

Fruit from the Neighbour's Tree: On Indirect Extra-Territorial Effects of

South Africa's Competition Law Rulings

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INTRODUCTION

"This Act applies to all economic activity within or having an effect within the Republic..." Such wording, or its analogue, is included in the competition laws of most countries.² The jurisdictions of the respective competition authorities are, resultantly, founded upon and circumscribed by these words.

While the application of a law within the territory of its enactment is uncomplicated, "economic activity having an effect within" a country can extend the reach of competition laws to activity and parties located anywhere so long as there is some effect within that country. The former is often called the "territorial principle" of jurisdiction whilst the latter is the "effects doctrine".

In the context of competition law, the effects doctrine is not a novelty and "virtually all jurisdictions apply some form of the effects test."³ There are numerous judicial precedents wherein the competition authorities of one country exercised jurisdiction over firms or activity located in another country on this basis.⁴ This extra-territorial jurisdiction of the respective competition authorities shall be referred to, for present purposes, as direct extra-territorial effect. There may be other avenues by which the rulings of one country's competition authorities may find further, indirect extra-territorial effect.

The Southern African economy is dominated by South Africa. In terms of GDP, South Africa generates 61% of the region's income and its population of 50 million is 18% of the region's population, presenting the most populous and arguably it's most prosperous regional market.⁵ South Africa's companies, furthermore, have spread beyond her borders into the Southern African region and may accurately be described as Regional Multi-National Corporations (hereinafter "RMNCs").

South Africa also happens to have developed a robust competition law regime out of which numerous rulings have issued on various kinds of anti-competitive conduct over the thirteen odd years since the Competition Act came into force. The proceedings before South Africa's competition authorities could, therefore, involve a number of companies which, while South African by origin, have expanded into the rest of the region.

Consequently, the possibility is created for rulings of the South African competition authorities to affect persons in the neighbouring states. The RMNC whose conduct has been ruled upon by

¹ Cartels Division, Competition Commission of South Africa. The views in this paper are those of the writer, are made in his personal capacity and do not reflect the views of the Competition Commission. The author is grateful to Mmes. Ayanda Nxele and Rietsie Badenhorst for their valuable input.

²This example is quoted from section 3 (1) of the South African Competition Act 89 of 1998.

³IBA Legal Practice Division Task Force on Extraterritorial Jurisdiction, "*Report of the Task Force on Extraterritorial Jurisdiction*" (2009) at page 50.

⁴The USA's Department of Justice led the way in such exercise of extra-territorial jurisdiction as far back as 1945 in *United States v. Aluminium Company of America (Alcoa)* 148 F.2d 416 (2d Cir. 1945). A number of other jurisdictions have also enforced their competition legislation extra-territorially, including South Africa which expressed the willingness to do so in *American Natural Soda Ash Corporation v Botswana Ash (Pty) Ltd* Case no. 49/CR/Apr00.

⁵ Report of the Executive Secretary, "Activity Report of the SADC Secretariat" 2011-2012, available at http://www.sadc.int/files/1613/7243/4333/SADC_ES_Report_2011-2012_web.pdf.

South Africa's competition authorities shall be bound thereafter to conduct itself in a certain way. This conduct may be transported to the neighbouring states and persons in the neighbouring states may wish to make reference to the South African rulings in different proceedings.

The objective of this paper is to explore some of these other extra-territorial implications, which shall be called "indirect" extra-territorial effects in contrast with the "direct" extra-territoriality of jurisdiction referred to above. The regional exposure of South Africa's companies is considered immediately below before a brief survey of the rulings of South Africa's competition authorities which seeks to assess what proportion of these rulings might affect companies with such regional exposure. The occurrence of indirect extra-territorial effects in other regulatory fields is then demonstrated.

The subject is, thereafter, approached from two angles. Firstly, we consider the conditions under which indirect extra-territorial effects are likely to occur generally and whether these conditions are present regionally in regard to South Africa. Secondly, some competition-specific situations are considered whereby it is contended that such effects are possible in relation to rulings made by South Africa's competition authorities, and some difficulties posed by these indirect extra-territorial effects are identified. A means of formalizing indirect extra-territorial effects is suggested in conclusion, as an aid to the advancement of competition law and policy in the region.

THE REGIONAL REACH OF SOUTH AFRICA'S BUSINESSES

In treating of the Southern African region, reference is made to SADC member states.⁶ We are, ultimately, interested in those states that are South Africa's neighbours in a wide sense and the point is not dependent on how one defines the region. It must be understood, however, that any indirect extra-territorial effects of South Africa's rulings on competition matters shall not have the same impact across the region; some states will be more equal than others.

Those countries that are closer to South Africa shall, in the first place, present the most attractive markets for South African firms. This is confirmed by a recent study which states, "In general, South African companies appear to have an extensive presence in countries that are geographically close to South Africa..." pointing to strong historical and regional ties, particularly with the BLNS countries (which, with South Africa, form SACU) making them "clear target markets for South African firms."⁷

The same logic would apply to SADC member states; "South African companies also appear to have an extensive presence in countries within the SADC region, suggesting that this regional association has been supportive of business movement and investment."⁸ Table 1 illustrates the penetration of regional economies by South African firms with a numerical range of South African companies in each SADC member state. A distinction was made, in the study referred

⁶ The Southern African Development Community is composed of fifteen countries. In the United Nations Scheme of Geographic Regions, five countries constitute Southern Africa namely, Botswana, Lesotho, Namibia, South Africa and Swaziland.

