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MEMORANDUM

TO: ASHOK MENON, ARMANDO RODRIGUEZ

FROM: SAMUEL J. LEVY

SUBJECT: LEGAL ISSUES IN RESPECT OF COMPETITION POILCY IN MOZAMBIQUE, AND COMMENTS ON "COMPETITION POLICY IN MOZAMBIQUE: AN ASSESSMENT WITH RECOMMENDATIONS"

DATE: 03 APRIL 2004

In the Statement of Work regarding specific legal instruments required for the enforcement of competition policy in Mozambique (below, the "ToRs"), you request a report answering a number of specific questions. In addition, in subsequent discussion on the matter, you requested that I enlarge on those questions based on the analysis and recommendations included in Prof. Armando Rodriguez's draft paper entitled "Competition Policy in Mozambique: An Assessment with Recommendations" (below, the "Draft Paper"). This memorandum responds to those questions and that subsequent request.

This memorandum is divided into two sections. After this introduction, Section 1 supplies the answers to the questions posed in the ToRs. Section 2 then discusses the Draft Paper. In that section, I also include some further observations on pursuing a program to develop competition law and the capacity to administer such a program in Mozambique.

Section 1 Specific Questions

The answers to specific questions are set forth below in the order and according the numbering set forth in the Statement of Work. For ease of reference, each answer is preceded by the corresponding specific question (though not the introduction to that question).

DATA & INFORMATION

1. **Gathering Data through the Use of Subpoenas**. Identify how can a competition agency can issue and enforce subpoenas to obtain data, documents and relevant information from: (a) targets of investigations, and (b) parties that may be industry participants but are not necessarily direct targets of an investigation.

In Mozambique, the legal authority of an agency of the State, whether of the executive or the judicial branch, to compel the production of information that would otherwise be

privileged and confidential is ordinarily supplied by a specific law or regulation empowering that agency to compel production for certain purposes and under certain limited circumstances. For example, in the context of labor law, in pursuit of the enforcement of labor legislation, the Labor Inspectorate is empowered to inspect the books and records of employers and to take copies of relevant information.[1] Failure to grant access or information on the spot is a criminal offense.[2] In the context of the corporate law, on application by a shareholder holding not less than 20% of the shares of a limited liability company, a court may conduct a judicial inspection of such company's books and records.[3]

Thus, to the extent it is given statutory authority to do so, with respect to targets of investigation, it is both possible and consistent with Mozambican practice for a competition agency to have the authority to compel the production of data, documents and relevant information for certain purposes and under certain limited circumstances. Such a statutory approach is also consistent with Mozambican law in other contexts.

The conclusion set forth above becomes more tenuous when applied to parties that are industry participants but that are not necessarily the direct targets of an investigation. It is certainly possible for a statute to empower the agency to compel production of that information. There is a clear basis in the Constitution for the State to regulate commerce, and little evident constitutional basis to preclude the State from exercising a compelling state interest to obtain such information. Nevertheless, such a statute would be a relative innovation in Mozambique, and would likely provoke considerable opposition from the private sector, where firms generally evidence a reflexive aversion to disclosing information about themselves to anyone, let alone an agency of government.

One statutory means to these ends is through the licensing authority of the State. The decrees that govern commercial and industrial licensing in Mozambique could be modified to give the oversight agency (presumably the Ministry of Industry and Trade) power to compel the production of relevant information as a condition of the license. The same principle could be imported into the licensing legislation applicable to firms that are not under the direct supervision of the Ministry of Industry and Trade. As a matter of timing, however, the industrial licensing decree has just been amended, after a considerable delay, and the amendment of the commercial licensing decree is reportedly impending. We believe that the appetite in the Government to revisit these instruments in the near term is quite limited, and that these otherwise convenient routes may therefore not be readily available.

2. **Protecting Confidentiality**. Does the existing institutional framework provide sufficient protections to overcome the private sector's distrust over the treatment of proprietary commercial or research information and data?

