COMESA member States

Allow me to comment briefly on those factors which lead us in eastern and southern Africa, especially those of us who are members of COMESA, to the belief that increased regional cooperation is essential—even inevitable—in the coming years. Without pre-empting your deliberations in the next two days, I would like to mention that two main factors have nurtured the belief that increased regional cooperation is essential in the new trade order. The first is increased globalisation. The second—stemming directly from this increased globalisation—is the inevitability of increasing overlap, and thus contact, between the activities of national competition authorities.

Globalisaiton is no longer a trend, but a reality which is changing our lives. We are all familiar with the work of COMESA and the resulting reduction in tariffs which has led to a boom in regional trade—from about US$ 1.6 billion in the early 1993 to over US$ 4.2 billion in 1998. An increasing part of this is represented by "vertical trade" in which stages in the production chain are completed by companies and sometimes by the same company, in different countries.

With the increasing influence of new technologies this process will continue to accelerate in the coming years.

In particular the "telecommunication revolution", which has only just got under way, is certain to have a dramatic impact. Another consequence of globalisation is that regulatory measures adopted in one country may have a positive or negative impact in other countries. This is clearly true of the environment, but the same can be said about fiscal and monetary policies, securities regulations, standards, certification procedures and many other fields of government activity. Similarly the way competition policies are enforced has an inevitable impact on a country's trading partners. In this regard, we can identify two different problems. First, in a region where state imposed trade barriers are disappearing, especially in the wake of complying with the zero—tariff structure, anti-competitive practices are becoming more prominent in determining the development of cross border trade. There is a risk that public trade barriers may be replaced by restrictive business practices, undermining years of effort to liberalise trade. We continue to witness the phenomenon within the common market. Even after agreeing to the zero tariff market structure, we are still seeing businesses trying to convince their respective governments to the take steps to protect their traditional "national markets".

It is because of this emerging factors that even after the attainment of zero tariff in the region, countries still need to develop new ways of safeguarding their domestic markets against the likely effects of anti-competitive practices among firms such as anti-dumping and countervailing duties.

Thus it becomes imperative to have an effective competition policy in the region that will fill this vacuum.

Along with other provisions for the elimination of restrictions to trade, the implementation of an effective and uniform competition policy in COMESA member states will make it possible to dismantle trade instruments such as anti-dumping and countervailing duties within the region.

Secondly, even if competition law were enforced with equal determination by all the world's main trading partners, closer cooperation among competition authorities would still be necessary because more and more competition problems transcend national boundaries. International cartels, mergers or abuses of market power are rarely limited to just one country. It is not surprising, that national authorities face increasing difficulties in dealing with such cross-border practices. Crucial evidence may be located outside their jurisdiction. Other agencies looking at the same case, might adopt a different approach or different remedies. Consultation and some exchange of information and/or coordination of enforcement action may be the only way to apply the competition rules effectively.

Impediments to closer cooperation

However, I have to warn the participants that there are some deep rooted impediments to closer cooperation, and I wish to call upon this Seminar to discuss these impediments thoroughly and come-up with workable solutions.

Given the face of globalisation, the increasing interconnection and inter-dependence of national economies, and the increasingly international nature of commerce which has resulted from these trends, the need for cooperation in the implementation of competition policy among COMESA countries has become paramount. However, you should be wary to the fact that competition policy is influenced by political change and a developing understanding of economics. Above all, policy must adapt to the rapid evolution of the industries and markets that are its focus of attention.

Another obstacle to cooperation among competition authority, Mr. Chairman, stems from the very nature of competition policy. This will be better understood when during your deliberations you compare competition policy with trade policy.

Existing models of cooperation

I think it would be unfair if I closed my speech without making a brief reference to the existing models of cooperation. I know you will be able at the end of this Seminar to make far reaching recommendations in relation to this matter. What I would like to suggest is for the participants to take advantage of the presence of the various experts and find out more about experiences of the several bilateral agreements that have been concluded in this direction.

I am informed that two international organisations, UNCTAD and OECD, have already made efforts to develop principles of cooperation. The UNCTAD "set of rules" which is one of the topics you will be discussing provides an interesting model for possible future common basic rules on competition. This is important, especially for those countries which have not established a competition authority as yet. Turning to Europe, it may be fairly stated that the world's most sophisticated mechanism for regional cooperation in competition law and policy is that developed by the European union. I hope the participants of this Seminar will draw a lot of experiences from these models.

The important starting point, should be the need for all countries in the region to have adequate domestic competition laws coupled with adequate enforcement instruments.

In light of what I have said, COMESA's efforts and achievements on the subject of regional competition law and policy can be put in context and be encouraged. At this juncture, I wish to acknowledge the position that the COMESA trade and customs committee, which met in April this year, took in terms of Article 55 of the Treaty which calls for fair business practices and competition among member states. The committee recommended for the establishment of a COMESA competition policy and a study is to be undertaken to that effect with the co-operation of member states. It is gratifying to note that in fact the terms of reference for the study have already been drawn and approved by the Committee. This is a step in the right direction and the study should be expedited.

I wish to finally urge all the distinguished delegates to take active participation during the deliberations of the Seminar. As at the end of this Seminar, you will be expected to play a vital role in advising your respective governments on matters pertaining to the implementation of competition law and policy.

I note that international experts have been brought in to assist us think and discuss through various issues towards a regional competition policy. I wish to thank them sincerely for responding positively and at short notice. We need you in executing this mammoth task.

The organisers of this Seminar have informed me that this workshop has been made possible through the financial assistance provided by UNCTAD and UNDP. I would like on behalf of all the countries represented here to sincerely thank the two institutions for the good gesture. I urge all of you to please find time to visit some interesting sights of our beautiful city of Lusaka and to visit our country-side. I hope you will enjoy and like what you see.

It is now my sincere honour and pleasure to declare this regional competition law and policy Seminar officially open. I wish you successful deliberations.

Economic and market structures in COMESA: a business perspective

By Mebelo K. N. Mutukwa

Zambia Association of
Chambers of Commerce and Industry

Introduction

It is humbling to be in such esteemed company and I shall attempt to avoid being intimidated by the collection of degrees and certificates flooding this venue. I submit the observations of a business community that can sometimes be accused of being inadequately engaged in the unfolding evolution of COMESA, a consequence of the heavy political tilt of the original framers of the Treaties, and the continuing sequence of decision—making and operations that commences with Heads of State acting as the apex decision-making body in the form of the Authority, supported by the Council of Ministers, which oversees the Inter-Governmental Commission, all serviced by the Secretariat.

This is reasonably consistent with other regional economic groupings but does not make formal provision for the input and participation of the business community. We seek a more consistent, permanent, and formalised role in COMESA's march towards creating a united economic bloc.

Developments

The onset of globalisation and the consolidation of Economic Groupings in Asia, North and South America, Europe, and West Africa, necessitates a concomitant response in Eastern, Central and Southern Africa to avoid being swamped by better organized groupings and more importantly, to create a wider common market to attract pooled investment and to strengthen the groups negotiating position.

The concerted, though uneven, reduction of tariffs in the expanding COMESA region has confounded the naysayers and we have become converts/worshippers to the altar of free regional trade.

The business community has, generally, been anxious about the implications of enhanced competition in the region, with particular concern relating to the business entities in more developed economies within COMESA.

Competition has been exacerbated during the past five years, though the greatest impact has been the competition faced by a non-COMESA member, the Republic of South Africa. The other anticipated benefit of the economic integration of the region, i.e. increased foreign direct investment inflows designed to take advantage of the expanded common market, has yet to materialise, and it is imperative that COMESA Member States harmonise conditions and their national marketing strategies, as discussed later, to make the common market attractive to those still situating their projects in Botswana or South Africa, or to take further steps at integration of all SADC economies into one body.

Constraints

Intra-COMESA trade has increased and the tariff variable is now forming an important component of decisions on where to import from, and even where to situate a warehousing or manufacturing facility to exploit the competitive advantage.

The countries in the region have erected, or more accurately, not dismantled their uneven and sometimes inconsistent Tax Regimes and Investment Codes, divergent Regulatory Environments (such as having Competition Commissions and Privatisation Agencies), phytosanitary and licensing differences between states, and a treasure trove of non tariff barriers to trade. The situation is improving but remains a retardant to the growth of COMESA conglomerates straddling the region.

Domination from the South remains the equivalent of the lunatic uncle in the spare bedroom, with everyone, including the neighbours, aware of his existence, but not fully acknowledging his presence. The SADC question needs to be urgently addressed, though some could argue that RSA is an economic bloc on its own, begging the question that the relaxation of tariffs with RSA may require an independent time-table, that allow s COMESA products into RSA on preferential terms (not negotiated by individual countries) with the tariffs on South African goods being reduced at a slower rate, to allow for eventual free trade after 7-10 years.

The old adage, 'Familiarity breeds contempt' is applicable in much of our region. We, brothers and sisters, tend to assume that the quality of intra-COMESA goods, services and investment are inferior to those of the West or the South.

The fragmented assistance and advice received by private business in COMESA is interesting to consider. From Bulawayo to Cairo, we have been advised to grow roses for export. The hectarage under greenhouses has expanded accordingly, seeking sales on the same auction floors in Holland, and constraining prices by introducing excessive competition.

Recommendations

Individual chauvinism must be expunged to improve the region's ability to attract investment and to enhance intra-COMESA trade. This involves the enhancement of an opportunities database that scans and disseminates information on the comparative advantages of COMESA countries, their resources, the broader market with its attendant demand, and a legal framework and implementing institutions straddling the region.

The COMESA Secretariat, in conjunction with the Investment Promotion Agencies of COMESA member states, should coordinate "Invest in COMESA" Conferences highlighting opportunities in the region, for trade and investment, in Europe, Asia, the Americas, Australia, and South Africa to attract investment that can realise Economies of Scale, and create employment in the region.

Over time, there will be no option but to harmonise Tax Regimes, particularly in relation to Value Added Tax, Withholding Taxes on Dividends (consider developing Tax Treaties that exempt companies from tax on dividends if the dividend is remitted to another COMESA country) and Corporate Tax. The current maze of taxes and licensing laws are an unbearable expense for business.

COMESA is potentially a powerful, prosperous Economic Bloc that should be negotiating outward with other regional groupings and neighbouring countries (read South Africa), and to reinforce positions relating to World Trade Treaties.

A major hindrance to the growth of business relations amongst COMESA companies is the diversity of Currencies, most of which Exporters would prefer not to touch, and which are crowded out by United States Dollars. The ill-fated UAPTA was a noble effort to address the currency problem, though it appears that the 'familiarity' argument, and the lack of faith in the underlying strength 1 asset reinforcing the UAPTA. Regional trade remains dollar-based, and credit provision, both short and long term, remains dollar indexed and companies are compelled to demonstrate that they will always have access to foreign currency reserves, and it is simply considered not good enough to earn Zim$ or KShillings, regardless of the volume or margins. No mention shall be made of the Kwacha. We suggest that Foreign Currency Guarantees be provided to underwrite COMESA currency transactions. This is, apparently, in progress.

Cross-Border Listings are a dream of many COMESA business houses, which aspire to access Capital Markets, institutional savings, and venture capital in the region, with a view to creating regional companies and acknowledging the narrow scope and funding of individual Stock Markets in the region.

The consideration of a Regional Airline requires further attention, as we continue to be compelled to travel out of the region to visit another part of the region because of the absence of direct flights. Equally, there is a tendency to use foreign carriers to transport produce from COMESA to other regions, and there are opportunities for improved pooling of produce to obtain minimal cargo rates.

The Governments of the region are assessing the financial impact of a Free Trade Area on their individual budgets and it will be imperative that clarity is provided regarding the division/ allocation of Border Tariffs collected at the relevant Ports of Entry. An allocation that favours the least developed COMESA members would serve to reduce the anxiety of the weaker COMESA members and those in landlocked positions, who could be the main losers in a free trade area.

The COMESA Court of Justice offers a critical positive step in handling legal issues under COMESA, but it remains imperative that a fast track Arbitration system, acceptable and legitimate to all, stretches across the region, and protects business entities.

We as businesspeople in COMESA do not know each other very well, and we do not have sufficient intelligence or credit data to make informed decisions, particularly where Suppliers' Credit or Joint Venture Investments is concerned. The question of Credit Reference Bureaux or a Database of defaulters may need to be housed in an appropriate institution.

Conclusion

Several areas of concern for the business community in the past have been addressed by the Authority and the Secretariat over the past half decade, and it is heartening to note the plans of COMESA announced or reiterated recently in relation to Investment Guarantees, continuing trade liberalisation, the increased capitalisation of the PTA Bank, the creation of a regional communication network, market research, and the improvement of the trade information network.

Should the Competition Commissions in COMESA be regional or only analyse 1 supervise an individual country if we expand the size of the market and the free trade and investment zone ?

I would like to close by recommending that the business community take a more aggressive, leading role in breaking the barriers to business in COMESA, and promoting intra-COMESA trade, as well as collaborating to penetrate external markets, by creating a COMESA Business Network, that should operate under a centralised Secretariat that would record and incorporate the perspectives and priorities of business leaders from the broad range of COMESA states. The exchange of information will enhance the development of this noble objective, and will assist in drawing the views of those, the business community, who are expected to lead the implementation of the COMESA objectives.

Impact of legal reforms to enhance productive capacity and competitiveness in LDCS: competition policy in Zambia

by Oliver S. Saasa

Professor of International Economic Relations
University of Zambia

Background to competition law in Zambia

A number of policy fundamentals ought to be appreciated. Liberalisation entails that the period of government control has to end, something that the Zambian government has accepted in principle and, to a large measure, in practice. It is increasingly being recognised world-wide that monopolistic public providers of infrastructure, social services, let alone business ventures, are unlikely to succeed in their responsibilities. This means that carefully-designed strategy of private sector entry should be encouraged as it enhances the growth of markets.

The central focus of Zambia's policy of liberalisation since 1991 has been the switch from the system of central planning or control of the economy to the use of market forces as the means of resource allocation. It is anticipated that the free play of supply and demand would, in the long run, determine market prices throughout the economy, allowing productive resources to be allocated in an efficient manner. The country's structural adjustment programme (SAP) has been adopted to include market-oriented reforms, particularly in the areas of price deregulation, including the reduction or elimination of subsidies; administrative allocation of key product inputs; privatisation of public enterprises; and the liberalisation of trade and investment regimes. The main assumption behind the liberalisation policy in Zambia is that, by providing enterprises with more freedom and stronger incentives, this would stimulate entrepreneurial activity, business efficiency, productive investment and economic growth. It is also expected to enhance consumer welfare through improved quantity and quality of goods and services at prices determined by the market rather than administrative decision as was the case before.

Equally important, the government also recognised that the benefits of market-oriented reforms are likely to be fully realised only if enterprises acted under the spur of competition, so that consumer preferences are reflected in market responses. It is further recognised that a country that has undertaken trade liberalisation measures has every interest in ensuring that the welfare and efficiency arising from such measures are not lost due to anti-competitive practices by firms. A well functioning market mechanism is seen as essential in this respect. For example, price liberalisation in the market that is dominated by monopolies in the form of parastatal companies, unless specific efforts are made to ensure the existence of competition, almost always ends up in monopolistic price rises without corresponding competitive price equilibrium. This was exactly what obtained in Zambia prior to the policy of liberalisation.

Main elements of Zambia's competition law and policy

In the context of its policy of economic liberalisation that benefited from the support of the IMF and the World Bank, the Zambian government recognised that an active competition policy remains a key guarantor to economic efficiency and consumer welfare and contributes to greater availability to the consumer of a broad range of products and services at lower prices. An open competitive environment has also been recognised to fosters innovation and efficiency, thereby contributing to overall competitiveness of producers. By promoting optimal allocation of resources, competition policy is seen to contribute to economic growth and development and supports other objectives of macro economic policies.

Against the above background and mindful of the need to legislate against monopoly formation, the government passed the Competition and Fair Trading Act in 1994. Until the enactment of this piece of legislation, there has been no formal enforcement of competition rules and policy by any institution in Zambia. This Act enabled the establishment of the Zambia Competition Commission (ZCC) that is empowered to enforce the competition rules in various ways.

The Competition and Fair Trading Act states its objectives as follows:

- To encourage competition in the economy by prohibiting anti-competitive trade practices;
- To regulate monopolies and concentration of economic power;
- To protect consumer welfare;
- To strengthen the efficiency of production and distribution of goods and services;

- To secure the best possible conditions for the freedom of trade; and
- To expand the base of entrepreneurship.

The Zambian competition law as provided for under the Act focuses on four principal elements of potential abuse by producers and/or traders. These are (a) horizontal agreements; (b) mergers/takeovers; (c) vertical market restraints; and (d) abuse of dominant position. They are briefly elaborated upon below.

Horizontal Agreements: These refer to cartel arrangements between firms competing with similar products in the same market and is effected through, for example, agreements to fix prices, reduce output, share the markets amongst themselves, or allocate customers to individual suppliers in a market. Such an arrangement is considered unfair to other operators in the market and is being prohibited by the Zambian competition law.

Mergers: To the extent that mergers tend to lessen competition and minimise opportunities for innovation, the competition law in Zambia discourages their formation. However, the law empowers the Competition Commission to assess the degree to which a planned merger would compromise competition and, if this is found to be the case, prohibit its consummation.

Vertical Market Restraints: This refers to agreements between operators at different stages of production and marketing chain and include exclusive dealing (restrictions on a firm's choice of buyers or suppliers), exclusive territories (restriction on a firm's choice of location), lying arrangements (restriction on the source of supplies for particular inputs used by firms), and resale price maintenance (restrictions on the price to be charged by downstream firms). The Zambian competition law deals with these restraints as possible instances of abuse of dominant positions and are covered under Section 7(2) of the Competition and fair Trading Act.

Abuse of Dominant Position: The Act makes a distinction between agreements among firms, on the one hand, and, on the other, the abuse of dominant position through exclusive dealing, tied selling, price discrimination, market foreclosure through vertical integration, etc. Firms in this superior position, due to their market dominance and financial weight, often tend to determine prices, control production and/or distribution in a manner that disregards the market interests of their competitors and, hence, the Zambian competition law prohibits this behaviour.

Social and economic challenges of the competition law

General considerations

The impact of the 1994 Competition and Fair Trading Act on economic efficiency and social welfare is yet to be seen given the newness of the enforcing Commission, the Zambia Competition Commission (ZCC), which became operational only in 1997. A number of generalisations can, nevertheless, be made, mainly derived from the experience of the liberalisation policy under which competition law finds legitimacy. Competition policy vis-à-vis competitiveness is typically assessed in terms of '*economic efficiency*' that entails the combination of productive, allocative, and dynamic efficiency. Market Forces are evidently the best way to promote economic efficiency to the extent that competitive markets provide strong incentives for realising this. Competition law enhances economic efficiency in that it preserves market processes by preventing a firm engaging in activities which undermine rather than enhance overall economic efficiency. It does this by establishing the regulatory framework within which competition and market processes operate. In this respect, the ultimate objective of competition law is the promotion of economic efficiency and the assessment of its impact must focus primarily on this aspect.

In the Zambian case where the state dominated economic activity and the development of the private sector remained under check, an important precondition to competition is the transfer of state-owned assets to private hands (i.e. privatisation). The *success* of the privatisation policy, in turn, should be measured not so much in terms of its speed or how many companies have been privatised. Rather, an important tool for measuring success ought to be related to the rationale for privatisation, namely, the need to enhance efficiency, productivity, and competitiveness, aspects that have been absent when the parastatals were predominant in Zambia. It is at this level where strategic importance of competition finds expression: when the policy of privatisation is coached in terms of the need to enhance productivity and efficiency, it is often not appreciated that one of the most important factors that significantly influence enterprise performance, irrespective of who owns it (private or public), is *competition*. The history of British privatisation suggests that rather than who *owns* the company, it is the competitive environment within which a firm conducts business that weighs more as the most crucial factor in its performance. It can, thus, be deduced that the efficiency of an enterprise—public or private—tends to be highest when its profitability is enhanced in a competitive market; under managers that are given sufficient autonomy and with capacity and motivation to respond positively and promptly to competition-induced market signals; and when those companies that are not able to withstand competition are allowed to go bankrupt rather than sheltered with preferences and subsidies.

The above argument does not in any way ignore the characteristic institutional weakness of state-owned and run enterprises and, thus, the importance of privatisation and liberalisation. Neither does it imply that privatisation of state enterprises has no positive correlation with enhanced efficiency and productivity. Rather, the argument merely cautions against the often popular view that privatisation of ailing state enterprises would necessarily lead to a miracle transformation of an enterprise from loss-making to a high output record. The crucial point to appreciate is that it is the presence of *competition* that makes the difference. Indeed, it can be argued that, all things equal, giving a private firm monopoly control over a particular product or service is less likely to improve efficiency than a public enterprise that is opened up to competition. The putting in place of legislative and regulatory regime that safeguards competition in a privatising economy is, therefore, an important step in the enhancement of market efficiency and productivity. This reality underscores the importance of the existence in a liberalising developing country like Zambia of a coherent and enforceable competition law. It also underlines the need to entrust the competition authority/commission with the requisite powers, authority and resources (human, financial, and technical) to effectively enforce the relevant pieces of legislation that are meant to secure competitiveness.

The Zambian case is a clear demonstration of how undue political control over the activities of parastatals (*a*) de-motivated managers to levels that adversely affected productivity; (*b*) placed non-economic and commercial considerations above business principles and interests; (*c*) allowed subsidies cover up for bad business decisions; (*d*) resulted in suppressed private sector development; and, consequently, (*e*) resulted in low productivity/profitability and economic inefficiency. Almost all the state-run and owned enterprises were operating at a loss and most of them remained in operation as a result of government subsidies. A closer examination of the country's economic performance is made below to demonstrate that the period before competition was introduced recorded, at best, very insignificant positive growth.

It is noteworthy, furthermore, that before the major policy reforms of the mid-1980s when a comprehensive Structural Adjustment Programme (SAP) was attempted, the Zambian economy's state-dominated and uncompetitive productive sector was characterised by a lop-sided structure that was dominated by consumer goods with very few industries in the capital and intermediate goods category. Equally revealing, the productive sector in Zambia has retained the pre-liberalisation legacy of import-intensity at both the raw materials and machinery levels. In a number of more specialised areas, even labour has to be imported. Largely due to foreign exchange shortages that placed a strain on the importation of the required spares, components and raw materials, Zambia's industry has suffered from idle capacity long before the policy of liberalisation was put in place. Much of these problems were attributable to faulty government policies.

A wide range of policy instruments were employed to implement the anti-competition and anti-private sector policies. Firstly, the Zambian government sought to control and influence private investment through a system of industrial licensing. Secondly, since the country's major socialist reforms of 1968 and 1969, the government placed the parastatal sector as the principal actor in the economy in order to limit what was perceived as foreign economic dominance. In line with this policy, parastatal companies received considerable preference in the issuing of manufacturing and import licenses and foreign exchange allocations. Consequently, by 1980, approximately 50 percent of the manufacturing sector's output was accounted for by parastatals.

Secondly, while, on the one hand, the Zambian government extended protection to domestic industry during the 1970s and early 1980s, on the other, it imposed controls on the prices of a number of manufactured goods produced by both the parastatals and private sector, a phenomenon that demonstrated the state reluctance to allow the competition-induced market forces to determine the price of goods and services. The Prices and Incomes Commission was specifically established for this purpose.

Thirdly, in the pre-SAP controlled regime in Zambia, fairly high nominal tariff rates were set for consumer goods, particularly those classified as 'luxury' ones. At the same time, low tariff rates were set for industrial inputs. For example, intermediate and capital goods carried very low or even zero rates of duty. Consequently, a very high rate of effective protection emerged for the sectors that were involved in the production of consumer goods. During the mid-1970s, for example, non-food consumer goods in Zambia attracted as much as 342 percent tariff protection while consumer durables were awarded 473 percent duty protection. Low tariff levels were levied on heavy intermediate goods (30 percent); capital goods (60 percent) and zero/negative rates for what were classified as 'essential commodities' such as edible oil, grain mills and fertiliser.

The high degree of protection and the resultant absence of competition, later reinforced by decreasing capacity utilisation, had led to decreased efficiency and evidently escalated costs. In the parastatal sector, this poor picture was reinforced by weak management and conflicting objectives of profitability, on the one hand, and employment creation and the artificial promotion of low consumer prices, on the other. Overall, an industrial sector emerged in Zambia that was largely composed of firms that were internationally uncompetitive. They were not only unable to compete in the export market but also with incoming imports had the tariffs and other protective barriers been lowered. This adversely distorted the price structure in the country.

Fourthly, one of the noteworthy macro-economic policy in the pre-SAP Zambian economy was the system of import licensing and foreign exchange allocation. After 1975 and mainly due to foreign exchange shortfalls, the government placed quantitative restrictions on imports and put in place an elaborate system of import licensing and administrative allocation of foreign exchange. The quantitative restrictions imposed by the import-licensing and foreign exchange allocation systems, in fact, took over the function of protecting domestic industry and, thus, made redundant the role of tariffs in this regard.

Lastly, Zambia's exchange rate policy during the pre-reforms period is worth noting. The country's relatively high inflation growth rate at the time led to the Zambian currency (the Kwacha) becoming highly over-valued. Consequently, there emerged a flourishing parallel market where the unofficial exchange rate was several times higher than the official one. The various controls and other instruments mentioned above combined to distort business priorities severely. For the average business person in Zambia, there were huge profits gained in merely securing import licenses and foreign exchange allocations. For the most part, it was these things that many businesspersons chased instead of attending to genuine productive activities. In a situation of commodity scarcities, profit margins multiplied such that some industries managed to make net profits even with extremely low levels of investment and capacity utilisation. Under the above circumstances, competition and market forces were kept at bay in business and investment decisions of the predominant state-owned sector.

What did the above main macro-economic policies entail in general terms? Perhaps the most damaging aspect of the policy of nationalisation in Zambia was the absence of competition in the economy. Although it could be argued that the pre-nationalisation privately-owned import substitution sector had also been characterised by a high degree of monopoly, this was mainly because of the relatively smaller size of the Zambian market then rather than a product of state policy. In short, the policy of expropriation of private enterprises by the state and the subsequent state dominance of economic activity accentuated the magnitude of monopoly in the economy. Additionally, the overly centralised state holding companies (i.e., those that served as umbrella bodies for the nationalised enterprises) were generally unable to provide positive incentives to their companies to improve their efficiency, reduce costs, and enhance profitability, let alone upgrade the quality of their products.

Similarly, the policy of price control was particularly damaging to enterprise performance and profitability. In so far as price control had a high propensity to reduce corporate profitability, this inhibited both new investments and the ability (and willingness) to finance plant maintenance. From the point of view of the manufacturing sector, price controls in Zambia and the resultant enterprise inefficiency had tended to place supply at a much lower level than effective demand. Consequently, the most obvious effect of the pre-liberalisation protective regime in Zambia was the poor output record that it generated which, in turn, increased the cost of living due to escalated prices.

Lastly, another policy aspect that has had far reaching consequences refers to the country's import intensity. While this phenomenon did not pose any serious effect on the productive sector's performance during the period before 1975 (as export receipts were considerable), the picture changed after that. With the high level of import dependence, the country became extremely vulnerable to external shocks which came in quick successions, firstly in 1973 when the price of oil quadrupled and then in 1974 when the first major decline of copper price was registered on the world market (in a country where this commodity accounted for more than 90 percent of the country's export earnings. As the Zambian economy failed to adjust positively to cushion itself from those external shocks, the country's foreign reserves declined sharply by 1975. An escalation in the balance of payments and budget deficit followed immediately which necessitated yet another shock, namely, very high and unsustainable levels of domestic and international debt.

Given the generally poor performance of the Zambian economy during the pre-SAP period as demonstrated above, the capacity of the formal sector to absorb labour had been seriously affected long *before* SAP was introduced in a comprehensive way in 1991. The level of employment had declined considerably since 1975 but particularly during the period of adjustment. In 1988, three industrial sub-sectors registered employment losses, namely, construction; mining; and restaurants/hotels. The main explanatory factors behind wage employment losses during this period was the declining industrial output record largely due to the factors discussed above. In general, the industrial sector during this period possessed inbuilt structural rigidities that worked against expanded and sustainable output, a phenomenon that works against labour retention. The import-intensive nature of the average industrial enterprises; the dominance of the state sector; price controls; and low output all worked against the emergence of a dynamic productive sector that fully utilises labour.

Economic costs of absence of competition

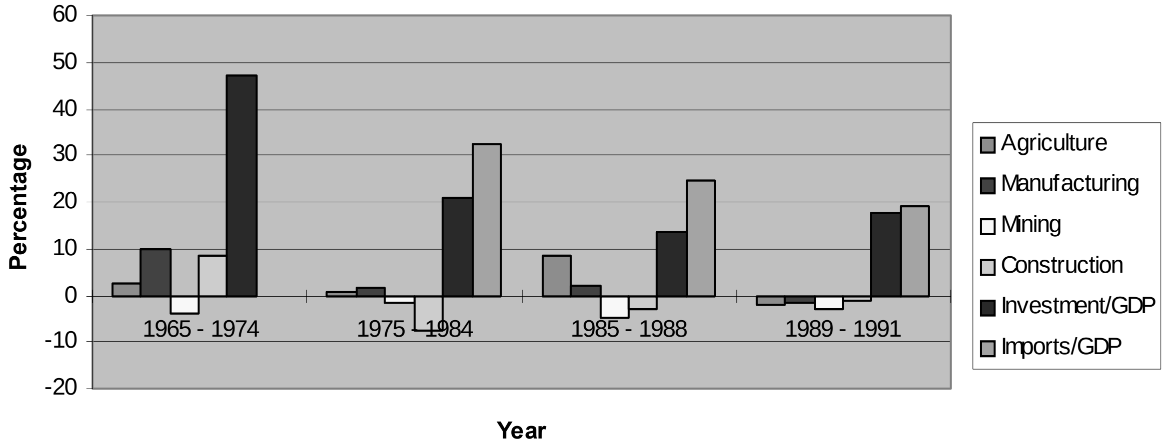
As a consequence of the above poor economic record, Zambia moved from the 39th position in a list of countries in per capita GDP ascending order to the 15th position by 1987. Zambia, with per capita income declining to its lowest at $250, was reclassified from a low-middle to a low-income country. Figure 1 gives the average GDP growth rate from 1965 to 1991 when the mew government embarked upon the policy of liberalisation.

The generally poor economic performance of Zambia's Third National Development Plan (TNDP) that covered the 1980-84 period reflected the above structural rigidities of the Zambian economy. The TNDP actual growth rate of only 0.06 percent was well below the anticipated annual rate of 4.8 percent. Much of this decline was explained by, *inter alia*, the severe decline in investment levels and volume of imports as a result of foreign exchange scarcity. The actual aggregate investment stood at only 15 percent as opposed to the planned target of 29 percent of GDP over the Plan period. Furthermore, only 62 percent of the planned import level was realised mainly covering the raw materials needed by the state-dominated manufacturing sector.

Perhaps the worst effect of declining government revenue was felt at the level of capital expenditure whose 1985 share in total government budget (in terms of GDP) had declined to approximately 9 percent. In real terms, the 1987 government expenditure on capital investments was more than 70 percent *lower* than that for 1974. The above picture tells a lot about the quality and cost of living in Zambia during this period. From being one of the most promising economies in Africa during the 1960s and 1970s, Zambia now ranks as one of the poorest. Figure 2 gives figures on government expenditure and revenue and fiscal deficit during the 1984-89 period. Real 1987 expenditure was actually lower than the 1980 level.

FIGURE 1

Average rate of real GDP gowth by sector : 1965-1991

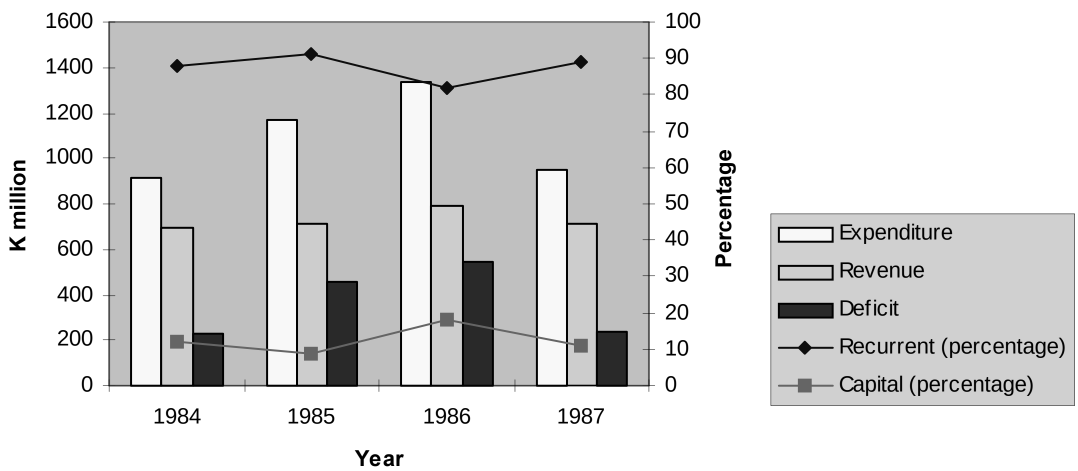


	1965-1974	*1975-1984*	*1985-1988*	*1989-1991*
Agriculture	2.5	0.5	8.3	-2.1
Manufacturing	10.1	1.4	2.0	-1.8
Mining	-3.7	-1.4	-4.8	-2.9
Construction	8.6	-7.5	-3.1	-1.2
Investment/GDP	47.3	21.1	13.4	17.6
Imports/GDP	-	32.2	24.5	19.1

Editorial note: This is the source of the graph in the event that it is preferred.

FIGURE 2

Government Expenditure, Revenue and Fiscal Deficit (Constant 1980 Prices)



Source: Derived from Economic Research Group (1989), Analysis of the 1989 budget of Zambia, Perspectives on the Zambian Economy, Working Paper Series, Lusaka, Institute fro African Studies.

	1984	*1985*	*1986*	*1987*
Expenditure	917	1173	1340	952
Revenue	692	713	793	715
Deficit	226	460	548	238
Recurrent (percentage)	88	91	82	89
Capital (percentage)	12	9	18	11

Editorial note: This is the source of the graph in the event that it is preferred.

The above developments in Zambia marked the beginning of a major crisis as the economy declined considerably. It was this state of affairs that the government reacted to in its effort to manage the situation and the decision to embark on the IMF and World Bank-supported structural adjustment programme (SAP), in general, and the enhancement of competition, in particular, should be seen against this background.

The first couple of years after 1991 when the new government took over and consolidated the policy of liberalisation registered a declining economic trend as the private sector was still adjusting to the new policy regime. The value of the manufacturing output declined by 10 percent in 1991 as opposed to the 7.8 percent increase the previous year. All indicators attribute this poor performance record to the sector's under-utilisation of its installed capacities, principally a function of a number of factors that included

- Foreign exchange scarcity and SAP's fiscal stringency;
- Reduced ability by most investors to import the required raw materials and equipment in a country whose productive sector has been import-intensive for close to 30 years;
- Slow progress in the rehabilitation of machinery and plants;
- Liquidity problems faced by producers emanating mainly from low profit margins and restrictive escalated interest rates on commercial loans; and
- Uncertainty among parastatal firms regarding the privatisation process.