⁷ Bobby Berkowitz, Yash Ramkolowan, Matthew Stern, Fouchè Venter, Melissa Webb (TNS Research Surveys and DNA Economics), *The role of South African business in Africa: South African outward investment*, (NEDLAC Fund for Research into Industrial Development, Growth and Equity: (2012) at pages 5 and 18.

⁸ *Ibid*, at page 5.

to, between South African companies that merely export to other African states and those that have a physical presence in those states.⁹ The data focuses on the latter.

Table 1: SADC Representation of South African Companies

SADC Member	Number of South African Companies
Angola	10 - 20
Botswana	50+
Democratic Republic of the Congo	10-20
Lesotho	40-50
Madagascar	1-10
Malawi	30-40
Mauritius	30-40
Mozambique	40-50
Namibia	50+
Swaziland	50+
Tanzania	40-50
Zambia	40-50
Zimbabwe	30-40

Source: Ramkolowan et al. "The Role of South African business in Africa"¹⁰

It is clear that South African firms are active on the markets of SADC. The term "regional multi-national corporations" seems apposite.

A SURVEY OF SOUTH AFRICAN DECISIONS ON ANTI-COMPETITIVE CONDUCT

A desktop survey was conducted, seeking to determine what proportion of the rulings made by South Africa's competition authorities concern RMNCs. Data was extracted from the annual reports of the Competition Tribunal (hereinafter "the Tribunal") for the years 2009-2010, 2010-2011 and 2011-2012 as well as decisions of the Competition Appeal Court (hereinafter "the CAC") in the period 2009 - 2012.¹¹

For each year, a list comprising rulings on prohibited practices was compiled. Decisions on mergers, procedural matters and interim relief as well as hearings still pending were excluded from the sample. This distinction is important because it is in the area of anti-competitive conduct, in particular cartels that the multi-jurisdictional effects of one jurisdiction's rulings might find greater expression and it is intended to be implicit that cartels are the point of departure.

The names of the respondents in these matters were compiled and a review of the respective companies' online presence was then conducted. As such, the analysis is based on secondary information from the media together with the companies' websites and annual reports. The firms

⁹ *Ibid.* "Physical presence" means the establishment of an office or store and the establishment of subsidiary companies or joint-venture companies in the other African countries.

¹⁰ Ramkolowan et al. *Supra* at page 6. The data for Seychelles could not be ascertained.

¹¹ The annual reports of the Competition Tribunal are available online at <http://www.comptrib.co.za/publications/annual-reports/>

identified as having a regional presence are those which were found to have a physical presence in at least one other Southern African country. Table 2 below illustrates the results.

Table 2: Rulings of the Competition Tribunal and the Competition Appeals Court Affecting Regional Multi-National Corporations

Competition Authority	Period	Total Cases	RMNC Cases	% of total
Competition Appeal Court	2009 - 2012	18	9	50
Competition Tribunal	2009 - 2010	10	6	60
Competition Tribunal	2010 – 2011	25	10	40
Competition Tribunal	2011 - 2012	30	14	47

The proportion of cases involving RMNCs, taking an average over the three years for both institutions is 49.25%, approximately half.¹²

INDIRECT EXTRA-TERRITORIAL EFFECTS IN OTHER REGULATORY AREAS:

THE CALIFORNIA EFFECT AND THE BRUSSELS EFFECT

California is the third largest state in the USA by area and has the largest state population and economy, which lends it considerable national influence in the regulatory arena. This influence on the regulations of other states and ultimately those of the entire USA has been noted and named the “California Effect”.¹³

David Vogel defines the California Effect as “the shift of consumer, environmental and other regulations in the direction of political jurisdictions with stricter regulatory standards.”¹⁴ The salient point is that intra-state regulations can find their way into other jurisdictions. There are two ways in which this may happen, the first being by way of legislative adoption where the external jurisdictions enact similar laws. Secondly, firms with a multi-jurisdictional market presence may, of their own accord, implement the standards set in one jurisdiction across borders.

These two ways are described as “*de jure* regulatory convergence” and “*de facto* regulatory convergence” respectively by Anu Bradford in an article entitled “The Brussels Effect” which studies the phenomenon as it has occurred with European regulations.¹⁵ The distinction is made from the agreement on uniform, international standards that follow negotiations in that this extra-

¹² A more comprehensive survey would have to be undertaken to give more than an approximation.

¹³ David Vogel “*Trading Up: Consumer and Environmental Regulation in a Global Economy*” (1995) at page 259.

¹⁴ David Vogel, *supra* note 14.

¹⁵ Anu Bradford “*The Brussels Effect*” in *Northwestern University Law Review*, Vol. 107, No. 1 (2012) at page 8.

territorial effect “occurs when a single state is able to externalize its laws and regulations outside its borders through market mechanisms.”¹⁶

It is emphasized that this, “The EU’s external regulatory agenda has thus emerged as an inadvertent by-product of [an] internal goal rather than as a result of some conscious effort to engage in ‘regulatory imperialism’.”¹⁷ Examples of the Brussels Effect are numerous - one of which, to illustrate, is likely to be very close by, literally, at any given point in time. In 2009 a Memorandum of Understanding was signed by ten mobile phone manufacturers after environmental concerns arising out of the electronic waste generated when consumers change mobile phones and discard incompatible chargers. The micro-USB standard which was specified is now common to the majority of smart-phones globally. That MoU was sponsored by the European Union.¹⁸

CONDITIONS CONDUCIVE TO INDIRECT EXTRA-TERRITORIAL EFFECTS

There are several conditions which are conducive to the existence of indirect extra-territorial effects. A set of these conditions is identified in “The Brussels Effect” as Conditions for Unilateral Regulatory Globalisation.¹⁹ The jurisdiction whose regulations shall have indirect extra-territorial effect must have (i) market power (ii) regulatory capacity (iii) a preference for strict rules (iv) a predisposition to regulate inelastic targets and (v) the standards for the different jurisdictions must not be divisible. In addition to these, the similarity of the legal traditions may also conduce to indirect extra-territorial effects.

