

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

The Southern African Custom Union (SACU)
Regional Cooperation Framework on
Competition Policy and Unfair Trade Practices



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A report prepared for UNCTAD at the request of the
SACU Member States

The report was prepared by:

Dr. James Mathis
Department of International Law
University of Amsterdam
J.H.Mathis@uva.nl



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NOTE

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Summary

This report provides an in-depth analysis of the legal provisions of the SACU agreement of 2002 dealing with regional cooperation on competition policy and cross-border unfair trade practices: Articles 40 and 41 of the SACU agreement among the five Member States (Botswana, Lesotho, Namibia, South Africa and Swaziland).

Article 40 and 41 of the treaty provides basis for national and community action to deal with private anti-competitive and unfair trade practices. However, the SACU treaty does not provide for a common and binding SACU Competition Law. The emphasis of the treaty provisions is on the role of member states and cooperation among the members for effective application of National Competition Laws. The report gives a legal and economic interpretation of the relevant provisions and outlines two options for cooperation on regional competition policy and in dealing with cross-border unfair trade practices, including the institutional and regulatory framework for the application of the competition rules.

SUMMARY

The SACU treaty is a customs union plan providing for free trade in goods and a common external tariff. Free trade in this context means the elimination of tariff duties and quantitative restrictions on importation and exportation.

Common policies provided in the treaty should be interpreted in the context of custom union formation, i.e. to support the free trade objectives for trade in goods.

The common policies provide some basis for action to deal with private practices. In the narrow treaty context, this would at least provide for policies to address private practices that act to restrict importation or exportation as these practices affect trade in goods. The concept of “unfair trade practices” also suggests some broader scope.

The SACU treaty does not provide for a common SACU area competition law. The emphasis of the provisions is upon member state policies and cooperation between the members for effective application of national laws.

The relationship between trade and competition objectives in the SACU treaty is not explicit. The objective of the free-trade treaty is best understood when considered in light of the following relationships:

a) when members agree to take action against private barriers to trade whether or not domestic competition laws are applicable to the particular case (free trade priority);

(b) When members agree to address private barriers that affect trade only to the extent that national competition laws apply to the actual case (competition law priority).

Both relationships can be accommodated by the cumulative application of Articles 40 and 41. These two relationships can also suggest a boundary between the Articles. What does not fall within Article 40 in respect to national competition policies can be covered by Article 41.

Article 40 reflects the agreement of member states to adopt individual competition policies and to cooperate in their enforcement activities. Given the treaty’s narrow trade objectives, the extent of cooperation required to satisfy the SACU agreement might include only those practices that injure competition by restricting importation or exportation.

The SACU Council has the authority to identify and address unfair trade practices by policies and instruments. The role and duties of member states in giving legal effect to these policies is not specified, but the Council is empowered to act in this policy area, as indicated by the treaty provision.

The customs union members have widely divergent territory size, development levels, and size of national firms. Dominance is an issue in the market, suggesting that practices affecting trade may include export restrictions and other cross-border anti-competitive practices.

National competition laws operate on a “territorial” basis. They are capable of addressing anti-competitive practices engaged by foreign actors on the domestic market. They do not address domestic actors accomplishing restrictive practices upon other territories.

Antitrust cooperation in the form of positive comity would allow states with laws to respond to requests from other states for investigation assistance and possibly legal action.

Positive comity is most effective in addressing internal practices that deny market access. A limitation of positive comity is that a state seeking assistance must request it. For the requested party to assist, its own laws must also be in violation. Positive comity does not easily deal with export and other output restrictions that affect the trade of other members.

Notification agreements can extend traditional comity where authorities agree to transmit information when they have reason to believe that the competition laws of another member state may be being violated.

Although SACU treaty Article 40 may not be explicit as to whether members are obligated to adopt competition “laws”, both positive comity and notification cooperation require laws to make competition enforcement effective.

However, in cases when a Member State does not have a law in place, it might still receive notifications of possible violations and consider whether or not those practices can be treated by reference to unfair trade laws, as provided under Article 41 of the treaty.

The practices treated as between Articles 40 and 41 is not a pure division of competence and there is a degree of overlapping. There are unfair practices undertaken as between competitors that may also affect competition.

The scope of Article 41 can accommodate practices harming competitors, as well as practices harming consumers. Common policies and strategies can include providing a listing of agreed practices and an agreement that such practices shall be made actionable in each member state, or providing for a common SACU authority and mechanism, or both.

The adoption of cooperation and notification procedures among SACU members should not cause conflict with the members’ other regional trade agreements and commitments. There can be MFN issues presented where enforcement procedures are maintained more favourably in respect to firms or states on the basis of origin.

