

# Competition Regulation in Africa Between Global and Local

## A Banyan Tree Story

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### Introduction

The literature on globalization takes the nation-state seriously, but the issue is generally polarizing. On the one hand, globalization is understood to imply a decline of national politics and their order-creating capacities with a parallel increasing role for markets and market logics (Held and McGrew 1998; Ohmae 1995; Strange 1996). On the other hand, the demise of the nation-state is contested and its role re-affirmed as central in the context of multi-level governance (Boyer and Drache 1996; Hirst and Thompson 1996).

This chapter begins from a different perspective. Globalization is not about the disappearance of rules and order; it comes, in fact, with an increasing density of regulatory and governance activities. On issues as distinct as climate, environment, labor, health, poverty, accounting and finance, competition, corporate responsibility, and more, dense transnational activism over the past decades has resulted in polyarchic and overlapping governance structures, in which multiple actors claim a right to engage in policy-making, rule-setting and rule-monitoring (Levi-Faur and Jordana 2005; Djelic and Sahlin-Andersson 2006; Graz and Nölke 2008; Tamm-Hallström and Böstrom 2010; Levi-Faur 2012). In the process, nation-states do not disappear; they remain involved but are profoundly transformed. The national rule of law is not displaced by a global runaway market but inscribed in a thick landscape of rules often produced and monitored transnationally. The national rule of law must, in other words, confront and adapt to the progress of a transnational ‘law of rules’ (Djelic 2011). Globalization always gets localized, but the local also becomes inscribed in and framed through global dynamics—‘glocalization’ is the right term to describe this circular interplay.

This interplay is often mediated at the level of transnational regions. The European Union (EU), the North American Free Trade Agreement (NAFTA), the Mercado Comun del Sur (MERCOSUR), the Association of South East Asian Nations (ASEAN), or the Common Market for Eastern and Southern Africa (COMESA), amongst others, are such transnational

regions. There is rich literature on the EU as a striking exemplar of the complex interplays between the global or transnational and multiple nationals/locals (Héritier 1996, 2001; Hooge and Marks 2001; Sabel and Zeitlin 2010). We know much less, though, about the ways in which glocal dynamics play out in the context of other transnational regions.

In this chapter, I propose to focus on the transnational region we arguably know the least about—Africa. To further our understanding of glocalization, we urgently need to expand our geographical reach to those parts of the world that have tended to escape scholarly attention. For at least two reasons, Africa represents a highly interesting ground for looking at the dynamics of glocalization. Firstly, the African continent is, on the whole, a rule-taker when it comes to the dynamics of globalization and is rarely or marginally involved in the arenas where transnational rules are negotiated and structured (Djelic and Sahlin-Andersson 2006). As a consequence, global norms and rules tend to be superimposed and to confront as clear external forces many actors on the African continent. Secondly, the local–national remains a fluid reality in Africa. National institutions and states do not have the type of hard historical embeddedness that nation-states and institutions have in countries at the core of the world system (Wallerstein 1979).

The empirical setting, in this chapter, is competition and its regulation. I explore the ways in which, in the case of competition regulation in Africa, the global interacts with different nationals/locals, in particular through the structuring mediation of regional initiatives. The first section provides an exploration of the context and identifies important steps in the transnationalization of competition regulation. The second section focuses on the development of regional initiatives, within the African continent. Finally, in the last section of the chapter, I underscore the complexities of global—national/local interactions and the particular dynamics of glocalization that emerge in this case. The image of the Banyan tree captures quite well, I propose, the nature of the dynamics at work in the case of competition regulation in Africa. With respect to competition regulation, regional initiatives in Africa are strongly shaped and steered by global actors and constitutive myths. Competition regulation in Africa, in other words, is a foreign seed grafted upon emerging regional integration regimes. Those regional initiatives, in turn, become mediators, with a clear focus on diffusion, transplantation, and translation of competition regulation nationally and locally. The idea is that the regional trunk, like the Banyan tree, should progressively send roots down towards the national/local ground.

## **The Context—Competition Regulation and its Transnationalization**

Until the mid-1980s, only a handful of geographic jurisdictions, mostly from the developed West, had a preoccupation for competition regulation and the regulatory tools that went with it. With the exception of the European community, most of those jurisdictions were national ones. Competition regulation was contained within each jurisdiction; there was no framework for cross-border collaboration and only rare opportunities for contact. A few initiatives to elaborate common guidelines—within the GATT in 1944, through the OECD in 1967, and within UNCTAD in 1980—were not associated with implementation mechanisms and hence had scant influence.

### ***Geopolitical Conditions and Globalization***

From the late 1980s, two developments made it urgent to consider antitrust and competition regulation as a cross-jurisdictional issue. Firstly, many national jurisdictions around the world

developed a competition regulation regime. Secondly, the increasing transnational projection of economic activity—often labeled ‘globalization’—created multiple opportunities for friction between different jurisdictions.