It is observed that the “*de facto* Brussels Effect is reinforced [after the fact] with a *de jure* Brussels effect,” in the sense that the “corporations’ *de facto* adjustment paves the way for legislators’ *de jure* implementation of” the donor state’s regulations.²⁰ The language of a “donor state” and a “receiving state” is convenient to denote the state whose regulations have extra-territorial effects and that which is affected.

(i) Market power

The donor state must present a relatively large and affluent market.²¹ Out of a total SADC GDP of 664 billion USD, South Africa accounts for the lion’s share of 406 billion with a GDP per capita of 8027 USD, the fourth highest in a region whose average is 2362 per capita.²² It cannot be gainsaid that South Africa has market power in the region.

(ii) Regulatory Capacity

The donor state must have effective regulatory capacity.²³ The Competition Act (hereinafter “the Act”) gives extensive investigative powers to South Africa’s competition authorities, the largest

¹⁶ *Ibid.* at pages 3-4.

¹⁷ *Ibid.* at page 6.

¹⁸ “MoU regarding Harmonisation of a Charging Capability for Mobile Phones” European Commission (June 5 2009) See also Bradford *supra*.

¹⁹ Bradford *Supra* at pages 9 - 10.

²⁰ *Ibid.* at page 8

²¹ *Ibid.* at pages 11-12.

²² SADC Report *supra* at page 66.

²³ Bradford *supra* at pages 12 – 13.

in the region, and they have utilized these powers to fulfill their mandate so effectively they have come to be highly regarded internationally.²⁴

(iii) Preference for Strict Rules

The regulations of the donor state must be strict.²⁵ The Competition Act permits the imposition of administrative penalties for contravention of its provisions up to a maximum of ten percent of the contravening firm's turnover.²⁶ This, arguably, meets the condition of strict regulations.

(iv) Predisposition to Regulate Inelastic Targets

The targets of the regulations must not be capable of being moved outside the jurisdiction of the donor country in response to the regulation. This is to say that demand for the products provided by firms must be inelastic in response to the regulations concerned.²⁷ The South African population is the market whose demand for goods and services this condition is directed towards. "Consumers rarely move to another jurisdiction in response to strict regulatory standards,"²⁸ This condition, therefore, is met in South Africa and a company that wishes to sell products to South Africa's 50 million people and to others regionally must comply with South Africa's regulations.

(v) Non-divisibility of Standards²⁹

It may be too costly for firms to differentiate the products that they sell to several jurisdictions (or the terms on which they are sold) according to the different regulations applicable in each jurisdiction. This condition is difficult to assess in an abstract manner as the costs of differentiation for separate markets may not be the same for all goods and services. It would appear, nonetheless, that at least four of the five conditions which are identified by Professor Bradford are present in the case of South Africa, relative to Southern Africa.

SIMILAR LEGAL TRADITIONS AND LEGAL PRECEDENTS

In addition to these conditions, the similarity of legal traditions may also make indirect extra-territorial effects more likely. Bearing in mind the legal nature of regulatory actions, they shall be more easily received when the legal traditions of the jurisdictions are similar.

South Africa has a mixed legal system, incorporating common law elements inherited from the British, elements inherited from the Dutch (Roman-Dutch law) and the customary law of her indigenous inhabitants. Botswana, Lesotho, Namibia, Swaziland and Zimbabwe share these

²⁴The World Economic Forum (WEF) annual Global Competitiveness Report ranked South Africa 12th out of 139 countries on the extent to which antimonopoly policy promotes competition and at the Global Competition Review Awards, the South African Competition Commission won "Agency of the Year in Asia-Pacific, Middle East & Africa" in 2011.

²⁵ Bradford *supra* at pages 14 – 15.

²⁶Section 59 (2) of the Competition Act.

²⁷ Bradford *supra* at pages 16 - 17. This has been seen in the relocation of western brands' manufacturing to Asian jurisdictions insofar as this can be attributed to less stringent labour legislation in the Asian countries. The demand for labour in the donor countries where the brands originated proved to be elastic in response to labour regulations and manufacturing was relocated to the Asian countries which were impervious to Western labour standards.

²⁸Bradford *supra* at page 17

²⁹ *Ibid* at pages 17 – 18.

legal traditions with South Africa by dint of colonial-era promulgations.³⁰ The other Southern African states have either a common law system (without the Roman-Dutch influence) or a civil law system.³¹

In the common law, there exists the doctrine of precedent, whose effect is that the decisions of the courts provide precedents which subsequent proceedings must follow. The Act gives the rulings of the Tribunal and the CAC the status of high court decisions.³²

In the interpretation of statutes, it is a common practice for one jurisdiction to use an interpretation of the law which has been adopted by other jurisdictions.³³ In Southern Africa, for competition law purposes, this reliance on foreign decisions may be greater since it is largely a new field in which most jurisdictions are inexperienced.³⁴

Competition law, moreover, lends itself to such comparative interpretation, being - as it is - founded upon policies which many jurisdictions hold in common in addition to their legislation being couched in similar language.