A customs union has the capacity to form a distinct legal personality both for its institutions and for its territory in respect of international trade agreements, bilateral and multilateral. The legal personality does not however likely extend to the competition law and policy area.

The SACU members have continuing capacity to engage in bilateral cooperation agreements with third countries. The EC/SA should be viewed in this context as well. To the extent that the EC or another third party, might obtain superior rights regarding cooperation with a SACU member, some efforts to balance these provisions as they affect the SACU trade should be considered. These considerations also apply to possible regional cooperation efforts.

I INTRODUCTION

I.1 The terms of reference

This report was requested by the draft recommendations resulting from the “Workshop to Prepare an Annex Agreement on Restrictive Business Practices to the SACU Agreement, Article 40 and 41”, held by UNCTAD in Mbabane, Swaziland on 11 and 12 March, 2004. The draft recommendations call for the preparation of a report on a framework for regional cooperation among SACU members on these articles of the Agreement. The relevant sections of the draft recommendations are copied here, and form the terms of reference for the following report.

The participants concluded that Articles 40 and 41 of the SACU Agreement provide adequate basis for working out a framework for regional cooperation. The Agreement calls for member states to adopt national competition policies to address anti-competitive and unfair trade practices as well as to cooperate in the enforcement of competition law.

The participants recommend that the Ministry of Trade and Industry, Cooperation and Marketing of Lesotho, prepare with the assistance of an independent consultant a report on a framework for regional cooperation among SACU members.

The report should assess the various options which could be considered for adoption by member states, including but not limited to, establishing a competition network of SACU competition officials, and using existing national expertise and institutions.

The report should also consider the financial implications as well as sources of funding of such cooperation mechanisms. The report should be concluded by the end of June 2004.

I.2 Structure of the report

The purpose of the report is to provide options for the SACU members in developing

cooperation in competition policy matters (Art. 40), as well as common policies or strategies in respect of unfair trading practices (Art. 41). In order to design these possible options, the following points of discussion are raised in order to establish the context for the report and the description of options:

The stated objectives of the SACU Agreement, its legal scope, its institutional framework, and the role of Articles 40 and 41 within the SACU Agreement;

The relation of the common policy provisions to the larger treaty, and the meaning and structure of the two SACU articles within this context;

The market practices of concern as these may occur within the SACU area, the position of the territory members as related to size, development levels, and their respective enforcement capacities, also in relation to the customs union objectives of the members;

The respective sphere of Articles 40 and 41, including the distinct definitions of “competition policies” and for “unfair trade practices”;

The different approaches required by the terms of each separate Article, 40 and 41 as to the roles of the Member States and the SACU institutions; and

For Article 40, the recognized elements of “cooperation” as these are concepts are being applied by practice among other states, as defined by international organization documents, as practiced in bilateral agreements, and as discussed in the academic literature on the subject.

For Article 41, the types of practices that fall under the concept of “unfair trade practices”, as these may relate to both competitors and consumers, and the possible options for common policies and instruments to address them.

II THE SACU AGREEMENT

II.1 The SACU Agreement, Outline and Objectives

The purpose of this section is to review the SACU Agreement in light of the common policies provided for in Part Eight, as well as Articles 40 and 41.

II.1.1 Preamble

The governing treaty is the Southern African Customs Union Agreement¹ as signed by the Heads of State (or representatives of Member States) on the 21 October, 2002. The Agreement consists of a Preamble, Nine Parts, and one Annex. The Preamble recognizes that the predecessor 1969 agreement no longer caters to the needs of the customs union, and indicates that the implementation of the 1969 agreement (was) “hampered by a lack of common policies and common institutions”. The Preamble recognizes the importance of tariffs as instruments of industrial development policy, and expresses the desire of Members, “of determining and applying the same customs tariffs and trade regulations to goods imported from outside the Common Customs Area(.)”

The Preamble further recognizes the different economic development levels of the Member States as well as the need for their integration into the global economy. It takes into account the results of the Uruguay Round negotiations and the obligations of the Member States in their existing regional and bilateral trade arrangements and agreements. The Preamble finally expresses the belief that a dispute settlement mechanism will provide a mutually acceptable solution to problems that may rise between the Member States.

The primary legal objective of the Preamble is the recognition of a “Common Customs Area” and the call for the application of the same customs tariff and trade regulations to third-country goods upon importation to this Area.