From a handful of jurisdictions with competition regimes in 1980, there are more than a hundred today. This striking development is in large part the result of diffusion in the context of rapidly changing geopolitical conditions (Djelic 2005). The second half of the 1980s saw the revival of the European construction effort, boosting activity around antitrust at the community level. Old and recent member states developed or modernized their antitrust regimes to follow evolutions at the European level. At about the same time, the world was struck by the fall of the Berlin Wall. The ‘extension of the West’ was a direct consequence. With respect to antitrust, this triggered a wave of international missionary activity. In the 1990s only, American antitrust authorities organized close to 400 antitrust missions worldwide (Djelic 2005). The European commission was also actively involved, either directly or in a more indirect manner, through UNCTAD. As a consequence, competition authorities were set up and competition laws enacted in many countries around the world.

As Charles James, then Assistant Attorney General, US Antitrust Division (DoJ), liked to put it, ‘We sometimes joke that antitrust has been one of the United States’ most successful exports’ (James 2001). Even though there has been a rapid diffusion process, from two core centers or nodes (the US and the EU), this has not resulted in easy or clear convergence of rules and institutions. The wildfire-like spread of competition regimes has come together with a fair amount of local translation and adaptation. Hence opportunities for friction and contradiction have multiplied in the process. Complexity was only reinforced by the rapid internationalization of economic activity. Globalization and an increasing number of jurisdictions combined to create new challenges for the regulation of competition and its core actors. Risks of inconsistent and/or conflicting decisions became particularly salient. By the mid-1990s, it was clear that the antitrust world was facing a problem more acute every day. Antitrust was ‘going global’ and it appeared necessary, in that context, to create the conditions for better coordination of existing regimes and jurisdictions.

### ***Different Routes to Cross-jurisdiction Coordination***

A first easy strategy was to negotiate bilateral agreements as a forum to ensure reciprocal understanding. In 1991, the United States and the European Union signed an agreement that provided for cooperation—a reciprocal notification system, exchange of information, synchronization of investigations and coordination of enforcement activities. Similar bilateral agreements were then signed in rapid succession. By the end of the 1990s, a dense web of bilateral agreements connected the most developed authorities in the world. While bilateral agreements had positive results, they also rapidly showed their inherent limitations. They did not prevent conflict and tension between the US and the EU on highly visible cases (Boeing in 1998, GE/Honeywell or Microsoft in 2001). They were also highly insufficient when more than two jurisdictions were involved. As a consequence, multilateral initiatives were given serious consideration.

In 1986, and then again in 1995, the OECD revised its 1967 Recommendations. In parallel, the OECD was promoting international discussion of competition policy matters within its long-standing working group, the Competition Law and Policy Committee (CLP). The CLP worked well as a forum-promoting soft convergence; it did not, however, achieve much with respect to rule-making or dispute settlement. In 1999, the Europeans tried to mobilize the WTO to foster the development of a multilateral framework for competition.

Reactions to the EU proposition were far from enthusiastic, though. Developing countries were generally skeptical, not recognizing what interest could lie for them in a multilateral framework. The US also insisted that any agreement should be set on a voluntary basis and that it would be difficult to frame competition in a way similar to trade (Pons 2002).

UNCTAD also proved an active forum. The United Nations Conference on Trade and Development (UNCTAD) was held for the first time in 1964 in Geneva, with a focus on developing countries and international trade. Rapidly, UNCTAD connected the weak trading position of developing countries in international trade to restrictive practices in developed countries. In 1980, the United Nations adopted as a non-binding resolution the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set) produced by UNCTAD. The Set is a list of recommendations to states, multinational corporations, and regional institutions with the objectives of a) encouraging national states to adopt a competition regime and b) encouraging transnational cooperation in antitrust matters. While the non-binding character of the Set has certainly limited its influence, the role of UNCTAD should not be minimized. In 1995, UNCTAD compiled a 'model law' of competition that could be used to develop national or regional competition regimes. UNCTAD was also very active in technical assistance and capacity-building projects, sending experts to those jurisdictions, mostly in the developing world, that were building competition regimes during the 1990s (UNCTAD 2004).

In parallel to these developments, the US was launching its own initiative in 1997: the International Competition Policy Advisory Committee (ICPAC). After holding extensive public hearings, ICPAC recommended against the development of binding competition rules subject to dispute settlement procedures within the WTO. Instead, it proposed a Global Competition Initiative to foster dialogue not only among antitrust officials but also between officials and broader constituencies with a view to bring about common understandings and a common culture, a greater convergence of laws and principles but also of analyses and implementation (James 2001). The following step was the setting up, in October 2001, of the International Competition Network (ICN). From thirteen founding members, numbers rose quickly, and today, the ICN is close to having a global reach, as 98 jurisdictions are represented that together account for more than 90 percent of world GDP. From its early days, the ICN defined and positioned itself as a transnational 'community of interest' structured around issues of competition and antitrust. The ICN is not only a platform for discussion around topics of common interest. It has also become a 'self-disciplining' transnational community with a clear regulatory objective. More precisely, the ICN wants to drive progressive but real homogenization not only of formal rules, but of practices and understandings as well. The 'community of interest' of the ICN has therefore moved to become a 'community of governance,' and it belongs, as such, to the dense web of contemporary transnational governance activism (Djelic and Sahlin-Andersson 2006; Djelic and Quack 2010; Levi-Faur 2012).