While the foreign precedent is not binding in the common law, it may be a persuasive authority.³⁵ It can, therefore, be said with confidence that the rulings of South Africa's competition authorities shall influence the competition authorities and the courts of the neighbouring states when they interpret their competition legislation. In the cases of the Roman-Dutch flavoured jurisdictions, this effect is likely to be more conspicuous with declining weight through the common-law states to the civil code countries where it would be expected that they shall have the least persuasive authority.

This is the first and obvious way in which the rulings of the South African competition authorities shall have indirect effects in the neighbouring countries, without the South African Authorities attempting to exercise any extra-territorial jurisdiction. This is a generalized indirect effect though, referring to the influence of South African rulings on the interpretation of competition law provisions in an abstract fashion and not that of any specific ruling with respect to specific parties, to which we now turn.

³⁰The legal systems of these five countries are based explicitly on the South Africa's Roman-Dutch legal tradition by various colonial-era stipulations.

³¹Mozambique, Angola, the Democratic Republic of the Congo, the Seychelles and Mauritius largely follow civil, code-based legal traditions. In the remaining five states the Common Law tradition is followed without reference to Roman-Dutch influences.

³²Section 64, Competition Act. The Constitution Seventeenth Amendment Act of 2012, further, makes the CAC the court of last instance in competition matters, ousting the jurisdiction of the Supreme Court of Appeal; the Constitutional Court retains its jurisdiction over constitutional issues that may arise.

³³The provisions being interpreted must be *in pari materia* or on the same subject.

³⁴Southern Africa's competition authorities are, with few exceptions, recent developments. See Nelly Sakata, "Are Southern African Competition Law Regimes geared up for Effective Cooperation in Competition Law Enforcement?" (2011) at pages 10 – 11, Paper presented at the Fifth Annual Competition Law Conference:2011.

³⁵This must be understood in the light of, as Justice Ackermann put it, the reality that "foreign law is not in any sense binding on the court that refers to it... One may be seeking information, guidance, stimulation, clarification or even enlightenment but never authority binding on one's own decision." Laurie Ackermann, "Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke" in "Judicial Recourse to Foreign Law: A new Source of Inspiration?" Cavendish Press, (2006) at pages 510-513.

EFFECTS ON COMPANIES BEHAVIOUR

Within the South African jurisdiction, it goes without saying, firms which have been found culpable must cease their anti-competitive conduct as an immediate result of the said rulings. South Africa's laws, however, are applicable only within South Africa and there is no obligation to cease anti-competitive conduct elsewhere. To cite a parallel, South Africa's National Credit Act is intended, *inter alia*, to provide protection to consumers to whom credit might be offered. These protections may or may not be extended to persons in the neighbouring countries where South African companies are active.

There lies, however, the point of the foregoing discussion of indirect extra-territorial effects and the conditions which make them more likely to occur. As it has been established that the conditions precedent to *de facto* unilateral regulatory convergence are present, it follows that the rulings of South Africa's competition authorities are likely to be carried into the neighbouring jurisdictions by the RMNCs against which such rulings may have been made.

The cessation of anti-competitive conduct and subsequent good behavior of a RMNC in the neighbouring jurisdiction may, in this way, flow from an adverse ruling by South Africa's competition authorities, regardless of the fact that such ruling was directed only at the effect of the impugned conduct within South Africa's borders.

PUBLICITY OF SOUTH AFRICAN RULINGS AND THEIR USE FOR EVIDENTIARY PURPOSES IN OTHER JURISDICTIONS

The Competition Tribunal is an administrative body. This means that it must conduct itself in a manner that is consistent with the administrative law of South Africa. One of the basic tenets of South Africa's administrative law, under the 1996 Constitution³⁶ and the Promotion of Administrative Justice Act³⁷ is that a person against whom an adverse ruling has been made by an administrative body is entitled to written reasons for that ruling.

The Competition Tribunal, as a matter of course, provides reasons for its decisions after hearings, drafted to the same exacting standards as the judgments of the courts. The Competition Appeals Court, similarly, provides written reasons in a judgment. In the case where a matter has been resolved by a settlement with the firm concerned, a draft consent order is submitted to be made an order of the Tribunal.³⁸ In this way, a written and publicly-available record of the outcome with the facts on which that outcome is based shall invariably exist, regardless of the manner in which the matter was finalised.

The rulings of the competition authorities are, in this manner, a matter of public record to which any person can have access.³⁹ They are published on the website of the Competition Tribunal. As such, the rulings on competition matters made by South Africa's competition authorities are

³⁶ Section 33 (1) of the Constitutions of the Republic of South Africa, Act 108 of 1996.

³⁷ Promotion of Administrative Justice Act, 3 of 2000, at section 5.

³⁸ The consent order shall, typically, include a description of the contravention of the Competition Act as well as an admission of culpability by the firm concerned and by being made an order of the Tribunal is a ruling no less than had there been an investigation and hearing of a matter.

³⁹ Rule 15 of the Competition Commission Rules and Rule 13 of the Competition Tribunal Rules also permit access to non-confidential information in the possession of these institutions.

available to be utilised for evidentiary purposes in separate proceedings in the neighbouring states.