The above poor industrial performance has had a negative impact on the country's export performance. Persistent unfavourable balance of payments had continued. For example, accounted in US dollar terms, export receipts declined considerably in 1992 while imports had risen. Thus, whereas Zambia's trade surplus in 1991 was estimated at $357.3 million, this declined by 60 percent to only $146.3 million in 1992. Considering that the investment income and non-factor services were in deficit in 1992, a deficit of $315.7 million was recorded for the current account of the balance of payment. This was equivalent to 14 percent of the country's GDP in that year. Additionally, Zambia's export earnings declined from $1,103.3 million in 1991 to $965.9 million in 1992, a significant 12.5 percent fall. For the non-traditional export sector (i.e., non-copper exports), export receipts declined from $68.1 million in 1992 against $116.8 million for the previous year. At the same time, the value of Zambia's imports grew to $819.6 million in 1992, a 9.8 percent increase over the 1991 figure. This trend continued into 1993. Thus, several years into SAP, economic recovery was still illusive.

Another important development worth noting during the 1991-93 period has been the continuation of the decline in the level of formal sector employment. Between March and December 1992, for example, retrenchment claimed 34,000 jobs out of which 15,000 was accounted for by those from the central and local government sector. The trend has continued into 1993 when the government launched the Public Service Reform Programme in November 1993 that includes plans for major reductions in public sector employment. For the parastatal sector, when the policy of liberalisation took hold, many of them had to be liquidated (rather than privatised) since their equipment was obsolete due to many years of poor maintenance and under-capitalisation.

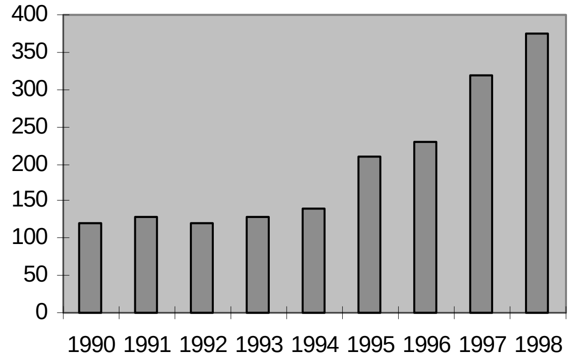
The above analysis attempted to demonstrate that the period of controls and limited market openness (the main indicators of the absence of competition) revealed a very poor economic performance record in Zambia. While it is true that not all the problems catalogued above are principally explained by the absence of competition, it is equally true that market openness would have brought in the requisite competitiveness that is generally acknowledged to be so vital for economic efficiency and productivity enhancement. Indeed, the Zambian case shows that after privatisation was initiated and most of the state companies were privatised and/or liquidated, several positive developments have been registered: (*a*) the contribution of the private sector to GDP has been increasing; and the economy's overall productivity has improved, albeit sluggish due to several factors that include the high inflation growth rate and a severe foreign exchange scarcity in an import-intensive economy. By 1998, the investment by the private sector increased to 10 per cent of GDP, compared to only 5.5 per cent prior to reforms in 1991.

More private sector-led positive changes have been registered. The liberalisation of the financial sector saw the emergence of over 20 commercial banks that are operational; and several non-bank financial institutions such as insurance companies pension funds, the Lusaka Stock Exchange (LuSE), and the Securities and Exchange Commission (SEC) were established to provide the needed financial intermediation and investment security. The liberalisation of access to foreign exchange added a further stimulus to the private sector entry as well as the significant reduction in non-tariff barriers to trade. Furthermore, the opening up the economy to competition has removed the inefficiencies and distortions that were associated with the former protectionist economic regime. The playing field is also sought to be levelled for all competitors, domestic and foreign and, in this process, the casualties would be all those firms which were hitherto earning huge rents simply by obtaining import licenses and foreign exchange allocations and receiving implicit 'subsidies' from Zambian consumers by charging internationally uncompetitive prices.

The introduction of competition in the foreign exchange market further brought significant improvements in the country's foreign trade sector. External trade performance in Zambia has been closely linked to the country's exchange rate policies. The experience of the country over the years confirms the strong correlation between export volumes and the real exchange rate. The economic dividends derived from competition enhancement in Zambia is perhaps best revealed in the non-traditional (i.e. non-copper) export sector. Under the liberalised and competitive economic climate of the post-1992 period, non-traditional exports, principally contributed by the private sector, have been growing considerably. Figure 3 shows the overall healthy performance of non-traditional exports.

FIGURE 3

Performance of Non-Traditional Exports, 1990-1998
(US$ million)



The stronger than forecast export performance since 1995, thanks to the policy of liberalisation and competition enhancement, principally explains the sharp contraction in the country's current account balance-of-payments deficit that declined to US$104 million in 1997, its lowest since 1993. The positive private sector response to liberalisation has also been witnessed in the agricultural sector. The impact of the policy of market liberalisation has been quite significant. To start with, private traders' entry into marketing was almost immediate following the policy shift although this introduced some transitional difficulties. As an earlier evaluation noted,

> Private traders emerged in response to market liberalisation; 47.3 per cent of all produce by the small-scale farmers in 1994/95 was sold to private traders, compared to 10 per cent sold to the co-operatives… Private-led contract farming under which credit is given in-kind to smallholders by private firms has emerged to replace government-sponsored credit.[1]

Competition and the Challenge of SMEs

How does competitiveness, in general, and Zambia's Competition and Fair Trading Act, in particular, affect small- and medium-scale enterprises (SMEs)? There are several positive points. Firstly, to the extent that competition enhances productive and allocative efficiency, its *long-term* benefits are expected to maximise economic and social welfare. In particular, structural adjustment processes, in general, and competition in a liberalised economic regime, in particular, has the potential, in the long-term, to facilitate the opening up of new production opportunities for SMEs especially when looked upon against the background of Zambia's past restrictions on domestic and external trade and price controls. In the Zambian case, the highly regulatory economic policies that were adopted during the pre-1991 period principally explained the low productivity of the economic sectors, including SMEs. Hence, a shift from government regulation of the economy to a more market-based and competitive policy regime would necessarily create the much sought out enabling environment that would ultimately free productive resources to respond competitively to market signals. A more market-based policy climate should, thus, be seen as essential for the development of productive enterprises, including SMEs.

In theory, deregulation-cum-competition contributes to the development of SMEs at two levels: (*a*) productive gains through improved efficiency; and (*b*) lateral expansion due to the enabling environment created for the establishment of SMEs. These two benefits are derived from such liberalisation policies as the relaxation of protracted investment approval procedures; price decontrols; and freeing of labour market regulations. Similarly, the open competitive trading system has resulted in the availability of, and/or easier access to, better quality inputs which should allow SMEs in Zambia to improve and diversify their areas of activities, thus, creating new production opportunities for the sector. This would also allow for easier adjustment to changed market conditions.

Notwithstanding the above advantages that are associated with competition, there are still a number of outstanding challenges and/or costs. Firstly, at the macro level and in the transitional, short-term, a number of factors and elements must be in place in Zambia, as in other LDCs, to facilitate the anticipated economic efficiency gains emanating from competition enhancement. They include the following:

- The existent of a fairly developed market (as opposed to '*imperfect market*');
- The presence of a well-developed private sector with entrepreneurs that have the capacity to respond promptly to market signals;
- The existence of regulatory and legislative atmosphere, including enforcement capacity, that provides the needed regulations; and
- Economic stabilisation that induces relatively efficient operation of the privatised enterprises.

[1] INESOR (1996), *Zambia: Agricultural Sector Performance Analysis*, Lusaka, MAFF, August, pp. 10-11.

In the Zambian case, the above pre-requisites to the maximisation of benefits from competition are hardly developed and the expected responses to free market-induced changes are often not forthcoming. In this country, entrepreneur development is still in its infancy; the markets are often imperfect in important respects; the legal and regulatory infrastructure that safeguards competitiveness (e.g. ZCC) is still undergoing the process of development and refinement amidst institutional and human resource capacity limitations; and economic stabilisation still remains illusive despite externally-supported structural adjustment.

Secondly, there still are weaknesses in the competition law that compromise the development and consolidation of SMEs. Perhaps the most immediate challenge is that the Competition and Fair Trading Act does not make a distinction between the different sizes of enterprises, a phenomenon that seems to suggest that all enterprises, large and small, local or foreign, productive or trade-oriented, are treated the same under assumed perfect market conditions. And yet, given the initial conditions and circumstances prior to liberalisation as earlier discussed and under which SMEs operate, the country's competition policy needs to acknowledge the existing distortions so as to address positively the adverse distribution effects of market liberalisation. Some form of discrimination in favour of SMEs would seem to be justified to enable them attain a certain degree of competence and efficiency under a liberalised market. The conditions under which SMEs operate in Zambia today demand that the legal and regulatory regime has to recognise their peculiar circumstances and offer some preferences if their productive capacity is to be enhanced, in the short-term, so that they become competitive, in the medium- to long-term. The main characteristic inhibitions that presently compromise SMEs in Zambia to fully get into the liberalised market, let alone to become competitive, include the following:

- Lack of capital and access to credit;
- Limited technical and managerial skills;
- Inadequate business premises and infrastructure;
- Lack of diversified markets and market information;
- Lack of technology and access to relevant technological information;
- Unfavourable policy environment, including legal restrictions; and
- Inadequate institutional framework.

Under the above state of affairs, one observes that although the long-term benefits of the policy of liberalisation are clear, the short-term adverse effects of a comprehensive SSE exposure to full-scale competition (that includes competition with in-coming imports) have remained a major challenge for Zambia. In the light of this realisation, there is growing recognition that the process of creating a fully-fledged competitive market in Zambia would take time especially under conditions where private sector development, particularly as it relates to SMEs, has been held hostage to a legacy of past inhospitable state-market relations. One crucial consideration here is that, in the short-term, market liberation tends to be disruptive particularly in countries where the policy regime for a long time disregarded market considerations in the determination of prices for inputs and outputs. SMEs' income levels have generally remained low and many of them are actually closing down due to the fact that liberalisation in Zambia has entailed sudden increase in input expenditure almost across the board following government withdrawal from the provision of inputs and credit facilities. This is not to say that government withdrawal is a bad thing. Rather, this merely recognises that the withdrawal, if not properly sequenced and when its speed is not aligned to the capacity of the domestic private sector to fill up the void left open by the retracting state, serious short-term adverse effects on the productivity and general performance of SMEs ensue. Although, for example, the Zambian government's withdrawal from the delivery of credit[2] is understandable in a country that is passing these responsibilities to the private sector, this has led to a crisis especially given the slow response from the still budding private operators to take over this responsibility from the state, a development that has resulted in the cost escalation of vital inputs for SMEs. This seems to suggest the importance of adopting a phases and properly sequenced approach in the integration of SMEs in the all-encompassing competition policy.

Under the above conditions, the main national challenge at the policy level is to work out how best to help SMEs improve their productivity and competitiveness through institutional, regulatory, and legislative mechanisms but in a manner the recognises their intrinsic disadvantages relative to the larger size competitors on the market, including direct foreign investors, particularly the more market-dominant transnational corporations that often stifle free competition. From the above analysis, it is clear that, presently, the conditions are evidently uncertain regarding the degree to which purely market forces and the enhancement of competition, at least during the transition, would alone automatically improve SMEs' productivity.

The third challenge is Zambia's introduction of external trade liberalisation (as opposed to domestic competition policy) with little consideration of the speed and degree to which the country's main regional trading partners are doing the same. This last point is particularly important for Zambia. Although *competition law* relates principally to regulation of producers and traders in the domestic market (as opposed to *trade law* that mainly regulates external trade policy), the nature of the 'land-locked' and import-intensive Zambian economy and how it has interacted with the regional economies is such that the two laws are so intertwined that it would be superficial to address their concerns independently. This challenge, that comes closer to a cost of competition, has to do with the extent to which the government's elimination of trade restrictions and liberalisation of financial markets may have resulted in the clouding out of the domestic market with competing imports, a phenomenon that is generally assumed to threaten the survival of local industries, includ-

[2] For example, the state has withdrawn from the provision of agricultural credit following the closure of the Lima Bank. The credit facility under the Small Enterprises Development Board (formerly Small Industry Development Organisation) has also ceased.

ing SMEs. Many producers in the country today complain that they are being unduly exposed to '*unlevelled playing field'* in their intra-regional trade interaction, particularly with South Africa and Zimbabwe that have not yet opened up their trade regimes (including exchange controls) to the same degree. Hence, it is generally argued that Zambian producers/exporters are being subjected to *unfair competition* (see next section).

Notwithstanding the validity of the above concerns, a closer examination suggests that the 'clouding out' argument ought to be taken with caution when the effects of trade liberalisation are examined with respect to SMEs. First, since the devaluation of the Zambian currency has made imports dear, this must have reduced the 'external' threat from incoming imports, especially considering the fact that the products of SMEs appeal more to the low income groups that can least afford expensive imports.[3] Indeed, what is likely to happen is that the short-term demand contraction that has resulted from the structural adjustment's cost recovery measures would overshadow the current worries, thus, limit the anticipated violent fluctuations in the demand for SME products.

Similarly, while competing imports may be harmful to SMEs in the short-term, the Zambian experience so far suggests that this is more so only for particular sectors. The clothing and textile sector, dominated by numerous SMEs, is perhaps the worst hit by the immediate effect of trade liberalisation. Cheaper imported textiles and garments, including second-hand clothing, have so far resulted in a very high rate of factory and retail outlet closures.

The challenge of trade liberalisation

The above analysis of competition enhancement vis-à-vis SMEs suggests that the speed of liberalising markets ought to be guarded and aligned to the country's capacity to manage the needed regulations. In the financial and trade sectors, for example, a word of counsel from the World Bank's most resent annual report, *Global Economic Prospects and the Developing Countries 1998/99* is instructive in this regard for countries like Zambia that has completely removed all foreign exchange controls.[4] The Report warms that the poor countries are in for theirworst time since the 1980s debt crisis and recommends caution in liberalising financial markets. "Excessive zeal in deregulation" in countries lacking strong institutions and policies to manage private capital flows was largely to blame for the financial crises that began in Asia in 1997 and spread to Russia and Latin America, says the Report.

'Excessive zeal' in Zambia's liberalisation is evident at the level of tariff reduction relative to its regional trading partners. Despite the policy of liberalisation analysed earlier, most of the trade and investment problems still persist. Most manufacturing firms, particularly those in the small- and medium-scale categories continue to face liquidity problems and lack of funds for investment while trading has become more attractive than before. What has caused these problems appears to be the speed and manner of policy implementation. Trade liberalisation is one prominent example where adequate attention was not paid to the policy trade-offs. In 1991, the government reduced the number of tariff rates from eleven to six and the new minimum and maximum tariff rates were set at 15 percent and 50 percent, respectively. There were only a few exceptions in the form of a small number of luxury goods which were subject to 100 percent duty. The objective of these measures was to simplify the tariff structure to allow for freer trade and better revenue collections. A year later, further simplifications followed. By 1995, the system carried only three tariff rates with 40 percent applied on finished import products and 30 percent or 20 percent applied on intermediate products or raw materials. Also, many goods were zero-rated. The 1996 government budget set the tariff bands at 0, 5, 15, and 25 percent. There is a standing commitment to reduce these further in the future. It is clear that these big changes in the tariff structure, much as they are commendable particularly in the context of the missions of such regional integration schemes as the Common Market of Eastern and Southern African States (COMESA) and the Southern African Development Community (SADC), as well as in the context of the ideals of WTO, they seem to have been implemented with too much swiftness especially in the light of what takes place in the county's major regional trading partners.

It is the above speed of the trade liberalisation that has caused concern to Zambian manufacturers who have complained of the rapid opening up of the Zambian market to foreign imports especially from the COMESA region and South Africa and have maintained that it has rendered the playing field 'unlevelled'. In particular, their complaints have been directed at South Africa which offered for a long time export subsidies of up to 20 percent and at Zimbabwe which has placed a number of bureaucratic non-tariff barriers making it difficult for Zambian products to enter its markets. The validity of these complaints is partially borne out by the statistics that indicate a growing negative balance of trade with Zimbabwe and South Africa. For example, in 1993, South African exports to Zambia were of the order of $360 million while Zambian exports to South Africa were valued at a meagre $15 million.

The Policy implementation challenge

In the light of the above-discussed challenges and contradictions, the actual implementation of Zambia's competition law poses major difficulties at the level of both policy-cum-strategy and institutional capacity. Additionally, the constraints faced by the Zambia Competition Commission should also be looked at in the light of historical events and the change in the structure of the Zambian economy. The adoption of the structural adjustment program entailed a number of changes in the policy domain pertaining to, *inter alia*, privatisation, investment and competition policies. However, from the above analysis, it is clear that the pace of the privatisation policy in Zambia has not matched that in areas of (*a*) competition and fair trade policy and (*b*) investment policy. The problem seems to have stemmed from the failure of the government system to implement these policies on a parallel

[3] Note that 70 percent of the Zambian population is classified as 'poor'.

[4] By. January, 1994, the government had completely liberalised the financial markets. The suspension of the Exchange Control Act in that year completed the liberalisation process in this field.

basis (rather than sequentially as has generally been the case). Buyers of firms that were sold through the privatisation process and who had incentives to form monopolies were initially not subjected to fair trade and competition regulations. They could form strategic alliances with the end objective of transferring assets to each other and ultimately forming monopolies. In the setting of a parallel and somewhat disjointed development of privatisation and competition policy, such hidden motives can be mitigated by the enforcement of legislation on the part of ZCC. There are many restrictive trade agreements especially between dominant companies in the supply of goods and services e.g. exclusive distribution agreements, territory exclusivity agreements, price maintenance agreements, and price fixing agreements. The Commission is currently going through a review of these to ensure that they are aligned to the anti-monopoly legislation, a process that could have been forestalled had the sequencing of legal reforms to enhance competitiveness been appropriate in the first place.

It is equally noteworthy that competition policy was a new issue in the Zambian environment, thus, partially explaining the apparent sequencing difficulties. The setting up of ZCC revealed existing gaps in human resource capacity to enforce and manage such a policy and these gaps still persist. Support from government has been mild due to the apparent inability to relate competition policy to overall developmental goals. This also largely explains the delay in the setting up of ZCC. Although the Competition and Fair Trading Act was enacted in early May, 1994, it only came into force in February, 1995. The Commission itself was not established until April, 1997. In the meantime, considerable level of investments and privatisation was on-going following the passing of the Privatisation Act in July, 1992 and the subsequent establishment of the Zambia Privatisation Agency. The Investment Centre was established shortly after the passing of the Investment Act as early as 1991, later revised in 1993 to facilitate equal treatment of local and foreign investors. By January, 1996, over a year *before* the Commission was established, 102 companies had already been privatised; the assets of 10 non-performing parastatals had been sold; and 100 companies had been restructured to facilitate their privatisation.[5]

It is evident that the Zambia Competition Commission should have commenced its operations at the same time as the Zambia Privatisation Agency (ZPA) in 1992. The problems of competition were actually foreseen during the enactment of the Privatisation Act in which it is clearly specified that during the privatisation of state owned companies, ZPA shall ensure that monopolies are not created in the process of privatisation. Indeed, it was acknowledged during the privatisation process that if the sale of the state owned enterprises was not carefully planned, the whole privatisation exercise may end up transforming the state monopoly into a private monopoly. Despite this recognition much earlier in the process of privatisation, it was clear that the enabling legislation to safeguard this was not put in place.

Because of the 'after-thought' character of the formation of ZCC, the rather belated expectation for compliance from the business community has not been well received and there is little sign that private entrepreneurs appreciate the role of regulatory bodies such as the Commission as evidenced by minimal representation made to it on issues of fair trade and competition policy.

Additional efforts for guaranteeing policy coherence

So far, there is no major incoherence with respect to the Zambian competition policy and law. There are, nevertheless, a few areas that call for some reflection. Specifically with respect to the Zambian competition law, one observes that, if mishandled, some provisions of the Competition and Fair Trading Act would unduly restrict firms' ability to freely compete. Part III, Section 7 of the Act, for example, prohibits "…mergers, takeovers, joint ventures or other acquisitions of control whether of horizontal, vertical or conglomerate nature…" Under a normal competitive environment, takeovers and joint ventures are normal and unless something sinister is established, a blanket prohibition of this in a liberalised economy seems inappropriate.

It is worth observing that, under specified circumstances, the Act provides for exemptions to the law. Although Part III of the Act prohibits conduct that compromises competition, exemptions are given on the ground that full competition does not necessarily/always deliver the desired outcomes. The Act's adjudication (Authorisation and Notification) procedures give authority to ZCC to grant immunity from legal proceedings for conducts that may breach the Act. Such authorisation is possible if the Commission, after investigations and consultations, concludes that the public benefit from an otherwise prohibited behaviour exceeds the anti-competitive effect.

The lack of clarity over the issue of which merger or takeover is allowable and which one is not raises the question of policy coherence as the final decision is left to the capacity, integrity and competence of ZCC to investigate and interpret the special circumstances of each case. Considering the newness of the Commission; the limited financial, information, and human resources at its disposal; and the powerful and influential attributes of some of the firms it has to deal with (especially multinational corporations), it would seem inappropriate under the Zambian circumstances to leave the final decision on whether or not to allow a merger to the sole interpretation of the Commission. To preserve its coherence and integrity, the competition law should guide the Commission, in a more precise manner than is the case in the current legislation, regarding the types or forms of mergers or takeovers that are not permitted. This is particularly important as mergers per se are not intrinsically bad especially since, in an economy that is still consolidating its private sector, they could be one means of achieving efficiencies, particularly where increased exposure to global markets is placing pressure on generally weak and smaller domestic firms to reduce costs; improve quality and service; take advantage of economies of scale; and innovate in order to become more competitive in those markets.

Lastly, the coherence of the competition policy reforms is, to an overbearing degree, dependent on the capacity of the government to enforce its competition law. This, in turn, is dependent on the capacity of the law

[5] GRZ, 1996 *Budget Speech*, Lusaka, 1996.

enforcement institutions, particularly ZCC in this case, to access the requisite financial, human, and technical resources that would allow them to secure the business community's adherence to the provisions of the law of competition and fair trading. At the financial level, the Commission requires sufficient resources to enable it implement its mandate. Presently, fiscal stringency across the Zambian public sector has crippled the realisation of many policy ideals. If ZCC would have to stand any chance of facilitating the provision of legal and regulatory infrastructure that is necessary for productive capacity and competitiveness, the government needs to provide the requisite finance.

At the level of human resources, ZCC presently has a staff of only 18 professionals.[6] One of the most important aspects of institutional capacity regards the role of human resources in management. Presently, with the slowness in the implementation of the Public Service Reform Programme, the government has generally been unable to recruit and retain the needed well-trained and skilled manpower. The public sector's low salaries; poor conditions of service, particularly for professionals; and a largely uncompetitive working environment have all worked against the creation and consolidation of the required professionalism in strategic sectors. There has also been a tremendous erosion of real wages over the years. Under these conditions, one hopes that special incentives shall be created for ZCC professionals to enable them provide the needed facilitation of a hospitable competitive business environment. Capacity is required, for example, to effectively review the existing trade agreements with a view to aligning them to the provisions of the Competition and Fair Trading Act. This is because there are still many restrictive trade agreements especially by dominant companies in the supply of goods and services.

Against the above background, ZCC faces a formidable task in building its own capacity to undertake a catalogue of responsibilities as well as raise awareness and support for competition policy among the general public and the business community. The existence of a 'competition culture' within the country is vital to the success of the Commission's work and ultimately to the effectiveness of the competition law. There is recognition that competition enforcement can only be effective if the business community and the people at large are supportive. In this regard, the Commission's current areas of concentration include the following:

- Providing as much information as possible to the public about the activities of ZCC (mainly through workshops);

- Educating the consumer and the business community about competition law and how it is enforced;

- Developing public support for enforcement, by demonstrating how consumers benefit from an effective competition policy; and

- Safeguarding consumer welfare through its consumer complaints desk that has been set up to handle these and similar issues.

Recommendations for LDCs

A number of lessons can be derived from the Zambian case regarding the capacity of competition policy and related legal reforms to enhance productivity and competitiveness in developing countries. Firstly, it is evident that liberalisation does stimulate entrepreneurial activity, business efficiency, productive investment and economic growth which, collectively, result in the enhancement of consumer welfare through improved quantity and quality of goods and services at market-determined prices. Secondly, competition also fosters innovation and efficiency in a manner that promotes the competitiveness of producers. Thirdly, it is also a truism that competition enhancement is best realised when the private sector, rather than the state, is allowed to dominate production activities, thus, underlining the importance of privatisation in any developing country that aspires to implement competition-enhancing policy measures.

In the light of the above, it is important to ensure that the welfare and efficiency gains from liberalisation are not lost through anti-competitive and monopolistic practices by firms. Legal reforms that focus on competition law are, therefore, crucial for economic efficiency to the extent that, if well enforced, they preserve competitive market processes by checking anti-competition practices in the interest of overall economic efficiency. In this regard, the ultimate goal of competition law should be the promotion of economic efficiency.

Specifically with respect to SMEs, a number of recommendations are noteworthy. Firstly, notwithstanding the merits of the above conclusions, it is important to recognise that not all countries are at the same stage of private sector development and that they face different challenges in their quest for economic efficiency and productivity. This means that the pattern and speed of liberalisation and competition promotion ought to be aligned to the peculiar circumstances in the country prior to the needed reforms. The relative competitiveness of SMEs in a liberalising economy, for example, is conditioned, to an overbearing degree, by their peculiar constraints and market position relative to the more established firms, particularly foreign direct investors. In countries similar to Zambia, a further challenge is brought about by the crippling effects of in-coming imports under conditions that are not always favourable to SMEs, a phenomenon that gives further credence to the importance of ensuring that the speed and sequencing of market liberalisation are in tune with what obtains in the country's major trading countries, particularly at the regional level. A phased approach to liberalisation in the implementation of competition policy is, therefore, recommended under these conditions.

Secondly, considering the fact that the dominant position of large-scale local and foreign firms checks the smooth entry of SMEs into the marketplace in a competitive manner, it is recommended that some form of discrimination in favour of the latter is made to enable them attain a certain degree of competence and efficiency

[6] ZCC has 10 economists, 5 accountants and administrators, and 2 legal officers. Unless the Commission has sufficient resources to subcontract out some of their tasks as provided in the enabling legislation, the core staff of only 18 seems to be inadequate.

under a liberalised market if their productive capacity is to be promoted, in the short-term, so that they become competitive, in the medium- to long-term. This should help in addressing positively the adverse distribution effects on SMEs of unregulated competition.

An equally important lesson learnt from the Zambian case is that the promotion of competition through institutional and legal reforms entailed a number of changes in the policy domain pertaining to, among other things, *privatisation, investment and competition* policies. Because of the multi-faceted nature of the challenges, it is recommended that the pace of *competition* and fair trade policy in LDCs must be aligned to, and concurrently managed with the policies regarding *privatisation*, and *investment*. In this regard, it is recommended LDCs should implement these policies in parallel to each other rather than sequentially. The timing of the enactment of the competition policy and legislation should also recognise the interrelationship between these elements.

Another important consideration relates to the coherence of the competition-enhancing legal reforms, in general, and what is provided for in the enabling pieces of legislation, in particular. In order to ensure that the provisions of competition law do not unduly restrict firms' ability to freely compete and that their enforcement does not leave too much to the interpretation and discretion of the overseeing authority, the law should be explicitly clear on what is allowable/exempted and under what circumstances. This is particularly important for most LDCs considering the newness/inexperience of the institutions tasked with the responsibility of competition enforcement; the limited financial, information, and human resources at their disposal; and the power and influence of some of the firms (particularly transnationals) whose activities they have to monitor and regulate.

The above recommendation calls LDCs to address capacity building aspects of law enforcement. Apart from the need for the existence of a conducive regulatory and legislative atmosphere, the capacity of LDC governments to enforce the competition policy and laws is quite fundamental in translating the legal reforms into positive economic change. In this regard, the legal and regulatory infrastructure/institutions that safeguard competitiveness need to be developed and consolidated by attending to, *inter alia*, their human, financial and technical capacity limitations. Governments should, thus, allocate more resources to the institutions that are charged with the mandate of competition policy enforcement.

Ensuring consumer benefits from competition in globalizing markets and creating a competition culture supportive of development

By Geraldine Foster

Special Advisor to CARICOM

Why the need for competition legislation

Over the past twenty (20) years, the world has witnessed a trend towards economic liberalization. Many developed and developing countries have begun to emphasize decentralized competition rather than centralized state direction as a means of determining the production and distribution of goods and services.

It has become widely accepted that the adoption of a free market system holds the best prospect for Jamaica's economic development and improvement in the welfare of its citizens. This recognition led the Jamaican government to introduce a number of policy measures popularly associated with such terms as liberalization, deregulation, divestment etc. A similar outlook may have precipitated the move to formulate competition legislation in your various territories.

What the government of Jamaica hopes to achieve is the promotion of a free market economy with the attendant benefits, namely, (*a*) the efficiency which results from competing firms; (*b*) lower prices and more choices for the consumer; (*c*) better products and services; and (*d*) increasing opportunities for existing and new businesses.

It has also been recognized that the gains from the operation of a free market can be subverted if care is not taken to ensure that certain controls are put in place. The passing of the Fair Competition Act in 1993 and the establishment of its administrative body, the Fair Trading Commission, demonstrate a clear understanding of this reality.

The Fair Competition Act was put in place to ensure competition in the conduct of business in Jamaica. All legitimate business enterprises must have an equal opportunity to participate in the Jamaican economy. Additionally, the consumer ought to have the benefit of adequate and relevant information, and be afforded meaningful choice.

In Jamaica, benefits have clearly been recognized. More importantly, however, those involved in the enforcement of the Fair Trading Act have seen first-hand that in a developing economy, certain complaints predominate, hence rendering particular provisions in the law more applicable than others. This paper will attempt to address, *inter alia*:

(*a*) The complaints in question and the provisions which render them actionable; and

(*b*) the approach which should be taken by developed nations towards small island economies in a multilateral trading context in light of certain economic realities.

However, to ensure a proper understanding of the issues, it would be useful to discuss the Act itself and the functions of its administrative agency, the Fair Trading Commission.

The Fair Competition Act

The Fair Competition Act (FCA) was enacted on March 9, 1993 and came into effect on September 9, 1993. The legislation establishes an agency known as the Fair Trading Commission (FTC or Commission) that is empowered to enforce the provisions of the Act. The Act's primary objective is to provide for the maintenance and encouragement of competition in the conduct of trade, business and in the supply of services in Jamaica with a view to providing consumers with competitive prices and product choices.

The FCA applies to all activity in relation to the conduct of business in Jamaica. However, there are certain exceptions. These many be itemized as follows:

(*a*) collective bargaining;

(*b*) patents/ trademarks;

(*c*) conduct authorized by the Commission;

(*d*) activities expressly approved or required under any treaty or agreement to which Jamaica is a party; and

e) any activity exempted by the Minister and there after ratified by Parliament.

Conduct prohibited by the Act

Price Fixing—by contract or other agreement or arrangement.

Bid-rigging—it is unlawful for two or more persons to enter into an agreement whereby the persons attempt to influence who wins the bid by either deciding amongst themselves that one should not participate in the bid or agreeing amongst themselves on the dollar amount to be bid.

Misleading Representations—a person may not make a representation to the public that is false or misleading in a material respect. The representation may be oral or written and there is no requirement that the person making the representation intend to mislead. This breach appears most frequently in matters relating to advertising.

Double Ticketing—a person shall not supply any article at a price that exceeds the lowest of two or more prices clearly expressed by him on the article.

Sale at Bargain Price Without Adequate Stock

Sale above Advertised Price

Conspiracy—any practice whereby one person combines, agrees or arranges with another to limit unduly the manufacture, transport or supply of any goods or services or to enhance the price of same or to restrain or injure competition unduly.

Exclusive Dealing—any practice whereby a supplier of goods requires that his customers interact exclusively with him as a condition precedent to the supply of the goods, which in effect protects the supplier from his competitors.

Tied Selling—any practice whereby the supplier of an article as a condition of supplying the article requires his customer to, at the same time, purchase any other item.

Market Restriction—any practice whereby the supplier of goods requires that his customer supplies goods only in a defined market or extracts a penalty of any kind from the customer if he supplies any goods outside the defined market.

However, please note that anti-competitive business practices may be authorized if the Commission is satisfied that the particular practice provides some overwhelming social benefit.

Structure versus conduct approach

One of the critical aspects of competition law worldwide is how the competition legislation purports to deal with economic concentrations namely, mergers, acquisitions, joint ventures and the like. Jurisdictions must make a policy decision as to whether their economy is such that they would wish to prohibit certain economic concentrations as opposed to focusing on the behaviour of existing entities. This has been known as the structure versus conduct dilemma. For example in the United States where there is present a huge economy of first world proportions, stress is placed on prohibiting conduct prior to its practice.

Jamaica has chosen the opposite approach. Its legislation is activated only after a business engages in prohibited conduct. Economic concentrations are analyzed under the FCA in terms of dominance. In other words, this is conduct-based legislation. The FCA defines a dominant company as one which “occupies such a position of strength in the market as will enable it to operate in the market without effective constraints from its competitors or potential competitors.”

However, it is important to point out that simply being dominant does not constitute a breach of the Act. An enterprise must be found to have abused its dominant position and that such abuse has had or is likely to have the effect of lessening competition substantially in the marketplace.

The Act states that the enterprise “abuses its dominant position if it impedes the maintenance or development of effective competition in a market.” It goes on to outline, specifically, conduct which would be considered evidence of an enterprise's abuse of its dominant position. The list in the Act is illustrative only.

The Fair Trading Commission: structure and functions

Structure

The FTC is comprised of two distinct arms: the quasi-judicial arm represented by the four (4) appointed Commissioners, and the investigative arm, of Commission’s staff, headed by the Executive Director, who directs three lawyers, two economists, two research officers and a cost accountant.

Functions and responsibilities

The Commission may carry out, at its own initiative or at the request of any person, such investigations in relation to the conduct of business in Jamaica as well enable it to determine whether any enterprise in engaging in business practices in contravention of the Act and the extent of such practices.

The Commission has a duty to advise the Minister on such matters relating to the operation of the Act, as it thinks fit or as may be requested by the Minister. The Commission also has a responsibility to inform and educate the public with respect to their rights and obligations under the Act, to undertake studies and to publish reports regarding matters affecting the interests of consumers and to co-operate with and assist any body or persons in developing and promoting the observance of standards of conduct for the purpose of ensuring compliance with the provisions of the Act.

Powers

The Commission may summon and examine witnesses, call for and examine documents and in certain instances, issue directions to a company that it believes to be in breach. Specifically with respect to an enterprise's abuse of its dominant position, the Commission may take any action it considers necessary. The Commissioners are empowered to make “findings” in certain cases, those cases being abuse of dominance, exclusive dealing market restriction and tied selling. In this regard they behave very much like judges. In other matters, the Commission will have to take the entity charged to court.

Procedure

The FTC is a law enforcement agency. In practical terms, this means that the Commission is not the adjudicator of individual disputes but rather it seeks to address matters of national interest.

A complaint is received by the Commission and is investigated or an investigation may be initiated internally. If the investigation reveals to the Commission's staff that a breach of the FCA has occurred, then the staff will usually recommend certain remedial action to the Company in an effort to resolve the matter in a non-adversarial manner. If, however, the company is reluctant to co-operate with the Commission's staff, it may be served with a Notice of Examination to appear before the Commissioners. Acting in their quasi-judicial capacity, the Commissioners will then meet with the company to determine the cause of the lack of co-operation and inform the company of the Commission's expectations with a view to settling the matter. If settlement seems unlikely, the staff requests the Commissioners' approval to take the matter to Court so that the issues may be adjudicated.

Not all matters are handled in the first instance by the court. Breaches of section 20 (abuse of dominance) and section 33 (market restriction, tied selling and exclusive dealing) of *the Act* are determined firstly by the Commissioners who sit as judges at a public hearing and make findings based on the evidence presented by both sides. Should the Commissioners find in the staff's favour, they may issue any directions to the company they deem appropriate to correct the breach.