II.1.2 Stated objectives

The Stated objectives of the Agreement provided in Article 2 provide additional detail

¹ Between the Governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa, and the Kingdom of Swaziland.

as to the legal objectives of the Agreement and its related activities. All of these can be said to relate in some manner or another to the subject matter of Articles 40 and 41, but for those most directly related to the subjects of competition policy cooperation and the treatment of unfair trade practices, the following are noted as objectives:²

- facilitation of cross-border movement of goods between Member States;
- creation of institutions ensuring equitable trade benefits to Member States;
- promotion of conditions of fair competition in the Common Customs Area;
- increasing of investment opportunities in the Common Customs Area;
- enhancement of economic development, diversification, industrialization and competitiveness of Member States;
- integration of Member States into the global economy by enhanced trade and investment; and
- development of common policies and strategies.

The objectives refer to the Common Customs area and to the circumstances of the Member States. Cross-border trade is to be facilitated as between the Member States for goods, and SACU institutions are to be established to ensure equitable trading benefits amongst Member States. Likewise, Member States are identified as the principal beneficiaries of enhanced economic development, diversification, industrialization and competitiveness, and it is an objective to integrate them into the global economy.

The Common Customs Area (CCA) (and not the Member States) is the point of reference, both as to the promotion of conditions of fair competition to be established in the CCA, and in regard to the objective of enhancing inward investment.

II.1.3 Free movement provisions and exceptions

The more precise legal entity that is created by the SACU Agreement is that of a customs union. Article 3 indicates that there shall be

² Agreement objectives inform the meaning of particular provisions of a treaty, where a term should be determined in accordance with the “ordinary meaning” to be given “in its context” and in light of the “object and purpose” of the treaty. VCLT, Article 31.

established the Southern African Customs Union (SACU). This customs union shall have the status of an international organization with a legal personality (Article 4). The supporting substantive legal provisions are found in Part Five, "Trade Liberalization". Article 18, titled "Free Movement of Domestic Products" states that goods grown, produced or manufactured in the CCA shall be imported to the area of another Member State, free of customs duties and quantitative restrictions, except as provided elsewhere in this Agreement.

For goods originating outside the CCA being imported to one Member State from another, except as otherwise provided in the Agreement, a Member State shall not impose any duties on these goods (Article 19).

These free movement provisions generally accord with the definition of customs unions that is provided in the GATT, Article XXIV, whereby "duties and other restrictive regulations of commerce" shall be eliminated with respect to substantially all of the trade between the members, at least as to those goods originating in the members.

Regulatory aspects of free movement are addressed in Article 28 which states that Member States shall apply product standards in accordance with the contents of the WTO Agreement on Technical Barriers to Trade, and shall further strive to harmonize product standards and technical regulations within the CCA.

The SACU free movement provisions provide for exceptions. The first grouping is a standard listing of legitimate objectives (health of humans, animals, etc...) as found in Article 18, paragraph 2. A more complex set of exceptional provisions are provided in Articles 25 and 26. The first allows import or export prohibitions for "economic, social, cultural or other reasons as may be agreed upon by the Council; provides that the SACU provisions shall not supersede previous enacted laws restricting importation or exportation of goods, but at the same time, indicates that these provisions may not be interpreted to prohibit trade to a Member State "for the purpose of protecting its own industries producing such goods" (Art. 25, paragraph 3).

Article 26 provides for certain special and differential treatment for the protection of infant industries in all Member States, with the exception of South Africa. The provisions provide an eight-year period on behalf of an

established industry for the purpose of levying temporary additional duties on a non-discriminatory basis to other SACU members and external trade.

The external dimension of the customs union is established in Article 31, Trade Relations with Third Parties. Members may maintain existing agreements with third countries, but shall also establish a common negotiating mechanism and shall not enter new agreements or amend existing ones with third states without the consent of other SACU Members. This provision establishes the intent of the SACU to represent itself as a single customs territory for the purposes of trade negotiations. Together with the establishment of a common tariff regime, the second primary requirement of a customs union (on the basis of GATT Article XXIV) is established, that the members apply substantially the same duties and other regulations of commerce to the trade of non-members.

II.1.4 SACU institutions

The legislative function is provided by the Council of Ministers, consisting of at least one Minister from each country, and which is responsible for the overall policy direction and functioning of SACU institutions. This includes the formulation of policy mandates, procedures and guidelines, as well as overseeing "the implementation of the policies of the SACU (SACU Article 8, paragraphs 1, 2, 6).

The Customs Union Commission, composed of officials from Member States, has an executive function in SACU. It is responsible for ensuring the implementation of the decisions of the Council and for implementing of the Agreement. (Article 9, paragraphs 1-3). Where, as in the case of Article 41 (Unfair Trade Practices), the Council shall act upon the advice of the Commission, it may be said that the Commission also has a certain role of initiative in implementing the mandate provided by the Article for common policies.