It is important to note that the South African competition authorities can make no orders that relate to those effects of any parties' actions whose impact is felt outside South African borders. There is no question, therefore, of persons in the neighbouring states seeking judicial recognition and enforcement of a South African judgment in their jurisdictions or the delivery of relief granted in such judgment because the South African competition authorities can give no such relief.

What is possible, it is contended, in the case where a ruling has been made, is that the ruling itself (as well as publicly available information relating to the case) may be referred to as evidence in legal proceedings in the neighbouring states. Such reference shall be made to the South African ruling as evidence of fact that may not, of itself, be conclusive.

The matters on which rulings have been made may present characteristics which would increase the probative value of the South African rulings. In one matter, South African firms met in South Africa to allocate tenders for projects located beyond South African borders, in neighbouring states.

This availability of South Africa's rulings for evidentiary purposes in legal proceedings in neighbouring states could, in this wise, result in significant impact extra-territorially. The RMNC against which a finding has been made might experience considerable difficulty in refuting factual allegations in respect of which the South African competition authorities have made a finding.

Such indirect extra-territorial effects present difficulties for the RMNCs concerned as well as the competition authorities of South Africa. The interactions between these effects and leniency programmes, criminalisation and delictual liability warrant some consideration.

THE CORPORATE LENIENCY POLICY

In the South African jurisdiction, the ruling on anti-competitive conduct may follow on one of two processes. Firstly, there may have been an investigation which shall follow a complaint or have been initiated *mero motu* by the Commission. There may, alternatively, have been an application for leniency in terms of the Corporate Leniency Policy.

It is a premise of the Corporate Leniency Policy that the party applying for leniency must disclose all the information which is relevant to the matter at hand. It is, also, understood that the *quid pro quo* shall be leniency on the part of the competition authorities when it comes to imposing sanctions on the guilty parties.

With the "first through the door" rule which South Africa employs, the first company to apply for leniency and to disclose the relevant incriminatory information may be given immunity from the sanction of an administrative penalty which the competition authorities may have otherwise imposed as a penalty. Further applicants for leniency shall not receive the same immunity but may still choose to co-operate and settle a matter, in return for lesser fines than they would otherwise have received.⁴⁰

⁴⁰ See Corporate Leniency Policy of the South African Competition Commission (2008).

It is prudent practice, where multinational companies have decided to lay themselves at the feet of competition authorities in this manner, for them to apply simultaneously for leniency in the various jurisdictions where they are active and their anti-competitive conduct has had an effect.⁴¹

It would be helpful if all the relevant jurisdictions had a leniency programme in place. This is not the case in the SADC. Zambia, Malawi and Namibia are the closest of these countries to having a leniency programme in place, where the policies have been drafted but even in their cases, they have not been implemented as yet.⁴²

This means that the RMNC which applies successfully for leniency in South Africa shall be bound to disclose facts pertinent to its anti-competitive conduct and an adverse ruling shall be made, albeit with immunity from punishment or a decreased administrative penalty in South Africa. There shall have been no leniency application, nor may leniency be granted, in the neighbouring states.

The ruling in South Africa shall, therefore, place these companies in the undesirable position where they may have fallen on their own sword in these neighbouring jurisdictions. The ruling made in South Africa is available for evidentiary purposes in proceedings before the neighbouring states' competition authorities and courts.

CRIMINAL LIABILITY

The Competition Amendment Act was passed by the South African parliament in 2009 whose effect, amongst others, is that hard-core cartel conduct is a criminal offence for which the officers of the company so impugned may be prosecuted. This provision has not, as yet, come into force in South Africa.

The criminalisation of cartels is not something that all jurisdictions agree on; it is a criminal offence in some and not in others. Within SADC the competition legislation of Swaziland, for example, makes it a criminal offence to contravene the provisions of the Competition Act.⁴³

To date, neither in this jurisdiction nor in any other SADC jurisdiction has an attempt at criminal prosecution for a competition offence been made. The fact remains that the criminal offence may be there in the legislation of a neighbouring jurisdiction.

In addition to the agreement to co-operate on competition issues that SADC states entered into⁴⁴ there is an additional imperative when it comes to criminal matters. The Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters⁴⁵ enjoins SADC member states to "provide each other with the widest possible measure of mutual legal assistance in criminal matters." This includes "investigations, prosecutions or proceedings in the

⁴¹ "Improving International Co-Operation in Cartel Investigations," Contribution from the European Union, Global Forum on Competition, OECD (2012) at paragraph 13.

⁴² Sakata *Supra* at page 16.

⁴³ Section 42 of the Competition Act, 2007. This is, in itself, a somewhat unusual position in that it goes beyond the usual criminalisation of hard-core cartels which is the limit of other jurisdictions' criminal liability for competition offences.

⁴⁴ See Regional Status Quo on Cooperation below.

⁴⁵ Ratified on 14 April 2003 by the Parliament of the Republic of South Africa and given effect in terms of the International Cooperation in Criminal Matter Act 75 of 1996. The protocol does not extend to the extradition of accused persons. The UK case of *Norris v Government of the USA and Others* [2008] UKHL is informative on the subject of extradition for competition law criminal offences.