If the Commissioners acting in their judicial capacity find a breach of section 20 and/or 33 of the Act, the company has up to fifteen days from the date of the finding to appeal to a Supreme Court Judge in Chambers. The Judge has the discretion to up hold the Commissioners' finding, modify it or reverse it completely.

Public response to the Act

In general, the FCA and its enforcement body, the FTC has received a positive reception from the Jamaican public. The FTC is seen as a pro-active agency with a reputation for effectiveness and efficiency. This is due in part to the provisions of the Act, which permit the agency to seek stiff penalties for failure to co-operate with the Commission. Although the Commission's focus is the nation at large, that all-encompassing term can be divided into three categories: the business community, consumers and the professional sector.

The business community

The Commission's experience with this sector has been mixed. It is human nature to resist change. However, the Commission has been successful in implementing its policies where it has been able to show that its recommendations are beneficial to the business, as well as the consumer.

The primary issue that surfaces with regard to this sector is the matter of disclosure, which is addressed by section 37 of the Act which speaks to Misleading Advertising. Businesses have been required to provide more complete disclosure regarding their products and services, methods of payment, etc. to enable the consumer to make informed decisions.

The business benefits as the rights and obligations of its consumers are clearly outlined prior to the completion of the transaction and, therefore, the consumer cannot claim ignorance.

Consumers

Initially, the Commission's focus was that of a consumer protector. This proved to be useful as it helped the Commission to earn public support and effectively communicated to the average person those aspects of this new law which would directly impact their day-to-day existence. The Commission was seen as the saviour for every beleaguered consumer who had purchased a malfunctioning appliance or was duped by slick advertising.

More recently, the F17C has shifted its focus to some extent so as to deal with the more sophisticated issues of competition law. The agency now primarily addresses the issues, which affect a significant cross-section of the community. If the complaint is particularly egregious and/or raises issues for the public at large or if the complaints received reveal a pattern of anti-competitive conduct, then the will consider intervention.

It is not the case however, that consumers have been left to fend for themselves. The government recognizes the need for an agency which focuses on the right of the individual and has therefore set up the Consumer Affairs Commission (CAC) with significant funding. That body handles individual disputes and is not bounded by the strictures of any particular statute.

The professional sector

The legal community has, in some instances, been a particularly harsh critic. However, the Commission is undaunted and works diligently in an effort to educate the Bar as to our role and function. The Commission accepts that the adversarial stance of the lawyers may simply be vigorous representation of their clients, as well as a defensive reaction to an extremely pro-active statutory body. Additionally, research has shown that there is indeed a difference between the common law principles and definitions and those of competition law, in that competition law has its own unique nuances and concepts, and these differences have not been readily accepted by the legal community.

The Commission believes that its on-going educational programme will go a far way in helping to woo this reluctant group.

The relationship between the FTC and other statutory agencies

Section 54 of the FCA states, *inter alia*, that "this Act binds the Crown". However the Commission has interpreted this to mean that its power does not extend to government when the latter acts in its executive capacity. Conversely, the Commission holds the view that government is regulated to the extent that it engages in trade.

For the most part, the Commission has enjoyed amicable working relationships with other statutory organisations. However, there have been instances where some regulatory bodies resist the Commission's intervention as it is viewed as an encroachment on their turf. This will be more fully discussed, infra.

By way of example, however, the following have been found to be co-operative:

Office of Utility Regulations (OUR)

The staff of the Commission involved itself in extensive discussions with the OUR regarding formulating their draft legislation. Specifically, the OUR sought the FTC's input so as to ensure that the regulatory framework of the proposed legislation takes into account competition policy and objectives.n

*Customs & Excise Departmen*t

The staff of the Commission, along with senior representatives of the Customs Department, the Ministry of Finance, the Revenue Protection Division and the Customs Brokers' Association of Jamaica, discussed the mandatory use of the services of customs brokers by consumers for goods valued at US$ 1,000 and upwards. The staff of the FTC, after a thorough consideration of the competition implications, and following discussions with the above organisations, was able to provide the relevant governmental body with an advisory position and recommendations. In sum, the staff recommended that the threshold be raised US$ 3,000, so that these would be less hardship for the consumer while protecting the government's right to collect revenue and protect its borders. This body has agreed to take the FTC's position into account, (notwithstanding its autonomy to regulate the area of revenue collection), when drafting legislation for the aforementioned area.

National Water Commission (NWC)

The Commission investigated this state monopoly with a view to determining whether the company was abusing its dominant position by passing off its inefficiencies to the consumers in the form of increased rates. After prolonged studies and economic analysis, the staff found evidence of abuse. In a meeting wherein the Commission's staff discussed its findings, the company agreed to co-operate with the staff whereby the Commission would continue to monitor the company, and the company would, in turn, provide the Commission with ongoing status reports regarding the implementation and progress of certain programmes in the areas of weaknesses that had been identified.

Port & Airport Authority of Jamaica

The staff of the Commission has held continuing discussions with authorities for the air and sea ports of the island. Specifically, the staff has informed these authorities of the competition implications which impact on the current deregulation exercise being conducted by both entities. The Airports Authority has actively sought the FTC's input in this area. With respect to the sea ports, the Commission's staff has consulted with the relevant Ministry and the Port Authority, with a view to dealing with the issue of ensuring equal access to the ports for all players in the tourism transport market. This Authority has now referred the body responsible for this deregulation exercise to the FTC so that the Commission may advise on competition implications that may arise.

Jamaica Public Service Company Limited (JPSCo)

The staff has conducted intensive reviews of the complaints received against this state monopoly. These complaints relate to pricing, meter reading, and selective tendering of contracts. 1 n some instances, it has been found that the FTC does not have jurisdiction, and thus the matters are referred to the Ombudsman for Public Utilities. However this does not alter the fact that the JPSCo. does engage in trade and is therefore subject to the FTC's jurisdiction.

Jamaica Bureau of Standards (JBS)

A deregulated economy has resulted in a wider variety of items offered for sale in the market. These items were previously not available for purchase by consumers. However, arising from this situation is an increase in the number of substandard goods entering the Jamaican marketplace, since some importers choose low unit price over acceptable quality. The above-mentioned scenario has brought the FTC and the JBS into a very close working relationship. In fact, the FTC's mandate of consumer protection and the JBS's responsibility of ensuring that goods offered for sale comply with basic international standards appear to converge at this point. The FTC has, from time to time, called upon the expertise of the JBS in areas where the Commission requires a determination based on technical analysis and assessment. One common area of co-operation is that of the JBS performing standards testing in the laboratory and giving its opinion and/or report in matters relating to electronic appliances.

The co-operation between both agencies has also seen the passing of information from one agency to the other. For example, the FTC, on the basis of numerous complaints received concerning a particular product, may request the intervention of the JBS which will then undertake an empirical investigation and make a decision regarding that item in question. Very often, the decision results in the banning of that particular product.

The JBS, for its part, informs the FTC of any discovery of substandard products which have been imported and are being offered for sale in the market. The FTC then may recommend that individuals who have been injured be offered some form of redress.

Additionally, other statutory departments and agencies, such as the Broadcasting Commission and the Ministry of Construction, have sought the FTC's assistance regarding their tendering process and practices in an effort to ensure that the laws regarding competition are not breached.

It can therefore be said, that in exercising its mandate to regulate competition in a new liberalized economy and to ensure the observance of the provisions of the FCA, the Commission has had to build close relationships with other statutory agencies, the actions of which impact on the operation of the free market economy. In many instances, those agencies are now actively seeking the FTC's input in shaping their own policy.

General Legal Council v. *Fair Trading Commission*

As noted initially, the Commission has met with resistance from some statutory bodies. Where such conflict has not been resolved, both statutory entities have guarded their turf jealously and in one instance, the issue of jurisdiction has been adjudicated. Specifically, there is the case of the *General Legal Council* v. *the Fair Trading Commission.*

The General Legal Council (GLC) established under the Legal Profession Act (LPA) sought to determine whether the FTC could exercise its jurisdiction over that body. The Supreme Court held that the GLC is not amenable or subject to the jurisdiction of the FTC. (Please see discussion, infra, of this decision).

It is the Commission's position that the Court ousted the jurisdiction of the FTC, because there was specific legislation which governed particular practices.

With respect to other professional bodies, such as the medical profession etc, the Commission has taken the position that generally it can exercise concurrent jurisdiction. However, it has no right to intervene where there is particular legislation that requires these bodies to act in a certain manner.

The Commission is currently seeking to amend the FCA, so that all professional services fall within its jurisdiction, notwithstanding the existence of specific legislation. However, the Commission does not intend to disturb any profession's authority to regulate standards of competence.

Jamaica Stock Exchange v. *Fair Trading Commission*

In another matter currently before the Courts, the *Jamaica Stock Exchange v. the Fair Trading Commission,* the JSE is seeking to have determined the question of jurisdiction. The JSE believes it should only be regulated by the **Securities Commission** (SC), established under the **Securities Act (SA)** in 1993. For its part, the FTC claims concurrent jurisdiction with the SC (Please see further details, infra).

Summary

The above discussion raises core issues as to the extent to which the FTC can exercise jurisdiction vis-à-vis another regulatory body. In other jurisdictions, a competition tribunal may have concurrent jurisdiction with another regulatory body. Ultimately it is a matter of statutory interpretation as to whether there is room for both bodies to play a regulatory role, or whether only one regulatory agency has jurisdiction.

One possible solution is that the problem should be addressed by Parliament. In other words, Parliament in enacting legislation, should specifically state whether or not a particular area should be exempt from competition legislation, thus avoiding ambiguities as to the scope of the Commission's jurisdiction.

Factors which have contributed to the development of the FTC

Interaction with international counterparts/donor agencies

The FTC has been the beneficiary of a significant amount of assistance, primarily from the United States Agency for International Development (USAID) and the British High Commission, among others.

By virtue of a Memorandum of Understanding between the Government of Jamaica and the USAID, the USAID has provided funds to facilitate public education, technical assistance, computer administration and network linkages and the procurement of reference materials.

The FTC has received technical assistance from the USAID in the form of internship programmes and missions organized in conjunction with the US Department of Justice (DOJ) and the United States Federal Trade Commission (USFTC). Through the internships, the FW staff has been exposed to the procedures and investigational techniques employed by these agencies. Through the short-term missions, US attorneys, economists and computer specialists provide consultancy services, conduct in-house training of FTC staff and also participate in public education seminars. Additionally, the internships and missions have served to cement working relationships between personnel of the FTC, DOJ and the UK's Office of Fair Trading, allowing the FTC to continue to benefit from the expertise of agency staff of the listed bodies, even after the participants return to their countries of origin.

Specifically with regard to the British High Commission, it has provided technical assistance in the form of funding internships for FTC staff to visit, observe and learn from their British counterparts at the Office of Fair Trading (OFT) and the Monopolies and Mergers Commission (MMC). The British High Commission has also funded the Commission's Executive Director's participation in an international seminar on Competition Law in London.

The FTC staff's initial problem concerned die acquisition of reference materials to assist with investigations and to inform it on the status of competition law in other states. However, that problem has been addressed through the USAID which has facilitated the acquisition of the Lexis/Nexis system and the Internet in May 1996. The installation of these computer linkages has gone a far way towards allowing the FTC staff access to materials to support investigations and in some cases, litigation. USAID has provided the initial subscription fees for these services. Hopefully, by the time the funding has expired, the Commission would have amassed a body of information sufficient to aid its work in the area of competition law and practices.

Public education programme

The success of any competition legislation is intricately linked to the provision of adequate information to promote an understanding of such legislation. Public education has therefore, become the vehicle by which such information is disseminated.

The FTC has, since its inception, embarked on an aggressive education programme aimed at inflorining both businesses and consumers of the provisions of the law and how they may be affected by same.

In order to effectively propagate the information produced by the FTC, the Commission has utilized a variety of channels to achieve this objective. To this end, the FTC has promulgated press releases, advisory opinions and policy papers on several industries operating within the Jamaican marketplace. The automobile, insurance, banking, real estate industries are among those reviewed. The Commission also produces an annual report outlining the work carried out by the Commission for that year. These reports are sent to a number of institutions. Copies are also readily available at the offices of the Commission.

The FTC has also utilized the electronic media to transmit its education programme by appearing on various talk shows and granting interviews. Not to be outdone are presentations made at various types of gatherings, for example, at corporate meetings, citizens' associations, seminars, exhibitions, and lectures at educational institutions.

The on-going education programme of the Commission has seen a marked change in the responses and attitude of target groups and indeed, the general psyche of the Jamaican marketplace.

General achievements of the FTC

The Commission's achievements have undoubtedly emanated from its active and continuing educational programme, its resolve to enforce the law, its willingness to provide guidance in terms or how businesses should operate within a free market system, and its facilitation of redress for the injured parties.

Since its inception, the FTC, as the regulator of business practices and conduct within the free market, has created a more sensitized and enquiring business community. This is evidenced by the numerous opinions and advice sought by businesses operating in the Jamaican marketplace.

The F.TC has been particularly successful in educating businesses that the provision of material information concerning purchases is vital to consumer's ultimate purchasing decision. As a result of this, businesses have taken the time to convey information by way of clearly worded signs placed at conspicuous points in stores as well as on their sales receipt.

The consumers have also become more vigilant and are at this point demanding information relevant to purchases, refusing to purchase from stores where they are riot adequately informed, and notifying the FX if they believe the practices of these entities run afoul of the law.

Perhaps the major accomplishment of the FTC lies in the area of complaint resolution by way of settlements or through legal proceedings. Statistics for the period September 1993 to December 1995 indicate that of a total of one thousand five hundred and forty-seven (1,547) complaints, one thousand two hundred and thirty (1,230) have been resolved. This represents a resolution of 80% of all complaints lodged for that period. Some of the more celebrated cases are FTC vs Air Jamaica, FTC vs Caribbean Cement Company, FTC vs Telecommunications of Jamaica, FTC vs John Crook. The details of these cases among other will be cited in the section titled "Summary of Complaints brought before the FTC".

The FTC has also forged a successful working relationship with a variety or interest groups. Of note is the Commission's continued dialogue with Courts Jamaica Limited (the island's largest retailer in the furniture and appliances) and the Petroleum Marketing Companies. The relationships have in fact contributed ultimately to a more healthy business environment through constant dialogue and co-operation.

A similar relationship has been forged with consumer groups. The Commission provides assistance by way of advice, policy papers and guidelines with regard to matters complained of and those likely to be complained of. This liaison has seen an increase in consumer vigilance and a deepening of the recognition of their rights and responsibilities and the recourse available to them under the FCA.

Summary of cases brought before the Fair Trading Commission

Telecommunications of Jamaica Limited (TOJ)

Following negotiations between the TOJ and the FTC, an agreement was reached whereby TOJ's residential customers were allowed to connect certain compatible equipment to the TOJ network for a reasonable price. Prior to the FTC's intervention, this had not been the case. The consumer was required to purchase all equipment from TOJ and if TOJ did not have the item in stock thereby necessitating its purchasing elsewhere, the customer was still required to pay a rental charge to TOJ The FTC took the position that TOJ's conduct constituted an abuse of dominant position in the market for telecommunication services. TOJ agreed to interconnection without admitting liability.

Caribbean Cement Company (CCC)

A complaint was made against CCC charging that its practice of constantly raising prices was an abuse of its dominant position. The Commission retained an outside consultant to examine the company's business practices in order to ascertain whether or not the price increases resulted from inefficiency or were otherwise justifiable.

The Consultant opined that there was an under-utilization of assets and that the company was not taking advantage of modern technology available in the marketplace which could substantially increase its efficiency, He further advised that major capital expenditure would he required to effectuate improved productivity which would hopefully lower cost in the long run. The upshot would be a lower price to the consumer.

The company did not completely agree with the consultant's findings but overall was amenable to reviewing its operations. Given that undertaking, the Commission decided to suspend its investigation but would continue to monitor the company's operations. So far, the company has reduced its prices twice in the last six months.

Jamaica Stock Exchange (JSE)

Subsequent to the FTC's filing a complaint against the JSE for abuse of dominance, the JSE filed its own suit claiming, *inter alia*, the Commission lacked jurisdiction. As noted earlier, it is the JSE's contention that it should only be regulated by the Securities Commission. For its part, the FUC claims concurrent jurisdiction with the SC. The trial commenced June 3, 1996. It has been adjourned and is expected to reconvene later this year (1996).

National Water Commission

As observed earlier, the FTC's staff investigated this state corporation seeking to determine whether the company was abusing its dominant position by passing on its inefficiencies to the consumers in the form of' increased rates. Evidence of abuse was found by the staff.

Eventually, the staff and the company arrived at an Agreement, wherein the company agreed to tile continuous monitoring of the company. Additionally, the Company assumed the duty of providing the Commission with quarterly reports regarding the implementation and progress of certain programmes in the many areas of weakness that were identified, namely –

—Meter replacement,

—Leak detection and repair,

—Revenue enhancement,

—Collections,

—Operational strategies: including the billing cycle and standpipes,

—Preventative maintenance and plant improvement, and

—Cost reduction strategies

The baking industry

The Commission initiated an investigation, sua sponte, to determine whether the industry members were engaged in price fixing. While investigations revealed no concrete evidence of concerted action, it was somewhat disturbing to note that prices tended to be uniform. One explanation is our country's history. In other words, against the backdrop of Jamaica having been subject to a centrally planned economy for most of its history, most manufacturers set their prices by simply taking the prices that the industry leaders charge and simply follow suit. This phenomenon is known as price leadership. The Commission determined that periodic review of this industry is necessary because although there is no direct evidence of conspiracy, the Commission would like to encourage members to behave in a more individualistic fashion and thereby stimulate competition within the industry.

Petroleum Corporation of Jamaica

This state monopoly was investigated because it was alleged that the company was engaged in unfair pricing. The Commission's investigation revealed, however, that although the company was indeed a monopoly (it being the only oil refinery in the country) it was not dominant as that term is defined by the FCA, given that potential competition from existing marketing companies constrains its conduct. In other words, the present company is mindful that if prices are raised beyond a certain level, others will enter the market. That forces them to keep their own prices competitive.

General Legal Council v. *Fair Trading Commission*

The General Legal Council v. Fair Trading Commission case is one of the matters which has been adjudicated in the Supreme Court since the enactment of the FCA, and has already been discussed, supra. The facts, however, are now more fully set forth.

In July 1995, the GLC took the FUC to court. It wanted the court to determine whether or not the LPA has been repealed by the FCA. The court declared that in performing its statutory functions and duties under the LPA, the GLC is not amenable or subject to the jurisdiction of the FTC established under the FCA. Additionally, that the Legal Profession (Canons of Professional Ethics) Rules, being subsidiary legislation and/or statutory rules made under the LPA are riot governed by tile FCA. The court also declared that the provisions of the LPA and the Legal Profession (Canons of Professional Ethics) Rules made thereunder are not repealed, amended, nor modified by the provisions of the later enacted, FCA.

As noted above, an amendment of the FCA is being sought so that all professional services fall for regulation.

The Banking Industry

The FTC arrived at an agreement with the Bankers Association of Jamaica. This agreement was brokered as a result of allegations that documents often signed by clients are not written in "reader-friendly language" so that the average consumer does not understand what he or she has signed. The agreement sought to cover the areas of:

1. Clarity in banking documents

It was agreed that a fact sheet in layman's language would be attached to the face sheet of all loan documents for individual consumers. The fact sheet would contain information that the average person would consider material. The sheet would detail, at the very least, the effective interest rate, whether or not there are prepayment penalties and the total amount of the loan.

2. The posting of the exchange rate

The banks would indicate whether or not these rates were opening rates only. In other words, the consumer should be put on notice if the rate stated could vary throughout the day. If that indication is not given, the consumer is entitled to assume that the rate given is the set rate and should be given foreign exchange at that rate.

3. The advertising of interest rates

Where "add-on" rates are used, they will be designated as such. However, it was generally agreed that it would be more useful to state the effective rate of interest when advertising as the add-on rate is deceptively lower. This will minimize confusion and the average consumer will be better able to compare rates among banks.

The JBA and the FTC plan to continue dialogue as there are other issues which need to be addressed. These issues involve the use of panels of professionals and tied arrangements which are allegedly the practice of most banks. The FTC and the JBA will notify the public as to the outcome of its discussions on those matters.

Media Association of Jamaica

The staff of the FTC and the Media Association of Jamaica have reached a settlement concerning that Association's Recognition Agreement. Prior to the advent of the FCA, media houses by means of the so-called Recognition Agreement, would pay a fixed commission and extend credit to only "recognized" agents.

To be "recognized" an agent had to apply to the MAJ and satisfy it as to certain billing and other structural capabilities. Having been duly satisfied, the MAJ would then pay a fixed commission of 18% to that agency in addition to extending it a credit period for advertisements place in the various media. Should the agency fail to pay its bills timely to even one media house, all media houses would deny that agency credit.

It was the view of the staff of the FTC that the FCA made those specific portions of the agreement illegal. The getting-together of the media houses to fix the amount of the commission, in the view of the staff, constituted both a conspiracy to restrain competition and price-fixing. Additionally, it was felt that media houses which act in concert against an agency are behaving in a cartel-like fashion which also constituted a conspiracy against competition and thus disfavoured in a free market system.

The unequal treatment of the unrecognized agents also invited scrutiny of the staff, for while the MAJ can certainly put in place reasonable standards for recognition, it is anti-competitive to penalize media houses who choose to extend credit and pay commissions to those agents who happen not to meet those standards. Commercial entities must not be deprived of their ability to engage in independent decisions-making vis-à-vis trading partners.

In light of the effect of the staff s views, the MAJ entered into negotiations with a view to arriving at a form of Agreement which would not offend the terms of the FCA. The parties developed a Recognition Agreement which conforms to the terms and spirit of the FCA.

The MAJ has agreed, as part of the settlement with the FTC's staff', that it would institute a 90-day period for the procession of applications for recognition and, should an application be denied, that denial may be appealed to a three-person panel who are unconnected to the media.

Additionally, there is also the possibility of provisional recognition where an agency, new to the marketplace, may nonetheless be afforded the legal benefits of a recognized agency. Provisional recognition automatically expires at the end of one (1) year, at which point the agency may apply for full recognition.

John Crook Limited

Acting on complaints, which in sum alleged that John Crook sold 1989 Ladas to the public as 1993 vehicles, and 1993 Subaru Justys as 1994 models, the FTC was able to broker a settlement in favour of the complainants. The settlement package arrived at saw the company paying out approximately four million dollars ($4,000,000.00) to individual complainants who had purchased the automobiles in question.

Air Jamaica Limited

Several individuals complained to the FTC regarding what they alleged as Air Jamaica's nondisclosure of additional charges for its "Love-A-Fare" package. A particular fare was advertised, yet when the consumer arrived to purchase their ticket, they were then made aware of additional charges. The Commission viewed that practice as misleading advertising. In the settlement, arrived at with the company, it was agreed that passengers who could prove that they traveled within the particular period (February 14—March 10, 1995) would be given special upgrades. The offer remained open until July 31, 1996.

Issues Generally Peculiar To A Developing Economy

General information

A newly formed competition agency should develop a close relationship with other domestic and international bodies which can provide assistance with the gathering of necessary information. As discussed, supra, staff participation in the various internship and externship programmes offered by international competition agencies may facilitate (lie development of greater technical expertise in this specialized field. It will also, expand basic information concerning particular industries.

Drafting the legislation

The drafters of the Jamaican FCA extracted portions of existing legislation from Commonwealth jurisdictions, primarily New Zealand, Australia and the European Union. This was necessary as it allowed thein to consider a variety of styles and approaches to the enforcement of competition law. The Jamaican experience however, has shown that is can be dangerous to adopt legislation on a piece-meal basis. The section of the Act which prohibits a company's abuse of its dominant position in the marketplace, for example, suffers from certain philosophical inconsistencies which have come about because that particular section is an amalgamation of sections of the New Zealand Commerce Act, the Article 86 of the European Union's Treaty of Rome.

The United States of America has been engaged in competition law since the late nineteenth century and has earned the reputation of being an expert in this field. The Jamaican FTC has, quite understandably, used the expertise, policies and internal procedures of the United States, in formulating its own. Notwithstanding the shared common law jurisprudence of the Commonwealth and American jurisdictions, it may be difficult to reconcile the written legislation of Commonwealth jurisdictions with the American policy perspective. There is a basic difference in U.S. administrative law and that of Commonwealth countries.

Additionally, in light of the FTC's approach in playing different roles (to be discussed in more detail below), the drafters would be well advised to define carefully the roles of the Commissioners vis-à-vis the staff, and to ensure the consistent use of the terminology throughout their competition legislation. This will facilitate the efficient application of the Act.

One should also consider the role that Parliament wants competition law to play in one's economy. That cannot be decided without considering the state of a country's economic development and its plans for future growth. Perhaps one of the most important questions that should be asked and answered before the statute is actually drafted, is whether the legislation should form the basis of the country's economic constitution? This will force Parliament and the public to give due consideration for the principles and policies which are intended to underpin the legislation itself. For this very reason, it is essential to properly document each stage of the Parliamentary and drafting process. This will provide generations to come with information on the genesis of the law and its intended application.

Operating procedures of the FTC

The Commission was established to administer and enforce the provisions of the FCA. To enable the exercise of this function, the FX has been empowered by section 5 (1) of the FCA, to -

> "carry out at its own initiative or at the request of any person such investigations in relations to the conduct of business in Jamaica as will enable it to determine whether any enterprise is engaging in practices in contravention of this Act….", *inter alia.*

In carrying out its statutory functions, the Commission as a law enforcement agency, performs the multiple, but distinct roles of complainant, investigator and adjudicator, thus wearing many hats, so to speak. Therefore the three separate and seemingly conflicting functions of investigation, prosecution and decision-making, are fused together in one entity, with combined functions requiring separate procedures, thereby creating what one Court has described as statutory schizophrenia.[1]

While this may appear to be inherently inconsistent, other jurisdictions with similar competition tribunals have found that this does not violate the principles of natural justice.[2]

While it is also this Commission's view that this fusion of multiple roles does not impair the principles of fairness, it is aware of the possible perceptions of injustice and has put in place procedural safeguards. Some of these are outlined below:

1. On those occasions when the Commissioners act in a judicial capacity the Executive Director never participates as a Commissioner, although the Executive Director is identified as an "ex officio Commissioner" in the FCA; and

2. Once a complaint has been laid before the Commissioners, there can be no ex parte communications with them by the staff. With respect to items 1 & 2, it should be noted that under section 52 of the FCA, the FTC may, with the approval of the Minister, make Regulations prescribing the procedure to be followed in carrying out the provisions of the Act.

To date, the FTC has not promulgated regulations. However, procedural guidelines have been formulated which are comprehensive in scope, and exhibits the observance of the principles of natural justice. Briefly, these procedures cover the following areas: the Examination of Witnesses, the Production of Documents, Applications for Authorization, Commencement of Proceedings where the Commission is authorized to make a Finding, Prehearing Procedures, and the Procedures for Appeal of the Staff Findings.

Economic tips

Although competition agencies are primarily concerned with the enforcement of competition legislation, this task is not exclusively legal in nature. As stated hereinabove, the role of economics is of supreme importance. Thus careful consideration should he given to the needs of both departments.

It is also advisable that economic guidelines be formulated at the outset as these guidelines would create a standard procedure for the assessment of various breaches under the Act. The Jamaican FTC has formulated such guidelines and those are available to all who wish them.

Conclusion

Small island economies face certain realities which cannot be ignored. Creative solutions, therefore, must be found so that, in the long run, the inherent harshness of antitrust philosophy is not a legislative cross to be borne and despised, but a challenge to which they can rise and

[1] *Fisher & Paykel Ltd.* v. *Commerce Commission & Ors* (1990) 3 NZBLC, 101,660, wherein it was noted that amendments to New Zealand's competition legislation led to the combining of investigative and adjudicative functions.

[2] *FTC v. Cinderella Carrer & Finishing Schools,* 404 F2d 1308 (D.C. Cir. 1968, wherein it was held that for the Federal Trade Commission to consider recommendation of subordinates, issue a complaint and a press release and later to decide the case, does not violated due process; *See too, Sharpe v. The Jamaica Racing Commission* (1974) 12 JLR, 1319, discussing how bodies that serve combined functions do not violate natural justice principles in so doing.

eventually an aid in helping them to take their place alongside their global counterparts.

Small island economies which have a history of being state-controlled, have to be educated as to the differences which obtain in a free market economy. In is therefore important to educated the public at large and also focus on certain groupings within the economy so that they may know how to adjust their conduct accordingly.

Disclosure is a key element in a liberalized regime. Given the selective unsophisticated nature of consumers in developing countries, businesses used in their advertising and any ambiguities should be resolved in favour of the consumer.

It is important the antitrust agency be aggressive at the outset. The market place must be made aware of its presence. The legislation therefore should allow the agency to set on its own initiative and not simply react to complaints.

Internationally, developed countries should willing to exercise patience. Time must be given for the changing of the psyche of the marketplace.

Elimination of trade measures in a customs union and their relevance to regional integration

By James Mathis

Trade Law Program Coordinator
Department of International Law
University of Amsterdam

Introduction

The selection of a legal form for regional trade groupings will be made on the basis of a number of factors, but one major factors would be the degree of unified external representation the group wishes to achieve in international trade. Members seeking to speak together as a single territory will consider a customs union formation rather than a free-trade area where each member retains its individual commercial policies as to third party goods. For customs union members, although a leading motive for formation may be external or representational, many of the consequences of making this choice are decidedly *internal* to the grouping, especially as to those aspects relating to how goods are circulated within a completed territory. For customs unions, the primary internal consideration is to establish the legal basis for free circulation for goods whereby third party goods admitted to the union circulate on the same basis as member state goods. This requires the condition of uniformity in the external tariff. Upon this development, deviations in treatment for imports are eliminated and the need to establish the country origin of goods in *intra* union trade is no longer necessary in order to confer the preference for local goods.

The establishment of external uniformity for trade policy and the provision for free internal circulation also suggests that member states should forego the legal ability to apply trade policy instruments to the goods of other member states, especially contingent trade measures such as safeguards and anti-dumping. This is effected by establishing a prohibition against the use of such measures. At this point a regional competition policy becomes relevant as it is able to provide an alternative remedy for anti-dumping. The appropriate competition policy to consider therefore is that policy which can insure that private restraints will not frustrate the re-exportation of dumped goods between the member states. It follows that a core competition policy element in the determination to form a customs union is a policy able to address vertical restraints.

I. Legal form, customs union

Since a (completed) customs union is also a customs territory, member states should forego their individual external commercial policies to whatever extent is necessary to present a common external tariff as to third-party goods for substantially all of the trade. Some type of common commercial policy is designated to operate the decision-making aspects of this uniform tariff and for both import and export measures. This may not require an independent institution, but whether it is formal or informal, some assurance of uniformity in the tariffs application by each member state is required in order to maintain the external legal structure of the entity as a separate customs territory.

There is a strong link between the ability to establish and maintain a uniform external tariff and the ability for the union to provide for the internal free circulation of goods, as the first is a precondition to the second. As for the case of a single national territory, once duties are paid and compliance with other customs formalities is completed, goods are then admitted for sale and will circulate within the territory on the identical basis as those goods produced by a member. Under this condition, there is no need to assess the origin of goods as they across internal national borders, since this all applicable trade measures have already been assessed by the union on the point of initial entry. Although internal controls for inspection and certification may persist where members have not harmonised health and safety requirements, these operations, while requiring frontier controls, are not trade policy instruments and do not require certificates of origin. Inspections are made on third-party goods in the same measure as they are performed on member state goods.

In order to summarise, consider the case where uniformity of entry conditions is not attained by the union. Where the import treatment for third party goods varies from one entry point to another and for whatever reason, then free internal circulation for those goods will also fail. The member state imposing the higher entry requirement will seek to impose internal customs control as necessary to avoid trade deflection as third party goods are routed via the lower tariff member state. In re-establishing national commercial policy, origin verification will also be required to be re-established, since some goods of third party origin will be assessed for the adjusting measure and member state goods will not.

II. The requirement to eliminate internal measures

Once free circulation is committed to be achieved, the retention by a member of the power to impose antidumping measures on the goods of another also appears inconsistent with the concept of a single territory. If internal trade measures are permitted to be imposed by member states, then (non preferential) origin rules must also be recalled *internally* in order to determine which goods shall be subject to dumping duties and which goods shall not. Therefore, just as in the case where disparities in external application of the tariff will result in the imposition of national internal measures to avoid trade deflection, national internal trade measures imposed between members will produce the similar result. In both cases free internal circulation will fail to be achieved as an aspect of the customs union formation. As a practical matter, this result is also paradoxical where goods produced within the territory can be subjected to treatment that is worse than that to be applied to third-party goods.

Based upon these considerations, the choice of forming a customs union should also be accompanied by a prohibition of internal antidumping measures, to be made effective not later than the end of the transition period.

III. Competition policy to give effect to the prohibition

Once member states are pledged to the elimination of internal measures, it is then possible, if not necessary, to contemplate an appropriate competition policy response at a regional level which will permit this prohibition to securely function in practice. In this sense, it can be argued that the appropriate regional competition policy is one which will support the prohibition made against trade measures, i.e., a decision to prohibit anti-dumping internally should act to define the minimum competition policy required to validate a customs union formation. This is distinct from the policy options presented in a free-trade area where member states choose to retain the power to apply trade measures in regard to the goods of other member states.

Although other aspects of competition policy should also be considered in the equation of customs territory formation, the essential formulation of competition policy in this regional context is to provide for the legal means to guarantee that traders in the territory will be secured in their ability to re-export any dumped goods back to the member state of origin. This is understood to provide a market-driven or self-corrective mechanism which will act to undermine the benefits anticipated from dumping, at least to the extent that the price difference between markets does not exceed the cost of re-transport, administrative costs, plus profit. Where it is provided, this guarantee of re-exportation will eliminate market strategies based upon price discriminatory predatory behaviour.

IV. Competition policy elements

If we understand that territory formation has provided for the elimination of public barriers in the form of tariffs and quotas, traders will then only be frustrated in re-exportation by the use of private restraints which act to prevent goods from entering the distribution channels of the home market. Thus, it appears that the competition policy element essential to customs union completion in this context is that which provides a legal redress for vertical restraints imposed in the member state of origin.

The elements which can be designated to this policy include the following:

— A definition of legal regional territory jurisdiction which is directed to the elimination of distortion to trade *between* the member states;

— A basis for complaint and prompt redress on behalf of firms and individuals seeking to re-export; and,

— A guarantee of uniformity for the interpretation of the competition policy principle as it is to be applied throughout the customs territory.

Policy considerations

As demonstrated by the EC experience, these elements can be provided in a centralised agency which functions independently at the regional level. For the EC, this means a requirement for undertakings to notify vertical restraints to a single regional agency (European Commission, DG-IV), and then by providing that exemptions permitting pro-competitive restraints can only be granted by this central regional authority. Undertakings may complain directly to the Commission, but may also direct complaints to member state authorities, which are encouraged to make determinations and engage in enforcement. However, in the EC system a member state authority cannot grant an exemption. Certain de-centralised aspects are also provided. By Court of Justice rulings, the regional prohibitions for anti-competitive practices are given direct effect in the Community legal order. Undertakings may initiate actions against other undertakings in the national courts of the member states national courts which are bound to apply Community law. The Treaty provides a procedure for preliminary opinions by these national courts to the EC Court of Justice. Points of law are interpreted by the regional court, published, and then applied by all national courts as applicable law.