### **Transnational Community-building in Regional Integration Regimes—The Case of Africa**

Soon after its creation, the ICN became the dominant template for the transnational coordination and homogenization of competition regimes. In rapid succession, parallel initiatives emerged at the regional level. The European Competition Network (ECN), for example, was set up in 2004. The European Commission, and in particular DG Comp, envisioned the ECN as a governance tool allowing for greater effectiveness and integration

of competition regulation in Europe. Other initiatives of the same nature emerged in other parts of the world; I focus here on developments in Africa. I consider, in particular, three community-building projects on the African continent—one within the boundaries of the East African Community (EAC), one within the boundaries of the Common Market for Eastern and Southern Africa (COMESA), and the recent and more inclusive African Competition Forum (ACF).

### ***Competition in the East African Community***

The East African Community (EAC) is an intergovernmental organization that brings together five East African countries—Burundi, Kenya, Rwanda, Tanzania, and Uganda. Originally created in 1967, it was dissolved in 1977. It was formally revived in 2000, and Article 75(1) of the EAC Treaty identified competition as one of the priority targets. The protocol setting up a customs union and planning for an East African Competition policy was finally signed in 2004 and took effect one year later. In 2006, an East African Competition Act was enacted that provided for the creation of an East African Competition Authority (EAC 2006). As defined in the 2006 Act, the East African Competition Authority shall have five commissioners, one from each member state. It shall have the power to

collect information, to investigate and compel the provision of evidence, to hold hearings, to issue legally binding decisions, to impose sanctions and remedies, to refer matters to court for adjudication, to develop appropriate procedures for advocacy, to pursue a research program.

(EAC 2006; Bonge 2010)

The Act identifies prohibited practices—cartels of all kinds—which are clearly associated with punitive provisions (Bonge 2010). Dominance in itself is not illegal; only when a firm abuses its dominant position does it have to incur penalties (predatory pricing, denying market access, use of dominance in one market to enter another, etc.). The EAC Authority will have the power to scrutinize all proposed mergers and acquisitions with cross-border effects. The Act also limits, in theory, the powers of the EAC partner states to unilaterally impose subsidies (Bonge 2010).

### ***Competition within COMESA***

The Common Market for Eastern and Southern Africa (COMESA) was established in 1994. With 19 country members, it represents a total population of close to 400 million. Except for Tanzania, all member countries of the EAC are also members of COMESA. Article 55(1) of the COMESA Treaty dealt with competition in a manner that committed member states:

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

(COMESA 1994)

The Treaty, however, did not say much about how members should go about implementing this. It simply indicated that ‘the Council shall make regulations to regulate competition within the Member States’ (COMESA 1994). Those regulations were finally produced in 2004 (COMESA 2004). They are ‘consistent with internationally accepted practices and principles of competition, especially with the “Set” developed by UNCTAD in 1980’ (Njoroge 2008).

In December 2008, the COMESA Competition Commission was finally formally appointed. With a total of nine members, it is chaired by Peter Njoroge, former Commissioner of the Monopolies and Price Commission of Kenya and one of the founding fathers of the EAC Competition regime.

### ***Launching the African Competition Forum***

A third important initiative is the launch of the African Competition Forum (ACF) on 3 March 2011. The ACF pertains of the same philosophy—to structure in Africa, at the regional level, a competition regime compatible if not homogeneous with Western and global standards. The ACF focuses more specifically on the construction of a transnational regional community—an African counterpart to the ICN—that would be creating the conditions of tighter coordination within the African continent.

The creation of an ACF was initially proposed in the UK 2009 White Paper on International Development ‘as a way of taking forward competition policy activities under the British Aid Program’ (Joekes 2011). This early proposal suggested that an ‘African-led Competition Forum’ would help ‘governments in the region identify and address obstacles to fair competition’ (DIFD 2009: 34). Representatives from 23 national and regional competition authorities from across Africa were present at the formal launch of the ACF in Nairobi, Kenya. Also present were representatives from regional and international organizations such as UNCTAD, OECD, the World Bank, the EU, and the South African Development Community (SADC), as well as scholars and experts in the field from across the world. The scoping phase will be co-financed by DIFD and the Canadian International Development Research Center (IDRC). The ACF will have three main objectives: a) to create awareness and build support for competition policy within/outside national governments; b) to strengthen implementation of competition policies by providing advice and building capacity; and c) to encourage regional integration on the matter of competition regulation (Kaira 2010). In its philosophy (a common ‘platform for mobilizing and harnessing experiences and ideas in competition regulation’) and in its structure and governance (a ‘virtual and flat’ organization), the ACF has clearly been modeled on the ICN (Kaira 2010; Kenyatta 2011).