Requesting State in a criminal matter, without regard to whether the conduct which is the subject of investigation, prosecution, or proceedings in the Requesting State would constitute an offence under the laws of the Requested State.”⁴⁶

This would extend to the criminal prosecution of individuals for competition offences in those states where the offences might exist. The rulings from South African proceedings take on a harsher tone in this regard. The proceedings and rulings of the South African competition authorities may have deleterious effects for officers of the firms concerned in that the disclosure of information that shall have happened may expose those officers to criminal proceedings in the neighbouring states.

DELICTUAL CLAIMS

When it comes to delictual claims, the same issue arises insofar as the ruling of the South African authorities may be of probative value for the claimant from the neighbouring country who seeks to recover damages caused by the anti-competitive conduct of a RMNC in the courts of that country.

A damages claim against an RMNC for harm that happened to a person in a neighbouring state could, potentially, also be brought in a South African court. A distinction must be made from the attempts that have been made to extend the direct extra-territorial jurisdiction of the USA in making claims for damages that occurred in foreign jurisdictions. In these matters, the would-be claimants sought to bring legal proceedings in the USA courts in terms of the Sherman Act.⁴⁷ This has the limitation, however, of being limited to conduct that has an effect in the USA and hence the reticence of the USA courts to freely extend their jurisdiction to cover such claims. Proceedings before the South African competition authorities would fail for the same reason; the jurisdiction of the competition authorities is limited by application of the effects doctrine.

It is proposed that no such limitation is in place where the foreign claimant wishes to institute a civil action for damages in a South Africa court against a South Africa-based RMNC whose anti-competitive conduct had local effect and in respect of which a ruling has been made, provided that the claimant can establish a sufficient *ratio jurisdictionis*.⁴⁸ In the case of a price-fixing cartel, for example, where the foreign person had purchased products directly from the implicated firms in South Africa, having travelled to the South African firm’s premises to transact, sufficient grounds for jurisdiction would exist notwithstanding the fact that the harmful effects of inflated prices could be located in the neighbouring state where the payment originated.

The Act provides that in any civil proceedings where an issue is raised that concerns conduct that is prohibited in terms of the Act, the court hearing the civil matter must either defer to the judgment of the Tribunal and the CAC – if a ruling has been made – or refer it to these authorities if none has been made, with regard to the competition issue.⁴⁹

It is difficult to see how the courts might accept the competition authorities’ ruling in any other way other than that envisaged by the Act since they are enjoined by that provision to defer or refer to the competition authorities. The ruling of the South African competition authorities

⁴⁶ Article 2 of the Protocol.

⁴⁷ See *Hoffman-LaRoche v Empagran S A* 124 S.Ct. 2359 (2004).

⁴⁸ Reason for jurisdiction.

⁴⁹ Section 65 of the Competition Act.

would, in this manner, be sufficient evidence of the RMNC's conduct, leaving just the other elements of delictual liability to be established.

THE REGIONAL STATUS QUO ON COOPERATION

Given the regional reach of South Africa's business interests, the harmful results of anti-competitive conduct on the part of RMNCs have the potential to affect the welfare of consumers beyond the borders of South Africa. "Cooperation between [regional] competition authorities has become increasingly important," if any significant progress is to be made in curbing the anti-competitive conduct of RMNCs.⁵⁰

There are fifteen SADC member states with competition law regimes, nascent and extant, which operate independently. As is evident in the preceding treatment, there are disparities between the competition laws of the different Southern African states which can present challenges to the effective enforcement of competition law in the region. This situation is not helped by constraints to institutional capacity which face the new competition authorities in the region.⁵¹

In 2009 the SADC Declaration on Regional Cooperation in Competition and Consumer Policies was adopted by member states. It states, in the preamble, that "there is a need to formalize a system of cooperation between national regimes that can harness the collective efforts of relevant national authorities and add value to national enforcement efforts in the face of problems affecting more than one country."

In practice, there have been two main outcomes of this commitment by member states; firstly, mutual assistance through training workshops, study tours and staff exchanges.⁵² Secondly, the SADC Secretariat has engaged member states in a project whose goal is the harmonization of competition laws and policies in the region.⁵³ While commitments to information exchange have been made, there are difficulties in sharing information that has been classified as confidential and in practice only non-confidential information could be shared easily between the region's competition authorities, regardless of the regional reach of the anti-competitive conduct under investigation.

These are laudable efforts but more is needed. The indirect extra-territorial effects of South Africa's competition rulings illustrate some of the difficulties presented by the atomistic regulation of competition in the region. The possible exposure of RMNCs and their officers to liability in South Africa's neighbours when they have complied fully with this jurisdiction's Corporate Leniency Policy is a particularly unpalatable consequence of the region's multifarious approach to competition law.

The point of the Corporate Leniency Policy is to aid the discovery and deterrence of cartels in South Africa. If the disclosure of incriminating information in terms of the CLP exposes the members cartels to liability in the neighbouring jurisdictions, the incentive for RMNCs to disclose their anti-competitive conduct may be decreased. This could hamper the effectiveness of the CLP and perhaps make cartels operating regionally more stable.⁵⁴

⁵⁰ Sakata *supra* at pages 2 - 3

⁵¹ Sakata *supra* note 38.

⁵² Sakata *supra* at page 13.

⁵³ Harmonisation Framework of the National Competition Laws and Policies in SADC (2011).

⁵⁴ "The Use of Leniency Programmes as a Tool for the Enforcement of Competition Law against Hardcore Cartels in Developing Countries" Note by the UNCTAD Secretariat (2010) at paragraphs 3, 37 – 38.