An additional mechanism of support is provided by Article 12 of the Treaty, which establishes several Technical Liaison Committees to assist the Commission in the designated areas of agriculture, customs, trade and Industry, and transport. By the same Article, the Council has the authority to determine the terms of reference of these committees and to alter them if necessary. The area of trade and industry is broad enough to

encompass questions related to competition and unfair trade practices, if the Council so decides. If not, the Council also has the power to create new technical liaison committees and other institutions, and to determine and alter their terms of reference as well (Article 8, paragraph 9).

II.1.5 Summation for the objectives of the SACU Agreement

These provisions taken together establish a clear and narrow scope for the SACU as the Agreement is dedicated to the formation of a customs union for trade in goods. Since this term is also used in the context of GATT law, for SACU this definition requires the parties to eliminate duties and other restrictive regulations of commerce on substantially all trade originating in the members. In addition, customs union members would apply substantially the same duties and other regulations of commerce to parties who not members of the customs union.³

The Agreement does not establish provisions for the movement of services or service providers, as in the formation of an economic integration agreement according to GATS Article V. It also does not contain provisions for either the free movement of persons or for free movement of capital between the Members. Although the objectives refer to enhancing inward investment in the Common Customs Area, a common area in this sense is not provided as an objective as free movement provisions are not provided for investment or services. Likewise, the CCA itself is not being granted the power to represent Member States in external agreements relating to services, labour movements, or investment.

In light of the articles and objectives on customs union formation, the meaning and scope of common policies provided for in the Agreement should be interpreted in this context as well, suggesting that such policies as they may be undertaken should not (or need not) exceed the scope of the Agreement's own stated objectives.

II.2 Common Policies

The Agreement provides a separate Part dedicated to "common policies", within which there are four Articles dealing with:

- Industrial Development (Article 38);
- Agriculture Policy (Article 39);
- Competition Policy (Article 40); and
- Unfair Trade Practices (Article 41).

There are textual variations unique to each of the Articles and each therefore presents its own approach to dealing with a recognized common policy area. The concept itself of "Common Policies" should be viewed broadly enough to accommodate the differences between the Articles and the different types of actions suggested by each.

The different Articles do not uniformly refer either to the same institutions or provide for Member State responsibility in the same manner. Each Article contains the term "policy", but only one of them uses the term "common policies". It should not be assumed that the Part's title refers to common policies, or that common SACU rules or a superior SACU law is directed to be formed in respect of each policy. The contrary is rather the case, and each Article should be taken up for interpretation in respect to the meaning of its own terms.

If we were to consider a spectrum of possible actions within the concept of "Common Policies" as titled in the Part, and in light of the differing text of each Article in the section, one might identify the Articles from "strongest to weakest" accordingly, in reference to whether a common SACU policy is being required, and/or whether SACU institutions are being engaged for the process.

From this view, the Articles relating to Industrial Development and Unfair Trade Practices emerge as the strongest substantive and institutional provisions in the "Common Policies".

The Article on Industrial Development (Article 38) specifically refers to the creation of common policies. However, these policies are not established by the Council, but rather by the Member States: "Member States agree to develop *common policies and strategies* with respect to industrial development." The Article does not give SACU institutions role to set policies, but it is clearly directing members to develop a common approach with policies and strategies.

The Article for Unfair Trade Practices (Article 41) also refers to policies, but not to *common* policies. However here, "(T)he Council shall, on the advice of the Commission, develop

³ GATT Article XXIV, paragraph 8(a), here paraphrased.

policies and instruments to address unfair trade practices between member States...” This is the only article that provides a designated rule and responsibility for the SACU institutions. It is not clear why the term “common” has been deleted, however it could be that these policies could be SACU-wide policies, as in Article 38, or policies to be adopted individually by Members but according to some common SACU parameters as determined by the Council. What is clearer is that “instruments” to provide for conformity in order to realize the objective are to be developed.

The Article on Competition Policy (Article 40) also refers to policies but without any suggestion that they should be “common policies”, as provided for in both Articles 38, and also without the designated role of the institutions as found in Article 41. In this context the objective of formulating policies falls within the remit of individual Member States as they agreed to *each* have a competition policy. This does not refer to common policies but rather to national policies. While these may be subject to a form of convergence by the process of cooperation between Members States, they are not designated by the Treaty as being legal acts established by the SACU or SACU institutions.

The objective of “commonality” in Articles 39 and 40 is achieved by the process of cooperation rather than by establishing common policies *per se*. Thus, for Agriculture Policy (Article 39), Member States “agree to cooperate...in order to ensure the coordinated development of the sector within the CCA.” A similar expression is used for Competition Policy where, “(M)ember States shall cooperate with each other with respect to the enforcement of competition laws and regulations (Article 40).

These last two articles provide that the approach to common policies is through cooperation between Member States with respect to their own laws, i.e. by not seeking to create any common SACU law nor governance by SACU institutions. These are the cases where the members have laws and need to develop a coordinated approach.