Although the existence of member state authorities are now understood to be a vital aspect of making this policy effective, the existence of national authorities is not a legal pre-requisite to the implementation of a regional competition policy. Likewise, although the EC relies upon a centralised agency at the centre of the policy, it cannot be concluded that the provision of such an agency is a also pre-requisite to giving a treaty prohibition legal effect.

In the case of COMESA, the existing prohibition against restrictive business practices which distort trade between the member states should suffice as a legal basis to enunciate a regional competition policy for these purposes. The national courts of the member states can act as receivers of complaints and then apply the regional prohibitions to particular cases. A preliminary opinion procedure or appeal procedure can guarantee uniformity of interpretation by the COMESA regional court. The COMESA secretariat can play a supporting administrative and research role for the Court, and can be responsible for effecting the policy by education efforts throughout the market. The question of centralised agency formation can be left open.

For member states with national authorities, an additional element can be suggested by reference to positive comity co-operation. This would provide that where a member state believes distortion in trade has occurred either in regard to its exports, that the authority of the subject member state will be obligated to investigate the matter and act to secure a competition policy remedy for the designated practice.

Conclusion

There are other competition policy considerations which may distinctly flow from the determination to form a customs union. For the purposes of simplification, this essay has chosen to focus on one fundamental policy inherent to customs union formations, that being the goal of providing for free internal circulation and the elimination of contingent trade measures between members states. By doing so, it is hoped to illustrate that the choice of a legal form selected for a regional grouping has implications for the creation of additional policies which may be necessary to give this decision legal effect. For customs unions, competition policy may be viewed as the mechanism which drives the process of integration forward to the completion of a customs territory.

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Competition policy and small open economies: investment, trade and competition policy in developing countries and some implications for COMESA

By Mark Warner

OECD

This study discusses the relationship between competition policy development in small open economies. The aim of the study is to identify and analyze the main issues and options for small open economies to undertake policies to strengthen competition in the context of development and regional integration in the Common Market for Eastern and Southern African Countries ("COMESA").

The first section makes the point that the relevance of competition policy issues is not related to the size of an economy but to certain characteristics of its markets, such as entry barriers, market power and asymmetrical information. A key conclusion of this section is that the strengthening of competition within an economy may often enhance welfare and reduce barriers to trade in such economies. One question that requires further work, however, is whether a horizontal competition law of broad application is essential to fostering competition, or whether other policy measures which emphasize competition principles can establish competition within small open economies.

The second section surveys how small countries have approached competition law in various regional trading arrangements in Europe, Asia and Africa. Several points emerge from that review. First, in the European Union context small economies have had to participate to some degree in the implementation of competition law and policy whether they be actual or prospective Members of the EU, or Members of free trade agreements with the EU. This has assured that from the point of view of trade there is some degree of a level playing field among economic agents acting within the economic space. Notwithstanding this fact, these rules have had more of the character of a "floor" rather than a "ceiling" such small economies are have not been required to have extensive national laws, although some have chosen to implement them of their own choice.

In the Tasman context, the survey shows that some degree of competition policy convergence and integration was essential to the integration of the smaller New Zealand economy with Australia. It is too early to determine clear trends from Asia and Africa. Some relatively small economies have implemented competition laws, but most have not yet done so. However, as discussion and negotiation of economic integration progressed so too has the prominence given to competition policy both at national level and within regional trading arrangements. There appears to be increasing awareness that open liberal economies cannot forestall all of the effects of anticompetitive practices, and thus competition policy of some form can serve as a useful complement.

Drawing on the first two sections of the paper, the concluding section of the paper sets out briefly a template of elements that might be included in a competition law for small economies on their own, or within the framework of a regional economic integration agreement. It is worth stressing at the outset that this study is at this stage is solely one of a conceptual nature. No attempt has been made at this stage to translate this analysis to particular legislative or policy directions for future COMESA negotiations.

Section 1: Market size and market structure

There is no *a priori* reason to believe that competition law and policy is only relevant to relatively large open or closed economies. Competition law and policy are concerned principally two things. One concern is with collusion between or among competitors who agree to, in effect, set price or quantity in a particular market such that consumers pay more for goods and services than would be the as in the absence of such agreements.

Another concern of competition law and policy is with exclusion by a firm or, perhaps firms acting together, to exclude competitors from a particular market such that prices to consumers are increased. Competition law addresses this problem by prohibiting a firm from wilfully obtaining or attempting to obtain a monopoly by any means other than a superior skill, foresight and industry. Viewed in this way, the size of a firm is not problematic in and of itself, rather the issue is what a firm does with its size and how it obtains its size. Accordingly, competition law tends to deal with dominance and monopolisation by focusing on abusive or exclusionary conduct. The problem for policy is balancing the desire to urge a competitor to compete, and punishing it for competing successfully.

A related concern of competition policy is with mergers that can sometimes produce market structures which are anti-competitive in the sense of making it easier for a group of firms to cartelise a market, or enabling the merged entity to act more like a monopolist. That is, when there are fewer firms in the market, it becomes easier for them to compete less vigorously and even collude. Also, if the merged entity gains market power, the concerns about exclusion, monopolization and abuse of dominance come to the fore.

That being said, there is a debate about the incentives to engage in successful collusion or exclusion in open economies. In an open economy, a certain proportion of goods and services are tradable, and a certain proportion are non-tradable. The distinction between the closed economy and the open economy is less relevant for non-tradable goods and services because foreign imports do not compete with local goods and services to discipline prices. However, in an open economy tradable goods and services face some degree of competition from foreign sources. The degree of competition will vary to some extent with the nature of the good and service in question, transportation and distribution costs etc.

However, where foreign goods and services provide actual or potential competition, then collusion should be less likely because a price rise above the competitive level should induce a foreign supply response. Of course, the colluding domestic firms could try to make the collusion successful by incorporating the foreign firms into the scheme. The likelihood of such successful international collusion would be limited over time because the incentives for cheating and defection among members would increase as the numbers increase, and alternatively stated the costs of policing and monitoring such agreements would increase as the number of participating firms increased. However, in the interim, consumers would suffer be harmed from higher prices and reduced choices. Furthermore, it should be stressed that obstacles to competition are not always the result of the strategic behaviour by firms, but are often the result of inconsistent domestic policies, such as regulatory and trade policies. In such cases, collusion that would not be successful in an open economy, might otherwise succeed.

With respect to exclusion, the analysis of the closed economy is similar to the analysis of collusion above. A firm in the closed economy will, by definition, not be subject to competition from foreign sources that might render the exclusion strategies unprofitable. However, an open economy context is not a guarantee that exclusion strategies cannot be successful. Consider an example where a dominant firm producing widgets, attempts to exclude a competitor (foreign or domestic) by having all the local distributors agree only to sell its widgets. In that case, the dominant firm could raise the costs of entering the market by requiring both foreign and domestic entrants to establish or develop their own alternate distribution channels. In such a case, an open economy would not be a guarantee that exclusion strategies would be unprofitable. Again, it should be stressed that this problem is not dependent solely on the strategic behaviour of a firm. Rather, firms might profit from existing regulatory entry barriers that facilitate their own exclusionary actions or intentions.

The example above also shows that the size of the economy might also influence the successfulness of the predation strategy. The foreign entrant might judge that the relative costs of setting up the alternate distribution network to be too high relative to the potential profits to be gained from serving that economy. In that case, the absence of economies of scale and scope in the small open economy could render the domestic exclusion strategy profitable to the detriment of the local consumers.

Thus far the analysis in this section of the paper has focussed on why competition policy might be beneficial to small open and closed economies having regard principally to domestic anticompetitive practices. It is also true that certain anti-competitive practices may originate in other countries may affect competition in the country, such as international cartels that rig bids, fix prices or divide or allocate markets, anticompetitive international mergers and acquisitions and exclusionary practices engaged in by foreign or multinational firms with regional or global dominant positions in particular relevant product markets.

In such cases, a domestic competition policy might be a useful tool to address these challenges to competition that harm consumers, and certain producers in the case of anticompetitive exclusion, in the domestic economy. However, it may also be the case that a small economy acting alone would not necessarily have effective remedies to these anticompetitive practices that originate outside of their borders. Accordingly, such economies might opt to “free ride” on the enforcement initiatives of larger economies, however that will not work in situations where the anticompetitive effects occur in the small economy, but not in other larger economies. Similarly, remedies crafted in other larger countries will not always address the particular anticompetitive effects occurring in the smaller economy. Alternatively, the smaller economy may opt for some form of international enforcement cooperation, however having a credible domestic competition law in effect may be a precondition for any successful enforcement cooperation.

What this analysis demonstrates, therefore, is that competition policy directed at collusion and exclusion in the small open economy may serve a useful purpose. The question that remains is whether a horizontal competition law is necessary to insure that competition is maintained in the local markets. With respect to exclusion, answering this question involves an analysis of the structure of the local market that might give rise to successful predatory strategies. It may be the case, that at the root of the problem are barriers to entry that are regulatory in nature, and that if these barriers are removed then the likelihood of successful exclusion could be reduced. Similarly, with respect to collusion, it may be that asymmetries between the information available to firms and consumers, permits the collusion among firms to go undetected. Accordingly, it is worth considering whether there are not other means of addressing such informational asymmetries without creating a horizontal competition law.

Given the limited resources available to small economy, there must be some principled way of engaging in a cost/benefit analysis of a horizontal competition law as opposed to competition principles that inform the whole panoply of government policy measures. It may be the case, that in the small economy, problems of exclusion can be dealt with adequately by a combination of open trade and liberal regulatory policies. It may also be the case that in the small economy, issues of collusion are more difficult to address simply by open trade and liberal regulatory policies. That does not, however, mean that in the case of collusion, a horizontal competition law is *a priori* the optimal policy instrument given resource constraints. It is worth considering whether other laws of general application such as criminal laws directed at conspiracies or fraud, or consumer protection laws might also be effective.

This section has demonstrated that competition can often be welfare improving to the small economy, and often help to reduce barriers to trade. Thus laws and policies that promote competition are often in the interests of the small economy whether those policies are pursued through a horizontal competition law, or through a range of policies that are designed bearing in mind competition principles.

That being said, it is worth stating that competition law and policy tends to focus on consumer welfare. It is generally assumed in this analysis that when consumer welfare is enhanced then total welfare is implicitly enhanced. However, most competition laws do recognize that over time, consumers are better off if competitors can agree amongst themselves in respect of innovation, or research and development. Accordingly, many competition laws are less hostile to some agreements among competitors, or joint ventures, or some dominant firm practices where dynamic efficiencies can be clearly proved. Another way of stating this proposition is that, competition law sometimes give greater weight to producer welfare in the short term where the concern is with achieving dynamic efficiency objectives over the long term as opposed to static allocative or productive efficiency objectives.[1]

However, a focus on dynamic efficiency is not inconsistent with consumer welfare. The exception discussed above is employed with a view to providing lower prices and greater choices to consumers over time. However, it is unlikely that an economy that focussed exclusively on producer welfare, rather than competition, would achieve the same measure of lower prices and product choices for consumers over time. Accordingly, some laws that promote competition would be important even for a small economy that chose to pursue an innovation-based approach to economic development.

For certain small and micro economies, the apparent exceptions from the norm of competition may not be based solely on dynamic efficiency concerns. It might be the case that the minimum efficient scale for production or distribution in some relevant markets is such that only one producer or distributor could function profitably, or that several producers and distributors could function profitably only in some form of cooperative or collaborative joint venture. It is important to note, however, that this is not necessarily an argument against competition per se. Rather, what is important is that those markets remain contestable, in the sense that the incumbent firm has to make its pricing and output decisions having regard to potential entry. In other words, there may still be a role for competition law and policy in ensuring that strategic and regulatory entry barriers are minimized or eliminated such that the incumbent firm does indeed face certain competitive pressures.

The problem of minimum efficient scale in small and micro economies, however, may not always be resolved by relying on contestable markets. In some instances, the apparent need of a firm to have a near monopoly in the local market in order to function a minimum efficient scale, may indicate that the production or distribution should be achieved instead by importing goods or by another mode of supplying the service other than a local presence. Of course, this will at times, require governments to make very sensitive and strategic decisions that go to the heart of their concerns over sovereignty. For instance, few economies would likely be prepared to do away with a local monopoly for policing and public order simply because some foreign security firm could provide the service more efficiently and at less cost. Similarly, some industrial and manufacturing sectors might be seen as having some inherent strategic importance, or some importance as infrastructure that supports other important sectors of the economy that are indeed subject to competition. The important point to note, is that competition law and policy can help shape the analysis in these situations so that the choices made by governments are not based on private rent seeking and corruption.

This problem can also be posed differently. For instance, it my be the case that some foreign producer or distributor of a good or service is engaging in collusive market division and allocation schemes, or using anticomptitive exclusionary vertical agreements in order to service the local market in the small or micro economy. In such cases, the local consumers may be adversely affected by prices above competitive levels. A country with a competition law and policy may be better positioned to counter arguments from such firms that such practices are necessary in order to achieve the scale economies needed to service the small and micro economies.

Finally, it should be added that when small and micro economies enter into regional free trade agreements, the gains from trade from such arrangements are unlikely to be fully realized in those economies if a significant number of sectors are exempted from competition.

Section 2: Policy options for small economies

This Section of the paper discusses the different policy options countries may adopt, at the national or sub-regional level, to enhance competition in their economies, taking into account the different sizes of their economies and the relative burden that establishing competition legislation and institutions would imply. At the outset it should be stated that there is more evidence to be gained from the approaches to competition policy in relatively large developed economies. However, it is possible to learn from the experience of the adoption of competition policy among developed countries of varying sizes. Similarly, it is possible to draw out some implications of

[1] Allocative efficiency is concerned with ensuring that economic resources are distributed to those who put the greatest value on them. This is efficiency in exchange. Productive efficiency is concerned with assuring that a given level of output is achieved at the lowest cost. In competitive markets, both allocative and productive efficiency are achieved at the same point. While allocative and productive efficiency are static concepts, dynamic efficiency is concerned with the process of discovering the best technologies, processes and products for meeting changing consumer tastes and incorporating them efficiently into the economic system.

adopting competition policy among developing countries of varying sizes. Nonetheless, in terms of *per capita* incomes some of these small, and even micro, economies are similar to other countries that have developed, national and regional approaches to the adoption of competition law. Accordingly, this section of the paper will discuss the approaches that have been taken to the adoption of competition laws and polices in a range of developed and developing countries.

A. *Smaller economies within the European Union*

The competition rules applicable to undertakings in the EU are found principally in Article 85 (general prohibition against anti-competitive practices), Article 86 (abuse of dominant position) and Article 90[2] (public undertakings) of the EC Treaty or the Treaty of Rome and in relevant secondary legislation such as the Merger Control Regulation and various Notices and Block Exemptions. Article 85 and 86 have direct effect in the 15 Member states through the national courts. The coherence of the system is assured by the existence of common EU legislative institutions, the European Council and the European Parliament, a common administrative institution in the form of the European Commission ("EC"), and common courts, the Court of First Instance which reviews EC decisions ("CFI") and the European Court of Justice ("ECJ") which hears appeals coming from the CFI and national courts.

In order for Articles 85 and 86 to be directly applicable by national competition authorities, national legislation must expressly provide for that eventuality. Nonetheless, there is an increasing trend for the EC to cooperate with national authorities in handling cases under their own national laws, but also in implementing Articles 85 and 86 where authority is allocated to them by the EC in accordance with the principle of "subsidiarity" (e.g. EU decisions should be taken as closely as possible to citizens).[3]

The smallest Member of the European Union is Luxembourg, and it provides a good example of how the EU competition system applies to small economies. Luxembourg is subject to EC competition law through the direct application of Articles 85 and 86 in its national courts, and through the actions of the EC, CFI and CFJ where a case involving Luxembourg has a Community dimension. However, Articles 85 and 86 are not directly applicable by the Luxembourg national competition authorities. Luxembourg also has had its own national competition law since 1970, however the law is not administered by an independent authority, and has not been vary actively enforced, although there are some recent indications that this might be beginning to change. The philosophy of enforcement was reflected in a 1997 OECD Annual Report on Competition Law Developments in Luxembourg where, Luxembourg stated that it was:

> "in the process of redefining its position, in light of its particular economic structure and geographic position. As Luxembourg is not a major manufacturing country, it has to import most of its consumer goods. Furthermore its fabric consists essentially of small enterprises, which find it difficult to compete individually with foreign firms. For this reason, the objectives of competition policy cannot be the same as in neighbouring countries."[4]

Ireland, Denmark, Finland, Austria and the Netherlands may also be considered to be smaller economies within the EU in terms of relative population size and per capita GDP. As with Luxembourg, Articles 85 and 86 are directly applicable by their national courts, but not their national competition authorities. Unlike Luxembourg, however, each of these countries has its own independent competition authority and its own national competition law.

Several conclusions can be drawn from this brief survey of EC competition rules. First, small and large EU Members are bound together by certain core principles of competition policy that must apply to transactions of their citizens with citizens from other Members, and between and among their own citizens. However, beyond this "floor" Members reserve the right to apply their own laws tailored to their own legal, historical and socio-economic circumstances. At the centre, the administrative institution, the EC, focuses on the effects of particular practices on trade between and among the Members. In doing so, it is increasingly relying on national authorities to take actions at the national level to remedy matters which have a Community dimension, but a mainly national effect. Although just over half of the Members permit their national authorities to apply Articles 85 and 86 directly, to an increasing extent national competition laws are being revised to be made consistent with Articles 85 and 86.

B. *Smaller western European Economies outside of the European Union*

Iceland, Liechtenstein and Norway are contracting parties to the Agreement on the European Economic Area ("EEA Agreement") along with the European Community and its individual member states.[5] Under the EEA Agreement, the three countries are obliged to incorporate the competition rules in the Agreement into domestic legislation The objective of the EEA Agreement is "to promote a continuous and balanced strengthening of trade and economic relations between the contracting parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area". Two important means for attaining these objectives are the implementation of provisions corresponding to the EC provisions regarding the free movement of goods, persons, services and capital, and EC competition legislation.

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[2] Corresponding to Articles 53, 54 and 59 respectively, of the EEA Agreement.

[3] EC Notice on Cooperation Between National Competition Authorities and the Commission in Handling Cases Falling Within the Scope of Articles 85 and 86 of the EC Treaty OJ 262, (October 10, 1996). See also EC Notice on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty OJ 39 (February 13, 1993).

[4] OECD *Annual Report on Competition Policy in the Grand-Duchy of Luxembourg* DAFFE/CLP(97)11/13.

[5] These three countries are the remaining members of the European Free Trade Area (EFTA) that signed the EEA Agreement. Switzerland was also an EFTA member, but it did not agree to participate in the EEA.

The competition rules applicable to undertakings in the EEA Agreement, correspond to Article 85, Article 86 and Article 90[6] of the EC Treaty and to the relevant secondary legislation. The regime for merger control under the Treaty also applies under the EEA Agreement. Under this regime the European Commission or the European Free Trade Area ("EFTA") Surveillance Authority has the exclusive authority to take decisions on merger cases above specific thresholds

The EFTA states which are contracting parties to the EEA Agreement have established a separate institutional system for decision-making and supervision. The EFTA Surveillance Authority, located in Brussels, Belgium, and the EFTA Court, situated in Luxembourg, were established by an agreement between the EFTA countries.[7] These two bodies are in charge of surveillance and judicial control with regard to the EFTA countries' fulfilment of their obligations under the EEA Agreement, and with regard to the competition rules applicable to undertakings. The EFTA Surveillance Authority is a parallel body to the European Commission in the field of competition, and the EFTA Court is a parallel body to the European Court of Justice.

The EEA Agreement contains provisions on the attribution of cases between the EFTA Surveillance Authority and the Commission in the fields of competition. The guiding principle is the "one stop shop", which is intended to avoid the parallel handling of cases. This means that a decision by one of the authorities should be respected by the other authority. Thus, the agreement contains specific provisions governing the close cooperation between the two bodies.

Under the EEA Agreement undertakings from each of the three countries has to comply with both the national regime and the EEA regime insofar as the practice at hand has an appreciable effect on trade. For transactions that do not implicate trade with the European Union, or between the EFTA countries themselves, each country retains the right to determine whether or not to enforce a national competition law.

Of the three EFTA countries, the largest, Norway, has the most expansive national competition law which is based on two principles: a prohibition against horizontal practices generally considered to be anti-competitive and legal power to intervene in individual cases against other anti-competitive practices. The Norwegian competition authority review mergers, but does not require prior notification of mergers. The competition authority has a statutory right to give its views on competition implications of regulatory and legislative initiatives. On the other end of the spectrum are the smaller of the three countries Liechtenstein and Iceland which do not have a national competition law.

Before leaving this section, it is worth considering the case of Switzerland, the one EFTA country that did not join the EEA Agreement. Swiss competition law was substantially revised in 1995, and in many respects it is now broadly similar to EC law. Prior to 1995, Switzerland did not distinguish between agreements among competitors and dominant positions. The revised law adopts the distinction along the lines of Articles 85 and 86 of the Treaty of Rome, however unlike the prohibition and exemption system for cartels in Article 85, the Swiss law requires all cartels to be notified and authorized. However, the law contains broad guidance as to the types of cartels that will not be authorized so the distinction may not be as great as it first appears. The Swiss law also adopts a pre-merger notification system, and the substantive analysis of mergers is very similar to that under the EC Merger Regulation.

C. *Smaller central and eastern European Economies*

The competition rules prevailing between the European Union and the Associated Countries of Central and Eastern Europe are contained in bilateral agreements. They are part of the so-called "Europe Agreements", which concern a broader set of policies. In the period between 1991 and 1996, the European Union has concluded such agreements with Poland, Hungary, the Czech Republic, Slovakia, Estonia, Lithuania, Latvia, Slovenia, Romania, and Bulgaria. The Europe Agreements tackle a number of competition issues directly through explicit provisions, but they also go further than that by containing a clause on approximation of legislation. These two aspects clearly illustrate the idea that liberalization of trade goes in parallel with adopting regulations in the field of competition. More generally, it fits into the philosophy that governments are required to enforce competition rules in their countries as a condition for being admitted as players in a globalized economy.

- Agreements that are deemed to be incompatible with the proper functioning of the Europe Agreements, in so far as they distort trade with the EU are:
- All agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition. (Article 85)
- An abuse by one or more undertakings of a dominant position in the EU or the other associated country. (Article 86)
- Any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods. (Article 92)

In addition, the Europe Agreements require that undertakings with special or exclusive rights be subject to rules that are consistent with Article 90 of the EC Treaty. Similarly, state monopolies of a commercial character are to be treated as under Article 37 of the EC Treaty such that there is no discrimination in government procurement.

These agreements carry with them an obligation for the aspirant to "approximate" the EU competition law, and creates some common institutions for ensuring that the aspirant's competition authorities do so in fact. No similar approximation requirement was ever made explicitly part of a process of an EC enlargement exercise before which

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[6] Corresponding to Articles 53, 54 and 59 respectively, of the EEA Agreement.

[7] The Agreement between the EFTA States on Establishing a Surveillance Authority and a Court of Justice.

in part explains why only 8 of the 15 member states directly apply Articles 85 and 86. Further, it is worth noting that antidumping remedies are still applicable to trade from countries subject to Europe agreements despite the approximation process. Interestingly, the Council and the Commission have signalled first in respect of trade negotiations with South Africa, and subsequently in its negotiation strategy for the next renewal of Lomé IV in 2000, competition policy enforcement will be a required element.

It is interesting to note that as the EU continues to expand, the principle of "subsidiarity"—i.e. decisions should be taken at the national level wherever possible—takes on greater importance. Over the last few years, greater reliance has been put on national courts and national competition authorities within existing EU members. More recently, the Commission has proposed sweeping changes to Article 85 and 86 that will result in further authority being exercised at the national level. This is due in large part to the accession of new Member States in the foreseeable future which is becoming an ever more real prospect. In March 1998, negotiations for accession were initiated with a first group of six candidate countries (Poland, the Czech Republic, Hungary, Estonia, Slovenia, and Cyprus). A further five countries (Romania, Bulgaria, Slovakia, Latvia, Lithuania) are continuing their preparations with a view to opening accession negotiations at a later stage. Thus, a European Union with more than twenty-five Member States is on the horizon. The EU thus faces three main challenges: how to bridge the enormous economic gap between old and new Member States; how to avoid market distortions between advanced free-market countries and those completing their transition to a market economy; and how to adapt the institutional and procedural laws, which were designed for a much smaller Community in order to keep the system workable and to allow the integration process to continue.

An interesting element of the "approximation" process is that the parties to the Europe Agreements were required to approximate to EC law as it existed even in cases such as with respect to vertical agreements where the balance of academic opinion has found that law to be overly restrictive. The irony that resulted is that once these countries having approximated their laws, the EC began the process of fundamentally reforming its approach to vertical restraints to be far less restrictive. Similarly, as many of these economies were moving from state-owned enterprises and centralized regulatory regimes, many wanted to apply more stringent rules for abuse of dominance than existed under EC law. In this case, however, the EC seemed to require its own law as a floor rather than a ceiling thus permitting the transition economies to enact stronger laws on abuse o dominance.

D. *ANZCERTA*

The Tasman experience with trade and competition policy rule making is also of interest. In 1983, Australia and New Zealand entered into the Closer Economic Relations Agreement ("CER") to provide for free trade in goods, but not services, over a seven year period. In 1988, the two countries entered into the Australia New Zealand Closer Economic Relations Trade Agreement ("ANZCERTA") in 1988 to expedite the process of liberalizing trade in goods. The ANZCERTA also abolished antidumping remedies for intra-Tasman trade much as the Treaty of Rome had done from its inception for trade among the member states of the European Union.

Instead both countries agreed to apply their respective competition law provisions to abuses of market power to deal with cross-border issues of predatory pricing. This agreement was facilitated in large measure by the gradual reform of New Zealand competition law, culminating in statutory amendments in 1986, to conform to Australian precedent. Interestingly, in 1986 New Zealand did not copy the Australian provisions on price discrimination, and Australia itself abolished these provisions in 1996

To be clear, differences remain in each countries competition laws with respect to market power thresholds, efficiency exceptions and public benefits tests. For instance, with respect to mergers, Australia applies the concept of market power, while New Zealand applies the concept of dominance. While these are similar concepts, the former is a narrower concept linked to the ability of a firm to impose a significant non-transitory price increase, but the latter is a broader concept that asks whether a firm is able to choose its conduct without taking account of eventual reactions of competitors and suppliers.

Nonetheless, there have been few government investigations, no reported government decisions using these cross-border provisions, and only one private case that was dismissed on largely procedural grounds. Interestingly, since the abolition of anti-dumping remedies for intra-Tasman trade, anti-dumping remedies have increased dramatically against non-Tasman countries.

The Tasman approach to anti-dumping places it as a hybrid between the European and North American models. In particular, it is worth noting that there has been no attempt to move towards a complete harmonization of national laws or centralization of Tasman competition enforcement. While there are interesting provisions facilitating cross-border investigations in these cases, and provisions for judges from one country to become involved in decisions in another, in all other respects Tasman competition policy enforcement is governed by a 1994 Co-operation and Coordination Agreement between the Australian Trade Practices Commission and the New Zealand Commerce Commission, and mutual legal assistance legislation in both countries relation to business regulation and criminal matters. One especially interesting feature, however, is the explicit provision for the regular exchange of staff every six months. This represents a cautious nod in the direction of further convergence.

E. *APEC*

The Asia-Pacific Economic Cooperation Council ("APEC") was formed in 1989. It is neither a formalized free trade agreement, nor as developed a policy and discussion institution as the Organization for Economic Cooperation and Development ("OECD"). In Osaka in 1995, the APEC Economic Leaders adopted an "Action Plan" in 15 specific areas – competition policy was one such area and deregulation was another. (In 1996, a decision was taken to fold the work on competition and deregulation together.) APEC Members have developed both "Collective Action Plans" and "Individual Action Plans" in each of these areas.

With respect to competition policy, the Collective Action Plan establishes the objective of enhancing:

"The competitive environment in the Asia-Pacific region by introducing or maintaining effective and adequate competition policy and/or laws and associated enforcement policies, ensuring the transparency of the above, and promoting cooperation among APEC economies, thereby maximizing, inter-alia, the efficient operation of markets, competition among producers and traders, and consumer benefits."

To achieve this objective, each APEC economy agreed to follow three guidelines:

- Review its respective competition policy and/or laws and the enforcement thereof in terms of transparency;
- Implement as appropriate technical assistance in regard to policy development, legislative drafting, and the constitution, powers and functions of appropriate enforcement agencies; and
- Establish appropriate cooperation arrangements among APEC economies.

With respect to the Collective Action Plans, the APEC economies agreed to:

1. Gather information and promote dialogue on and study on:

- The objectives, necessity, role and operation of each APEC economy's competition policy and/or laws and administrative procedures, thereby establishing a database on competition policy;
- Competition policy issues that impact on trade and investment flows in the Asia-Pacific region;
- Areas for technical assistance and the modalities thereof, including exchange and training programmes for officials in charge of competition policy, taking into account the availability of resources; and
- The inter-relationship between competition policy and/or laws and other policies related to trade and investment;

2. Deepen competition policy dialogue between APEC economies and relevant international organizations;

3. Continue to develop understanding in the APEC business community of competition policy and/or laws and administrative procedures;

4. Encourage cooperation among the competition authorities of APEC economies with regard to information exchange, notification and consultation;

5. Contribute to the use of trade and competition laws, policies and measures that promote free and open trade, investment and competition; and

6. Consider developing non-binding principles on competition policy and/or laws in APEC.

With respect to deregulation, the Collective Action Plan establishes the objectives of promoting the transparency of their respective regulatory regimes; and eliminating trade and investment distortion arising from domestic regulations which not only impede free and open trade and investment in the Asia-Pacific region but also are more trade and/or investment restricting than necessary to fulfil a legitimate objective.

The Collective Action Plan with respect to deregulation provided that the APEC economies, taking into account work done in other areas of APEC would:

- Publish annual reports detailing actions taken by APEC economies to deregulate their domestic regulatory regimes; and
- Develop further actions taking into account the above reports, including;
- Policy dialogue on APEC economies' experiences in regard to best practices in deregulation, including the use of individual case studies to assist in the design and implementation of deregulatory measures, and consideration of further options for a work program which may include:
- Identification of common priority areas and sectors for deregulation;
- Provision of technical assistance in designing and implementing deregulation measures; and
- Examination of the possibility of establishing APEC guidelines on domestic deregulation; and
- Regular dialogue with the business community, including a possible symposium.

It may be useful to examine the Individual Action Plans for competition policy for a number of APEC Members to see how different economies conceive of competition policy in the process of economic integration.

Hong Kong, a country without a competition law, indicated that it:

"Subscribes to the basic economic philosophy of minimum government intervention in market forces and is fully committed to the promotion of free trade and competition. Where necessary, appropriate and pragmatic measures will be taken to rectify any unfair business practices, safeguard competition and protect consumer interests."

And with respect to deregulation, Hong Kong stated:

"Hong Kong believes in market forces and adopts a hands-off approach to economic management. Its regulatory regimes are established to provide prudential supervision, ensure safety, protect consumer interests, and to encourage investment. Most of the public utilities are privately owned."

Other than that, Hong Kong committed to open competition in the telecommunications and energy sectors and with respect to certain professional services, and to study whether any further administrative and legislative measures are required to improve the competitive conditions in Hong Kong. Hong Kong did not make any commitments beyond 2000.

Another clear expression of the Hong Kong approach to competition policy can be found in a 1997 submission to the WTO Working Group on the Interaction between Trade and Competition Policy. There, Hong Kong stated that:

> "It is committed to the promotion of competition. This is the means to enhance economic efficiency, which is the ultimate, shared objective of HKC's competition and trade policies. A fundamental test of whether competition exists is whether the market is accessible and contestable.
>
> Although competition thrives best on the free force of the market, some degree of government involvement is sometimes called for. It is necessary, for instance, for the Government to put in place a package of legislation to outlaw deceptive trade practices and protect the fundamental rights of consumers. There may also be circumstances where a very high level of investment is involved (as in the broadcasting business), where prudential supervision or regulatory efficiency is needed (as in the banking and financial services sectors), or where the longer term interest of consumers is at stake (as in the provision of utility services). In such circumstances, the HKSARG will ensure that the monopolistic or oligopolistic situation that is allowed to exist does not unduly compromise, amongst other things, the quality of services and the price that consumers have to pay.
>
> The needs, requirements and characteristics of individual sectors vary. Accordingly, HKC adopts a sector-specific approach to safeguard competition. The Government also reviews these regulatory measures periodically to ensure they still meet the needs of prevailing circumstances. Where possible, it will undertake liberalization initiatives to promote competition in these sectors. . . .
>
> Whilst promoting competition is important, it is a means rather than an end in itself. The HKSARG has to strike a delicate balance between the promotion of competition and other government policies and weigh these against what is best for the economy as a whole."[8]

Singapore noted that it "does not maintain competition laws but depends on its free and open market to ensure a competitive environment in the domestic economy." It further noted that for services which the Government has traditionally been the sole provider, the Singapore Government has commenced a programme of corporatization and privatization to subject the provision of such services to competition and market discipline. Examples include: broadcasting, telecommunications and maritime and post services. Singapore made very limited further commitments from 1997-2010 to: continue to maintain its free and open market to ensure a competitive environment in the domestic economy;for services which the Government has traditionally provided, continue to review and introduce competition through privatization where appropriate; and continue to participate in competition policy dialogues among APEC economies to enhance mutual understanding of competition policy and laws.

Similarly, with respect to deregulation Singapore stated that it:

> "believes in the discipline of market forces and has, in the past few years, embarked on a programme to corporatize/privatize the provision of major public services. These include electricity, gas, telecommunications, local transport (including train, bus and taxi services), broadcasting and postal services.
>
> Regulation, where applied, is to provide prudential supervision (for example, in the financial services sector), ensure public safety, protect consumer interests, protect national security interests and ensure that the Singapore market is not over-supplied."

The Singapore statement is particularly interesting because it seems to go right to the heart of the merits of competition policy. As discussed in the first section, competition policy normally promotes consumer welfare by promoting competition such that prices to consumers are bid down. However, Singapore, expressly provides for regulation to prevent "over-supply" which might be thought of as a mechanism for reducing prices to consumers.

Singapore and Hong Kong are both dynamic relatively developed developing countries with a strong manufacturing base and active service economy. Therefore, it might be useful to also have regard to smaller, less developed APEC Members. Brunei Darussalam is a small but wealthy oil producing state undertook to publish and make available any competition laws enacted in the future; participate in dialogues/workshops/seminars on competition policy; facilitate the establishment of a national consumer protection body.

By contrast, Papua New Guinea, a lower middle income developing country actually undertook to Formulate a consumer protection law, introduction of business practices act, national competition policy and appropriate technical assistance and policy development, legislative drafting powers and functions of appropriate enforcing agencies. It also committed to deregulate price control mechanisms and to review existing contractual agreements the state has entered with investors.

The APEC Individual Action Plans for the much larger APEC members with a substantial manufacturing base, developed service sector but which are lower middle and upper middle income countries respectively in terms of per capita GNP, Indonesia and Malaysia are also of interest. Malaysia indicated a short to medium term intention to enact a law to address "unethical trade measures and abuse of market power". Indonesia, however, indicated that it already had laws "to protect consumers and business from unfair competition in business activities., and accordingly it undertook to promote transparency and deregulation in the short to medium term. Both of these Individual Action Plans have been superseded by the Finan-

[8] WTO, Submission from Hong Kong, China WT/WGTCP/W/53 (4 December 1997).

cial Crisis which prompted Indonesia to pass a comprehensive competition law in March 1999, while Malaysia continues drafting a law at present.