EMBRACING INDIRECT EXTRA-TERRITORIAL EFFECTS

Michal Gal proposes the embracing of indirect extra-territorial effects by consensus among a set of nations.⁵⁵ This would advance the cause of competition policy and law in the region and help to resolve some of the problems presented by the different, uncoordinated competition jurisdictions of Southern Africa.

The principle of *res judicata* means, simply put, that a matter that has been decided before shall not be adjudicated upon again by the courts. Professor Gal's proposition is an extrapolation of this principle, advocating that national competition authorities and courts be permitted to "recognize and apply foreign decisions finding international hard-core cartels in their own jurisdictions" by means of a "Recognition of Judgments Mechanism".⁵⁶

This would take advantage of the international reach of a cartel and formalize extra-territorial effects such that, in the case where anti-competitive conduct has been found to have occurred in one jurisdiction against a specific party, the fact of the conduct would not have to be proved in the subsequent proceedings of another state. What would remain to be proved in the second, receiving state, would be the "local elements of the offence (generally damage to local markets) and that the foreign decision meets some pre-specified standards to ensure reasonable and fair reliance."⁵⁷

This would deliver several benefits to the states participating in such an arrangement. Firstly, the unnecessary costs resulting from duplicated enforcement procedures would be minimized since "the existence of the [regional] cartel would need to be proved in only one jurisdiction."⁵⁸ Relatively inexperienced or under-resourced competition authorities which might not have acted against the international cartel shall also have the opportunity to enforce competition law more timeously and effectively. Further, the deterrent effect for regional cartels would be increased since enforcement actions could happen in many affected jurisdictions whereas, presently, only a small number of jurisdictions act against international cartels.⁵⁹

Five criteria are proposed as measures of the pre-specified standards which would be used to ensure reasonable and fair reliance. The foreign decision must (i) have been made in accordance with foreign law (ii) include a factual finding (iii) be essential to the foreign judgment (iv) have been made by a judicially competent forum and (v) the impugned party must have enjoyed the full and fair opportunity to litigate.

(i) Decision in accordance with foreign Law

If reliance is to be placed upon the ruling of a foreign jurisdiction, it stands to reason that such ruling must have been made in accordance with the laws of that jurisdiction. This ensures that it "is based on sound legal principles within that foreign jurisdiction."⁶⁰ It must also, preferably, be a final decision with no further appeals being possible. This assures the receiving state of the certainty of the foreign ruling for were an appeal to be noted after reliance had been made upon

⁵⁵ Michal Gal "Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance" *Virginia Journal of International Law* Vol. 51: 57 (2010)

⁵⁶ *Ibid.* at page 59

⁵⁷ *Ibid.* at page 74

⁵⁸ *Ibid.* at page 74.

⁵⁹ *Ibid.* at pages 63, 65, 74

⁶⁰ *Ibid.* at page 87

that ruling, it would make a mockery of such reliance if the appeal was successful.⁶¹ The conclusion of appeal procedures, additionally, “increases the likelihood that the decision is factually accurate,”⁶² since the parties shall have had ample opportunity to ventilate all issues pertaining to the matter.

(ii) Decision to include a factual finding

The ruling of the donor state must “clearly include a finding of a cartel that specifically relates to its operation within the adopting jurisdiction.” This ensures that the foreign decision-maker has applied itself to the question of whether the anti-competitive conduct extended beyond that jurisdiction’s borders into the adopting state. It may be enough though, in Professor Gal’s view that the decision refers to the operation of the cartel, “in a region including the adopting jurisdiction.”⁶³ This finding of fact is central to the Recognition of Judgments Mechanism since the factual conclusion is the core of what would be recognized extra-territorially.

(iii) Decision essential to the foreign judgment

The finding of fact in regard to the cartel’s operation must be essential to the foreign judgment. This is, in the language of the common law, saying that it must be the *ratio decidendi* or a reason for the decision, rather than *obiter dictum* or non-essential to the ruling. Professor Gal notes that this is a problem since the operation of a cartel outside a jurisdiction’s borders may not be essential to the decision on its operation within that jurisdiction. It is suggested that this standard can be relaxed in line with the preceding view, such that there need not be an explicit reference to any jurisdiction as long as the international character is established together with the other facts which prove the existence of a cartel.⁶⁴

(iv) Judicial Competence

Fourthly, the foreign decision must also meet some acceptable standard of judicial competence. “Only decisions by reliable and well-functioning decision makers should be adopted.” Judicial competence refers to the reliability and capable functioning of the decision-makers. The forum which makes the decision need not, further, be a court and competition authorities’ quasi-judicial nature should suffice to enable judicial competence to be imputed to them.⁶⁵

(v) Full and Fair opportunity to litigate

Finally, the party against whom the ruling was made must have been afforded a full and fair opportunity to litigate in the foreign proceedings. This ensures that procedural fairness requirements in the adopting state are met.⁶⁶ The principle captured in the Latinism *audi alteram partem* is, it goes without saying, one of the foundations upon which justice is erected. Reliance could not be placed upon a decision which was made in conditions wherein the right of the parties to be heard was not given its due importance since any subsequent ruling which relied on it would, in turn, be tainted by procedural irregularity. Professor Gal would also require

⁶¹ *Ibid.* at page 88. See also Ralf Michaels, “Recognition and Enforcement of Foreign Judgments” in Max Planck Encyclopedia of Public International Law, (2009), Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press at para 27.