In contrast, the first two Articles do allow for the possibility of creating separate policies at the SACU level, as distinct from the domestic laws of Member States. This may take different possible forms. One would be

superior SACU law, which may be directly applicable to the transactions among individuals within the members, or where the members pass domestic laws reflecting a common text and common set of rights and obligations. A slightly less invasive construction would be where the common policies are a list of objectives or principles, and each member’s law is expected to give these principles a meaningful legal effect in their own domestic legal environment. One can also conceive of a common policy that would simply establish negative or positive parameters on what must be provided by a member state law.

This interpretation suggests that while all four policies are “common policies”, and in accord with the title of Part Eight, different avenues are being pursued to achieve this commonality. A first avenue is the establishment of “area” rules and policies for investment and unfair trade practices, while the second is an active cooperation between national rules and policies for agriculture and competition.

If this interpretation is correct, the provision in Article 40 must then be read in this more restrictive context as it does not require the establishment of an independent customs union area competition law or policy; Member States are furthermore responsible for establishing domestic competition policies, and will further cooperate in respect of the enforcement of *their* separate laws and regulations.

The approach on Article 41 is clearly different. Here it is the Council that must (shall) activate on the advice of the Commission to develop the policies and instruments to deal with unfair trade practices “between the Member States”. Overall, this suggests that these policies and instruments will provide some parameters of behaviour on the part of the Member States. This may either be relieving them of the power to take action (prohibition against retaliatory trade measures) by the substitution of some common SACU rule regime, or as suggested above, that member state laws must be provided which meet the criteria or provide for the instruments as directed and established by the Council.

II.3 The relationship of common policy objectives to SACU objectives

It was suggested above that the common policies provided in the treaty should be interpreted in the context of a custom union

formation, in order to support the free trade objectives for trade in goods. To be more specific in defining this objective, the emphasis in a free trade plan is on the restrictions imposed upon importation and exportation of goods. In addition, a customs union has the extra legal burden of presenting a “unified” legal front in external relations. Internal provisions have to be adequate to maintain external common tariff duties and other regulations of commerce.

It is clear that the common policies provide some basis for Member State or SACU action to deal with private practices. For competition policies, even a narrow treaty interpretation would provide for some policy action to address private practices that are acting to restrict importation or exportation as affecting the trade in goods. This minimum concept can be also broadened a bit by introducing the notion of “distorting” the trade within the customs union, or between the members. For Article 41, the notion of “unfair trade practices” itself also suggests some broader scope of action, but is certainly capable of directing policies dealing with private behaviour in the market. That a treaty objective is stated for promoting fair conditions of fair competition in the area (Article 2) lends support to policies dealing with trade and distortions in the market.

It can also be understood from a reading of Article 40 of the SACU Agreement, that the treaty does not seek to provide for any common SACU area competition law. The emphasis of the provisions is upon the policies and cooperation between Members States for effective application of national laws. A conservative reading of the treaty would suggest that if parties wished to establish a common set of stated principles that would be carried forward to each member’s national law, that this type of expressive activity could be accommodated under the larger notion of “cooperation”. This is particularly the case as any adoption of common stated principles would, in any case, be by consensus.

Since the SACU treaty does not contain a section describing common principles relating to competition policy, it also does not relate the objectives of competition policy to the trade objectives of the agreement.

The objectives of free trade and competition law are often, but not always, complementary. An example of a non-complementary relationship is where a free trade objective of

eliminating a market access restriction takes precedence over the application of national competition law, particularly when no overall injury to competition itself can be discerned.

Trade agreements deal with this relationship in different ways, and the intent of the drafters in establishing the relationship between free trade objectives and competition policy is normally identified in the preamble or “principles” section of a competition policy chapter. For one pertinent example, the EC-SA agreement provides the following in its title on “trade related issues”.

COMPETITION POLICY - Article 35 - Definition

“The following are incompatible with the proper functioning of this Agreement, *in so far as they may affect trade* between the European Community and South Africa:

a) agreements and concerted practices between firms in horizontal relationships, decisions by associations of firms, and agreements between firms in vertical relationships, *which have the effect of substantially preventing or lessening competition in the territory of the Community or of South Africa*, unless the firms can demonstrate that the anti-competitive effects are outweighed by pro-competitive ones; (italics added)

(b) abuse by one or more firms of market power in the territory of the Community or of South Africa as a whole or in a substantial part thereof.”

This paragraph establishes the scope of action to be undertaken by the members to the agreement. They are to address the practices listed which have the “effect of substantially preventing or lessening competition” in either territory (not the common territory to both), in so far “as they may affect trade” between the two parties.