The ACF hence targets community-building at the transnational but regional level with a view to foster coordinated action around competition policy in Africa. As such, the ACF could work in two main directions. It could build up institutional strength in order to have an impact on the structure and development of national competition regimes (Kenyatta 2011). The ACF could also represent a unique opportunity for a group of weak and dispersed actors to gain visibility, power, and influence—this time as an organized collective—within the broader transnational community, delineated in particular by the ICN.

### **Competition in Africa—Complexities in the Global–Local Interface**

Competition and competition regulation have come into Africa only recently. The notion of competition, and the concepts and tools associated with its regulation, have entered this

region as foreign objects coming from the global/transnational galaxy. Interestingly, the regional level emerges as pivotal mediator and glocalization has, in that context, striking features. We explore below the most interesting of those features.

### ***Complex Layers of Transnational Influence***

As suggested above, an important mechanism for the transnational diffusion of competition and its regulation has been a multi-layered process of transnational community-building. A first layer has been woven through the active involvement of a small number of older, powerful, and resourceful agencies (the US, Europe, Germany, the UK, and France). This central kernel has played a significant role in the transnational diffusion of competition and its regulation, whether through bilateral technical assistance or through the steering of multilateral fora (Nicholson 2008). A second layer of transnational community-building has been driven by key international organizations—the OECD and UNCTAD, and less so, the WTO. Those organizations have provided models, resources, training, and networking opportunities. UNCTAD has played a particularly significant role in Africa, contributing to the integration of actors from that region into broader communities. The International Competition Network represents a third layer of transnational community building. Initially driven from and by the United States, the ICN has today a nearly global reach—this is at the same time its strength and weakness. Finally, I identified above a fourth layer of transnational community-building that plays out regionally. In the case of Africa, different initiatives with a regional or sub-regional reach are more or less loosely connected to or in interaction with each other.

This multi-layered process of transnational community-building suggests a complex landscape. However, the different layers are not simply juxtaposed; there is, in fact, a fair amount of interconnectedness across layers. Regional initiatives are strongly helped by activities in and around international organizations and/or by the activism of certain core agencies. On the development and advocacy of antitrust, the ICN works in close cooperation with international organizations such as the WTO, UNCTAD, or the OECD. The ICN also explicitly identifies regional initiatives and organizations as privileged partners in its strategy of international coordination.

### ***A Small Group of Bridging Missionaries***

In parallel to a complex, multi-layered organizational and community landscape, it is interesting to note that a small group of individuals has played a pivotal role. These few ‘bridging missionaries’ have been and remain instrumental as they connect global, regional, and, increasingly, national initiatives in favor of competition and competition regulation. This small group includes active African-based champions of competition. But it also involves a small number of foreign (Western) experts and consultants, working for and through international organizations or national public agencies, namely competition agencies or, increasingly, development agencies, such as the British DIFD.

The small group of African-based champions has deployed considerable energy over the past decade to foster a competition agenda. So far, they have mostly worked at the regional level, keeping in mind, though, the importance of reaching the national level. Their active involvement has taken place in a difficult environment, where competition and competition regulation were essentially strange and alien. I have already mentioned Peter Muchoki Njoroge, a Kenyan lawyer, who became the Chairman of the COMESA

Competition Commission in 2008. Before that, Njoroge had been Commissioner of the Kenyan Monopolies and Price Commission and one of the founding fathers of the EAC Competition regime. George Lipimile, who holds an MSc in Law from Queen Mary's College in London and a PhD in Economics from the University of California, also played an important role. Lipimile has been Executive Director of the Zambian Competition Commission, which he helped to establish, as well as a Special Consultant to many African countries on competition issues. He is now a Senior Advisor to UNCTAD and involved, as such, in technical assistance programs that aim to create or stabilize competition regimes in developing countries. He was instrumental in the development of the COMESA Competition Authority and remains the official contact person (COMESA 2012). Francis Kariuki, who followed Njoroge in 2008 as Commissioner of the Kenyan Monopolies and Price Commission, is another regional champion of competition. He coordinated the review and modernization process of the Kenyan Competition Law that was finalized in 2010. He holds an MSc in Economic Regulation and Competition from City University, London. He actively championed the formation of regional competition communities and became, in March 2011, the first Chairman of the African Competition Forum. Finally, Thulasoni Kaira has also been strongly involved. With an MSc from the Norwegian School of Management and an LLB from the University of Zambia, Kaira started his career as a competition analyst in the Zambian Competition Commission. He then followed in the footsteps of Lipimile as Executive Director of the Commission. In 2010, he became the Executive Secretary of the Botswana Competition Commission. In parallel, he was actively championing the creation of an African Competition Forum (Kaira 2010). While the list is certainly not exhaustive, these four men have been key bridging missionaries, contributing in powerful ways to the development of competition regulation within Africa.