The new Indonesian Law Prohibiting Monopoly Practices and Unhealthy Business Competition reflects the turmoil in which it was drafted. Accordingly, while it probably should not serve as a model competition law in its particulars, it does broadly reflect the concerns outlined in the first section of this paper. It contains provisions in conspiracies and cartels, monopolies and dominant positions. It provides for merger review, but not pre-merger notification. It also includes rather complex provisions on interlocking directorates and shareholding that reflect local market structure concerns. The law also establishes an independent Business Competition Commission with the power to investigate and to impose fines and administrative remedies. The law includes exemptions for export cartels, research and development agreements and some small scale businesses.

Notwithstanding the disparate positions of the APEC Members on the importance of competition policy to development and economic integration, APEC Ministers agreed in Kuala Lumpur in 1998 that APEC would examine the possibility of APEC principles for competition policy and deregulation in 1999. Work is now underway towards developing a set of core APEC competition and regulatory principles in for discussion at the next Ministerial meeting in Fall 1999.

Much of the work on developing those principles has been conducted under the auspices of the Pacific Economic Cooperation Council ("PECC") a grouping that includes representatives from business, government and the academic communities. The PECC Competition Principles have not been approved by APEC, but have become "an important reference document" for the work of the APEC Working Group on Competition Policy. The PECC Competition Principles consist of four "First-Level Core Principles" for the application of competition policy—comprehensiveness transparency, accountability and non-discrimination. The "Second Level Principles relate to government interventions, rules for business codex, and cooperation between international competition agencies. They include the following items:

- Review of existing and new government interventions with a view to identifying distortions to the competitive process
- Progressive elimination of efficiency-reducing regulatory barriers and other interventions
- Minimize the risk of 're-regulation' via anti-competitive business conduct—by effective enforcement of appropriate competition disciplines
- Where a general competition law is considered appropriate, its characteristics to include:
  - —Focused objective (promoting competition and efficiency)
  - —Prohibitions of specific business practices only where these are unambiguously harmful to efficiency and welfare
  - —Rule of reason approach
  - —Minimal exemptions
  - —Effective and accountable enforcement
  - —Access by complainants to relevant authorities
  - —Cooperation between national competition agencies/authorities especially for avoiding/managing jurisdictional conflict
  - —Robust protection of confidential business information

The APEC Ministers adopted the PECC First Level Core Principles in Auckland, New Zealand on September 13, 1999.[9]

F. *Africa*

It is also instructive to examine the Treaty Establishing the Common Market for Eastern and Southern Africa[10] The 21 Members are: Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. COMESA's mandate is to promote "outward-oriented" regional integration through trade and investment.[11] COMESA has agreed to establish a free trade area by October 2000, as a prelude to establishing a customs union in 2004.

Perhaps, the most interesting provision of this treaty is its embrace of competition policy in Article 5:

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

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

(*a*) any agreement or category thereof between undertakings;

(*b*) any decision by association of undertakings;

(*c*) any concerted practice or category thereof;

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

Provided that the agreement, decision or practice does not impose on the undertaking restrictions inconsistent

[9] See: APEC Economic Leaders' Declaration, *http://www.apec.govt.nz/n/index.htm.*

[10] 33 I.L.M. 1067; (1994) (signed November 5, 1993).

[11] M.J. Musonda, "A Regional Competition Policy for COMESA Countries and Implications of an FTA in 2000" A Paper Presented to the National Seminar on Competition Law and Policy, Lusaka (May 31- June 2, 1999) at 2-3.

with the attainment of the objectives of this Treaty or has the effect of eliminating competition.

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

What makes this provision all the more interesting is that of the 21 COMESA Members, only five, Egypt, Kenya, Malawi, Zambia and Zimbabwe have relatively recently enacted competition laws, and a sixth Member, Mauritius is in the process of drafting a competition law. Accordingly, COMESA Members are now actively discussing how best to give effect to Article 5 of the Treaty. There are, at present, considerable differences over the degree to which either a common competition law or institution should be established, or whether individual Members should be required to have some law that prohibits anticompetitive agreements or practices that distorts trade and competition within COMESA. What ever the form of competition law eventually agreed to within COMESA, the enforcement of the provisions will benefit from the existing COMESA Court of justice that has the power to interpret provisions of the treaty, and to adjudicate disputes that arise between COMESA Members about its interpretation and application.

There are two other Southern African trading arrangements that are potentially relevant: the Southern African Customs Union ("SACU") and the Southern African Development Community ("SADC"). SACU consists of Botswana, Lesotho, Namibia, South Africa and Swaziland. Of these five countries, so far only South Africa has a competition law, although Botswana may be in the process of drafting one. SADC consists of 14 countries: Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Of these only three countries, South Africa, Zambia and Zimbabwe have competition laws, and Mauritius is in the process of drafting a law.

These three agreements highlight potential problems associated with introducing competition policy into regional free trade agreements. First, the countries involved may be subject to conflicting requirements in terms of competition law if they are members of several regional trading arrangements.

Second, within both SACU and SADC, the fact that South Africa, the regional economic power has a competition law, and has recently concluded a free trade agreement with the European Union has put pressure on the other Members of these arrangements to consider adopting a competition law. The issue is most acute for SACU Members because of their customs union with South Africa which implies the need for a level playing field across a range of regulatory policies. SACU Members are considering whether they need individually to adopt a competition law, and if so whether the law should be modelled on the new South African law, or whether some regional competition law arrangement should be created. Similar concerns are arising within SADC, and increasing discussion is being given to whether SADC should establish a Competition Law Protocol, and if so whether it should be modelled on the South African law. However, the latter option is not without controversy as Zambia and Zimbabwe also have competition laws of their own.

Third, while there is no clear consensus among SADC or SACU members about future directions for competition law at the national or regional level, many are beginning to express concerns of the need to be able to react to the large South African firms that are investing or selling into the region at a tremendous pace. One topical example of the concerns expressed relates to South African beer and mining concerns which are acquiring incumbent local producers throughout the region, and attaining regional dominant positions in these markets.

Before concluding this section, it might be useful to briefly examine the kind of provisions that are found in the competition laws of South Africa, Zambia and Zimbabwe. South Africa has by far the most complex law with provisions prohibiting and exempting certain anticompetitive horizontal agreements similar to Article 85 of the Treaty of Rome. The South African law also deals with abuse of dominance, anticompetitive mergers and has certain presumptions about interlocking directorates. The merger provisions demonstrate how the law is tailored to the particular history of South Africa. There is a public interest test in evaluating the effects of a merger, however the factors to be considered are set out in the statute, and include a narrow provision relating to the ability of small businesses, or firm*s* controlled or owned by historically disadvantaged persons, to become competitive. The South African law also creates an independent Competition Commission, and provides for effective rights of appeal against its decisions. The Commission has a statutory right to participate in regulatory proceedings, and to advise the government on the effects on competition of government legislation and policy.

The Zimbabwean law contains provisions prohibiting and authorizing certain anticompetitive horizontal agreements, monopolies and anticompetitive mergers. The law creates an independent Industry and Trade Competition Commission, and establishes rights of appeal against its decisions. The Commission has the authority to advise the government generally on all aspects of competition in the formulation and implementation of government policy.

The Zambian competition law is broadly similar to both the South African and Zimbabwe competition laws.

Section 3: Models of regional integration

A. *North America*

I think that several other interesting insights can be drawn from the North American model of competition policy enforcement which is characterized by both formal and informal enforcement cooperation in respect of civil and criminal maters between competition officials in Canada and the United States.[12]

[12] Mark A. A. Warner, International Aspects of Competition Policy—Possible Directions for the FTAA 22 World Competition 1 (1999).

In Chapter 15 of the North American Free Trade Agreement ("NAFTA"), the parties agreed to adopt or maintain measures to proscribe anticompetitive business conduct and to consult periodically about the effectiveness of measures undertaken by each party. Furthermore, the parties agreed to cooperate on issues of competition law enforcement with respect to: mutual legal assistance; notification; consultation and exchange of information relating to enforcement. However, the competition provisions are not subject to the dispute settlement provisions of NAFTA.

In 1990, the Canada-United States Treaty on Mutual Legal Assistance in Criminal Matters, which was signed in 1985 came into force.[13] Article II sets forth the scope of application such that the Parties shall provide, in accordance with the provisions of this Treaty, mutual legal assistance in all matters relating to the investigation, prosecution and suppression of offences. Assistance includes: examining objects and sites; exchanging information and objects; locating or identifying persons; serving documents; taking the evidence of persons; providing documents and records; transferring persons in custody; executing requests for searches and seizures. Assistance must be provided without regard to whether the conduct under investigation or prosecution in the requesting state constitutes an offence or may be prosecuted by the requested state. This Treaty is intended solely for mutual legal assistance between the Parties and does not give rise to a right on the of a private party. Article V limits compliance where: the request is not made in conformity with the provisions of this Treaty; or execution of the request is contrary to its public interest, as determined by its Central Authority. The requested state may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the requested state.

Article I provides for certain limitations on the use of information obtained pursuant o the Treaty such that: the Central Authority of the requested state may require, after consultation with the Central Authority of the requesting state, that information or evidence furnished be kept confidential or be disclosed or used only subject to terms and conditions it may specify; the requesting state must not disclose or use information or evidence furnished for purposes other than those stated in the request without the prior consent of the Central Authority of the requested state. However, information or evidence made public in the requesting state may be used for any purpose.

In August 1995, Canada and the United States updated and broadened the 1994 MOU by signing, *A Cooperative Enforcement Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws* ("1995 Cooperative Agreement").[14] The stated purpose of the 1995 Cooperative Agreement is to promote cooperation and coordination between the competition authorities of the Parties, to avoid conflicts arising from the application of the Parties' competition laws and to minimize the impact of differences on their respective important interests, and, in addition, to establish a framework for cooperation and coordination with respect to enforcement of deceptive marketing practices laws.

Article II sets forth when notification of enforcement activities is required. Each party must, subject to Article X(1), notify the other party in the manner provided by this Article and Article XII with respect to its enforcement activities that may affect important interests of the other party. Enforcement activities that may affect the important interests of the other party and therefore ordinarily require notification include those that:

(*a*) Are relevant to enforcement activities of the other party;

(*b*) Involve anticompetitive activities, other than mergers or acquisitions, carried out in whole or in part in the territory of the other party, except where the activities occurring in the territory of the other party are insubstantial;

(*c*) Involve mergers or acquisitions in which—one or more of the parties to the transaction, or—a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other party or of one of its provinces or states;

(*d*) Involve conduct believed to have been required, encouraged or approved by the other party;

(*e*) Involve remedies that expressly require or prohibit conduct in the territory of the other party or are otherwise directed at conduct in the territory of the other party; or

(*f*) Involve the seeking of information located in the territory of the other party, whether by personal visit by officials of a party to the territory of the other party or otherwise.

Notification pursuant to this Article must ordinarily be given as soon as a party's competition authorities become aware that notifiable circumstances are present, and when certain enumerated events occur.

In Article III, the Parties acknowledge that it is in their common interest to cooperate in the detection of anticompetitive activities and the enforcement of their competition laws to the extent compatible with their respective laws and important interests, and within their reasonably available resources. The Parties further acknowledge that it is in their common interest to share information which will facilitate the effective application of their competition laws and promote better understanding of each other's enforcement policies and activities. The Parties will consider adopting such further arrangements as may be feasible and desirable to enhance cooperation in the enforcement of their competition laws. Each party's competition authorities will, to the extent compatible with that party's laws, enforcement policies and other important interests:

(*a*) Assist the other party's competition authorities, upon request, in locating and securing evidence and witnesses, and in securing voluntary compliance with requests for information, in the requested party's territory;

[13] See 24 *International Legal Materials* 1092 (1986) and 29 *International Legal Materials* 1576 (1990).

[14] See: http://www.usdoj.gov/atr/public/international/docs/uscan721.txt.

(*b*) Inform the other party's competition authorities with respect to enforcement activities involving conduct that may also have an adverse effect on competition within the territory of the other party;

(*c*) Provide to the other party's competition authorities, upon request, such information within its possession as the requesting party's competition authorities may specify that is relevant to the requesting party's enforcement activities; and

(*d*) Provide the other party's competition authorities with any significant information that comes to their attention about anticompetitive activities that may be relevant to, or may warrant, enforcement activity by the other party's competition authorities.

Article IV provides for coordination with regard to related matters. Where both Parties' competition authorities are pursuing enforcement activities with regard to related matters, they will consider coordination of their enforcement activities. In such matters, the Parties may invoke such mutual assistance arrangements as may be in force from time to time. In considering whether particular enforcement activities should be coordinated, either in whole or in part, the Parties' competition authorities shall take into account the following factors, among others:

(*a*) The effect of such coordination on the ability of both Parties to achieve their respective enforcement objectives;

(*b*) The relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;

(*c*) The extent to which either party's competition authorities can secure effective relief against the anticompetitive activities involved;

(*d*) the possible reduction of cost to the Parties and to the persons subject to enforcement activities; and

(*e*) the potential advantages of coordinated remedies to the Parties and to the persons subject to the enforcement activities.

In any coordination arrangement, each party's competition authorities agree to seek to conduct their enforcement activities consistently with the enforcement objectives of the other party's competition authorities. In the case of concurrent or coordinated enforcement activities, the competition authorities of each party must consider, upon request by the competition authorities of the other party and where consistent with the requested party's enforcement interests, ascertaining whether persons that have provided confidential information in connection with those enforcement activities will consent to the sharing of such information between the Parties' competition authorities. However, either party's competition authorities may at any time notify the other party's competition authorities that they intend to limit or terminate coordinated enforcement and pursue their enforcement activities independently and subject to the other provisions of this Agreement.

Article V provides for cooperation regarding anticompetitive activities in one party that adversely affect the interests of the other party. The Parties note that anticompetitive activities may occur within the territory of one party that, in addition to violating that party's competition laws, adversely affect important interests of the other party. The Parties agree that it is in their common interest to seek relief against anticompetitive activities of this nature. If a party believes that anticompetitive activities carried out in the territory of the other party adversely affect its important interests, the first party may request that the other party's competition authorities initiate appropriate enforcement activities.

The request must be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the party, and must include an offer of such further information and other cooperation as the requesting party's competition authorities are able to provide. The requested party's competition authorities agree to carefully consider whether to initiate enforcement activities, or to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the request. The requested party's competition authorities must promptly inform the requesting party of its decision. If enforcement activities are initiated, the requested party's competition authorities agree to advise the requesting party of their outcome and, to the extent possible, of significant interim developments. Nothing in this Article limits the discretion of the requested party's competition authorities under its competition laws and enforcement policies as to whether to undertake enforcement activities with respect to the anticompetitive activities identified in a request, or precludes the requesting party's competition authorities from undertaking enforcement activities with respect to such anticompetitive activities.

Article VI sets forth principles for the avoidance of conflicts. Within the framework of its own laws and to the extent compatible with its important interests, each party agree to, having regard to the purpose of this, give careful consideration to the other party's important interests throughout all phases of its enforcement activities, including decisions regarding the initiation of an investigation or proceeding, the scope of an investigation or proceeding and the nature of the remedies or penalties sought in each case. When a party informs the other that a specific enforcement activity may affect the first party's important interests, the second party shall provide timely notice of developments of significance to those interests.

While an important interest of a party may exist in the absence of official involvement by the party with the activity in question, it is recognized that such interest would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities. A party's important interests may be affected at any stage of enforcement activity by the other party. The Parties recognize the desirability of minimizing any adverse effects of their enforcement activities on each other's important interests, particularly in the choice of remedies. Typically, the potential for adverse impact on one party's important interests arising from enforcement activity by the other party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalized, or at which other forms of remedial orders are imposed. Where it appears that one party's enforcement activities may adversely affect the important interests of the other party, each party must consider all appropriate factors, which may include but are not limited to:

(i) The relative significance to the anticompetitive activities involved of conduct occurring within one party's territory as compared to conduct occurring within that of the other;

(ii) The relative significance and foreseeability of the effects of the anticompetitive activities on one party's important interests as compared to the effects on the other party's important interests;

(iii) The presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers or competitors within the enforcing party's territory;

(iv) The degree of conflict or consistency between the first party's enforcement activities (including remedies) and the other party's laws or other important interests;

(v) Whether private persons, either natural or legal, will be placed under conflicting requirements by both Parties;

(vi) The existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

(vii) The location of relevant assets;

(viii) The degree to which a remedy, in order to be effective, must be carried out within the other party's territory; and

(ix) The extent to which enforcement activities of the other party with respect to the same persons, including judgments or undertakings resulting from such activities, would be affected.

Article VIII provides that either party may request consultations regarding any matter relating to this Agreement. Article IX further provides that Officials of the Parties' competition authorities agree to meet at least twice a year to: exchange information on their current enforcement efforts and priorities in relation to their competition and deceptive marketing practices laws; exchange information on economic sectors of common interest; discuss policy changes that they are considering; and discuss other matters of mutual interest relating to the application of their competition and deceptive marketing practices laws and the operation of this Agreement.

Article X addresses the issue of confidentiality of information. Notwithstanding any other provision of this Agreement, neither party is required to communicate information to the other party if such communication is prohibited by the laws of the party possessing the information or would be incompatible with that party's important interests. Unless otherwise agreed by the Parties, each party agrees to, to the fullest extent possible, maintain the confidentiality of any information communicated to it in confidence by the other party under this Agreement. Each party must oppose, to the fullest extent possible consistent with that party's laws, any application by a third party for disclosure of such confidential information.

The degree to which either party communicates information to the other pursuant to this Agreement may be subject to and dependent upon the acceptability of the assurances given by the other party with respect to confidentiality and with respect to the purposes for which the information will be used. Notifications, consultations and other communications between the Parties in relation to the agreement are deemed to be confidential. A party may not, without the consent of the other party, communicate to its state or provincial authorities information received from the other party pursuant to notifications or consultations under this Agreement. The party providing the information must consider requests for consent sympathetically, taking into account the other party's reasons for seeking disclosure, the risk, if any, that disclosure would pose for its enforcement activities, and any other relevant considerations.

The notified party may, after the notifying party's competition authorities have advised a person who is the subject of a notification of the enforcement activities referred to in the notification, communicate the fact of the notification to, and consult with that person concerning the subject of the notification. The notifying party agrees to, upon request, promptly inform the notified party of the time at which the person has, or will be, advised of the enforcement activities in question.

In general, information communicated in confidence by a party's competition authorities to the competition authorities of the other party in the context of enforcement cooperation or coordination must not be communicated to third parties or to other agencies of the receiving competition authorities' government, without the consent of the competition authorities that provided the information. A party's competition authorities may, however, communicate such information to the party's law enforcement officials for the purpose of competition law enforcement. Similarly, information communicated in confidence by a party's competition authorities to the competition authorities of the other party in the context of enforcement cooperation or coordination must not be used for purposes other than competition law enforcement, without the consent of the competition authorities that provided the information. Furthermore, nothing in the Agreement requires a party to take any action, or to refrain from acting, in a manner that is inconsistent with its existing laws, or require any change in the laws of the Parties or of their respective provinces or states.

The 1995 Cooperative Agreement was used in a case involving Canada Pipe Company Limited and U.S. Pipe and Foundry Company. Canada Pipe pleaded guilty to conspiring with U.S. Pipe to have the latter exit the Canadian market for ductile iron pipe. The Director has stated that he received extensive cooperation from the U.S. Department of Justice which enabled him to secure a record $2.5 million fine. Another example of international cooperation pursuant to the 1995 Cooperative Agreement involves the thermal facsimile industry. In 1994, Kanzaki Specialty Papers Inc., a U.S. company, pleaded guilty in the Federal Court of Canada to price fixing and was fined CDN $950,000. Later that year, the court fined Mitsubishi

Corporation, of Japan, and its Canadian subsidiary, Mitsubishi Canada Limited, CDN $950,000 after they entered guilty pleas to price fixing. In 1995, Rittenhouse Ribbons & Rolls ltd. was fined CDN $98,000 following a guilty plea to price maintenance. In 1996, New Oji Paper Co. Ltd. pleaded guilty and was fined CDN $600,000 to a price fixing conspiracy, and in 1997 Mitsubishi Paper Mills Ltd. also pleaded guilty and was fined CDN $850,000. Concurrently, fines have also been imposed in the United States. Total fines imposed in respect of this case in Canada were in excess of CDN $3.4 million, and in excess of U.S $ 10.2 million in the United States.[15]

It remains to be seen whether the legal instrument is truly the cause or the effect of a new Canadian disposition to cooperate in competition law enforcement. The current Director of the Bureau, Konrad Von Finkenstein recently noted that cooperation has covered a wide range of enforcement activities including: regular communications at all levels of the Canadian and U.S. competition authorities; discussions of case theories and market definitions; and carrying out Internet sweeps together.[16] Quaere whether any of these examples actually require a formal legal instrument in order to be used. With respect to criminal matters, the Director has given the following examples of cooperation: sharing evidence; coodinating searches; and condcting parallel coordinated investigations together from start to finish.[17] Again, unless confidential information is being shared, it is difficult to see why any of these examples of cooperation would require a formal legal instrument in order to be used.

B. *The European Union*

From its earliest beginnings in the Treaty of Rome, the European Community, now the European Union, represented an attempt to bring together a number of sovereign states for reasons that were more clearly political than economic. Nonetheless, the early legal foundations of the Treaty of Rome included competition law principles. It is worth stating at the outset that in 1957 when the Treaty of Rome came into effect, Germany alone among the founding members had a competition law. In fact, Germany had a long tradition of competition policy dating back to the Fryberg School which emphasized the need to prohibit cartels. In addition to this, the post-war U.S. backed governments were encouraged to aggressively apply the anti-cartel law because cartels were seen as providing support for the fascist Nazi government.

The European example then is one of largely unintegrated markets that were glued together for reasons that were largely political. Lacking a common currency as an instrument of price transparency and price intermediation, and maintaining different regulatory frameworks and traditions—although mostly activist ones—competition policy soon became, arguably, the single most important instrument of market integration. This was accomplished in the main by a competition policy that would have been, in many respects, fairly consistent with the post-war ebb of U.S. competition policy enforcement. To the antitrust cognoscenti, these were the heart of the pre-*Sylvania* days of the 1970s and thereafter in the U.S. so vertical restraints were aggressively prosecuted in the name of market integration.

And it is only recently that the Commission has tentatively proposed that a more modern—more economic—approach to vertical restraints might be worth considering. And even these cautious steps are made with iron clad pronouncements that even with an emergent single currency there will be no relaxation of prohibitions on resale price maintenance or territorial restrictions. This is so despite the economic evidence cited in the Green Paper itself suggesting that price cost differentials remain extraordinarily high in the markets for manufactured products among the members of the Union. Were this not bad enough, the Commission's only power to liberalize its enforcement of vertical restraints lies either in a finding that a given agreement, or class of agreements, falls outside the scope of Article 85, or by finding that while it falls within the scope of Article 85 or 86, it may be exempted under Article 85(3). While the latter finding may be binding on national authorities, the former clearly would not be binding on them. Further since, an agreement cannot be exempted under Article 85(3) unless it is first found to be anticompetitive, in effect a liberal Commission policy to vertical restraints offers n protection against a reactionary policy from national authorities or national courts. Re-nationalization by any other name is simply not centralization.

Not surprisingly, therefore, the European model has been one of a powerful centralized European Commission together with first the European Court of Justice, and second the Court of First Instance implementing competition policy from the European Community to the Single Market. Unlike getting giddy at the thought of the European model as a complete example of the virtues and practicability of centralization, it is worth recalling that it was not until 1989 that the Council of Ministers could agree to Community-wide merger enforcement in the Merger Regulation. Even so, the price of agreeing to merger review by the Commission was bought by an insistence of very high thresholds that ensure that only a very few mega-mergers actually fall under the purview of the Commission. These high thresholds continue to impose high transaction costs on potential entrants and prospective merger partners because in effect such parties may still face duplicative and multiplicative filing requirements in several member states at once.

In 1996, the Commission issued a Green Paper seeking to address this, however the major member states imbued with the currency of subsidiarity and in many cases, spanking new competition laws, nixed any attempt to lower the thresholds to provide a true "one stop shop". Instead, they opted for a complex multijurisdictional threshold that does little to reduce transaction costs or create an effective "one-stop shop".

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[15] See Competition Bureau, Industry Canada, *Annual Report Director of Investigation and Research for the Year ended March 31, 1997* (http://strategis.ic.gc.ca/SSG/ct01190e.htm); U.S. Department of Justice, "Justice Department's Ongoing Probe Into the Fax Paper Industry Yields More Indictments" (December 13, 1995); and Joel Klein, "Criminal Enforcement in a Globalized Economy" 3 (February 20, 1997).

[16] Von Finckenstein, Konrad, "Speech to the Annual Meeting Of The American Bar Association Antitrust Section", http://strategis.ic.gc.ca/SSG/ct01297e.html (August 3, 1998).

[17] Ibid.

Obviously embarrassed by their own craven lack of bravery, and driven by the desire not to be seen to be to far out of step with the "business friendly" politically correct post-cold war culture, in September 1997 the major members—Germany, the United Kingdom and France—created their own common pre-merger notification form without the barest of nod or wink to the principles of consultation or transparency. What is worse is that it appears that the new form increases not decreases transaction costs in each jurisdiction. For instance, in Germany where the duty to notify mergers has always been wide, but the duty to disclose information narrow, merging parties in cross-border transactions have had their compliance costs raised in effect not by a statutory mandate, but rather by an intergovernmental agreement. In the U.K., multijurisdictional merger parties seeking expedited review will apparently have to file both the traditional UK form and the new common form.

And what of the Union? Well, even as the major members seek to cover their policy avarice and institutional greed through a questionable common form, scant one month late in October 1997 the Commission issued a new Notice on Cooperation Between national competition authorities and the Commission in Handling cases falling Within the Scope of Articles 85 and 86. Having described the serious re-nationalization problems that are emerging in terms of vertical restraints policy and merger enforcement, it now remains to describe the twin attack on a centralized model of European competition enforcement. The new Notice decentralizes power to a great extent by authorizing national authorities to enforce the European competition law where there are mainly local effects even though clear European effects. At present only 8—Belgium, France, Germany, Greece, Italy, Portugal, Spain and soon the U.K.—national authorities directly apply Articles 85 and 86, whereas 7—Austria, Denmark, Finland, Ireland, Luxembourg, the Netherlands, and Sweden—do not.

While proponents of this decentralization would probably argue that no matter how badly the national authorities botch things up, there will still be a single European competition policy despite the patchwork enforcement because the Court of first Instance and the European Court of Justice will be there to remedy any problems. All of that would be nice and sensible in a world of zero transaction costs, but we have yet to discover or create that world. Of course, this is just a further development of the trend embodied in an earlier notice where the Commission sent power back to national courts; see the Notice on Cooperation Between National Courts and the Commission in applying Articles 85 and 86. It is evident that the Commission is under funded, however it seems a bit odd for those who deny it funding to use that as dispositive proof of the need to re-nationalize or de-centralize European competition enforcement.

Against this backdrop, it is also worth noting the significant role that the Commission is playing in spreading the European model of competition policy around the world. First, and foremost, this can be seen in the "Europe Agreements" or "Association Agreements" described above. No similar approximation requirement was ever made explicitly part of a process of an enlargement exercise before which in part explains why only 8 of the 15 member states directly apply Articles 85 and 86. Further, it is worth noting that antidumping remedies are still applicable to trade from countries subject to Europe agreements despite the approximation process. Interestingly, the Council and the Commission have signalled first in respect of trade negotiations with South Africa, and subsequently in its negotiation strategy for the next renewal of Lomé IV in 2000, competition policy enforcement will be a required element. Thus, the EU, in addition to being an example of the centralization or decentralization, is also a model of soft convergence, or perhaps, more appropriately, coerced harmonization. This trend also offers some useful clues about future attempts to implement competition policy at a multilateral level. It is clear that convergence or harmonization of the growing competition laws of the world will be an essential pre-condition to any future progress on this score.

The recent trends towards re-nationalization and decentralization of competition law enforcement within the EU are not interesting only because for many Europe has always provided a clear example of a multilateral approach to competition policy. It is all the more interesting because it also comes precisely at the moment when the European voice has echoed out with singular clarity in terms of the need or potential for a more global analysis off the multilateral option within the framework of the WTO.

About two things can be said. Where markets are integrated by virtue of a "bottom-up" approach led by multinational corporations, the case for a bilateral or multilateral model of enforcement becomes less compelling. One could argue that as the Single Market program progresses there is less need for a centralizing Commission than before. This might be an attractive argument were it not for the resilience of price-cost disparities among the members of the EU, and cited in both Council and Commission documents. One might conclude, therefore, that Europe still needs a centralized competition policy enforcement model within Europe of the kind that some of her most senior statesmen call for on the global level. One thing that is clear, is that achieving a multilateral competition policy within the framework of an international organization such as the WTO will not be simplified if a microphones are increasingly placed before the cacophony of voices represented by the national competition authorities and the national courts. And yes, politics still remain. It may well be that the European example illustrates much better than her own statesmen have yet to publicly realize or admit, that the multilateralizing of competition policy enforcement is at best a distant dream. Alas, even as we dare to dream of conquering destructive sovereignty, it may well be preparing to conquer us yet again.

Let me summarize several conclusions with respect to the two dominant models of integration- the European and North American cases. First, unlike the European experience, North American markets have been integrated from the bottom-up by multinational corporations as is evidenced by the substantial trade and investment linkages, and in particular the substantial patterns of intra-firm and intra-industry trade. Second, given the size differentials between the U.S. economy and that of Canada and Mexico, and the substantial population differentials also, economic integration has been achieved in spite of concerns about political integration not because of them. In this sense, Europe may well be evolving or converging towards the North American model prematurely as European markets have simply not achieved the same degree of economic integration. Nonetheless, this convergence may offer some practical insights into the limits to the potential for multilateral rule-making in the competition policy area. Third, the importance of convergence of national law, and underlying economic understanding, was an essential pre-requisite in moving North American competition policy from a posture of contention to cooperation. Here again, we can see important parallels to the movement towards having Article 85 and 86 of the Treaty of Rome apply directly in the member states, and in the approximation process in progress in Central and Eastern Europe, and emerging in Lomé.

C. *South America*

It is also worth considering what the European and North American experiences suggest for the development of competition policy in the Andean Community (Venezuela, Columbia, Peru, Bolivia and Ecuador) and Mercosur (Brazil, Argentina, Paraguay and Uruguay). First, although the Andean Community is often compared to the European Union, with respect to competition policy there is a notable difference. At the time that the *Treaty of Rome* was created, and Articles 85 and 86 came into effect, only one country, Germany really had a tradition of competition policy enforcement. Second, coming out of the ashes of World War II, the United States sought to have competition policy enforced actively in Germany. Third, Germany remains arguably the most important single economy within the European Union. Accordingly, within the European Union until very recently the centralization of competition policy could work because there were no significant competing power centers in the member states. This has permitted a degree of policy convergence to occur among the member states. In both the Andean Community and Mercosur, the national competition policies preceded the multilateral or regional instrument, and thus policy convergence and institutional coordination or centralization are more difficult to achieve. Thus, the 1991 *Andean Pact Decision 285 concerning Norms for Prevention or Correction of Distortions in Competition Caused by Practices that Restrict Free Competition* has only rarely been invoked.[18] Similarly, the *1996 Mercosur Protocol of the Defense of Competition has only recently been ratified by all the member states*[19] In addition, both the Andean Community and Mercosur lack a strong driving force—such as Germany with respect to the EU and the United States with respect to NAFTA—with a long tradition of competition policy enforcement. Accordingly, convergence in these regional experiences must draw on forces from outside the region such as U.S. and European legal and administrative precedent.

That being said, it is clear that while the South American experience might be superficially closer to the European politically driven integration process, with respect to competition policy the political environment and legal heritage has not supported that kind of process. However, it is less clear that the South American experience tracks very closely the economic driven model of integration pursued in NAFTA. Accordingly, it is not surprising that informal cooperation, convergence and coordination has also not taken root in either the Andean Community or in Mercosur.

D. *The FTAA*

In the Santiago Declaration in May 1998, the Heads of State and Government of the Americas directed their Ministers Responsible for Trade to begin negotiations for the Free Trade Area of the Americas (“FTAA”), in accordance with the March 1998 Ministerial Declaration of San José and reaffirmed their determination to conclude the negotiation of the FTAA no later than 2005, and to make concrete progress by the end of the century. They instructed that the FTAA agreement would be balanced, comprehensive, WTO-consistent and constitute a single undertaking. In the San José Declaration from March 1998, the Ministers of established nine negotiating groups on: market access; investment; services; government procurement; dispute settlement; agriculture; intellectual property rights; subsidies, antidumping and countervailing duties; and competition policy.[20]

The Ministers acknowledged that work in different groups may be interrelated, such as agriculture and market access; services and investment; competition policy and subsidies, antidumping and countervailing duties; among others. Thus, they directed the Trade Negotiating Group (the “TNC”) to identify linkages and outline appropriate procedures to ensure timely and effective coordination, and agreed to give the mandate to the relevant negotiating groups to study issues relating to: the interaction between trade and competition policy, including antidumping measures; market access and agriculture, in order to identify any areas that may merit further consideration by the Ministers.

First, it is useful to recall the mandate of the Negotiating Group on Competition Policy (“CP-NG”). The mandate as set forth in the San José Declaration provides one

[18] See generally: Jatar Ana Julia and L. Tineo “Competition Policy in the Andean Countries: The Ups and Downs of a policy in Search of its Place” 1 *The Journal of Latin American Competition Policy* (April 1998). (http://www.jlacomp.org); and Taveres J. and L. Tineo, “Competition Policy and Regional Trade: NAFTA, Andean Community, Mercosur and FTAA” (Unpublished paper presented to the International Seminar on Competition Policy in Celebration of the V Anniversary of INDECOPI, Lima, Peru May 26-29, 1998).

[19] See generally: Tavares J. and L. Tineo, “Harmonization of Competition Policies Among Mercosur Countries” (OAS Trade Unit, August 1997).

[20] Among the general principles and objectives of these negotiations identified in the Santiago Declaration are: promoting prosperity through increased economic integration and free trade among the countries of the hemisphere, which are key factors for raising standards of living, improving the working conditions of people in the Americas and better protecting the environment; establishing a Free Trade Area, in which barriers to trade in goods and services and investment will be progressively eliminated, concluding negotiations no later than 2005 and achieving concrete progress toward the attainment of this objective by the end of this century; and maximizing market openness through high levels of disciplines through a balanced and comprehensive agreement.

general objective—to guarantee that the benefits of the FTAA liberalization process not be undermined by anti-competitive business practices. The Declaration also set forth two specific objectives for the CP-NG. These are: (1) to advance towards the establishment of juridical and institutional coverage at the national, sub-regional or regional level, that proscribes the carrying out of anticompetitive business practices; and (2) to develop mechanisms that facilitate and promote the development of competition policy and guarantee the enforcement of regulations on free competition among and within countries of the Hemisphere.

The June Work Program developed by the Vice-Ministers in Miami further indicates that the CP-NG, and perhaps the should:

—Identify main principles and criteria of competition;

—With respect to the principles and objectives set forth in the San Jose Declaration, guarantee that the benefits of FTAA liberalization are not undermined by anticompetitive business;

—Develop mechanisms to promote cooperation and exchange of information between competition authorities; and

—Study the interaction between trade and competition policy, including antidumping measures.