This relationship suggests that if a practice affects trade but does not lessen competition in either market, it does not fall under this obligation to address it. If a provision substantially lessens competition but does not affect trade, it also does not fall under the obligation of this chapter to address the practice.

The “trade affecting” standard is a first precondition without which the parties assume a more general obligation to simply apply competition laws to the types of practices listed. The use of the “affecting-trade” standard relates competition law and policy to the context of the larger agreement, which combines a *trade* agreement with a free *trade* objective.

Although the relationship in the SACU treaty is not made explicit, The stated treaty objectives could be satisfied by referring to either of the following possibilities:

- 1) where members agree to take action against private barriers to trade whether or not domestic competition laws are applicable to the particular case at hand.

Here the elimination of private restrictive barriers to trade is sought to be addressed by the parties in order to secure free trade and to avoid the substitution of private restrictions when government trade barriers are eliminated. The free trade objective is overall the priority policy and establishes the parameters of the common policies that have been introduced into the treaty to make the treaty effective.

- 2) Where members agree to address private barriers that affect trade only to the extent that national competition laws will apply to a case. (competition laws establish the parameter of action).

This relationship views the responsibility of Member States to address private restrictive barriers to trade only in respect to their domestic competition laws. If a private barrier is restricting market access, it may be actionable under the domestic competition law, but only if competition itself is lessened in the market. Not every private barrier has such an impact on the competition in the market.

The manner that the EC/SA Agreement treats this relationship is to impose both affecting trade and affecting competition standards in order to invoke Member State responsibility for addressing anti-competitive practices that affect the trade. In the competition policy context this is a reasonable construction, and in light of the SACU treaty objectives, would also be a reasonable interpretation of the scope of member action contemplated by Article 40. That would be to undertake national competition policies to deal with anti-

competitive practices that would likely affect trade between SACU members, and to cooperate in the enforcement of these laws when trade is being affected.

However, in the same instance, the larger set of practices that do affect trade, but which do not fall under competition policy requirements, can also be considered within the context of the SACU agreement, as according to the first relationship described above. This set of actions may be contemplated as covered by Article 41 which addresses the problem of “unfair trade practices”. This term can be given a broad scope to cover a whole range of practices as they affect competitor relationships and the security of consumers.

Without denying the possibility of addressing this wider range of practices, an initial scope for the Article can also be more narrowly identified within the stated objectives of the SACU agreement. This would suggest that Article 41 at the outset could be interpreted to address those practices and that, while they may not affect competition, they do affect trade as they seek to impose or re-impose barriers to importation or exportation, or possibly, act to distort the conditions of trade within the market.

This construction establishes the respective competence and the point of overlap between both Articles at the outset, and within the larger meaning of “fair competition” within the Common Customs Area (CCA). Those points related to national competition policies which are not covered in Article 40 may be covered in Article 41. At the same time, a matter that falls under Article 41 as affecting trade, may also affect competition and be touched upon by Article 40 as well.

III PRACTICES AND CATEGORIZATION

III.1 SACU workshop presentations

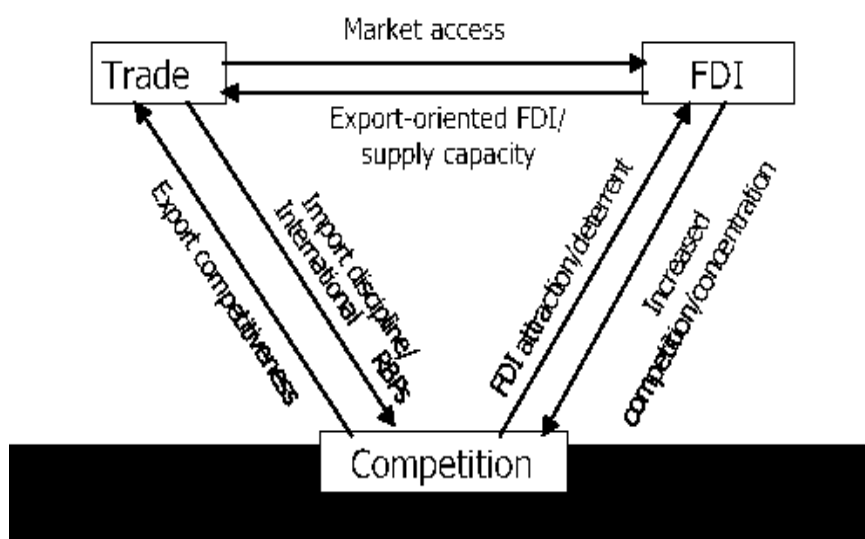
The UNCTAD Secretariat's introductory presentation at the workshop emphasized the development linkages between competition and trade and investment. By addressing both trade in services and foreign direct investment (FDI), a more complete picture emerges. This is composed not only of the linkages between trade and investment of market access and export-oriented FDI, but also where both trade

and FDI have effects upon competition (positive and negative), and competition has certain effects upon the market for trade and FDI.