   Would a law have to adopt new confidentiality guarantees?

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[1] See Decree 32/89 of 8 November, Article 4, paragraph 1.
[2] Ibid., paragraph 2.
[3] See Commercial Code, Article 149. The same principle applies in respect of a limited liability quota company. See Quota Companies Law, Article 46.

As implied in the answer to the foregoing question, the existing institutional framework for protecting firm's propriety commercial and research information and data is composed of weak constitutional guarantees qualified by broad if not irresistible general commerce powers and contextually specific powers to compel the production of information. In some limited contexts, the law gives certain parties some statutory right to confidentiality. One such context is financial institutions law, in which banking clients have the right to have their account information kept confidential from third parties.[4] But even then, the rights in question are those of the clients as against the bank, not of the bank itself. Moreover, these rights are in any case trumped by the bank's duty to disclose certain information about clients to the Government on demand: to Bank of Mozambique (the Central Bank) in the exercise of its powers, as otherwise required under the Penal Code of Penal Procedure Code, and to other Government agencies as required in any specific law.[5]

In practice, as distinct from at law, the distrust of private sector firms that their propriety commercial and research information and data would be treated confidentially by state agencies is well founded. In our experience, there is little awareness and, perhaps, less regard among the employees of government agencies or, for that matter, banks, for the proprietary interest in information supplied by private sector firms. Indeed, we are familiar with a number of instances in which officials of state agencies and bank employees in Mozambique have quite casually shared information that was privileged, in some cases in direct breach of their confidentiality obligations.

A competition law in Mozambique would certainly need to include explicit confidentiality guarantees and ought to include sanctions for the violation thereof. But practically speaking, it is doubtful that such guaranties would be sufficient to allay the concerns of private sector firms that their proprietary information would be treated with due regard.

THE NEED FOR A SPECIALIZED TRIBUNAL

1. To what extent would a Competition Agency's decisions have any precedential value, albeit informal? To what extent would Court decisions on Competition cases have precedential value? What do these limitations imply? Do they oblige the Competition Agency to retry every case every time? Do they imply that the agency must always shoulder comparable levels of proof every time?

The administrative decisions of a Competition Agency would not be binding on the agency as precedent, but would generate doctrine that, if published, would serve as guidance to the market generally and to the commissioners themselves. The agency would also likely seek to avoid charges of unequal application of the law, a circumstance that will also impel the commission to decide similar cases similarly. Court decisions would be similarly characterized.

To the extent the goal of the Competition Agency is to maximize the imposition of administrative sanctions for violations of competition law, it will have to process as many cases as there are instances of violations and parties involved and, to the extent its rulings

[4] See Law 15/99 of 1 November, Articles 48-50.
[5] Law 15/99 of 1 November, Article 49.

are appealed, defend them in court. But to the extent education, as distinct from the multiplication of sanctions, is the goal of the agency, concern about the workload of administrative hearings need not be foremost in planning. General education, plus a few strategically chosen and widely publicized administrative sanctions with attendant deterrent effects, will further its purposes better than lots of fines and the related litigation.

The level of proof required in respect of administrative hearings will likely be provided in the law and would have to be uniformly applied.

2. On the positive side, there are some advantages gleaned from the lack of binding precedents. If the agency errs by challenging a beneficial practice, the benefits may not necessarily be lost for good. Contrary to the general rule in common law countries, neither the competition agency nor the courts are bound by applicable precedent. How binding would competition agencies internal decisions be on the Competition Agency/Tribunal itself?

Please see the answer to the preceding question.

3. Can a commission/agency exist independently and be properly funded? What are some possibilities for launching such a commission/agency?

In Mozambican law, administrative bodies can have varying degrees of independence. At one end of the spectrum is a unit of a Ministry conceived and organized to execute a task squarely set forth in powers attributed to that ministry. Such a unit is created by operation of a simple ministerial order and is in all respect entirely subordinate to the Ministry. Examples are technical units within the different ministries created to carry out specific tasks.