All along, this transnational (but regional) small group had the support of international organizations and of powerful agencies in core countries. This support proved particularly significant during the drafting stages (Njoroge 2006, 2008). In 2001, the Secretariat of the EAC appointed a team of consultants with the objective of constructing a competition regime for the regional community. Njoroge was a member of that team and the EAC Secretariat, he recalls, had asked them to 'take into account the best international practices as a way of ensuring that the EAC region shall eventually develop into an internationally competitive single market and development area' (Njoroge 2006). UNCTAD's model law on competition was the main source of inspiration, but the team also looked at the OECD guidelines and at the European competition regime (Njoroge 2006). All along and in other regional initiatives as well, a small group of foreign experts were involved. Some names come up regularly: Carl Buick, Senior Advisor UNCTAD, John Preston, Senior Advisor Department for International Development (DIFD), UK, and Susan Joekes, from the International Development Research Center (IDRC), Canada. UNCTAD played a pivotal role. It provided models, consultants, and training opportunities, and it sponsored and fostered different fora, in which regional actors could meet and create powerful bonds:

Joint training and attendance at international conferences have allowed most senior staff to develop professional relationships with their corresponding counterparts in the other authorities.

(Njoroge 2008)

UNCTAD also facilitated the development of the Southern and East African Competition Forum (SEACF) as a mechanism for cooperation and dispute settlement between COMESA and the South African Development Community or SADC (Njoroge 2008).

Under the leadership of a small network of strong believers, a regional community has progressively emerged that was from the start deeply embedded within the broader transnational community for competition regulation (Djelic and Quack 2010). This remains, however, a work in progress, as actors themselves acknowledge:

Through such institutional arrangements under UNCTAD, OECD, ICN, SEACF, both formal and informal relationships should continue to be nurtured, which inevitably have helped in sharing information, joint training sessions, which have enhanced each other's knowledge and assisted in evidence collection and analysis.

(Kaira 2009: 2)

### ***Searching for Translation: Between the Global Myth of Competition and the Grail of Development***

A question that comes to mind, when we see the high level of resources and energy spent on the development of competition regulation in Africa, is that of motives and rationale. A functional and utilitarian explanation will not do—competition regulation is not an answer, in Africa, to a well-identified problem. Rather, a garbage-can type of logic seems to be at work—restrictions to competition are becoming a problem in the region only as competition regulation becomes institutionalized (Cohen et al. 1972).

The small group of active missionaries has provided a rationale for its activism. Interestingly, though, the rationale changed during the period explored here (about a decade). What stood out initially was a quest for (global) legitimacy. At a first level, at least, the internationalization of competition regulation, seen from Africa, is a relatively simple 'power and hegemony' story, where solutions and models belonging to a small core become dominant and increasingly taken for granted through broad-based diffusion. The following attempt at justifying competition regulation in Africa, by one of its key champions, clearly illustrates this:

All successful market economies have in place adequate competition regulation mechanisms ... As developing and less developed countries are not expected to reinvent the wheel, I take the position that a successful modern economy requires a robust competition regulation mechanism.

(Njoroge 2004)

Competition regulation and its positive consequences have had, in that period, the status of taken-for-granted and indisputable 'myths' (Meyer and Rowan 1977). The foundation texts of all regional initiatives reflected that (COMESA 2004; EAC 2006). In fact, this 'mythical' dimension remains present today, in spite of the evolution described below. The introductory speech of the Deputy Prime Minister of Kenya, Uhuru Kenyatta, to the launching conference of the African Competition Forum, is a nice illustration. To justify the development of competition regulation on the African continent, Kenyatta mobilized Adam Smith! In his speech, he quoted two sentences from *The Wealth of Nations* sequentially, which, in the original text, are not associated:

It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interest (Smith 1999: 119) ... People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices.

(Smith 1999: I, x, 232).

In reality, those two sentences connote very different things. The ‘benevolence’ sentence is a key foundational moment in *The Wealth of Nations* of the ‘myth’ of self-regulating markets. The second sentence, in fact, destroys that first ‘myth’—competition on the basis of self-interest is not self-sustaining. This second sentence outlines the intellectual foundation for another contemporary ‘myth’—that of ‘competition regulation.’

The importance of these two global myths has remained strong in the rationale of regional champions; adherence to both myths (even though they could arguably be seen as contradicting each other) ensures global legitimacy. But the rapid progress of competition regulation in Africa owes a lot to a consequential change in framing, the ‘story’ of competition regulation being told in time in an entirely different way. Over the past decade, competition regulation has progressively been connected to the idea of development and to the poverty alleviation objectives of the Millennium Development Goals (MDGs):

While some prefer to think of the effects of competition law and policy in terms of efficiency and resource allocation, many senior policymakers in developing countries, aid agencies and leading international organizations, see economic policies through the lens of the Millennium Development Goals.