The linkages between policies suggest that there is a "mix" of policies at stake for the region, and countries within the region. The manner in which each policy area either supports or undermines the other areas touches closely upon a government's objectives for economic development.

The slide below was shown during the workshop.

III.1.1 Figure one: linkages among policies



For trade effects on competition – imports contest the market and enhance rivalry in the market. At the same time, a more open market for trade poses a risk that international restrictive business practices may also take hold in the domestic market.

For competition effects upon trade – a competitive market provides better prices to producers for their inputs and the resulting products are more export competitive. Thus, when an international cartel is setting prices on a single country market, these goods as factored into local production undermine the producers' export position.

For FDI effects on competition – like trade, inward investment allows service providers to challenge the domestic market and stimulate competition. However, FDI can also lead to

concentrations (mergers and acquisitions) which, if not addressed, can raise prices by reducing supply and holds back development.

Competition can affect FDI as the degree of competition in the market can either act as a stimulus or a deterrent for inward investment.

Competition policy is not always the priority policy and priorities among trade and investment policies are often formulated within the structure of a competition law and its stated exemptions. However, in the absence of competition law there is no "lever" for the government to exercise this policy when it is called for. One illustration is drawn from the experience of transition market economics. While most production was state-owned, successful privatization was a priority. The necessity of attracting purchasers affects trade and competition policy in situations where the

government has chosen to maintain or establish trade barriers to ensure that prospective purchasers obtain a favoured position in the market. For competition policy, if a privatisation could be reviewed completely transparently in line with competition criteria, an important sale could be compromised as the competition authority is determined that a pending acquisition injured competition. At the same time, a competition policy review could contribute to designing a sale in such a way as to ensure that the resulting structure of the firm as competitive a result as possible. For developed and developing countries alike, the role played by competition law in respect of industrial policy objectives is a function of the law's application. The use of exclusions and exemptions is the way competition law is made operable in relation to other policy areas. In a regional trade setting, it is desirable to have a degree of commonality among the members regarding the exclusions and exemptions, the scope of their competition laws.

Besides the relationship between the policies, The UNCTAD Secretariat presentation also noted the dynamic possibilities where the right mix of policies can contribute to technology, economies of scale, production efficiency resulting from specialization and efficiency gains from increased competition. These dynamic aspects are actively sought out by governments. As above, competition law is one of the instruments that contributes to this favourable legal environment.

However, as also indicated, actual market and development factors also affect the potential for making gains with policies. Trade liberalization has the potential to work best when there are diversified structures, and this aspect is not present in intra-SACU trade where, for many members, there are few traded sectors. In services, market size and transport linkages facilitate the possibility of establishing dominance and restrictive business practices. Because FDI can also present issues for dominance, competition policy was seen by the UNCTAD Secretariat as a desirable, if not necessary, complementary policy.

III.1.2 SACU limitations as to integrated policies

From a legal perspective, the SACU treaty imposes certain limitations on formulating this more integrated view into regional law or policy. As outlined above, while the treaty poses objectives for enhancing investment in

the SACU area, it does not seek to establish free movement of services or investment. It is possible that some aspects of investment policy cooperation, notably in Article 38 on Industrial Development, can be found in some of the SACU common policies. Member State cooperation here could be seen to include the role of governments in promoting FDI as well as treating subsidization, and possibly, distorting "race to the bottom" strategies in competing for investment. These practices do have implications for trade and competition in the market and probably can be treated by this Article. At the same time, however, it is also clear that the SACU reserves some not-insignificant policy space for members to pursue their own development strategies, notably the trade exceptions in Article 25, and provisions for the infant industry protection in Article 26.

Thus, while a more integrated view among policies and movements may allow for a more dynamic view of regional economic development, the SACU Treaty is not reaching out so far as to call for the construction of such an integrated framework. The SACU is not an "internal market" plan. The focus is placed upon trade in goods and the competition law and policy provisions that are possible should also relate to practices that reflect SACU's defined scope. However, there are also practices in the trade of services, e.g. distribution, that have impacts on trade in goods, and these could be the subject of treatment in the SACU context even though the agreement does not mandate provisions for free movement or open market access in services trade.

To view some practices that relate to this more limited trade focus of the agreement, the UNCTAD Secretariat provided a listing of anti-competitive practices and their effects upon trade. These categories were organized according to horizontal and vertical practices.

Horizontal practices include:

- Market allocation;
- Refusal to deal;
- Price fixing.