Further along the spectrum is an agency created to carry out a task related to but distinct from the specific objectives attributed to a ministry. Such an agency may have distinct legal personality and either administrative or administrative and financial autonomy.[6] It will often be supervised (*tutelada*) by the relevant Ministry; in practice, there will be pretty strict limits on its autonomy of action in both policy-making and execution. An example is the national telecommunications regulator, the *Instituto Nacional de Comunicações de Moçambique* (INCM), which is supervised by the Ministry of Transport and Communications.

Still further along the spectrum are agencies that are answerable not to individual ministries but to interministerial commissions composed for particular purposes. In most cases the Prime Minister is the Chair of an interministerial commission, and the head of such an agency will in practice take instruction from her. Most such agencies are conceived to address questions that are beyond the scope of competence of any single ministry and that, in theory, may eventually no longer be required. Examples of

[6] However, to have both forms of autonomy, an agency would have to meet the high standards set forth in the public finance system legislation, including generating two-thirds of its revenues through its own activities. See Law nº 9/2002 of 12 February, Article 5 and Decree nº 17/2002 of 27 July, Articles 15-18.

such matters are legal reform and public sector reform, both of which are handled under the aegis of interministerial committees.

As may be seen from the foregoing examples, independence is relative. The members of the agency will always be answerable to and serve at the pleasure of the relevant supervising agency of Government.

Some agencies will receive their budget allocations from the Ministry to which they are subordinated, while others may have line items in the national budget. Even in the latter case, budgeted amounts can be and often are withheld, sometime as a means of influencing the conduct of the agencies. To the extent a donor is interested in contributing funding to an agency, it can do so either indirectly through project support, under an agreement with the relevant ministry (although technically the Ministry of Foreign Affairs and Cooperation is supposed to be involved), or through budget support negotiated under an agreement with the relevant line ministry and the Ministry of Plan and Finance.

4. Is it possible to embed concepts such as a rule of reason concept within existing Mozambican jurisprudence? What would have to be proposed within a law to enable this ex ante balancing within the law? Would per se prohibitions provide a more effective administration of the law?

By "rule of reason" we understand a weighing exercise in which the trier of fact considers the history of the alleged trade restraint, the harm perceived to exist, the reason to apply a particular remedy and the goal of doing so.[7] While the specific tests that are the elements of the rule of reason are term not part of Mozambican jurisprudence, it is common that criteria of decision embedded in much Mozambican legislation vests ample (many would say excessive) discretion in the relevant decision-making authority (often, the relevant Minister). That said, the relevant rule of decision is usually expressed in the operative legislation.

In general, because the risk of misapplication or abuse of discretion is considerable (whether by commission or omission), and because the educative value of clear, bright-line rules of decision is very high, per se prohibitions would likely be more effective than a rule of reason.

5. Is it possible that the competition law be managed via private alternative dispute resolution (ADR) mechanisms? What is the existing state of ADR mechanisms in Mozambique?

It is difficult to see how competition law questions can be managed using alternative dispute resolution mechanisms in Mozambique. The effectiveness of arbitration depends fundamentally on the consent of the parties to the jurisdiction. The posture in which most claims of anti-competitive conduct are likely to arise is not one in which the party whose conduct is challenged is likely to have previously consented to jurisdiction. And there is a sound argument that if, for its part (subject to limited exceptions) the State

[7] For a full definition of the "rule of reason," see U.S. v. National Soc. of Professional Engineers, D.C.D.C., 404 F.Supp. 457, 463.

cannot consent to the jurisdiction of an arbitral tribunal in respect of administrative contracts, still less may it consent in respect of a dispute that is a matter of law enforcement.

Indeed, even the most avid advocates of ADR in Mozambique[8], should take a long pause before embracing the idea that private persons should be empowered to rule on matters of public policy that may at times require a subtle balancing of competing public goods. The fact that a particular government may be poorly equipped technically to make the judgments in question does not justify its substitution with private persons.