Subsequently, in October 1998, antitrust authorities from 11 of the 12 nations of the Americas that have competition laws (Argentina, Brazil, Canada, Colombia, Costa Rica, Jamaica, Mexico, Panama, Peru, Venezuela and the United States) held a Summit an "Antitrust Summit of the Americas in Panama[11] The governments agreed to:

—Promote a "competition culture" among market participants in their countries;

—Enforce "sound" competition laws, particularly in combating illegal price-fixing, bid-rigging, and market allocation;

—Cooperate in enforcement, and to disseminate "best practices" for implementing competition laws with an emphasis on institutional transparency;

—Encourage small economies to develop competition laws; and

—Advance these principles in the CP-NG.

It appears that the "Antitrust Summits of the Americas" will run in parallel to the work of the CP-NG. It is worth noting that while so far national delegations to the CP-NG include competition, trade and foreign affairs officials, by definition, if not just practice, the Antitrust Summits include only the competition law officials. Another difference is that while the CP-NG is open to all governments in the FTAA negotiations, the Antitrust Summits appears to distinguish between those that "have" competition laws, and those that are as of yet antitrust "have nots". Finally, while the Santiago Declaration provided for the participation of the Tripartite Group of intergovernmental organizations (the Inter-American Development Bank (IADB), the Organization of American States (OAS), and the United Nations Economic Commission for Latin America and the Caribbean(ECLAC)), it appears that so far the Antitrust Summit has excluded the Tripartite Group. It is not clear yet why these distinctions have been made, or what affect these differences will have on the negotiations.

In the context of the mandate of the CP-NG, this section of the paper briefly discusses some potential issues for consideration relating to the application of competition policy in the FTAA.

Conclusions

This concluding section of the paper draws together the insights from the first three sections in order to suggest a template of elements that a small open might consider on its own or in the context of a regional trading agreement. The first section demonstrated how even an open small economy could be adversely affected by anticompetitive practices from outside of the country, as well as some from sources within the country too whether from governmental or private firm conduct. However, it was also suggested that there may be qualitatively different aspects of the market structure or development requirements of small economies that might require that competition law be tailored in its application to their specific needs.

The second section of the paper showed how the European Union has adopted certain core principles and common institutions that apply to small and large economy Members or partners in preferential trading arrangements. This architecture is designed to preserve and promote the coherence of the trade between the EU and its partners by eliminating or reducing trade distortions. However, beyond the floor of the core principles, the small economies retain significant scope to decide how much competition policy to apply in the purely national context. It also appears that the deeper the extent of the economic integration pursued, so too does the level of integration of competition policy and its enforcement institutions. This Tasman experience is consistent with this observation also.

From the Asian examples, great emphasis has been placed on the application of competition principles to many regulatory barriers without emphasizing competition policy to counteract private strategic anticompetitive behaviour. Notwithstanding this history, economic crises, and increased discussions of economic integration initiatives have led several countries to now begin to think of applying a competition law to address private strategic anticompetitive behaviour. This African experience is consistent with this observation also.

Accordingly, the rough outlines of a competition law and policy for a small economy can be drawn from this survey. Possible elements might include:

[21] Chile has a competition law, but did not attend. See FTC Press Release "FTC and DOJ Announce `Communiqué' from First Antitrust `Summit of the Americas' (October 20, 1998). [http://www.ftc.gov/opa/1998/9810/panama.htm].

- Open markets and liberal trade and investment policies.
- Laws to prohibit anticompetitive agreements among competitors, with exceptions for certain pro-competitive, efficiency-enhancing agreements.
- Laws to prohibit abusive or anticompetitive exclusionary practices by monopolies or dominant firms.
- Laws and institutions to promote competition in the design and implementation of government regulation and legislation.
- Laws that promote cooperative enforcement among national authorities to effectively remedy anticompetitive practices having their root outside of the national economy.

In the context of a regional trading arrangement, at a minimum these laws should apply to conduct that had a significant impact on international trade. Countries could then decide on their own to what extent they want to take these policies further in the purely national context. Countries could together also decide that given the nature of the integration that they seek to achieve further common institutions are necessary to eliminate the trade distortions that arise.

Again, this template is suggested at this stage for heuristic purposes solely. It is worth stressing at the outset that this study is at this stage is solely one of a conceptual nature. No attempt has been made at this stage to translate this analysis to particular legislative or policy directions for the COMESA negotiations.

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Trade and competition policy inthe framework of African countries
By Dr. Cornelius Mwalwanda

Economic and Social Policy Division
Economic Commission for Africa (ECA)

Let me start first by thanking COMESA and the United Nations Conference on Trade and Development (UNCTAD) for inviting the Economic Commission for Africa to, participate in this very important Conference which is taking place at the turn of the new millennium. Conferences, such as this one, offer a unique opportunity to share views and ideas on challenges that face our continent in the context of the ongoing globalization and liberalization of the world economy. The topic of this Conference "Competition Policy, Regional Integration and Development in COMESA" clearly reflects the challenges that many of our, countries face as they try to adapt to the momentum of globalization of production and trade and more importantly to the "competitive forces" of the world economy.

The globalization and liberalization of the world economy has brought to the forefront the issues of fair competition in international trade. The opening up of economics and markets to foreign direct investment and other forms of participation by transnational corporations can contribute directly towards contestability of host country markets in that these markets can now be entered by firms from other countries by establishing affiliates that produce goods and services within the host country and thereby compete with domestic firms. Accordingly, the liberalization of foreign direct investment regimes can lead to contestability of national markets, as both domestic and foreign firms are obliged to compete at a level playing field.

The concept of competition policy

Competition policy is based on the idea that competition enhances economic efficiency. Composed of a set of national rules, competition policy aims to prevent business from acting to the detriment of the common good by reducing or eliminating competition as such practices can reduce incentives for technical development and lead to the impairment of investment and of quality of goods and services. To ensure that this does not happen, competition authorities investigate complaints arising from restrictive business practices and enforce their findings through legal action.

It is generally believed that competitive markets are more innovative and efficient than those where industrial power is too concentrated. However, it has also been observed that in some circumstances monopolies can better improve welfare than competitive structures, for example for investments requiring large outlays. Furthermore, governments may want to provide scope for flexibility in implementation of Competition Policy laws in order to secure competitive advantage in international markets for national industries of strategic interest.

Implementation of Competition Policy laws started in earnest in the 1950s. Before then only the United States had adopted the first Competition Policy laws in 1890. However, since the early 1990s, a rapidly increasing number of countries have passed CP laws. Nonetheless, while competition policy is, an increasingly accepted concept at the international level, nations still have very different levels of maturity in its development and implementation. National practices vary considerably according to the balance favoured by countries between public interest and economic efficiency, the nature of their legal systems, and their levels of economic and technological development.

Competition policy and law in Africa

African countries have made significant strides to liberalise their trade regimes, although much still needs to be done in order for their economics to be effectively integrated into the global economy. The dilemma that continues to face these countries is how to respond to the inherent inequalities of the world trading system which basically arise from an asymmetrical distribution of economic power between the developed and developing countries.

There is no common rule for the elements of competition law that a country should adopt and the different competition laws that have been enacted by African countries generally reflect the objectives as well as the legal traditions of the countries concerned. The "main objectives" of competition policy and law in Africa appear to be similar and relate to: the need to organize and promote free and fair markets; to promote economic efficiency; to maximize consumer welfare; to encourage transparency in trade practices. Furthermore, the main elements and focus of competition policy and law in African countries relate to: restrictive business practices; monopolies and concentrations of economic power; mergers and takeovers; enforcement machinery; and extra-territorial coverage.

Several African countries have enacted and/or revised laws governing competition policy and include Algeria, Cameroon, Côte d'Ivoire, Gabon, Kenya, Morocco, Senegal, South Africa, Tunisia, Zambia and Zimbabwe. Many of these countries have become relatively open trade regimes and have introduced competition law and established competition authorities to enforce the law. In a number of other African countries, competition legislation is in preparation and includes Malawi, Ghana and Egypt.

Competition policy in the Seattle Round

Whether Competition Policy (CP) should be included in the next round of trade negotiations is the subject of debate in the preparatory process for the Seattle Ministerial Conference. Those arguing for inclusion of Competition Policy in the next round state that the absence of global rules on enhancing competition sharply contrasts with the global nature of business. In fact, an increasing number of competition cases have important international components and the adoption of competition rules at multilateral level could serve as a balancing factor to globalisation-related investment and mergers. Furthermore, competition policy could contribute to overall objectives of the WTO, including the promotion of trade. As trade and investment liberalisation increasingly reduces entry barriers, the competitive structure of markets becomes a more and more relevant issue for market access concerns.

Whatever, the case, WTO members agree that setting up an international authority on Competition Policy, with its own powers of investigation and enforcement is an unfeasible option. Nonetheless, where countries stand on the debate as to whether Competition Policy should be one of the new issues in the WTO depends on: their appreciation of the importance of the trade distortions provoked by the limited co-operation at the international level; their opinion about the anticipated level of efficiency that such a set of multilateral rules would achieve; the degree of flexibility that this common core of rules would provide for the public interest element of CP; and their overall strategy for the forthcoming trade negotiations.

Privatization and competition policy in Africa

Privatization has been the central issue of the development agenda since the mid-1980s as several African countries underwent structural adjustment programmes. However, because of institutional and. limited savings capacity factors, local participation in privatization has been significantly low. High political instability and economic uncertainty has discouraged firms and households from holding financial assets. Furthermore, many African countries have been concerned that with privatization large private corporations would replace existing public enterprises, with no significant change in the monopolistic powers of such enterprises.

Accordingly, despite the expressed desire of many African governments to broaden ownership of indigenous investors, with very few exceptions, methods that broaden local participation have not been commonly used. Nevertheless, privatization has been on the rise and acceptance of the need to reduce the size of public enterprises has grown.

ECA has recently undertaken a study, which focuses on review of the issue, the rationale and the problems associated with the broadening local participation in privatization including the difficulty encountered in reconciling equity with corporate governance within the African context. Selective methods that broaden local participation are concisely discussed. These include management and employee buyouts, employee share participation, directed group ownership, public flotation and financial intermediaries. Moreover, because of the major linkage between privatization and stock markets, a section of the paper discusses the different stages and nature of development of African stock markets.

Country specific efforts and outcomes in broadening local, participation are analysed. The countries and methods include Burkina Faso (consortium of local and foreign investors), Cape Verde (a participatory approach), Kenya (a politically acceptable ownership), Uganda (directed group ownership), Zambia (privatization trust fund), and Zimbabwe (Unit trust). Many of these schemes for broadening local participation in privatization provide very illuminating examples of efforts to ensure wider ownership of privatized public assets. Broadening local participation in privatization satisfies national aspirations. Privatization that results in some private ownership by indigenous citizens appears to be more acceptable than outright sale to foreign investors.

Furthermore, some important lessons emerge from the study. First, the study shows that in all the major procedures in improving the process of privatization, namely, securing consensus, ensuring transparency, investing more on design and preparation and ensuring appropriate institutional: blocks, the objective of broadening local participation reinforce the whole privatization process. *Specifically broadening local participation in privatization secures consensus of the general public, helps to depoliticize and speed up the process, indicates a strong commitment to transparency and sends an encouraging signal to foreign investors.* Second, acknowledging the difficulty involved in designing and implementing mass privatization, through voucher schemes in Africa in the short term, the study points out that with a strong commitment and planning, it could be achieved at least in the long-term. Third, as a prerequisite for promoting investment and acquiring credibility with both foreign and indigenous investors, continent-wide efforts are emphasized to ensure stability and to improve the investment environment.

In conclusion, while the study builds on the fact that privatization and stock market development are inextricably linked and mutually reinforcing it recommends this only as a long-term solution to broaden ownership. It also recommends the method of directed group ownership as one of the 'best practice' to be implemented as a medium-term solution, concurrently with stock market development for an optimal path to broaden local participation in privatization of public assets.

Final Comment

The challenges that face the global economy is how to ensure that globalization and liberalization produce a

"Pareto optimal" situation in terms of increasing global welfare. In such a situation promoting competition and a "level playing field" in international production and trade becomes imperative. Reducing restrictive business practices, ensuring that mergers and take-overs do not result in undue concentration of economic power, and minimising dumping practices are some of the objectives and targets of competition policy.

Given the current stage of development of trade in Africa, the challenges of adopting an appropriate competition policy and law are indeed formidable because of the dangers inherent in opening up economies, which hitherto have been relatively closed. The need for African economies to be integrated in the world economy is no longer an issue. However the pace at which this done, and the economic and social costs associated with the process, is an issue.

Practical risks and opportunities for countries creating new competition laws and enforcement agencies

By Donald I. Baker

Attorney and Counsellor
Baker & Miller PLLC, Washington, D.C.

I am honored to be here—and am very excited about being in Africa for the first time in my life. We from abroad have much to learn from you. I hope I have already learned some of it—inside this room and outside it, too.

Your problems are not the same as our problems - or Europe's either - and therefore you must be careful about just following North American or European solutions in competition law or elsewhere. (Last week in Bangkok, Professor Bill Kovacic of George Washington University old a wonderful story about a big U.S. law firm being paid to draft a new competition law for an African country - and the recipients were a little surprised to find buried in their new statute a provision that said their new Competition Commission "shall have its headquarters in the Mexico City Federal District.")

In creating your own solutions to your own circumstances, you still can and should learn from the mistakes that others have made on North America, Europe, and elsewhere. An old friend of a famous American Civil War General said when the General died: "He never admitted that he had made a mistake and he never repeated it." (The General was incidentally the brother of Senator John Sherman for whom our first and most famous competition law—the Sherman Act—was named.)

I. Mistakes to be avoided (if possible)

Returning to the question of mistakes, let me list a few that recur in OECD countries:

Starting with Legislative Errors

1. Creating a paper tiger—a nice sounding Competition Law that nobody is seriously enforcing. In practical terms, nothing has really changed from the prior era. It is simply "business as usual" for all concerned—the business community, the politicians, and the supposed enforcers. (This was true in the U.S. for the first decade or so after passage of the Sherman Act and may have been true of the Canadian Combines Act for over half a century.)

2. *Making the Competition Law too vague*—so that no businessman, lawyer or judge can predict what is legal or illegal. Beware of terms like "unduly," "unfair," or "restrain," if they are not explained in the statute or lack clear meaning! (This was clearly true of the U.S. Sherman Act and it took over two decades to get some *very* basic concepts sorted out by the Supreme Court.)

3. *Making the Competition Law too complicated—s*o that it is hard for the Competition Agency to figure out what to do, or for private parties to figure out which among the many detailed provisions are likely to be enforced. It is also politically easier to hide special-interest loopholes and exemptions in a complex statute.

4. *Providing the Competition Agency with inadequate tools for investigation.* If the Agency lacks the power to compel evidence—and to punish those who fail to produce it—the Agency will not be able to effectively investigate and prosecute a lot of the most important cases especially cartel cases. (The civil law tradition is seriously weaker on compulsory discovery than the common law tradition.) The power to make unannounced searches for documents ("dawn raids") is particularly important where other powers of compulsory production are not very effective.

5. *Underfunding the Competition Agency* in relation to its range of responsibilities. This is part of the "paper tiger" problem: if highly visible competitive restraints and abusive monopolies are not even seriously investigated, respect for the new Competition Law and enforcement process will be weakened; and, if only a very few investigations are undertaken, the targets selected will argue that they are being singled out for political reasons or favoritism of their competitors.

6. *Requiring that too much routine trash be submitted to the Competition Agency* for review or approval. Compulsory filings will swamp the Agency staff and prevent them from investigating more important things. (This is what the European Commission is admitting in its recent White Paper on reform of the Article 85 notification system that now requires so many routine agreements be reviewed by the Commission in order to be enforceable.) Compulsory filings are not a reasonable substitute for adequate investigational powers and funding for the Competition Agency, when it comes to uncovering serious violations.

Turning to Agency errors

7. *Being random and undisciplined in selecting targets* for investigation and/or prosecution. One variant (which might be called the "mailbag problem") occurs when the Agency allows its enforcement agenda to be dictated by complaints. Stated simply, the Agency is likely to lose stature and credibility if it comes to be perceived as simply selecting cases on the basis of who complains and

how loud their voices are. The problem becomes even worse if the complainants who have the most effective voices are perceived to be special friends of powerful politicians or their families.

8. *Being vague in explaining the Competition Agency's enforcement agenda.* The purpose of rules, guidelines', and even speeches is to give due warning to the business community and their professional advisers as to what conduct is likely to attract enforcement attention. Once warned, many will choose to desist rather than risk enforcement action. A serious test of the Agency's success is how much voluntary compliance is achieved in various areas of recurring business conduct. Cartel members are probably different: they generally know what they are doing is illegal and tend to be deterred only by the high probability of being caught and punished.

9. *Failing to follow through on Agency pronouncements.* Once you say you are going to pursue certain types of anticompetitive conduct or abuse, then you have to do it. Otherwise, those who followed the Agency guidance the last time are unlikely to do so again - and the pro-competitive benefits of the first pronouncement are diluted or lost. (This is just another aspect of the "paper tiger" problem.)

10. *Failing to secure adequate remedies in particular cases*—be they fines, penalties, injunctive order or divestiture. It is nice to win a famous victory that law professors and Agency officials can lecture about - but it matters little in the market if the business community does not see Competition Agency victories *in law* as achieving victories *in fact*. The Competition Agency temptation to settle is strong - to save staff resources and avoid the risk of losing—but, to get a good settlement, the Agency frequently has to be prepared to drag the defendant through a long, painful legal process. This requires determination and staff resources.

Having offered all these warnings, I still think that it is a good idea for a COMESA Member State to have a Competition Law—provided that it is *simple* enough to be *workable* and enforcement is funded sufficiently to make the law *credible* in the marketplace. Both simplicity and credibility are important.

If these conditions are not met, it would be better to have no law at all than to pretend you have a workable law. (Even without a Competition Law, it is still possible, as Mark Warner said yesterday, for competition policies to be written into other regulatory laws for particular sectors, such as transportation or electric power.)

II. Political dynamics related to competition and consumers

This gets me to the political dynamics that surround competition law in most countries and how this relates to trade law. The political reality of competition law is very different from trade law.

Competition law is mostly about protecting *consumers*—individual consumers as well as enterprises that buy intermediate goods and capital assets, and governments that build highways and arm soldiers. Competition law embodies a commitment to *a process*—not any particular *outcome.* The process seeks a market in which the efficient firms that respond to consumer demand can triumph over the inefficient or unresponsive firms; it is a market that allows consumers and suppliers to make the key choices—free of covert conspiracies and monopolistic bullying.

Trade law is mostly about protecting *domestic producers* who face loss of business to imports. Trade law is about *unfair competition*—an often subjective concept—that may be based on foreign government subsidies, price discrimination, law wages or other special cost advantages. Trade law generally favors incumbents versus outsiders. It tends to be suspicious of innovators, price cutters and other disrupters of the status quo. Some of what trade law prohibits is clearly pro-competitive (e.g., dumping that disrupts a domestic monopoly or oligopoly).

Competition works automatically and is generally invisible—so that the consumers who benefit from it do not even know that the competitive market is providing the critical incentives for lower prices and better services. Consumers are notoriously poorly organized in most—countries. There is simply no political constituency in favor of competition or competition law on an ongoing basis. The same is not true of the other side. Those who feel threatened by competition are generally well organized and politically determined not to give up the sweet fruits from a monopoly tree. These well organized beneficiaries may be producers, distributors, farmers, employees, domestic monopolies, or less efficient service providers.

Because the champions of competition law are advocates for a *market process,* they differ from their opponents—who generally are advocates of *particular results* (such as maintaining particular jobs and firms, barring new entrants, or preserving special cross-subsidies embedded in monopoly rates). Frequently, those who oppose competition opponents have as an ally some key bureaucracy—a Ministry of Finance, or Commerce, or Agriculture, or Transportation – which shares their commitment to stability and other non-competitive outcomes.

All this can lead to a serious risk of a *devil's bargain* when a new Competition Law is proposed:

- The champions of competition (the economists, the populists, and the World Bank/IMF, etc.) are rewarded with enactment of an impressive sounding Competition Law.
- Meanwhile, key opponents of competition are given sectoral loopholes and exemptions that save them out from the general Competition Act rules; and they may also receive quiet assurance that the Competition Agency will be kept too small and weak to be a serious threat to most enterprises.

Thus the competition champions can shout to the public "we have won- a famous victory. Now we too have a competition law and a competition agency in our country." Meanwhile, the opponents can *mutter quietly*—"well, we dodged that crazy bullet." (In fact, in the United States, when Congress enacted the famous Sherman Act in 1890, it also passed a Tariff Act that raised import duties to new heights, while providing no special appropriation for antitrust enforcement.)

III. An affirmative competition agency agenda

Let us assume political success rather than failure at the legislation stage—and ask what the new Competition Agency should do if given reasonable tools and resources. It should think carefully and big. There are two important roles:

(1) The traditional role of *enforcing* the *competition law by investigations, decisions, and cases;* and

(2) The less-defined role of acting as *advocate for competition* within the government.

The two are related: what the Competition Agency learns in investigating a suspected restraint or monopoly a case may be used to advocate a broader policy before the Parliament or Cabinet, or a government committee or regulatory agency.

A. *Traditional investigations of suspected legal violations*[1]

Here priority—in terms of resources and effort—should be give to:

- Investigation and prosecution of *local cartel activity* —including price fixing, bid rigging, market allocation agreements among competitors.

- Investigating *abusive monopoly conduct*.

The Competition Agency need not (and should not) just confine itself to "big" or "national" cases. I believe that price fixes, bid rigs, and customer allocations are much more prevalent than some may assume. Local banks, local service companies, or local merchants often agree on price floors or agree not to peach each other's customers.

Price-fixing conspiracies are hard to discover and prosecute. Thus it is important to try create incentives for those who know about a conspiracy or have participated in it to "blow the whistle" on everyone else involved. There are several possible tools:

—*Amnesty*, *immunity* or *penalty reduction* to informants in return for evidence (these devices are used in North America and Europe).

—*Bounties* for whistleblowers (we use this device in the U. S. to deal with fraud on government contracts, but not in antitrust investigations).

—*Intrusive investigation*—dawn raids, etc. to encourage participants to believe that they might be caught and therefore had better cooperate.

Monopolists present a different problem. They are generally clear, notorious, and have every incentive to drag out any Competition Law enforcement proceeding. At times, it may be more effective for the Competition Agency to try to open up the monopolized local market to imports—rather than to battle the monopoly in an endless proceeding. In any event, "abuse of monopoly" proceedings tend to be resource intensive, because the evidence on conduct is frequently ambiguous and it is necessary to separate *efficient* monopoly conduct from *abusive* monopoly conduct. The Competition Agency should not want to punish "skill, foresight and industry" which has enabled a firm to become dominant - even if the firm thereby makes life miserable for its competitors in the market. (Opening up the domestic market to imports is still an appropriate goal policy even with an *efficient, non-abusive* domestic monopolist.)

Merger enforcement is another increasingly common area of competition law, but it can be resource intensive and disruptive of other enforcement efforts because of short time deadlines and high visibility. No country should just embark on merger enforcement because lots of other countries are doing so. Any merger enforcement program for a new Competition Agency should probably be limited to horizontal mergers in concentrated markets and should only be undertaken if adequate staff is available.[2] Very limited and random merger enforcement is likely to look politically motivated. "Why did they try to block our merger when they let so many others go in even more concentrated markets?" is an easy question to ask and may sometimes be a hard one for the Competition Agency to answer. Merger enforcement based on vague ideas of Industrial policy" seems an affirmatively bad idea. I believe that Competition Agency enforcement guidelines are particularly useful in the merger area (and this is supported by experience in the United States and Canada). So are public explanations of decision not to block particular mergers (as in the EU).

B. *Advocacy of competition policies*[3]

There is a serious difference in mission and policy between (1) a Competition Agency on one hand and (2) sector-specific regulators or constituency-promoting ministries ("the Regulators") on the other. The Competition Agency's task, broadly speaking, is to protect the interests of *consumers* and *efficient producers* in an effective market system. The Regulators frequently focus on particular enterprises or interest groups whose interests may seem threatened by competition *(e.g.,* common carriers, farmers, employees, or domestic manufacturers). The tension is particularly clear in the international trade area—with antidumping regulations being classic producer-protection regulation that often runs counter to competition policy when it causes consumers to pay higher prices or be offered fewer goods than would otherwise be the case.

[1] I tried to outline the U.S. approach to traditional competition law investigation and enforcement in a paper at a 1993 European Institute conference at Leiden in the Netherlands. See "Investigation and Proof of an Antitrust Violation in the United States: A Comparative Look", in P.G. Slot and A. McDonnell (eds.), Procedure and Enforcement in E.C. and U.S. Competition Law (Sweet & Maxwell 1993).

[2] See D. Baker "Antitrust Merger Review in an Era of Cross-Border Transaction and Effects" (at pp. 71-78) and R.S. Khemany "International Merger Activity: Some Concerns of Emerging and Developing Economics" (at pp. 103-108) in Policy Direction for Global Merger Review (Global Forum for Competition and Trade Policy 1999).

[3] A good current example is found in A. Gunderson, J. Montiero, and G.C. Robertson, "Competition Bureau Advocacy in the Canadian Telecoms Sector" (Global Competition Review June/July, 1999).

Even in the context of an industry-specific or interest group-driven regulatory scheme (such as antidumping), there is substantial room for the Competition Agency to cause competition policy to be given a much wider role than the Regulators' traditional constituents would prefer. This can sometimes be done by legal proceedings, or internal advocacy within the government, or public lobbying for legislative reform.

Where the Competition Agency has limited staff resources (as is true in most countries), effective advocacy of pro-competition decision-making by the government may pay bigger dividends for consumers than many classic antitrust investigations.[4] The two types of effort clearly can be made to be complementary (as when an antitrust investigation leads to insights and evidence that the Competition Agency can use in promoting a better general policy).

Challenging well-established Regulators or protected interest groups can involve serious political risks for the Competition Agency. Therefore, careful selection of targets, tactics, and timing is critical. Possibly relevant opportunities include:

1. *Trade law* enforcement proceedings where the domestic monopolists or oligopolists are treating themselves very well at the consumers' expense.

2. *Privatization* of a state monopoly where competition would clearly work in the market.

3. *Regulation of* a *monopoly* by a sector-specific Regulator which is thwarting entry, maintaining a cartel, or preventing disruptive innovations.

4. *Licensing proceedings* that are likely to result in an award of a monopoly franchise to an already dominant and visible competitor.

Any of these may result in a political battle royal within the government. How_successful the Competition Agency is may depend on how strong its legal tools are:

1. Does the Competition Agency have the *formal right to intervene (*as in Canadian trade proceedings)?

2. Does the Competition Agency have the right to *force* the Regulators to hold a hearing on anticompetitive practices before it can grant a license or approve a transaction (as in the nuclear licensing system in the U.S.)?

3. Does Competition Agency have *right to appeal* and adverse decision by a Regulator (as is sometimes true in the United States, producing cases with such amusing names as *United States* v. *Interstate Commerce Commission* or even *United States* v. *United States)?*

4. Can the Competition Agency file antitrust *suits independently* against anticompetitive conduct approved, encouraged or tolerated by the regulator (as is true, e.g., in the banking and electric power sectors in the U.S.)?

5. Can the Competition Agency *veto* a Regulator's decision (as under the U.S. privatization statute)?

It seems altogether appropriate for the Competition Agency to try to get some of these powers whenever a political opportunity to do so comes along. When a national parliament is creating a new Competition Agency may be a more opportune time to do so, than later when the Competition Agency has already made itself a nuisance to some politically-important interest groups and Regulators.

IV. The final questions: is a regional solution better? Should COMESA consider establishing a competition law or agency?

This is a tough set of issues. Elevating competition law enforcement to the regional level does not make politics go away—indeed, it may make the problem worse. Still, even if the Member States can agree on strong and clear Competition Law provisions, then it may well be a good idea. (The European Community clearly offers an outstanding example of regional competition enforcement that is more effective than that of most individual states in the regional group.)

Having a separate COMESA competition law would not necessarily require a special COMESA enforcement agency. So long as leading COMESA members have Competition Agencies that can cooperate, these could enforce both their own national laws and the COMESA law as well.[5] The members could still rely on the COMESA court to bring some reasonable level of harmonization in how the COMESA law was interpreted.

It would probably be even more important to have a *good cooperation agreement* among national authorities than to create a new COMESA Competition Agency at this early stage. Such an agreement would allow the national agencies to exchange fruits of investigations, and use them in domestic proceedings, either under the COMESA law or the Member State law—than try to create a COMESA agency.

It would be an affirmatively bad idea to try to create a COMESA Competition Agency unless it would be a strong one politically. It has to be strong enough to battle effectively with the sector Regulators or governments in the Member States. (Europe shows how hard this is even for a strong Competition Agency.)

I recognize that smaller members might prefer to have a single Competition Law and Competition Agency at the

[4] We had some particularly favorable U.S. experience in the 1970s —when public frustration with inflation and effective advocacy by the Antitrust Division of the Justice Department helped to produce some enormous competitive results. These included airline and trucking deregulation, the elimination of cartel commission rates on the stock exchanges, and ultimately the break-up of the telephone monopoly. (The Antitrust Division, however, proved less effective when it tried to intervene in antidumping cases.)

[5] In the U.S., we allow the State Attorneys General to enforce the Federal Antitrust Laws as well as their own state antitrust laws. See, e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (state proceeding against domestic and foreign defendants based only on Sherman Act).

COMESA level (rather than for each to have a very small national agency). On the other hand, larger members might regard a proposed COMESA Competition Agency as a potential hassle—and therefore oppose the idea or at least assure that the COMESA Competition Agency is kept weak and understaffed.

If I am wrong—and larger Member States would seriously support this regional approach—then creating a COMESA Competition Agency would be a possible course. It could be more efficient, and could bring cases in national courts. But such the "paper tiger" problem does not go away at the regional level. A COMESA Competition Agency would have to be strong—and adequately staffed—if it really were to deter would-be cartel participants and monopolists in the region.

V. Conclusion

Those of you sitting around this room are embarked on a difficult and important task—of crating competition laws and agencies that *really work* in environments where the idea of *competition enforced by law* may seem strange and disruptive to a lot of traditional interests. You deserve not only our technical assistance—but our warm support—as you go forward.

B. CONCLUSIONS AND RECOMMENDATIONS

I. Conclusions

Relevance of competition policy principles, scope and instruments to regional integration and development in COMESA

The Group agreed that:

(*a*) Competition law and policy is an essential component of the policy measures required for the success of economic reforms and trade liberalisation process put in place by COMESA member States.

(*b*) Competition law and policy should be clear, transport and enforced effectively in a transport and non-discriminatory manner.

(*c*) Competition authorities should be autonomous and adopt a flexible approach to the enforcement of the law, and should also be a policy advocate and catalyst in creating a "competitive culture" and keep a check and balance on government policies, regulatory agency decisions and privatisation.

(*d*) The design of appropriate competition policy as well as subscribing its areas of applications to meet development objectives need to be flexible and effectively implemented.

The role of cooperation and communication in competition law and policy: What can be achieved at the regional and international level

The group agreed:

(*a*) There is need for strong and effective cooperation among competition agencies in the exchange, of experiences and expertise as well as non-sensitive information and enforcement including positive and negative comity.

(*b*) Cooperation between competition and regulatory agencies in various sectors along the lines of the reference paper on telecommunications.

(*c*) COMESA members should study the implications of the current proposals for international cooperation in the area of competition policy including the EU proposal, the OECD and UNCTAD on the development dimention and regional integration efforts.

(*d*) The regional cooperation objectives and aims of COMESA should be realistic and appropriate to the needs of its member countries.

The inter-relationship between the objectives, instruments of trade, investment and competition policies

The group agreed:

(*a*) That the conduct of enterprises and associations on trade can be detrimental to the flow of goods and services particularly through international cartels, abuse of market dominance, certain price-discrimination etc.

(*b*) That State monopolies and exclusive rights can affect market access and be harmful to the proper functioning of markets.

(*c*) That regional trade integration measures should be consistent with overall trade liberalisation commitments of member countries. In this context coherent national competition policies should be pursued.

(*d*) The growing flow of Foreign Direct Investment provides developing countries with opportunities to integrate their economies into the world economy and expand their economic base. To this end, it was agreed that competition policy is Primus inter pares among other policy measures (Trade and Investment policies) that could maximise the benefits of such flows.

II. Recommendations

(1) The Seminar recognised that Article 55 of the COMESA Treaty provides an advanced regional policy on competition, which should be sued as a starting point for further developing the regional competition policy.

(2) The Seminar concluded that this regional Seminar was timely and effective in addressing the issues of competition policy and regional integration within COMESA. The group having reviewed the terms of reference for the study on COMESA Competition Policy, made a number of recommendation for refocusing its objectives and scope which were incorporated in the text (see Annex). The group called upon UNCTAD to continue to extend its technical and financial support to COMESA member States in formulating and enforcing national competition laws. It also called upon UNCTAD to assist the COMESA Secretariat in carrying out the Study on Competition Policy.

(3) COMESA should as much as possible develop an institutional framework for the regional competition policy within the existing framework. In this respect the existing COMESA Court of Justice and the national Courts could be linchpins for giving legal interpretation to the "purpose" and "intention" of Article 55.

PART II

NATIONAL SEMINAR ON COMPETITION LAW AND POLICY

Papers presented at the National Zambian Seminar
Lusaka, Zambia, 31 May–2 June 1999

A. SUBSTANTIVE CONTRIBUTIONS

The role of competition law and policy in development: the experience of Zambia

By Nicholas Kwendakwena
Chairman of Zambia Competition Commission

Allow me to welcome all our foreign and local guests participating as speakers and as audience in order to share our pride to organize the first national and regional seminar in Zambia in the field of Competition Law and Policy.

The purpose of this National seminar is basically to foster the development of competition expertise outside the Zambia Competition Commission. Consequently, present amongst us today are the leading experts from the legal, educational, business and government departments.

It is my sincere hope that after the two days of intense discussions on the economic foundations of competition law, you will be able to participate effectively at the Regional seminar which commences on Wednesday, 3 June 1999. The Regional seminar will offer you a unique forum for exchange of ideas and cross-fertilization on the issues pertaining to the implementation and enforcement of Competition Law and Policy by the respective COMESA countries. I hope all of us shall not miss this great regional debate on Competition Law and Policy.

The growing emphasis on competition law

Towards the end of the last century, the first set of competition (antitrust) laws were enacted among the western industrialized countries, namely by Canada (1889) and the United States (1890). It is interesting to observe that 100 years later, several developing and transition market economies are now embracing competition laws. Since 1990 alone, more than thirty-five such countries have adopted new or have substantially revised their existing competition laws including virtually all of the former communist centrally planned economies in Central and Eastern Europe, and the former Soviet Union.

Several other countries more especially in the COMESA/SADC region are in the process of following suit. However, the underlying basis for the renewed interest in competition law differs from that a hundred years ago. The concerns during the end of the last century centered around preventing increased levels of industry and aggregate concentration which could give rise to the exercise of “market power” and undue economic-political influence. The competition laws were passed during a period of unprecedented corporate merger and acquisition activity, consolidations and formation of “trust”.

In contrast, competition laws in developing and transition market countries are being adopted in an environment where economic activity is already highly concentrated, mainly due to past government policies and interventions. These laws are now seen as instruments to accelerate the transformation process where economic activity is primarily determined by private ownership and market forces instead of state ownership and controls. Although, during the past 100 years, the role and importance of competition law has varied across countries and overtime, it has evolved as not only being an instrument to prevent anti-competitive business practices, but also to pro-actively strengthen market forces.