⁶² Bradford *supra* at 88

⁶³ *Ibid.*

⁶⁴ *Ibid.* at page 89

⁶⁵ *Ibid.* Section 65 of the Act, in point, provides *inter alia* that all decisions of the Tribunal and the CAC shall have the same effect as orders of the High Court.

⁶⁶ *Ibid.* page 90

similar burdens of proof and sanctions in order to give the parties similar incentives to exercise their right to be heard in different jurisdictions.⁶⁷

A fair criticism that may be leveled at the proposed mechanism relates to fact of reliance on a foreign ruling being potentially politically-sensitive, being as it is, a relinquishment of a measure of the adopting state's sovereign authority. Limiting the recognition to the factual enquiry, however, also limits this concern as a substantial part of the enquiry remains for the adopting jurisdiction to pursue. Further, the recognition would not be peremptory; the adopting jurisdiction should retain the discretion and "sovereign decision-making power in deciding whether and under what conditions to adopt foreign decisions."⁶⁸ The politician's fears of giving away sovereignty could be assuaged in this way.

Any concerns about over-enforcement, moreover, would be misplaced in the context of Southern Africa where it is understood that little action is taken against international cartels.⁶⁹ It is suggested, further, that the mechanism allow for recognition of leniency together with the foreign ruling to solve the problem of rulings obtained through one state's leniency programme exposing the recalcitrant company to the unmitigated sanctions of neighbouring states' competition laws.⁷⁰

Criticism relating to the subjectivity of the criteria is not without basis, most clearly with that of judicial competence. It could become an onerous task, in the hands of some lawyers, to require a determination on these criteria on a case-by-case basis. This problem is avoidable if a list of jurisdictions which shall be presumed to meet such subjective criteria is compiled by regional consensus, eliminating the need to establish them *casum basis*.

It can be argued that the criteria which are posited are not irredeemably objectionable and that the rulings of South Africa's competition authorities can meet the same. The Recognition of Foreign Judgments Mechanism would allow SADC competition authorities to assist each other in fulfilling their mandates. Practically, from South Africa's perspective, this would provide assistance to neighbouring jurisdictions that would not require the additional expenditure of resources. This would amount to an embracing of the indirect extra-territorial effects of a ruling from the South African competition authorities. This would, further, be a reciprocal arrangement that would allow South Africa's competition authorities to rely on the rulings of neighbouring jurisdictions as well. The only parties who would suffer, as a result, would be the RMNCs which engage in prohibited, anti-competitive conduct.

A rudimentary example of the Recognition of Judgments Mechanism was seen in Brazil's competition authority's utilization of the American and the European rulings on the vitamins cartel to corroborate its own finding.⁷¹ This was, however, corroboration that was additional to Brazil's own investigation. There are no precedents, it would appear, for an adoption of foreign decisions in the greater sense that Professor Gal proposes.

⁶⁷ *Ibid.* See also Micheals *supra* at para. 28.

⁶⁸ *Ibid.* at page 76

⁶⁹ "Technical Assistance to the SADC Secretariat to enhance regional integration and harmonisation of competition and consumer policy in the SADC member states: Cross-Border Cases and Issues" TRADECOM Facility (2011).

⁷⁰ Gal *supra* at page 86

⁷¹ The Brazilian Secretariat for Economic Monitoring reasoned that, "because of the American and European condemnation of the international cartel, and the import of vitamins whose prices were arbitrated in Europe, such imports would entail losses to Brazilian consumers and that the conduct of businesses are illegal..." See Gal *supra* at page 61.

Such a recognition of foreign judgments would be well-positioned in regard to hardcore cartels⁷² involving RMNCs and not, perhaps, as equally suitable for other competition offences and procedures. This allows for the fact that hardcore cartels, in and of themselves, are universally condemned creatures. Whether or not there are differences between SADC jurisdictions' legislative provisions as to whether the cartel is treated as a *per se* violation or it is approached by the rule of reason, the fact of its existence shall remain in common. Arguments relating to local economic effects would necessarily follow, as and where required. Such a mechanism would be easiest to implement and is, conceivably, most necessary in respect of hardcore cartels operating regionally.

CONCLUSION

The argument which is broached in this article is that there are these indirect extra-territorial effects, which are felt in the neighbouring states, that may flow from the rulings of South Africa's competition authorities when RMNCs are involved. The idea of indirect extra-territorial effects is premised upon several conditions which have been shown to be present in Southern Africa. These indirect extra-territorial effects may, potentially, present difficulties to businesses and competition authorities.

In accordance with the express goal of regional cooperation, and towards the advancement of competition policy and law in the region, the Recognition of Judgments Mechanism is recommended as being a suitable solution to some of these difficulties. The benefits of such an approach are self-evident.

There is, in the common law, a principle whose effect is that when a fruit tree grows close to the boundary of one property and its branches hang over a second, adjoining property, the neighbor is not entitled to enjoy any fruit from that tree, even those that hang over or fall on his property.

This tree is in South African territory and it is the competition authorities of South Africa. The fruit are all the effects of South Africa's rulings. The common law principle which would bar a neighbor from enjoying fruit from the neighbour's tree is the Territorial Principle of jurisdiction and the "Effects doctrine" which would limit the impact of South African rulings on competition matters to South Africa. Is the time ripe for *de jure* recognition that the some fruits from the neighbour's tree do, in fact, fall for the neighbours to eat?

⁷² Defined, per Section 4(1)(b) of the Act as price-fixing, market allocation and collusive tendering.

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