At most, one might aver that technical experts might be asked to opine on clearly defined questions of fact that might directly affect the outcome of a particular case. Indeed, it would be appropriate to make provision for the purpose in a competition law. But the prospective need for expert testimony on questions of fact does not lead to the conclusion that questions of competition law should be arbitrated.

It bears note too that institutionalized arbitration is only just beginning to take root in Mozambique, and would need more time to prepare for the administrative challenges of handling competition law questions.

6. *Recursos* are mechanisms within Mozambican law that enable private citizens to challenge the constitutionality of government actions, rules, statutes and laws. What are these *recursos*, how could they limit the effectiveness of the agency and how can (if it can) a law immunize the agency from the *recursos*? Would that be wise?

As suggested in the question, *recursos* (lit., appeals) can in certain circumstance be used by citizens to appeal administrative actions after an initial administrative appeal (that is, an appeal lodged with the institution that took the decision the citizen seeks to overturn) has been turned down. While the existence of such appeals may be interpreted to frustrate the will and judgment of the executive (in the present case, the projected competition agency), in fact such appeals are an essential guarantor of due process. It is very doubtful that a limitation on such appeals would be held effectively to oust the courts of their jurisdiction, and it would be inadvisable to attempt to do so in any draft competition legislation. The principle at stake – judicial review of executive action – is of far greater importance than the Executive's interest in timely enforcing competition policy.

Section 2 Comments on the Draft Paper

The main conclusions in the report are well founded. They bespeak a realistic view of the institutional and human constraints of Mozambique, including a general lack of understanding of the benefits of competition, no significant tradition of marketplace competition and the need for investment in the people who would eventually administer national competition policy. The main recommendations of the report are correspondingly modest. They are, in summary:

[8] I count myself among them.

- Create a technical unit in the Ministry of Industry and Trade as an embryo of a future competition authority (the "Technical Unit"). It would be composed of some of the participants (lawyers and economists) who attended the policy competition workshops given last year.

- The Technical Unit would at the start continue the public debate about competition policy. In the course thereof it would build knowledge about and a constituency for competition law. This role could be labeled as "competition advocacy." The members of the Technical Unit would learn as they go, with some continuing education on the subject.

- The Technical Unit would also produce a draft competition law.

- The draft competition law should provide a per se prohibition against horizontal price fixing. Enforcing that prohibition would be, at the start, the limit of the competition agency's enforcement role.

- Because the primary competition problem in Mozambique today is non-tariff barriers and other Government driven regulatory burdens, the competition law should empower the competition agency to review any proposed bill or statute within the government for its anti-competitive effects.

- The competition agency should be independent so as to avoid regulatory capture.

- The competition agency, once it is created, should only gradually expand its enforcement mission beyond the prohibition against horizontal price fixing.

Taken together, and assuming that something must be done in respect of competition policy in Mozambique, the foregoing recommendations are suitably modest and calculated to give some benefit while minimizing the dangers of substantial harm. Of course, as the foregoing statement suggests, the recommendations are founded on the assumption that something must be done. This may be so for a variety of reasons, including a USAID policy decision to do something in respect of competition policy in Mozambique, or an awareness that if USAID does nothing, and does not preempt the field, the European Union or some other donor with a far more muscular and interventionist approach to competition policy may succeed in convincing Mozambique to follow its proposed model. But if there is no compelling reason to do something, then doing nothing is a better approach. It's cheaper, too.

Assuming, however, that something must be done, below are some observations on the suggestions in the Draft Report.