It is now a fact that the period since 1991 has witnessed an unprecedented process of economic and social transformation in Zambia. The central theme of this process has been the switch from the system of central planning or control of the economy to the use of market forces as the means to allocate resources. It was anticipated that the “free play” of supply and demand would, in the long run, determine market prices throughout the economy, allowing productive resources to be allocated in an efficient manner. Structural adjustment programs were adopted that included market oriented reforms notably in the areas of deregulation of prices, including the reduction or elimination of subsidies, administrative allocation of key product inputs, privatization of public enterprises or state companies, as well as the liberalization of trade policy and investment regimes.

The common aspiration underlying these reforms has been that the reduction of government's direct involvement or intervention in economic activity would, by providing enterprises with more freedom and stronger incentives, stimulate entrepreneurial activity, business efficiency, productive investment and economic growth, as well as enhance consumer welfare through improved quantity and quality of goods and services at prices determined by the market rather than administrative decision.

However, it was also recognized that the benefits of market oriented reforms are likely to be fully realized only if enterprises acted under the spur of competition, so that consumer wishes and opinions are reflected in market performance. It was further recognized that, a country that has undertaken trade liberalization measures has every interest in ensuring that the welfare and efficiency benefits arising from such measures are not lost due to anti-competitive practices by firms. A well functioning market mechanism is essential in this respect. For example, price liberalization in the market dominated by monopolies in form of parastatal companies, unless specific efforts are made to ensure the existence of competition, will end up in monopolistic price rises without corresponding competitive price equilibrium.

In recognition of the major role of competition law and policy for the success of the policy reforms, the government enacted the Competition and Fair Trading Act of 1994. The act has generally two principal aims:

(i) To prevent anti-competitive conduct thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service; and

(ii) To ensure the interests and welfare of consumers are adequately protected in their dealings with producers and sellers.

Although the Competition and Fair Trading Act was enacted in 1994, the act only came into force in February 1995. The Zambia Competition Commission was established later in April 1997. It is evident that the Commission was supposed to have commenced its operations at the same time as the Zambia privatization agency commenced its operations. Unfortunately this was not the case. However, the problems of competition were foreseen during the enactment of the privatization act. The act clearly specifies that during the privatization of state owned companies, the privatization agency shall ensure that monopolies are not created in the process of privatization. It was realized during the privatization process that if the sale of state owned enterprises was not carefully planned, the whole privatization process may end up transforming the state monopoly into a private "hard-core" monopoly.

The existence of an effective competition policy ensures that industries which are privatized or deregulated cannot re-organize themselves as private monopolies.

Until the enactment of the competition law, there has been no formal enforcement of competition rules and policy by any institution in Zambia. Consequently, the creation of the Zambia Competition Commission is the first attempt by the government to enforce the competition rules in various ways and it is hoped that it will eventually lead to their uniform interpretation and application, in view of the different attitudes towards competition rules by the business community.

The objective of the Zambia Competition Commission is primarily to establish conditions of free and effective competition in the economy, to ensure that the anti-competitive practices do not create barriers to trade or other forms of protectionism. The competition rules set down minimum standards and allow enterprises to penetrate markets and establish themselves thereby facilitating inter-market trade.

Although an effective competition law is important, it is also important to foster a "culture of competition" in the economy. In this regard, the Zambia Competition Commission faces a formidable but highly important task in building awareness and support for competition policy among the general public and within the business community. The existence of a "competition culture" within the country is vital to the success of the Commission's work and ultimately to the effectiveness of the competition law. It is important to bear in mind that the competition enforcement can only be more effective if there exists outside the Commission a community whose members understand and support the concept of competition. Very few of us up to now understand what competition law and policy is all about. It is in this regard, that the first task of the Commission this year was to promote competition policy. There are several ways of achieving this, but it may include the following:

—Providing as much information as possible to the public about the activities of the Zambia Competition Commission;

—Educating the consumer and the business communities about the law such as, the meaning and purpose of its provisions and the procedures through which the law is enforced;

—Developing public support for enforcement, by demonstrating how consumers and the country at large benefit from an effective competition policy; and

—Fostering the development of competition expertise outside the Zambia Competition Commission i.e. to legal, educational, business and government communities.

I am informed that the topics to be covered during both the National and Regional seminars will cover or attempt to answer several pertinent questions relating to Competition Law and Policy such as:-

—Do countries need a specific competition law to complete their national economic development policy framework?

—Are other policies that promote competition, such as liberalization of international trade, privatization and regulation not sufficient?

—Is enacting of competition law not a low priority, worth considering only after other more urgent policy measures have been introduced?

Finally, I want to assure you that the Commission will work together with you as users of the system, in establishing broad principles of competition that are designed to preserve an unrestrained interaction of competitive forces that will yield the best allocation of resources, the lowest prices and the highest quality products and services for consumers.

I wish to urge you to discuss the Competition Policy matters and make a significant contribution to the success of the joint ZCC/UNCTAD/COMESA regional seminar on the theme Competition Policy, Trade and Development, which takes place later this week starting on 3 June to 4 June, 1999.

It is now my rare honour and privilege to officially open this national seminar on Competition Law and Policy.

The development of competition law and policy in Zambia

By Mr. George K. Lipimile

Executive Director
Zambia Competition Commission (ZCC)

The implementation of Competition Policy continues to be not an easy matter in the majority of developing countries. My presentation will limit itself to Southern Africa, particularly the countries constituting the Common Market for Eastern and Southern Africa (COMESA). The countries in this region had not gone very far down the competition policy path, thinking it was either unnecessary or unimportant when the main suppliers of goods and services in non-competing markets were in the public sector and therefore under government. There was no significant private sector to talk about. The general structure of the markets in these countries were characterised by a high concentration of economic power in state owned enterprises. In fact, certain government policies in some of these countries at the time encouraged monopolies by granting exclusive rights to specific state enterprises to be the sole producers in specific sub sectors of industries. In addition, there still existed various pieces of legislation which provided for arbitrary intervention of government in markets, and in some cases limit or control the entry into certain markets.

The economic scenario in these countries began to change in the last decade. The need for developing a comprehensive competition law and policy was as a result of economic changes in the whole region. With the majority of developing countries abandoning socialist oriented economic principles, most countries chose to pursue Practices (RBPs) as well as work on the model law on Restrictive Business Practices facilitated the enactment of competition legislation in these countries.

The importance attached to Competition law and policy in the region varies from country to country. South Africa has just finished major amendments to its competition law aimed at enhancing the operations of the national Competition Authority. Kenya introduced the national Competition Authority immediately it abandoned its price control system about nine years ago.

They are now carrying out a review of their competition legislation to give more powers to the Authority and make it autonomous. Tanzania, I am informed, has already a competition legislation in place. However, the impact of the law continues not to be felt by industries as its administration has been left with a government division in the Ministry of Trade and Industry. There may be need to revisit the law and make its enforcement more effective. Mauritius and Madagascar with the technical assistance of UNCTAD has already passed legislation on Competition Law. It is more interesting in the case of Zimbabwe and Malawi. Both these countries have recently enacted legislation on competition law and policy. They have recently called for Technical Assistance from UNCTAD to have Competition Authorities established in their respective countries. The other countries which are set to establish a Competition Authority are likely to be Botswana, Namibia and Ethiopia.

From the above, it is clearly evident that the list of countries in the region which now have Competition Authorities is growing. These trends underline the increasing importance of Competition law and policy as a means to ensure the efficient allocation of resources in an economy, resulting in he lowest prices and adequate supplies for customers. At the regional level, too, competition policy is gaining increasing attention. There are already requests from member states leading to the establishment of a harmonised competition regime in the Southern African states under the auspices of COMESA. Apparently, the COMESA Agreement has a provision on the competition policy which calls for all member states “to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the common market”. However, the treaty exempts the application of this provision to any agreement, decision or concerted practice which improves production or distribution of goods or promotes technical or economic progress and has the effect of enabling consumers a fair share of the benefits. Unfortunately for the region, no concrete effort has been made as yet by the organisation to promote or implement the competition policy in its member states. It may be now imperative for the organisation or its members states to come up with an administrative machinery to implement and enforce competition policy at regional level. At international level, we should not lose track of our legal obligations under the World Trade Organization (WHO) Treaty. We are still required under this treaty to enhance the competitive process in our national economies.

From the foregoing, it can also be argued that countries in this region are still reluctant to accept the need to promote and implement the competition policy in their development strategies. There is an argument to the effect that those countries which have progressed to establish Competition Authorities appear, more importantly, to be doing so because it is one of the conditions laid down by the IMF and the World Bank if they have to get financial support. Otherwise there appears to be no full conviction on the part of government policy makers, business communities and trade associations in these countries on the establishment of Competition Authorities.

Alternatively, the delay might be due to lack of the financial resources required to establish and enforce the competition law. Most developing countries have their priority in encouraging productive sectors and agriculture capacities. The establishment of Competition Authorities is not as yet on the priority list. It is not my wish to comment any more on this argument as it is highly debatable and it cannot be easily applied to all the countries in the region.

The Zambia setting

Until recently, Zambia has been in a similar position to many other developing countries in the region. About 80% of the Industrial, transport and energy companies were in the public sector and their policies were strictly controlled by government, often with social objectives in mind.

The so called private sector at the time was very small and there were hardly any large companies in what was deemed the private sector. The parastatal sector under ZIMCO was mistakably considered as the private sector. A competition policy at the time was obviously not appropriate, as Zambia was not a market economy and in any case, the likelihood of significant anti competitive behaviour or practices in the private sector was low.

The advent of economic and political liberalisation in Zambia dating from 1991, witnessed the adoption of structural adjustment programs involving the introduction of market oriented reforms. The central theme of this process or reforms has been the move from the system of central planning to the use of markets as the means to promote economic efficiency. Thus, The necessary conditions in the markets were created that made a competition policy a useful economic instrument.

The liberalisation process which the country embarked on led to the rapid enactment of new laws and amendments of existing laws, especially in the field of business and commercial related laws. This was in certain circumstances accompanied by the establishment of new institutions to implement the newly enacted laws.

The Zambia competition

I will now look briefly at the competition legislation in Zambia by illustrating its main features. The Competition and Fair Trading Act came into force in February, 1995. The Act was enacted in May 1994. The principal aims of the Act are:

—To encourage competition in the economy by prohibiting anti-competitive trade practices;

—To regulate monopolies and concentrations of economic power; to protect consumer welfare;

—To strengthen the efficiency of productions and distribution of goods and services;

—To secure the best possible conditions for the freedom of trade; and to expand the base of entrepreneurship.

Scope of the Act:

The Act applies to all enterprises in relation to all their commercial transactions regarding the supply of goods and services. The Act does not apply to certain activities. There are explicit exemptions which are specified under the Act. The notable one being that the Act shall not apply to any activity i.e. a treaty or agreement to which the state is a party. It would appear the provision is meant to allow government not to be bogged down during its negotiations as a result of the requirements under the competition law. The other areas exempted from the application of the Act are:

—Activities of employees for their own reasonable protection as employees;

—Arrangements for collective bargaining on behalf of employees for the purpose of fixing terms and conditions of employment;

—Agreements relating to the use of Intellectual Property rights;

—Such business or activity as the Minister may, by statutory instrument, specify.

The main elements of competition policy

Ladies and Gentlemen, allow me now to briefly outline an overview of the main elements of competition law as they are found in the Act, while also reflecting on the economic significance of these provisions.

The main elements of the Competition and Fair Trading Act generally cover the potential restrictions on competition relating to horizontal restraints, vertical restraints, abuses of dominant position and merger review control. The Act as earlier stated defines anticompetitive trade practices as any agreements, decisions and concerted practices which have their object the prevention, restriction or distortion of competition to an appreciable extent in Zambia or any substantial part of it. These are prohibited. The four main elements of competition law as provided for under the Act are:-

—Mergers/takeovers;

—Horizontal agreements;

—Vertical market restraints; and

—Abuse of dominant position.

I will not dwell much on these concepts as they are going to be ably covered by my colleagues from UNCTAD, Mr. Qaqaya and Mr. Dhanjee after the coffee break. Consequently, I will be extremely brief. However, I will dwell a bit longer on the merger/takeover regulation.

Mergers:

The merger regulation is an important element of any law aiming to preserve levels of competition. Mergers can lessen competition, potentially providing increased scope for price rises or collusive behaviour and lessening dynamic factors such as the rate of innovation. These possible detriments provide the rationale for government intervention in the area of mergers or takeovers.

In considering whether to grant authorisation to a proposed merger, takeover or any other form of acquisition, the Commission's main concern will be to ensure that the merger or takeover will not result in a substantial lessening of competition in any market in Zambia or a substantial part of it. However, mergers may be one means of achieving efficiencies, particularly where increased exposure to global markets is placing pressure on domestic firms to reduce costs, improve quality and service and innovate in order to become more competitive in those markets. Efficiency issues are relevant both for assessing the impact of a merger on competition and for assessing the overall public benefit that would flow from a merger.

Further, when considering a proposed merger or takeover, the Commission will usually. approach it on the basis of a consultative process with the parties and the relevant industry, in order to determine the potential market place effect of the merger. In most cases it will not be an adversarial process but one of consultation as no offence has been committed and parties will often seek the Commission's informal opinion well before proceeding with a merger or takeover proposal.

The Commission normally evaluate proposed mergers, takeovers and acquisitions in two circumstances, namely:

(i) Where it is believed that the object of the merger or acquisition is to prevent, restrict or distort competition; or

(ii) Where the merger or takeover could, through the abuse of market power, result in undue restriction of competition or have an adverse effect on trade or the economy.

In making a judgement, the Commission follows steps in evaluating a merger or a takeover. A comprehensive assessment is undertaken which carefully examines among other factors the following:-

(i) Defining the market;

(ii) Market shares and concentration;

(iii) The extent of import competition;

(iv) Barriers to entry; etc

(v) Countervailing power, etc.

One can distinguish between three fundamental types of mergers, namely: horizontal, vertical and conglomerate mergers. This will be covered by the other speakers.

However, certain specific remedies are employed by the Commission for the effective enforcement of the merger control law. The law on mergers requires advance notification to the Zambia Competition Commission. The purpose of such a requirement is to permit the Commission to prevent consummation of an anti-competitive merger before it occurs, because it is extremely difficult to break apart a merger that has been consummated.

In addition to having the ability to issue an order prohibiting consummation of an anticompetitive merger, the Commission has power to permit the merger, subject to certain requirements, including observing a remedial order or divesting some, but not all, of the assets of either of the merging enterprises.

Horizontal restraints:

The Act prohibits all forms of horizontal arrangements which have the effect of restricting competition. These arrangements generally refer to agreements between firms competing with identical or similar products in the same market. These arrangements are outright prohibited under the Act, they cannot be authorised by the Competition Authority. The Act specifically prohibits the following trade agreements:

—Price fixing

—Collusive tendering

—Market or customer allocation

—Sales/production

—Refusal to supply

—Collective denials of access to an arrangement

Vertical restraints:

The Act further goes to identify a number of specific practices, more especially vertical agreements between competing firms with identical or similar products in the same market, which are outlawed to the extent that they limit access or unduly restrain competition through an abuse of market power. The Act makes express reference to the following practices:

—Predatory behaviour

—Discriminatory pricing

—Exclusive dealing

—Bundling and tying arrangements

—Resale price maintenance

Some of the practices mentioned and related to vertical arrangements are widely used commercial practices. They may often be legal, provided that their use is not intended to restrict competition and does not represent an abuse of market power. The Commission can authorise the use of such commercial practices, following an application by the parties concerned, if it considers that this would be consistent with the objectives of the Act.

Abuse of dominant position:

The abuse of dominant position is one of the key elements of the Act. For the provision to apply, one or more persons must substantially control a class of business throughout Zambia or substantial part of it, and have engaged in or currently be engaging in a practice of anti-competitive acts that have the effect of preventing or lessening competition substantially.

The law, requires dominant firms not to be permitted to use their advantage to block challenges from existing or potential competitors. The abuse of dominant provision is particularly important in the context of a deregulated and privatised business environment and can be instrumental in assisting the transition from regulation to deregulation. Moreover, it helps to ensure that dominant firms do not preclude the competition discipline promised by the removal of trade barriers and increased foreign competition.

It is important to note that the emphasis of the law is upon the activity of an enterprise rather than its status. Consequently, the holding of a dominant position is not prohibited, but the abuse of the dominant position.

Competition policy and consumer welfare

Unlike other Competition Authorities, in Zambia, the Zambia Competition Commission (ZCC) has also the legal mandate to deal with matters pertaining to consumer affairs. Firstly, you will observe that there is a large number of consumer organisations, both governmental and non-governmental, business interests, enforcement bodies and other interested parties, which are active in the field of Consumer Affairs. On the Board of the ZCC, there are two representatives from the national non-governmental consumer associations.

The ZCC has identified what work on consumer affairs it should engage in, and how it should allocate resources between different types of activities. It has also developed a strategy aimed at providing the various bodies with guidance on how they might be affected by the work undertaken by the ZCC.

The ZCC's strategy has taken into account the need to work effectively with those other bodies. This strategy by the Commission aims to help maximise consumer welfare in the longer term, subject to protecting the interests of vulnerable consumers, by:

—Empowering consumers through information and redress;

—Protecting them by preventing abuse; and

—Promoting competitive and responsible supply.

The Commission recognises the fact that, in general, consumers are the best judges of their own interests: consequently, it is for them to make choices for themselves, based on those interests and accordingly to their own values.

While direct intervention by the ZCC may be necessary when things go wrong, the main thrust should be directed at empowering consumers to look after themselves. The main tool needed to enable them to do this is information. Consequently, the essential part of the Commission's work is to promote the availability of information, either by encouraging others to provide it, or by doing do itself.

It is always evident that where there is effective competition and sufficient information for consumers, dishonest traders cannot thrive. It is in this regard that because of imperfect markets, that regulation sometimes is necessary to ensure that consumers are adequately protected. The Commission also in a way provides an effective and accessible redress mechanism which forms an essential element of good consumer protection.

Authorization of allowable acts

Authorization and Notification

Part III of the Competition and Fair Trading Act is based on the fundamental principle that any conduct which has the purpose of substantially lessening competition in the market should be prohibited, while recognising that, in certain circumstances full competition may not deliver the most desirable outcome.

The Act, however, recognises that some objectives of our society may not always be met by the operation of the competitive markets. To secure such objectives, exemptions from the application of the Act are available. The adjudication (Authorisation and Notification) procedures under the Act provide the exemptions. It is important to note that the adjudication procedures apply only to specific parts of the Competition and Fair Trading Act. For example, do not apply to any of the consumer protection provisions of the Act.

To spare people the process of undergoing an investigation by the Commission or risking an action being brought on by a third party, the act provides a mechanism for authorisation by which the Commission may grant immunity from legal proceedings for certain arrangements or conduct that may otherwise contravene the Act. The outcome provides a greater degree of business certainty, important when a major investigation decision or other market initiatives are proposed.

Authorization of some types of anti-competitive behaviour is possible if the public benefit exceeds the detriment to the competition.

The Commission may grant immunity on the public benefit grounds from legal proceedings for some arrangements or conduct that might otherwise breach the restrictive trade practices provisions of the Act.

Authorization is a process whereby the Commission, in response to an application has the power to grant immunity from court action for arrangements or conduct which might otherwise be in breach of the Competition and Fair Trading Act. To grant authorisation the Commission must be satisfied that the public benefit stemming from the arrangements contact outweigh any anti-competitive effect. To assist the Commission in its consideration of the application it would be helpful to have as wide a range of views as possible concerning the public benefits and anti-competitive effects of the arrangement or conduct.

Certain types of conduct referred to under Section 9(3) of the Act are inherently anti-competitive. The Commission is unlikely to grant immunity from prosecution in respect of such conduct. They types of restrictive business practices mentioned in Section 7(2) of the Act may not be anti-competitive depending on the precise circumstance of each case, and negative clearance for such conduct under Section 13 is possible.

A person or enterprise may seek immunity from the possible prosecution under this section by notifying the Commission that it is undertaking or is proposing to undertake such conduct or acts which, it is inclined, will not have an adverse eff ect on competition or trade or the economy in general.

In the light of the information provided by the applicant or others, the Commission may decide to take no action to stop the notified conduct thus providing the immunity sought (negative clearance). Alternatively, the Commission may determine that the conduct has or will have an adverse effect on competition or the economy and issue a notice requiring the person or enterprise to cease the conduct or practice within a specified period from the date of the issue of notice.

Powers of enforcement

Mr. Chairman, let me now look at the power of enforcement available to the Commission. You will agree with me that the effectiveness of the competition law in addressing anti-competitive practices, depends on the actual degree of enforcement action by the Competition Authority and role of the courts or the judiciary in the enforcement of the competition law.

Vigorous, well targeted law enforcement goes hand in hand with advocacy. Competition law enforcement prevents economic agents in the market from distorting the competitive process either through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors.

To help the Commission in its functions of exercising strict control over all forms of anti-competitive practices, the Act gives the Executive Director and other officers of the Commission, the rights to apply to Court for a warrant granting them authority to enter any premises and seize records or other documents relating to the trade or business of any person, they feel are necessary to prove to the Commission of an offence under the Act.

Under the Zambian law, the Commission may opt to apply to the Director of Public Prosecution to allow them to have their own prosecutors to prosecute offenders under the Act.

The law further stipulates offences and penalties for persons who contravene or fail to comply with any provision of the Act or any regulations made thereunder, or any person who omits or refuses to furnish any information or to produce any document required by the Commission. It is also an offence to knowingly furnish any false information to the Commission. Those found guilty are liable to a fine or imprisonment or to both.

The way forward

Finally, I may ask, what is the way forward for the Zambia Competition Law and Policy? Zambia like other countries in the region still is facing teething problems in the administration, enforcement and implementation of competition law and policy. The same problems are applicable in different degrees to all the countries in the region. Although the enactment of the competition law was designed to remove the impediments in the market and create a level playing field for big, medium and small-scale business organisations, the effectiveness of the law is however reduced by several factors:

—Weak capacity to review and decide on complaints concerning anti-competitive behaviour;

—Weak capacity to investigate predatory mergers and acquisitions;

—Weak capacity to co-ordinate with regulatory bodies to enhance “competition for the market” in the provision of infrastructure services;

—Weak institutional capacity to develop procedures for alternative methods as well as use of courts for solving conflicts arising from anti-competitive behaviour;

—Low level understanding and awareness about competition law, procedures and remedies by consumers, business community and parastatals.

The eliminating of these impediments is essential for meaningful development of a competitive market system. The Zambia Competition Commission is determined to remove these impediments by designing a strategic action plan for identifying and developing options to remedy legal and institutional constraints, capacity building and developing an operations manual. Above all, there is need to establish a working relationship with enterprises, business people and trade associations. Thank you very much for your time.

Treatment of mergers and takeovers, including regional and international measures

By James Mathis

Trade Law Program Coordinator
Department of International Law, University of Amsterdam

Introduction: why merger control?

One may ask why developing or transition economies should have any business discussing the adoption of merger control (MC) in either national system or regional groupings. Any reference to historical pattern would simply indicate the developed countries, at least some of them, use merger control and that the consideration of adopting MC has appeared to come late in the competition policy scheme of evolution. The EC itself is a good example. Articles 85 and 86 were provided in the original Rome Treaty (1957) and given effect by Regulation 17 of 1962. The regulation for control of concentrations in the EC did not arrive until 1989.

One may also note the some common advice given by developed country experts on this subject. That is, small and/or developing countries are not large enough economic players to give meaningful effect to merger control on their territories. Their resources are limited and larger actors are not likely to be responsive to notification requirements, let alone investigative procedures. If the little territory attempts to assert MC in regard to a change in concentration on the local market, what is more likely to occur is that the larger actors will simply bypass investment upon that territory altogether, and thus deny that market whatever pro-competitive aspects the change in control might have been able to deliver to those consumers.

What is not so clear in this advice is whether it is intended to be applicable to all small countries, or just the poorer of them. Holland has adopted merger control notification in the recent past. It is however only a market of about 15 million people, notwithstanding that its economy is in the largest group of ten. Likewise, some developing/transition economies are enormous in regard to the size of the consumer base which may potentially be affected by new concentrations.

More important, certain practical differences relating to the particular problems of transformation economies appear to raise the issue of merger control. This also appears to occur an earlier stage of developments than has been observed for developed countries with longer records of private enterprise culture and lower historical levels of state intervention in the markets. For the new market economies, state ownership of primary economic sectors has been the rule rather than the exception. For the smaller of them, markets are said to be too thin to support a multitude of players. Since the process of market transformation is so closely associated with the process of privatisation, the business of selling state monopoly assets raises the prospect that assets once privatised are likely to be dominant.

It is at this step that a case for MC can be made. Since the state will no longer "regulate" as owner, and is intent on reducing its role as regulator of new private enterprise, it would seem reasonable to suggest that any analysis of the market structure of prospective concentrations, and the manner in which they may likely behave on the market, should be considered as an aspect of the decision to divest. Thus, MC aspects could play a helpful role throughout the process: to first determine the competitive components of a larger asset to be divested prior to tendering; to obtain valuable market information from prospective buyers, which in many cases will serve as the only available data base for the sector; to assist in framing negotiation goals so that related supply and distribution aspects of the sale may be rendered more competitive for local firms; and finally, to provide a point of reference for later investigations of traditional competition policy aspects if the new concentration is later abusive or engaged in cartel activity.

For these items, it is not so clear that a local MC authority need necessarily have the final power to block investment decisions, or even where such power was provided, that authorities would then seek to block international mergers which have greater effects upon other markets. It is not even so sure that a system of vetting privatisations between investment/competition agencies actually requires a separate notification provision to be made by undertakings. Rather, what is suggested for consideration is that any policy of promoting transformation by privatisation should be acknowledged at the responsible level to have a competition policy facet with implications for the quality of the resulting market. Since the purpose of the process is ostensibly to create "market economy", then the characteristics of this resulting market should be of concern for the parties undertaking the sale of assets. From this it follows that the relationship between agencies which sell assets and those which enforce competition policy should be structured in a manner so that the role of each may reinforce the role of the other.

I. What is merger control?

Although the point of this essay is not to provide any detailed descriptions, several definitional points are raised which illuminate the points made above. First, the descriptive "merger" control is a misnomer. More accurately, the control of "concentrations" is the matter to be considered, as this term contemplates any type of operation or operations which bring about a lasting change in the structure of the undertakings concerned. In this respect, the concept of "control" is essential to understanding the role of MC, as it is a change in the control of an undertaking(s) which is sought to be captured by a concentration control procedure. This definitional point allows us to delineate merger control from other enforcement procedures directed to pre-existing dominant positions or to abuses of such positions in the market. What is sought to be addressed by MC is the possibility or likelihood that a change in control of the undertakings concerned may act to effectively impede the quality of competition on the territory market. Thus, MC may be defined as a system or procedure for vetting or reviewing proposed concentrations which may result in the impeding of effective competition on the market.

Given this definition, other types of operations also fall within a merger control system. Besides mergers between independent undertakings, acquisitions of one undertaking by another also qualify. Likewise, certain joint ventures are subject to the review. Under EC law for example, full-function Joint ventures, which are autonomous and do not operate to coordinate the partner undertakings, are treated as concentrations for the purpose of MC Regulation. Also addressed in the EC regulation are such changes control that are not effected by a change in the legal personality of the resulting undertaking, but rather result from agreements between owners to vote stock in a certain manner or to exchange stock in order to change the control of a single undertaking.

II. Elements of merger control systems

Several institutional characteristics of MC are identified. First is the concept of *jurisdiction* which includes a definition of a territory, the geographical area over which a national (or regional) authority exercises its legal power. This may appear obvious for countries, but is not obvious for regional merger control systems, a matter taken up below. Also within the concept of jurisdiction is a reference to size or "dimension" which specifies that changes in control of undertakings below a certain size are not legally subject to the power of the MC authority. While the EC regional system applies a complex combination of factors including size (turnover) of firms on the world, the Community and member state markets, more simple national systems are also evident which only specify a resulting territory market share as a basis for activating the MC system.

A second element is that of *notification*, the legal burden placed upon undertakings to declare the impending changes of control contemplated. The materials included in the notification disclosure provides the information necessary for the authority to initiate an assessment of the resulting concentration. Common disclosures include the undertaking's description of the products and /or services concerned, the relevant product and geographic markets, the nature of the legal transaction which is occurring, and the resulting market shares of the concentration on the market.

This process of disclosure informs the third element, that of *investigation and assessment*. Since most changes in control are pro-competitive, the distinction is drawn here between MC systems and traditional competition policy procedures. The authority must have the dedicated resources to determine with dispatch that pro-competitive concentrations are not likely to impede competition on the market. Otherwise, economic restructuring that would otherwise be beneficial is simply frustrated. This consideration has led a number of territories to forego MC on the basis that if they cannot apply sufficient resources to do it well, that it is better not to do it at all.

Finally, an element of *enforcement* is evident where the authority has power to address the undertakings for additional disclosure, to recommend or require modifications in the structure of the resulting concentration, or to finally direct that the concentration shall not be permitted to be effected on the market. A system may provide for fines and penalties for failing to notify or for providing false or misleading information. Fines and penalties, including seizure of local assets, is provided in a number of systems for the enacting of a concentration that has been ordered to be blocked or modified by the authority. It is the case that these remedies are rarely applied. MC review by nature tends to be negotiative with modifications occurring by agreement early in the process.

III. National considerations

The elements described for MC can be incorporated as an aspect of the process of investment review. For notification, competition policy information can be incorporated into the process of disclosure which would accompany the tendering process for assets. The notice aspect in some cases may even be established as an internal element whereby the investment authority reviews thresholds and informs the competition authority. Where jurisdiction is apparent, perhaps a second level of disclosure by undertakings is attempted, either independently by the MC authority, or by the investment authority acting in this regard as an agent. Investigative inquiries and initial findings can also operate internally between competition and investment authorities which have a basis for continuing contact with the undertakings concerned, and also have a basis to conduct negotiations which may affect the resulting structure or its practices in the market. At the lowest level of interference, even where the MC authority is not given power to intervene to either modify or block divestment, even the right to obtain quality product and market information and/or the right to review and report could be valuable later in establishing abuse of dominance if practices on the market warrant a later investigation.

For the difficult cases mandated by economic or budgetary reality where the purchaser is being promised continued dominance by either suspension of national competition policy or application of trade measures, there may yet be room to manoeuvre if the MC authority is not locked-out of the process. Even while horizontal protection is visibly accorded, a competition authority is in the best position to fight the case for eliminating vertical restraints which may be so necessary for the participation of local firms and future entrepreneurs. Likewise, if dominance is only promised for a period of time, the ability to monitor from an original baseline understanding of the market may assist in closing out measures which are no longer required by the agreement of sale.

IV. Regional considerations

It has been argued that the necessity of MC within a regional formation flows directly from the level of integration actually being achieved on the region. At the point where regional members contemplate a larger market within which business will understand that it is doing business across the overall market, or some significant part of it, then a regional dimension can be said to have emerged which justifies regional merger control. “Doing business” should also be understood to relate to provision of services across borders, as investment is so closely related to delivering services. It follows that the regional market exhibit free factor movements for capital and also probably for labour. As in the EC example, the merger control regulation of 4064/89 provides by its preamble that the completion of the internal market program provides a justification for a regional jurisdiction where economic actors make investment decisions which affect the overall market.

There can be a case made for developing country formations to consider regional merger control prior to the level of integration outlined above. Besides the point of expediency for business whereby firms can make a single regional filing and thereby avoid a number of smaller MC authority procedures, there is also the situation where a number of national authorities operate without MC at all. If there is a reason to believe that the individual member-country markets are likely to be subject to the same sources of inward bound acquisitions/investments which will have similar effects on these markets, then the prospects of pooling resources to form a single operational entity may appear attractive.

The element of jurisdiction is less obvious in regional systems as compared to nations. The legal form chosen for the grouping may also have a bearing on the geographical territory element A customs union creates a customs territory which readily serves as a geographical expression of jurisdiction. Although a free-trade area does not create a separate customs territory, where a free-trade area does provide for a basis for regional (cumulative) mixing of inputs or processes, then investment decisions may also follow to take the overall market into consideration. Thus, regional MC should not be disregarded in free-trade area formulations solely because a customs territory is not created.

An advanced question is whether a centralised system is required in order to effect a functional MC system, or whether co-operation between national authorities can be made sufficient. For firms, the substitution of a single notification at the regional level in place of separate national filings is seen as a significant benefit, at least as a lesser of two evils. Where a territory dimension for concentrations has been defined on a regional level, a single notification for concentrations on this territory must be considered for its advantages. However, the resources provided to assess regional notifications may not be sufficient for a number of reasons. What may be suggested is that while a regional definition of territory and notification is provided, that initial assessment is made at the regional level by representatives of member national authorities composed for this purpose. Where additional investigation is determined to be required, then a number of possibilities present themselves by the use of referral to a competent national authority and perhaps by the application of positive comity for authorities with superior investigative access to examine the merger on behalf of the region. The regional authority may retain the power to make a final decision, or as above, representatives of national authorities acting together may hold this power. Thus, although the establishment of a regional system suggests centralisation, after the elements of jurisdiction and notification are met, number of decentralising possibilities can be considered.

Conclusion

Although MC appears to occur somewhat later in the integration process among countries in regional groupings, for individual countries engaged in significant economic transformations, it is suggested here that MC should be considered at an earlier juncture. Where a privatisation effort is being undertaken, the opportunity to affect the quality of the resulting market is offered only once, as an asset is divested only once. While any competition authority consumes scarce resources, some of the benefits of merger control may be realised by utilising less than formalised procedures between agencies responsible for investment and for competition policy. Regional considerations are more complex in the manner in which the elements of MC are applied, both as to the legal form of the subject grouping and in the degree that centralised systems are contemplated as necessary to provide for a credible regional response.

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Towards a positive agenda for multilateral negotiations on competition policy: interests of developing countries

By James Mathis

Trade Law Program Coordinator
Department of International Law, University of Amsterdam

I. Introduction:

Many developing countries do not yet have competition laws and many claim little or no interest in adopting them. It would seem to follow that they should likewise be indifferent to the issues regarding international/multilateral rules for anti-competitive (restrictive) business practices. However, the interests of lesser-developed countries in multilateral competition rules may be accented because of their relatively weaker position in the global economy and its trading system. This point follows if one applies a traditionally expressed goal for competition rules, which is to provide assurance that the "game" of contesting markets by private actors shall be enforced to insure its continuation. This suggests that small as well as large must retain some potential for having access to the field of play in order to compete.

This view of competition policy conflicts with the narrower perception that national competition policies are anti-competitive in effect where they only serve to promote the market-access opportunities of the larger global enterprises. This perspective ignores the potential that international rules, and perhaps regional rules, may offer to developing countries. Embedding the traditional competition policy principles into an international framework would serve to extend the reach of local authorities. This would assist them in insuring that newly-opened markets remain actually contestable, first to insure that international players are in competition on the local market, and second, to provide new tools to insure that there is space remaining on the local field of play for local enterprise to also compete.

This essay will first elaborate on the position of developing countries in international competition rules and contrast this view with that attributed to developed countries. Then, the original International Trade Organisation (ITO, Havana Charter, 1947) provisions will be noted to demonstrate how a complaint and reporting system was contemplated for restrictive business practices which affected international trade. Finally some suggestions for developing-country positions on question of international rules are made, including the consideration of a non-WTO approach which would imitate the ITO features in an open and informal network between national authorities

II. The case for international competition rules

We start from the position that any set of rules which act to restrain unilateral behaviour by territories will tend to benefit the smaller parties. The capacity to exercise unilateral behaviour in international trade is related to the ability to discriminate between trading partners. The primary instrument, though not the only one, to effect unilateral and non-compensated discrimination is antidumping. While many smaller and developing countries have passed antidumping laws in recent years, the potential use of these instruments as retaliatory is limited, as the a threat of foreclosure from a larger market will carry the greater weight in any exchange between large and small. The ability to use trade threats depends upon which party will be greater damaged by the cessation of trade.