(Evenett 2006: 3)

This had not always been the case. Evenett goes on to underscore that senior policymakers initially did not promote competition and competition regulation as ‘they did not see a strong link between competition and other indicators of development’ (Evenett 2006: 3). In the words of John Preston from DIFD, ‘to some people, “competition policy” might sound remote from the Millennium Development Goals’ (Preston 2004). The MDGs were set in September 2000, with 2015 being the target year. One year later, the UN Secretary General issued a report entitled ‘Roadmap towards the Implementation of the UN Millennium Declaration.’ The report underscored the importance of ‘good governance,’ ‘sound economies,’ and the ‘lowering of tariffs.’ It made no reference to the role of competition and competition regulation (Evenett 2006: 5).

Here again, UNCTAD was a key change agent. Progressively, throughout the early 2000s, UNCTAD came to weave its long-standing preoccupation for competition regulation with the newly framed MDGs. The official declaration, closing off the 11th Session of UNCTAD in 2004 in Sao Paulo, articulated this redefined approach. This declaration is known as the ‘Sao Paulo consensus’ and is often said to ‘mainstream competition into development policy’ (Evenett 2006: 6). The declaration clearly associated competition and competition regulation with development, and in particular, with the triple objective of alleviating poverty, reducing hunger, and spreading the benefits of new technologies:

The extent to which full economic and social benefits can be derived from FDI is dependent upon, among other things, a vibrant private sector, improved access to international markets, well designed competition law and policy ... Competition

policies best suited to their development needs are important for developing countries in safeguarding against anti-competitive behavior in their domestic markets.

(UNCTAD 2004: 9, 16)

The conclusion that Simon Evenett drew in 2006 from a systematic attempt at empirically showing the direct connection between competition and development, was that, in fact, competition regulation should be much more systematically 'sold' by interested parties as a direct mechanism leading in time to the achievement of the MDGs:

These findings provide a good starting point in making the case for promoting competition to senior policymakers and to the development community in general and for giving more attention to competition policy in national strategies on the MDGs ... With the appropriate expertise and support, in principle, competition law and policy can influence development outcomes but it would seem that, to date, the potential contributions in this regard have not been acknowledged by the broader development community. This may well account for the difficulties faced by competition authorities and their supporters when making their case in developing countries and in certain international institutions and aid agencies.

(Evenett 2006: 11)

This message, strongly relayed by UNCTAD, has now been heard. Arguably, this connection has fueled the rapid expansion of competition regulation in Africa over the past few years. By the end of the decade, development had become the main rationale used to defend the progress of competition regulation in Africa (Qaqaya and Lipimile 2008). In his introduction to the launching Conference of the African Competition Forum, the Deputy Prime Minister of Kenya, Uhuru Kenyatta, made it clear that 'competition' was the solution to the 'key problem of poverty in Africa' (Kenyatta 2011). By the end of the decade, the most active champions of competition regulation in Africa, along with UNCTAD, were development and aid agencies such as IDRC and DIFD. These agencies have internalized skills and competences on competition regulation and they have been producing large quantities of documents all pointing towards the link between competition regulation and development (e.g., Stewart et al. 2007; DIFD 2009). Local laws and texts, regional and national leaders, and the media are all coming to connect competition regulation with development objectives, stabilizing in the process the legitimacy of competition regimes in the region.

### **Conclusion: A Banyan Tree Story—The Challenge of Decoupling**

Banyan trees are surprising and beautiful multi-trunk trees that are found mostly in Asia and Africa. They grow from seeds that germinate in the cracks of a foreign structure—another tree, a wall, or a building. Once anchored in this pre-existing structure, the Banyan tree will grow a central trunk. In parallel, it will develop a multiplicity of associated trunks by sending aerial roots from the top down. When they reach the ground, those roots thicken and become trunks themselves. The numerous trunks of a single Banyan tree are hence interconnected from 'above,' as it were, through the main trunk structure. The result is a complex and often expansive natural 'cathedral' that produces deep shade.

The image of the Banyan tree captures well, I propose, the dynamics of glocalization associated with the current development of competition regulation in Africa. The legal provisions associated with different regional initiatives all look very similar, at least on paper.

They appear, furthermore, to be highly compatible with UNCTAD, OECD, WTO, and even European Union provisions. In light of what was described above, this is, in fact, not surprising. The seeds of competition regulation in Africa are foreign seeds that are grafted upon pre-existing or emerging regional structures. Behind the multiplicity of regional and national initiatives pushing the development of competition regulation within Africa, there is a small and tight network with access to organizational resources. The same individuals are involved and they carry with them the same models and templates produced and diffused by a small number of international organizations. Organizational power and individual activism combine to fuel dynamics on the ground, fostering the development of regional initiatives.

As the regional trunk thickens, the idea is that it will produce aerial roots that should reach down towards the various local/national contexts. There is an explicit rationale or vision that regional competition regimes should/would be spurring (if not forcing), in time, the emergence of national competition regimes (Njoroge 2004). The idea is to start with a regional strategy that should then become a key driver for the development of national competition regimes on the African continent. In time, the aerial roots stemming from the regional trunk should become anchored into the local/national soil and thicken themselves into more solid trunks. Those local/national trunks would then draw their initial sap not from the ground but from the main trunk above—regional initiatives around competition regulation. Once they themselves become stabilized as associated trunks, that is, national competition regimes, they should, in principle, come to play an important role in sustaining and reinforcing the central trunk. Here again, the image of the Banyan tree provides a vivid illustration.