Implicit in the Draft Report is a conundrum: if the primary competition problem in Mozambique today is non-tariff barriers and other Government driven regulatory burdens, can we reasonably expect that a new agency of government – and one that starts life in a deeply subordinate position – could really have or come to have the intellectual authority or political weight necessary to take on the many other agencies preserving or inventing barriers and burdens? In Mozambique, the Technical Unit for

Public Sector Reform (UTRESP), an interministerial committee answerable to the Prime Minister, and with funds to spend on ministerial reform, has been in operation for some four years, but seems to have had only very limited effect on how Government business is conducted. The interministerial committee on the removal of administrative barriers exists, and has had, nominally at least, a reform roadmap before it, but progress in implementing the recommendations in the roadmap has been very slow. If interministerial committees seem to have accomplished only little in these regards, it is questionable that a subordinate agency of the Ministry of Industry and Trade, even if it metamorphoses into a colorful independent agency, will accomplish much more.

But notwithstanding lowered sights, competition policy – including advocacy vis-à-vis other Government agencies – may still be worth pursuing. If so, the Government should not be tasked, or trusted, to do it alone: after all, if competition law teaches us anything, it is that monopolies are to be avoided. Hence the importance of private causes of action for violations of competition law (understood here as limited to the prohibition on horizontal price fixing). Private causes of action are treated ambivalently in the Draft Report, but they are a means to multiply the likelihood that the competition law is actually given effect. Preserving the possibility of private causes of action also diversifies against the risk of regulatory capture discussed in the Draft Report.

Contrary to an affirmation in the discussion thereof, there is precedent for private causes of action for even attenuated harms under Mozambican law, most notably in the context of the Environmental Law. If the draft *Lei de Acção Popular* (roughly, the Class Action Law) being considered at the current session of Parliament passes, then the principle of private causes of action for diffuse public harms will be firmly entrenched in the national legal framework.

The mix of initial tasks proposed for the Technical Unit is a sound one. Competition advocacy is an extremely important function in an environment with no significant market tradition. Starting with advocacy will also hone the technical and rhetorical skills, help entrench the convictions of the staff and better prepare the unit for its future role as an independent agency.

For the purpose, it must be said, the prospective staff will require considerable technical assistance, good salaries (if they are not to bolt at the first lucrative offer they receive) and some assistance in kind. If USAID is willing to fund such a Technical Unit for some period of years, it may be worth starting it up. If it is willing to make only a tentative financial commitment, it might be better not to start. The Draft Report notes that "[f]ree entry of products into Mozambique will ensure price and quality competition remain." [9] If that is so, USAID's policy goals might be better by concentrating attention on its already existing efforts to promote the reduction of non-tariff barriers to trade, than to start a new line of programs seeking similar results through less direct means.

The Draft Report's recommendations on the limited scope of enforcement actions are also on target, for the reasons cited.[10] A per se prohibition on horizontal price fixing is a simple, bright-line rule that is easy (for both the regulator and the public) to understand

[9] Draft Report, p. 17.
[10] See Draft Report, p. 40.

and not costly to administer. In any event, a competition law that identified no sanctionable conduct would be merely hortatory.

A word on the independence of the Technical Unit and its successor, the competition agency is in order. The risk of regulatory capture – indeed, of *ideological* capture – by forces hostile to genuinely free competition (including, obviously, the reduction of barriers to foreign products and market entrants) is substantial. To help avoid regulatory capture, it would worthwhile including a number of members of private sector associations on the board of the competition agency.

The risk of regulatory capture is aggravated by widespread corrupt practice, a problem only glanced on the Draft Report. These risks underscore the importance of able and present technical assistance not only as a source of professional training and information but also as a mitigator of such risks.

Finally, I note that, while drafting a competition law should be a task of the Technical Unit, it should not be that unit's first task. The unit should first store up some knowledge and experience before attempting to prepare such an eminently practical legal instrument. If among the Technical Unit's main purposes is public education on competition questions, it must first educate itself, both formally and practically, to perform both that role and others that should follow.

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This memorandum has supplied answers to specific questions posed in the ToRs and made some suggestions in respect of the Draft Paper, as well as some further observations on pursuing a program to develop competition law and the capacity to administer it in Mozambique. I hope you have found it helpful. Please feel free to contact us with any questions or comments you may have.

SJL