Thus, to the extent that any formulation of international rules regarding anti-competitive business practices may act by law or by practice to reduce the incidence of dumping and/or antidumping in international trade, this development would benefit those territories which are less capable of imposing trade threats in the first place.

A second aspect which relates to size and development level refers to the home jurisdictions of international firms. As they operate across a large number of territories, any restrictive agreements or practices undertaken by them will have their intended effects on third territories even while the evidence of agreements and decisions made will not be will not located in these territories. Although any national competition law may provide for out-of-territory jurisdiction to investigate practices, the authority in the superior position to actually engage investigations and to compel meaningful disclosures is that authority located in the jurisdiction where agreements are made. Therefore, any set of rules that can act to extend the reach of local investigation powers by co-operation or otherwise should be viewed as a favourable development by smaller or developing country authorities.

III. Recent evolution of the multilateral competition policy issue

Although developing countries have long advocated international competition rules (UNCTAD, 'The Set …' 1981) the re-emergence of this topic in the mid 1980s was led primarily by the interaction of developed countries, notably the United States in its ongoing trade issues with Japan. As Japan was bound at lower tariff levels after the Tokyo Round (1979), US policy increasingly identified non-tariff barriers as an explanation for market-access problems. Through programs such as the strategic impediments initiative (SII), technical barriers were raised, as well as a number of problems that could be loosely collected together as competition policy issues. Even recently this market-access orientation has been analysed in a WTO trade dispute (Japan—photographic film, 1997). Here, the US alleged a failure of Japan to enforce its domestic anti-trust laws with the effect that reasonable expectations of market access relating to tariff-bound products was not being realised. This market-access orientation for the use of national competition rules can also be found as providing a cause of action in various US legislation addressing of unfair trading practices of other countries, as well as in the EC unfair trade practices regulation.

The EC has taken something of a lead in setting forth proposals for an international framework for competition policy. Following the Uruguay Round (1994), the European Commission requested a group of experts to provide reports on the question of international rules. What emerged was a proposal for a plurilateral code for competition rules to function within the multilateral trading system. The EC experts also demonstrated some sense of balance in basing their recommendations not only upon the EC's problems of market access to other territories, but also by forwarding proposals which were responsive to the interests of developing countries in the formulation of international rules. Thus, while the report documented that "outward bound" anti-competitive directed from the EC market were not prohibited, that the concept of international anti-trust should accommodate a prohibition, agreed upon by all parties, against certain "hard core" practices, including export cartels and assumedly, certain international cartel activities.

IV. The ITO idea

The 1948 Havana Charter for the ITO, which did not go into legal effect, contained a chapter dealing with restrictive business practices which affect international trade. These provisions also appear to recognise the interests which would naturally be accorded to developed as well as developing territories. Thus, the new ITO members would have been obliged to prevent,

> "on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, omit access to markets, or foster monopolistic control." (Havana Charter chapter V, Art. 46:1)

This chapter did not seek to create an international police force for competition problems in international trade. Rather, like the early dispute settlement provisions generally, it provided that a member, on behalf of its national firms, would have a right to make a complaint to the ITO and then receive an independent report. This report would make a finding as to whether or not the practice alleged fell within a listed set of prohibitions (see addendum attached) that were stated in the chapter. If so, the respondent territory member was requested to take remedial measures in regard to firms located within its territory. This member could also be asked to re-appear before the ITO and indicate what remedial measures had actually been taken.

Although these provisions seem minimal compared to ambitious proposals for international enforcement agencies, in point the complaint/reporting idea is an advanced concept with implications for trade relations between developed and developing countries. Retrospectively, this reporting function might have documented the existence of trade restrictive aspects of restrictive business practices even if respondent territories chose to not take remedial measures. Reports might have cumulatively generated a body of legal interpretations as to how particular practices relate to the ITO list of prohibitions. Over time, one can also contemplate that a complaint and reporting feature might have evolved to be eventually assimilated into the formalised dispute settlement provisions, as now contained in the WTO-DSU.

The reason for looking back on the ITO complaint/reporting procedure is to reflect upon what value such a procedure would hold for today's situation and to frame a suggested direction which would respect the interests of developing countries in international rules for anti-competitive practices. The suggestion is made here that a reporting system, like that described in the ITO procedures, could be accommodated in the WTO, with a similar list included of prohibited practices which would form the basis for making legal conclusions as based upon the factual findings of independent reports.

V. Towards a positive agenda

Since all WTO members could have occasion to use such a system, it is difficult at the outset to discern why any member would object to such a development. However, country differences may also play a role here. Since the largest international firms are based in just a few territories, it is said that the largest number of complaints would be directed to the national authorities of those territories. Thus, the mere provision of a reporting procedure would tax even those large national authorities who also do not have the resources to respond to all of the internal anti-competitive practices in their markets, let alone those practices engaged by local firms operating externally.

Three points are made in response. First, the ITO reporting procedure does not necessarily compel a domestic national authority response nor does it imply that a national competition authority is necessarily the appropriate party to make a response. While effectiveness of investigation is diminished without the respondent's participation, a reporting agency can collect information from other territories that are also claimed to be effected. While this may not generate a complete report, the result may be better than no report. Related, a national authority has jurisdiction over the quality of competition on its national market. It may be that external relations authorities derive a better domestic legal basis to act as the respondent party. Second, whatever the appropriate agency to make response, developed authorities are already implementing bilateral positive comity procedures which assume responsibility to investigate outward-bound practices. Thus, resources are being committed in this manner gradually, but only between particular authorities and their respective territories. It may be more work to contemplate whether a particular cartel allegation affects more than one other territory, but as long as resources have been committed to investigate the activities anyway, then why not consider the broader territorial implications. Finally, as in the EC proposal, there is always the preemptive alternative to prohibit the same set of outward-bound activities that are already prohibited domestically. This option has the potential to relieve authorities of the burden where national courts can be engaged to handle foreign claims.

There is also an alternative for countries to obtain the benefits of a complaint and reporting system for international anti-competitive practices affecting trade. Just as existing bilateral co-operation agreements are outside the WTO framework and therefore are not required to extend their benefits by MFN to other authorities, any set of territories can establish communication and co-operation between their existing competition authorities and on their own initiative. Such a network need not be exclusive, but rather could be open to any territory. By utilising modern information networks, the sharing of complaints and the passing of non confidential information that is wholly in the public domain, like prices and disclosed market shares, could also form the basis for initial report information. Perhaps such a network could be open for any national authority willing to dedicate a representative to facilitate its participation in the process of investigation and reporting and, while acting with others, the preparing and approving of reports.

Conclusion

The possibilities for engaging the competition policy issue in the WTO does not look particularly promising at this juncture. Although a number of developing countries are in favour of raising the item, this is also not a common position among the large and varied group of territories in the WTO, developing or otherwise. One of the dividing lines that may be evident falls lies between developing countries that remain relatively closed to imports and therefore view competition rules generally as an undesirable market-opening mechanism. In contrast, there are others that have taken significant market opening measures and see a need for competition rules as a market-enforcing policy which responds to inward investment in respect to the formation of new dominant positions.

That there is no common position at this time should be viewed in context. Multilateral rules were offered by some developing countries at the outset of the Uruguay Round in 1986 without accommodation. Since then, the position of developing countries in the trading system has dramatically changed. Then, a great number of the lesser developed were functioning as non-market economies with high levels of state ownership. Few had national competition rules. In years since, all acknowledge that the degree of transformation to market-based economies with primary reliance upon private actors is an astounding occurrence.

Consideration of the territories engaging these transformations should cause a revaluation of the international competition policy issue, particularly as the requests by transforming territories for international rules is so directly related to the resulting quality of the competitive markets commencing to take root upon their territories. Market competition is, after all, the point of the exercise known as market transformation. While the consideration of a complaint/ reporting requirement is not really so invasive to the interests of developed parties, it does offer a bridge for the developing countries to answer the often-heard claim that "openness" means "dominance". From this view, it may appear in the last analysis to be somewhat disingenuous on the part of the most developed to refuse developments which are consistent with a rules-based international trading system, eliminate recognised distortions to trade, and which promote the progress many have made to foster the culture of competition in their territories.

For them, the multilateral option of securing a complaint and report procedure should continue to be pressed. At the same time, independent co-operative arrangements which commence the exercise between authorities outside the WTO framework should also be explored with the goal of evolving a process of documentation regarding the suspected practices in a procedure dedicated to credible and balanced reporting.

ADDENDUM

ITO Havana Charter, Restrictive Business Practices

Havana Charter, chapter V, article 46, paragraph 3:

“The practices referred to … are the following:

a. fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;

b. excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;

c. discriminating against particular enterprises;

d. limiting production or fixing productions quotas;

e. preventing by agreement the development or application of technology or invention whether patented or unpatented;

f. extending the use of rights under patents, trade marks or copyrights granted by any Member to matter which, according to its laws and regulations, are not wihtin the scope of such grants, or to products or conditions of production, use of sale which are likewise not the subjects of such grants;

g. any similar practices which the Organization may declare, by a majority of two-thirds of the Members present and voting, to be restrictive business practices.”

Regional competition policy for COMESA countries and implications of an FTA in 2000

By J. Musonda

Trade Advisor
COMESA Secretariat

Background

The Common Market for Eastern and Southern Africa (COMESA) is a regional integration grouping of 21 African sovereign states (Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe) which have agreed to promote regional integration through trade development and to develop their natural and human resources for the mutual benefit of all their peoples.

COMESA was established in 1994 to replace the Preferential Trade Area for Eastern and Southern Africa (PTA), which had been in existence since 1981 within the framework of the OAU's Lagos Plan of Action and the Final Act of Lagos. The PTA was established to take advantage of a larger market size, to share the region's common heritage and destiny and to allow greater social and economic co-operation, with the ultimate objective being to create an economic community.

COMESA is one of the more successful regional economic co-operation and integration groups in Africa. Supported by its financial specialised institutions, namely the Trade and Development Bank For Eastern and Southern Africa, (PTA Bank) the Clearing House and the Re-insurance Company, COMESA, and before it, PTA, has a proven track record of achievements. Over the past fourteen years, it has developed a large number of regional programmes which are assisting member States, in a positive way, to attain economic recovery and sustainable economic growth.

Formation of COMESA

In 1965, the United Nations Economic Commission for Africa (ECA) convened a ministerial meeting of the then politically independent states of Eastern and Southern Africa to consider proposals for the establishment of a mechanism for the promotion of sub-regional economic integration. The meeting, which was held in Lusaka, Zambia, recommended the creation of an Economic Community of Eastern and Southern African States.

An Interim Council of Ministers, assisted by an Interim Economic Committee of officials, was subsequently set up to negotiate the treaty and initiate programmes on economic co-operation, pending the completion of negotiations on the treaty.

In 1978, at a meeting of Ministers of Trade, Finance and Planning in Lusaka, the creation of a sub-regional economic community was recommended, beginning with a sub-regional trade area which would be gradually upgraded over a ten-year period to a common market until the community had been established. To this end, the meeting adopted the "Lusaka Declaration of Intent and Commitment to the Establishment of a Preferential Trade Area for Eastern and Southern Africa" and created an Inter-governmental Negotiating Team on the Treaty for the establishment of the PTA. The meeting also agreed on an indicative time-table for the work of the Intergovernmental Negotiating Team.

After the preparatory work had been completed a meeting of Heads of State and Government was convened in Lusaka on 21st December 1981 at which the Treaty establishing the PTA was signed. The Treaty came into force on 30th September 1982 after it had been ratified by more than seven signatory states as provided for in Article 50 of the Treaty.

The PTA Treaty envisaged its transformation into a Common Market and, in conformity with this, the Treaty establishing COMESA was signed on 5 November 1993 in Kampala, Uganda and was ratified a year later in Lilongwe, Malawi on 8 December 1994.

Main Objectives of COMESA

The COMESA Treaty, which sets the agenda for COMESA, covers a large number of sectors and activities. However, the fulfilment of the complete COMESA mandate is regarded as a long-term objective and, for COMESA to become more effective as an institution, it has defined its priorities within its mandate, over the next 3 to 5 years, as being *Promotion of Regional Integration through Trade and Investment*. The role of the COMESA Secretariat is to take the lead in assisting its member States to make the adjustments necessary for them to become part of the global economy within the framework of WTO regulations and other international agreements.

This is to be done by promoting "outward-orientated" regional integration. The aims and objectives of COMESA, as defined in the Treaty and its Protocols,[1] is, therefore, to facilitate the removal of the structural and institutional weaknesses of member States so that they are able to attain collective and sustained development.

Among other things, COMESA member States have agreed on the need to create and maintain:

(a) A full free trade area guaranteeing the free movement of goods and services produced within COMESA and the removal of all tariffs and non-tariff barriers;

(*b*) A customs union under which goods and services imported from non-COMESA countries will attract an agreed single tariff in all COMESA states;

(*c*) Free movement of capital and investment supported by the adoption of common investment practices so as to create a more favourable investment climate for the COMESA region;

(*d*) A gradual establishment of a payment union based on the COMESA Clearing House and the eventual establishment of a common monetary union with a common currency; and

(*e*) The adoption of common visa arrangements, including the right of establishment leading eventually to the free movement of *bona fide* persons.

Institutional structure of COMESA

COMESA is made up of the following:

—The Authority of Heads of State and Government, the supreme Policy Organ of the Common Market, responsible for general policy, direction and control of the performance of the executive functions of the Common Market and the achievement of its aims and objectives;

—Council of Ministers, which takes policy decisions on the programmes and activities of COMESA, including the monitoring and reviewing of its financial and administrative management;

—Court of Justice which has been established to ensure the proper interpretation and application of the provisions of the Treaty and to adjudicate any disputes that may arise among the member States regarding the interpretation and application of the provisions of the Treaty;

—Committee of Governors of Central Banks which manages the COMESA Clearing House and ensures implementation of the Monetary and Financial Co-operation programmes;

—Intergovernmental Committee, a multi-disciplinary body composed of permanent secretaries from the member States responsible for the development and management of programmes and action plans in all the sectors of co-operation, except in the finance and monetary sector;

—Technical Committees, responsible for the various economic sectors and for administrative and budgetary matters;

—The Secretariat, to provide technical support and advisory services to the member States in the implementation of the Treaty; and

—The Consultative Committee of the Business Community and Other Interest Groups to provide a link and facilitate dialogue between the business community and other interest groups and organs of the Common Market.

COMESA'S Institutional Linkages

There are a number of other regional organisations in operation within the region also covered by COMESA, such as the East African Co-operation (EAC), Inter-Governmental Authority on Development (IGAD), Indian Ocean Commission (IOC) and the Southern African Development Community (SADC).

COMESA has excellent working relations both formally and informally with all of the regional organisations mentioned above. Memoranda of Understanding have been signed with EAC and IGAD such that these two organisations have agreed to adopt and implement the COMESA trade liberalisation and facilitation programme. A similar Memorandum of Understanding is also being formalised with the IOC.

Although these organisations also include as their aims the promotion of regional co-operation and integration, the COMESA Secretariat is neither in competition with these organisations nor wishing to duplicate the efforts of other organisations. COMESA sees its contribution to the process of regional integration and regional economic development as being able to work together, and to co-operate fully, with its member States, other regional bodies to which its member States are affiliated, and donors and financial institutions and build upon the achievements it has already made in its priority areas.

It is also true to say that the broad objectives of all of the regional organisations are similar and largely complementary. They all endeavour to promote balanced economic development among their member States by, among other things, harmonising their investment laws, regulations and practices. All organisations aim to attain Free Trade Areas among their membership and to liberalise the movement of capital by abolishing exchange controls. They also all aim to liberalise, for example, movement of persons through relaxation of visa requirements and restrictions. While development goals and ambitions

[1] The following are the Protocols annexed to the Treaty:

1) Protocol on Transit Trade and Transit Facilities.
2) Protocol on Third Party Motor Vehicle Insurance Scheme.
3) Protocol Relating to the Unique Situation of Lesotho, Namibia and Swaziland.
4) Protocol on the Rules of Origin for Products to be Traded between COMESA Member States.

are similar, strategies each sub-regional organisation employ are different.

As is well known, the origins of SADC were in provision of donor support to develop infrastructure in the region which would allow the “front-line States” in the apartheid era to function economically without being dependent upon South Africa. Owing to its origins, SADC has adopted a sectoral approach to its development agenda. Member States have shared and assigned each other economic sectors to co-ordinate. For example, Angola coordinates the Energy sector, Zambia the Mining Sector, Zimbabwe Agriculture, Mozambique Telecommunications, Tanzania Commerce and Industry, and so on. To generalise, SADC, therefore, has emphasised supply-side interventions in its development approach, although on can detect a different strategy being introduced, for example with the promotion of a free trade agenda.

COMESA, on the other hand, has traditionally placed emphasis on demand-side measures. The philosophy of COMESA is that the economic development of the sub-Saharan region will be largely dependent upon private sector investment into the region. If this investment is to be attracted into the region, the small countries of the region must be able to offer a large single market. There is, therefore, an *a priori* need to liberalise the trade and investment environment in the region as a whole to attract the investment needed to address the supply-side of the region’s economy. Hence, the COMESA agenda places emphasis such issues as tariff reduction and elimination of non-tariff barriers, streamlining documentation and movement procedures for cargo and harmonising trade documentation and enhancing the capacity of the private sector to take advantage of opportunities arising from regional as well as global integration.

It is apparent that though the conceptual approach may vary between SADC and COMESA, their goal is common. In recognition of this fact, the Secretariats of the two organisations are collaborating in the implementation of various activities. Notable among these areas of collaboration are a review of Rules of Origin; adoption of a common customs document, and common customs bond guarantee scheme; expansion of the COMESA third party motor insurance scheme (the Yellow Card) to include non-COMESA SADC members including South Africa; and undertaking joint training programmes on WTO.

It is noteworthy that of the 14 SADC members, 10 are also members of COMESA. This overlap in membership has the advantage of co-ordinating the approaches of the two organisations. For example, the various protocols of SADC draw heavily on the COMESA Treaty and its protocols, which is neither controversial nor surprising. The majority of SADC member States have been through the process of drawing up a trade protocol (for example) under PTA/COMESA and would presumably not want to either “re-invent the wheel” or contradict previous agreements they drew up together when drawing up a protocol on trade for SADC.

The existence of the regional organisations of COMESA and SADC can therefore be viewed as an attempt by the common membership of both organisations to bring together all the countries of the region into a common regional integration agenda.

The East African Co-operation (EAC), the Indian Ocean Commission (IOC) and the Intergovernmental Authority on Development (IGAD) are regarded by COMESA as fast-track integration paths for the region. All their membership, except for Somalia under IGAD, are simultaneously members of COMESA. In a bid to ease the movement of persons, the EAC has introduced a common East African passport for nationals of Kenya, Uganda and Tanzania.

Similarly, 14 countries implementing liberalisation measures under the Cross Border Initiative (CBI) are all COMESA member States[2]. These measures are again seen as ‘fast-track’ integration mechanisms for Eastern and Southern Africa.

COMESA's trade liberalisation programme

The COMESA aims to establish a Free Trade Area (FTA) by October 2000 through an annual reduction of intra-COMESA tariffs. The timeframe for achieving a Free Trade Area is as set out below.

The trade liberalisation programme gained momentum and a higher leverage when PTA was transformed into the Common Market for Eastern and Southern Africa (COMESA) in 1994. COMESA agreed to new tariff reduction timeframe and schedule. COMESA further agreed a uniform tariff reduction base of 60% as at October 1993—as a starting point.

COMESA Tariff Reduction Timeframe

Date	*October 1993*	*October 1994*	*October 1996*	*October 1998*	*October 2000*
Rate of Tariff Reduction	60%	70%	80%	90%	100%

The programme of reducing intra-COMESA tariffs is well advanced and is scheduled to be completed by the year 2000. This will convert COMESA into a Free Trade Area.

As at 31st May 1999, 3 countries had reduced tariffs by 90%, 7 by 80%, 1 by 70% and 3 by 60%, bringing the total number of countries to have effected and published reduced COMESA tariffs by not less than 60% to 13. A further 2 countries have indicated that they will effect and publish reduced COMESA tariffs in the near future. Two (2) other countries have derogations up to the year 2000, while another 2 are new members, having joined the grouping in 1998. Only 2 countries have not published, nor announced the intention to publish in the near future, any tariff reductions according to the agreed timetable.

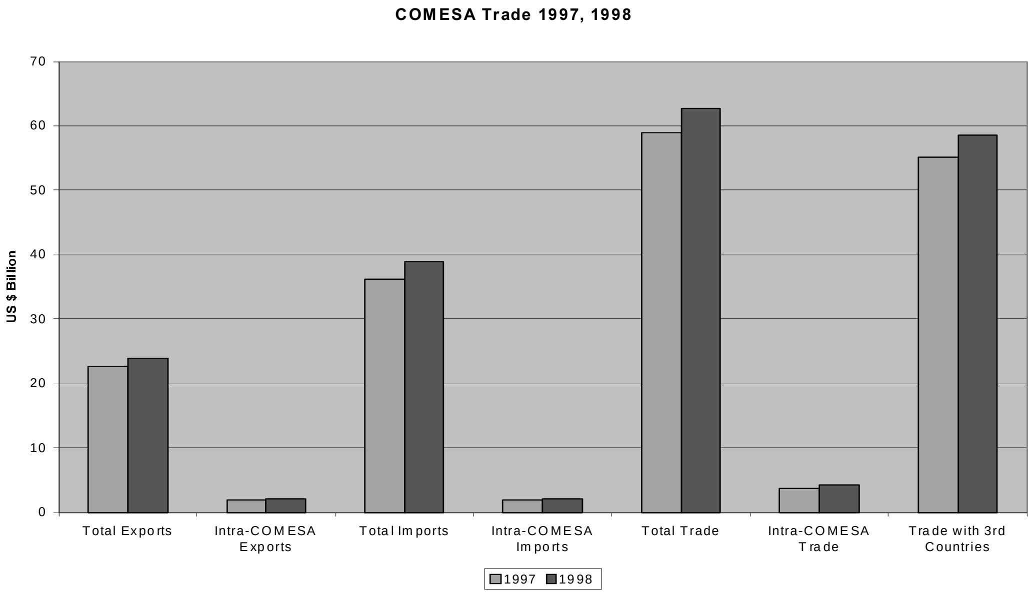
[2] Mozambique has recently expressed an interest in being a part of the Cross Border Initiative and, as such, will presumably need to produce a Letter of CBI Policy to be endorsed by the co-sponsors which will also, presumably, commit Mozambique to implementing 100% tariff reductions on intra-CBI trade by October 2000.

While average national and MFN tariffs as of end of May 1999, ranged from 8% to 60%, except for Egypt whose average national tariff was higher, average tariffs on COMESA-originating products ranged from 1% to 23% on the basis on the above reductions, again except for Egypt whose average COMESA rate was still a little higher. The overall average national tariff rate was in the range of 25% compared to an overall average COMESA tariff rate of less than 10%.

The effect on intra-regional trade of these tariff reductions has been positive. The Table overleaf shows growth of trade in COMESA countries amongst themselves (intra-COMESA trade), with third countries and total COMESA trade.

Growth of intra-COMESA Trade, 1992-1998

The effect on intra-regional trade of these tariff reductions and reductions in non-tariff barriers has been positive. In 1992, total intra-COMESA trade[3] was estimated at US$1.8 billion, trade with third countries at US$40.5 billion and total COMESA trade at US$42.3 billion.

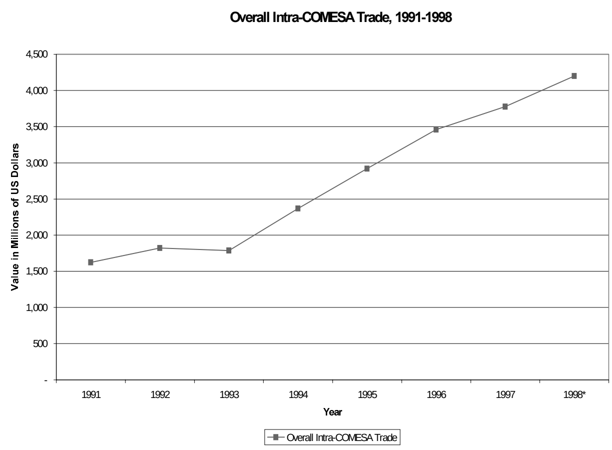


Of the US$42.3 billion, imports accounted for US$26.2 billion and exports US$16.1 billion giving a negative trade balance for COMESA (then PTA) of 38.5% of export receipts.

By 1996, though exports grew to US$22.0 billion, the import bill had grown to just over US$35.2 billion, representing a negative trade balance equivalent to 37.5% of COMESA exports. The small reduction in the relative trade balance was partly due to the higher growth of exports compared to imports. Between 1992 and 1996, exports grew by an average of 7.2% per annum while imports grew by an average of 6.5% over the same period.

Intra-COMESA trade, on the other hand, grew by substantially higher margins. Between 1992 and 1996, intra-COMESA trade grew by an average of 13.6% per annum while COMESA trade with third countries grew by an average of 6.1%, and total COMESA trade (intra- plus extra-COMESA trade) grew by 6.5% per annum on average over the same period.

From 1996 through to 1998, intra-COMESA trade grew even faster. In 1997, intra-COMESA trade grew by 8.45% while trade with third countries grew by only 2.3% and total trade by 2.8%. In 1998, total trade grew 6.2% while trade with third countries grew by 6%. Intra-COMESA trade, on the other hand went up by 10%. This phenomenal growth of intra-COMESA trade can be attributed in large part to the trade liberalisation measures being implemented by member States.



COMESA Customs Union

The establishment of a FTA in COMESA by the year 2000 is a prelude to the establishment of a Customs Union. The FTA is planned to operate for about 4 years during which time all administrative, legal, institutional

[3] Trade was conducted under PTA preferences.

and logistical preparations for the operation of the Customs Union are to be completed.

COMESA member States have already committed themselves to the implementation of a Common External Tariff (CET) by the year 2004 of 0%, 5%, 15% and 30% on capital goods, raw materials, intermediate goods and final goods respectively.

Significant work has been undertaken, or is in the process of being implemented, on the design and implementation of a CET, all with financial and technical support coming from the European Union. Notable among these are:

- The COMESA Customs Document (COMESA-CD)
- Common Statistical Rules
- Common Tariff Nomenclature
- Institutional and Administrative Framework of a Customs Union

Trade facilitation

In the area of trade facilitation the COMESA Secretariat is implementing programmes to improve the transport and communications systems of the region as well as improving information available to businessmen wishing to trade both within the region and overseas.

Harmonised road transit charges

The Road Transit Charges system was introduced in 1991 (currently being implemented by Burundi, Ethiopia, Kenya, Malawi, Rwanda, Sudan, Uganda, Tanzania,[4] Zambia and Zimbabwe) and specifies that heavy goods trucks with more than 3 axles should pay a road charge of US$10 per 100km; trucks with up to 3 axles should pay a charge of US$6 per 100km; and buses with a capacity of more than 25 passengers pay US$5 per 100km.

COMESA carrier's license

The COMESA Carrier's License allows commercial goods vehicles to be licensed, with one license, which is valid throughout the region so that the vehicles can operate in all member States. This means that vehicles can pick up back-loads in other countries which makes more efficient use of the region's transport fleet so reduces the cost of trade. The license was introduced in 1991 and is currently in operation in 9 mainland countries (Burundi, Kenya, Malawi, Rwanda, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe).

Harmonised axle loading and maximum vehicle dimensions

- Axle load limits are:
- Single steering axle = 8 tonnes
- Single load or drive axle = 10 tonnes
- Tandem axle group = 16 tonnes
- Triple axle group = 24 tonnes

The maximum vehicle dimensions approved by the COMESA Authority (and currently implemented by Malawi, Namibia, Swaziland, Zambia and Zimbabwe) are:

- 12.5m for a rigid chassis single vehicle or trailer;
- 17m for articulated trucks;
- 22m for truck and draw-bar trailer;
- 2.65 maximum width; and
- 4.60 maximum height.

COMESA Yellow Card Scheme

The COMESA Yellow Card is a vehicle insurance scheme which covers third-party liability and medical expenses, with a Yellow Card issued in one COMESA country valid in all other countries participating in the scheme. At present the scheme is operational in 12 countries (Burundi, DR Congo, Eritrea, Ethiopia, Kenya, Malawi, Rwanda, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe). The insurance industries of South Africa and Namibia have expressed a wish to be part of the Yellow Card scheme and consultations are in progress. At present over 125 insurance companies are involved in the Yellow Card scheme. Annually, about 41,000 Yellow Cards are issued, a premium income of over US$2 million is collected and about 60 claims lodged. Within the last year a Yellow Card re-insurance pool has been set up and plans are underway to expand the scheme to Botswana, Lesotho and Mozambique as well as the already mentioned countries of South Africa and Namibia.

COMESA Customs Bond Guarantee Scheme

COMESA has also introduced a Customs Bond Guarantee Scheme, the objective of which is to eliminate the avoidable administrative and financial costs that are associated with the current practice of nationally executed customs bond guarantees for transit traffic. It has not yet come into force but all member States have agreed to ratify the scheme as soon as possible to eliminate the need to open and close customs bond guarantees at each port of entry. The introduction of the Bond Guarantee Scheme is expected to release over US$200 million held in bonds at any one time.

Advance Cargo Information System

The Advance Cargo Information System (ACIS) is a computer-based system, developed by UNCTAD. The full ACIS suite of programmes consist of PortTracker, RailTracker, RoadTracker and Lake Tracker. To date UNCTAD, the main contractor, has developed and installed only RailTracker, which tracks cargo on the railway systems of Zambia Railways, Uganda Railways, TAZARA, Kenya Railways and Tanzanian Railways.

[4] The Harmonised Road Transit Charges are based on a Marginal Cost Recovery system, although Tanzania has authority from Council to apply a schedule which reflects Full Cost Recovery so has different charges.

Telecommunications harmonisation

A reliable, efficient and cost-effective regional telecommunications network would greatly facilitate economic integration in the region. It is recognised that the existing network is not adequate to meet the needs of the users and the current practice of routing regional telecoms traffic via countries outside the region (mainly in Europe) makes the implementation of competitive tariffs very difficult. To address this problem, COMESA has initiated the establishment of a private, limited liability company (COMTEL) which will build an asynchronous transmission mode (ATM) system which will link national systems together. While gateway to gateway infrastructure is COMTEL's priority, the national infrastructures are equally important and there is a need for all countries in COMESA to continue to develop and improve national infrastructures.

COMTEL is to have a strategic partner who will hold 30 per cent of the equity of COMTEL, the rest being owned by participating National Telecoms Operators (25% of the equity)and private sector investors (45% equity stake). The estimated investment cost is US$300 million.

Information dissemination

The COMESA Secretariat is making use of recent advances in information technology to fulfil its role of providing commercially valuable information to the business sector to enable them to take advantage of business opportunities emerging in the region. Specifically, the COMESA Secretariat has established a website on the Internet (http://www.comesa.int) which is to be up-dated on a regular basis and which is intended to be self-financing (after the initial pilot period) and so will have to meet the needs of the users for them, or advertisers, to be willing to pay for this information. The website provides information on a country as well as a sector basis. It uses information from a number of sources, such as the in-house TINET and ASYCUDA databases (which have front-ends attached to make them searchable) as well as information from member States themselves (including Central Banks and relevant Ministries) and other international sources.

Financial and Monetary Systems

In the financial sector, COMESA has an ambitious harmonisation programme which is intended to lead to a monetary union in the year 2025.

Investment

COMESA countries in general have made good progress in simplifying and liberalising investment approval processes and publishing of investment codes and regulatory instruments. The Secretariat is in the process of up-dating a 1991 study it did on trade and investment laws in COMESA countries. The objectives of the study are to provide information on trade and investment laws of COMESA member States; create appropriate conditions for the evaluation of a common approach to trade and investment in the region; and serve as a basis for the harmonisation of these laws. The study presents information in six sections: Investment Laws; Taxation; Exchange Control; Financial services and Capital Markets; Trade Laws; and Other Miscellaneous Laws.

COMESA is scheduled to become a Common Investment Area on the advent of the Free Trade Area in October 2000.

Regional competition policy

COMESA is scheduled to become a Free Trade Area in October 2000 and a Customs Union in 2004. The absence of tariff and non-tariff barriers in an FTA enhances and promotes competition. In order to ensure fair competition and transparency among economic operators in the region, COMESA will formulate and implement a regional competition policy. The policy shall be consistent with internationally accepted practices and principles of competition especially the principles of the World Trade Organisation. Existing national competition policies shall be harmonised and brought in line with the regional policy to ensure consistency in regional policies, avoid contradictions and provide a regionally predictable economic environment.

The Treaty establishing COMESA provides, in Article 55, for fair competition within the region by prohibiting *any agreement between undertakings or concerted practice* whose objective or effect is the *prevention, restriction or distortion of competition within the Common Market.*

The treaty adequately provides for anti-dumping, countervailing measures and safeguards in cases where national economic development initiatives and programmes are in jeopardy. COMESA now working on ensuring that the provisions of the Articles relating to these trade measures (Article 51—Dumping, Articles 52—54 Subsidies and Countervailing Duties, Article 55—Competition) are made operational. Article 51 paragraph 6, for example, provides that a Member State may only institute anti-dumping measures in conformity with regulations set by Council. These regulations will be formulated as COMESA becomes a Free Trade Area.

With regard to the resolution of trade-related disputes, the COMESA Court of Justice shall play an important role in interpreting the provisions of, and ensuring compliance with, the regional competition policy.

The proposed study will have the following terms of reference:

- To compile all competition laws, regulations and policies of each member State which aim at removing or lessening the concentration of economic power into one firm or a group of firms;

- To catalogue all companies or businesses which undertake activities likely to promote unfair trading e.g. mergers, joint ventures, acquisitions, interlocking company directors for the purpose of gaining unfair market share;

- Examine trade agreements among businesses and/or governments that may lead to price fixing, collusion tendering, dumping or the establishing of conglomerates for the purpose of undermining competition;

- Document import and export business legislation and practice to establish whether these promote the concentration of economic power in a firm or a group of firms;
- Identify and assess institutional mechanisms in member States that promote fair business practices.

It is envisaged that study shall be completed by early next year, and implementation to follow immediately thereafter.

ANNEX

Average national and COMESA customs tariff rates as at end of May 1999

	Country	Average national tariff rates, %	COMESA tariff reduction, %	Average COMESA tariff rates, %	Rank
1	Angola	24.67	0	24.67	17
2	Burundi	35.40	60	14.16	13
3	Comoros	25.00	80	5.00	7
4	Congo, DR	14.00	0	14.00	12
5	Djibouti	24.50	0	24.50	16
6	Eritrea	60.00	80	12.00	11
7	Egypt	367.00	90	36.70	19
8	Ethiopia	23.50	0	23.50	15
9	Kenya	18.00	90	1.80	3
10	Madagascar	16.00	90	1.60	1
11	Malawi	16.25	70	4.88	6
12	Mauritius	30.00	80	6.00	8
13	Namibia	28.66	0	28.66	18
14	Rwanda	38.33	60	15.33	14
15	Seychelles	-	-	-	-
16	Sudan	42.00	80	8.57	10
17	Swaziland	28.66	0	28.66	18
18	Tanzania	19.00	80	3.80	4
19	Uganda	8.75	80	1.75	2
20	Zambia	11.25	60	4.50	5
21	Zimbabwe	35.30	80	7.06	9