Still, the road towards a regional homogeneous regime in action will not be easy; there are many obstacles (Njoroge 2004). The formal legal provisions, although mainstream, are often weakened by exemptions stemming from political fiat (COMESA 2004; EAC 2006). The implementation of regional regimes and their possible translation into national frameworks are challenging because resources are missing and a competition culture does not exist (Njoroge 2004). Most actors on the ground (whether regional or Western-based) agree that regional regimes will not become fully operational as long as they are not relayed by well-structured national regimes (Bonge 2010). For now, though, the aerial roots of the Banyan tree of competition regulation in Africa remain weak. Many countries involved in regional initiatives still do not have national competition regimes fully in place. In June 2010, the EAC launched a sensitization drive aimed at implementing more systematically the EAC's Competition Act at the national level, in each of its five member countries. By then, only Kenya and Tanzania had operational national regimes. The other three countries were at different stages of preparing or enacting their national regulations (Bonge 2010). The main trunk (transnational regional competition initiatives in Africa) will stay fragile if associated trunks (national competition regimes) do not come to buttress it in time. The local inscription of competition regulation at the national level in Africa remains an important challenge for champions of competition regulation in Africa and elsewhere. If this does not happen, competition regulation in Africa will remain a fragile Banyan trunk with aerial roots that never reach the ground.

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## References

- Bonge, G.M. (2010). Towards EAC competitions law and policy. EABC Briefing Paper, Issue 05/10, August.
- Boyer, R., and Drache, D. (eds). (1996). *States against markets*. London: Routledge.
- Cohen, M., March, J., and Olsen, J.P. (1972). A garbage can model of organizational choice. *Administrative Science Quarterly*, 17(1): 1–25.
- COMESA. (1994). *COMESA Treaty*. Accessed 28 January 2012. [http://about.comesa.int/attachments/comesa\\_treaty\\_en.pdf](http://about.comesa.int/attachments/comesa_treaty_en.pdf).
- COMESA. (2004). *COMESA Competition Regulations*. Accessed 28 January 2011. [http://www.givengain.com/cause\\_data/images/1694/COMESACompetitionRegulation.pdf](http://www.givengain.com/cause_data/images/1694/COMESACompetitionRegulation.pdf).
- COMESA. (2012). *COMESA Competition Commission Website*. Accessed 15 January 2012. <http://www.comesacompetition.org/>.
- DIFD. (2009). Eliminating world poverty: building our common future. *White Paper presented to Parliament by the Secretary of State for International Development*, July.
- Djelic, M.L. (2005). From local legislation to global structuring frame: the story of antitrust. *Global Social Policy*, 5(1): 55–76.
- Djelic, M.L. (2011). From the rule of law to the law of rules. *ISMO*, 41(1): 35–61.
- Djelic, M.L., and Quack, S. (eds). (2010). *Transnational communities*. Cambridge, UK: CUP.
- Djelic, M.L., and Sahlin-Andersson, K. (eds). (2006). *Transnational governance*. Cambridge, UK: CUP.
- EAC. (2006). *Treaty for the Establishment of the East African Community*. Accessed 15 March 2012. <http://www.eacj.org/docs/Treaty-as%20amended.pdf>.
- Evenett, S. (2006). Competition and the Millennium Development Goals: new ‘evidence’ from official sources. Paper commissioned by the Competition and Consumer Policies Branch, UNCTAD. Accessed 15 January 2012. [www.alexandria.unisg.ch/export/DL/28428.pdf](http://www.alexandria.unisg.ch/export/DL/28428.pdf).
- Graz, J.C., and Nölke, A. (2008). *Transnational private governance and its limits*. London: Routledge.
- Held, D., and McGrew, A. (1998). The end of the Old Order? *Review of International Studies*, 24: 219–44.
- Héritier, A. (1996). The accommodation of diversity in European policy-making and its outcomes: regulatory policy as a patchwork. *Journal of European Public Policy*, 3(2): 149–67.
- Héritier, A. (2001). New modes of governance in Europe—policy making without legislating? in A. Héritier (ed.), *Common Goods*. Lanham, MD: Rowman and Littlefield, 85–104.
- Hirst, P., and Thompson, G. (1996). *Globalization in question*. London: Polity Press.
- Hooge, L., and Marks, G. (2001). *Multi-level governance and European integration*. Lanham, MD: Rowman and Littlefield.
- James, C. (2001). International antitrust in the 21st century: cooperation and convergence. Address before the OECD Global Forum on Competition, 17 October, Paris, France.
- Joekes, S. (2011). African Competition Forum—Scoping Phase. Accessed 28 March 2011, [http://publicwebsite.idrc.ca/EN/Regions/Middle\\_East\\_and\\_North\\_Africa/Pages/ProjectsList.aspx](http://publicwebsite.idrc.ca/EN/Regions/Middle_East_and_North_Africa/Pages/ProjectsList.aspx).
- Kaira, T. (2009). The competition authority and economic development: the case of Zambia. Paper presented to the Third Annual Competition Conference and 10th Anniversary of the South African Competition Commission, Pretoria, 3 September. Accessed 15 January 2012, <http://www.docstoc.com/docs/18570307/Speaking-Notes-for-Thula-Kaira-at-the-10th-Anniversary-of-the>
- Kaira, T. (2010). The possibility of establishing an African Competition Forum. Workshop in competition law and policy in African small states, Windhoek, Namibia, 26–27 July.
- Kenyatta, U. (2011). Uhuru Kenyatta launching the African Competition Forum, 3 March. Accessed 23 November 2011. [http://www.youtube.com/watch?v=UX7LtqGA\\_w](http://www.youtube.com/watch?v=UX7LtqGA_w)
- Levi-Faur, D. (ed.) (2012). *The Oxford handbook of governance*. Oxford: OUP.
- Levi-Faur, D., and Jordana, J. (eds). (2005). *The rise of regulatory capitalism*. Annals of the American Academy of Political and Social Science, 598. London: Sage.
- Meyer, J., and Rowan, B. (1977). Institutionalized organizations: formal structure as myth and ceremony. *American Journal of Sociology*, 83(2): 340–63.

- Nicholson, M. (2008). An antitrust law index for empirical analysis of international competition policy. *Journal of Competition Law and Economics*, 4(4): 1009–29.
- Njoroge, P. (2004). 'A vision of competition policy: experience and lessons for developing and developed countries – the case of Kenya'. Working Paper World Bank. Available online: <http://siteresources.worldbank.org/INTCOMPLEGALDB/Resources/VisionOfCompetitionPolicySAConference.pdf> downloaded May 15, 2012.
- Njoroge, P. (2006). Regional cooperation on competition policy and law: the East African Community experience—contribution by Kenya on behalf of the East African Community. *Intergovernmental Group of Experts on Competition Law and Policy*, UNCTAD, Geneva 30 October–2 November. Accessed 5 March 2011. [http://www.unctad.org/sections/wcmu/docs/c2clp\\_ige7p25\\_en.pdf](http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p25_en.pdf).
- Njoroge, P. (2008a). Technical assistance and capacity building. Intergovernmental Group of Experts on Competition and Policy, UNCTAD, Geneva 16–18 July. Accessed 28 March 2011. [http://www.unctad.org/sections/wcmu/docs/c2clp\\_ige9p5COMESA\\_en.pdf](http://www.unctad.org/sections/wcmu/docs/c2clp_ige9p5COMESA_en.pdf).
- Ohmae, K. (1995). *The end of the nation state*. New York: Simon & Schuster
- Pons, J.F. (2002). Is it time for an international agreement on antitrust? Speech at Frauenchiemsee, 3–5. Accessed 15 January 2012. [http://ec.europa.eu/competition/speeches/text/sp2002\\_027\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2002_027_en.pdf).
- Preston, J. (2004). Competition, growth and poverty reduction. Accessed 15 January 2012. [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/ConferencesCompetitionPolicyTanz\\_John+Preston+2.prn.pdf/\\$FILE/Conferences\\_CompetitionPolicyTanz\\_John+Peston+2.prn.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/ConferencesCompetitionPolicyTanz_John+Preston+2.prn.pdf/$FILE/Conferences_CompetitionPolicyTanz_John+Peston+2.prn.pdf).
- Qaqaya, H., and Lipimile, G. (2008). The effects of anti-competitive business practices on developing countries and their development prospects. UNCTAD: UNCTAD/DITC/CLP/2008/2. Accessed 15 January 2012. [http://unctad.org/en/docs/ditclp20082\\_en.pdf](http://unctad.org/en/docs/ditclp20082_en.pdf).
- Sabel, C., and Zeitlin, J. (eds). (2010). *Experimentalist governance in the European Union*. Oxford: OUP.
- Smith, A. (1999 [1776]). *The wealth of nations—Books I–III*. London, New York: Penguin Books.
- Stewart, T., Clarke, J., and Joekes, S. (2007). *Competition law in action: experiences from developing countries*. IDRC, Canada.
- Strange, S. (1996). *The retreat of the state*. Cambridge, UK: CUP.
- Tamm-Hallström, K., and Boström, M. (2010). *Transnational multi-stakeholder standardization*. Cheltenham, UK: Edward Elgar.
- UNCTAD. (2004). Draft Sao Paulo Consensus. 11th Session, Sao Paulo, 11–18 June. Accessed 15 January 2012. [http://www.unctad.org/en/docs/tcl380\\_en.pdf](http://www.unctad.org/en/docs/tcl380_en.pdf).
- Wallerstein, I. (1979). *The capitalist world economy*. Cambridge, UK: CUP.