Vertical practices include:

- Differential pricing;
- Resale price;
- Tied selling;
- Predatory pricing;
- Transfer pricing;

Exclusive deals.

The trade effects of these practices include::

- Export prohibition;
- Excessive pricing for imports;
- Low pricing for exports;
- Reduced output;
- Profit squeezing;
- Reduced consumer choices;
- Predatory pricing for imports; and
- Excessive pricing resulting in remittance evasion.

While not exhaustive, some of these effects do imitate government barriers to trade, notably export prohibition, excessive or low pricing on imports, reduced output and predatory pricing. As those barriers in the form of governmental controls are eliminated, these practices, if privately established, would tend to undermine the trade objectives of the SACU agreement.⁴ Regional integration may provide significant welfare gains, but as argued during the presentation “the need still exists for complementary regulatory and competition policies to ensure that the predicted benefits are not impaired by private anti-competitive practices.”⁵

III.2 Practices raised during workshop discussions

One workshop session provided an opportunity for participants to describe the practices of concern in the SACU region or particular member countries. Most attention appeared to be directed to the problems of domestic firms attempting to compete in their own market against larger South Africa (SA) firms. For one Member State, this basket of concerns included assertions of high market concentrations of single firms, and that local firms found it difficult to access supply chains in their own home markets, questions of refusal to deal (to supply or purchase), dumping (below normal pricing), and investment affected by restrictive business practices. Another Member State made the analogy that while all parties were present in the theatre, all the good seats in the

⁴ Several of the other practices listed are trade-related, but may be considered more as practices affecting competition itself (reduced consumer choices) or competitors (profit squeezing).

⁵ UNCTAD Secretariat, “Recent trends in trade and investment”, SACU workshop presentation, 11 March 2004, Swaziland.

cinema were already being occupied. This raised the issue of liberalization as between unequal partners, and noting that South African enterprise maintained significant shares (dominant) in a number of production sectors. An additional example was suggested to offer terms of finance to purchasers by foreign firms that could not possibly be matched by domestic firms. For another Member State, the effects of mergers was noted as important. The example given was for the banking sector where two SA firms operate in the market (there are no domestic players). While the SA competition authority had blocked that merger, in the absence of any action, there would only have been a single player left in the Member State market. Finally, another member referred to the problem of exclusive rights, whereby a dominant firm could choose a single distributor in a Member State.

All Member States indicated that their laws, if they had them, suffered from implementation problems related capacity considerations, the lack of provisions to attend to the practices, and the issue of competing resources.

Larger SACU members also experienced some of the problems of the smaller Member States as its domestic market is somewhat characterized by dominant firms. Most major complaints were dealing with monopolies, together with the problems faced by new entrants, and that while this Member State has a functioning authority, firm anti-competitive activity can outpace authority resources. Although cartel actions had not been pre-eminent, more activities related to cartels were also emerging. This member had been active in pursuing foreign export cartels, e.g. the cases of US soda ash and motor vehicles. The member noted that it also maintains relationships with the other regional players and had been receptive to inquiries from them.

However, where a practice did not affect competition within its own market, the solution was not to be found in its domestic competition law, but rather by members all having and implementing their own laws, and then operating them on the doctrine of effects in relation to their own territories. This would seem to be a precondition to establishing better forms of cooperation. Finally, a number of practices did not fall under the scope of the

competition laws of individual members, and this includes predatory dumping.⁶

The relationship between responsive dominant positions and regional economic integration has been raised in the literature. Bilal and Olarreaga consider that, “the topsy-turvy principle of implicit collusion argues that anything that makes a market more competitive (as trade liberalisation) may actually result in more collusive behaviour by firms. The idea is that as the market becomes more competitive, firms will try to enter into strategic agreements to keep their profit level at a sufficiently high level. There is some evidence in the EU, NAFTA and MERCOSUR that such a phenomenon has occurred during the integration process (see Hodara, 1992 for example)”.

“... In particular, in the case of deep forms of regional integration such as customs unions and common markets, the need for a common competition policy approach is stronger.”⁷

⁶ It can be presumed that this practice would not fall under the law because its effects are targeted to another jurisdiction.

⁷ Bilal, S., Olarreaga, M., *Regionalism, Competition Policy and Abuse of Dominant Position*, European Institute of Public Administration (EIPA), Maastricht, 1998, p. 5. The authors assert that any common policies addressing dominance in a developing country context should, in part, be based upon efficiency considerations in respect to the presence of other market failures.

III.3 Categorization of practices

Most of the cited examples related to dominance and cross-border effects of dominant practices on other markets, either as to domestic competitors and/or consumers, or on the quality of competition itself. Any particular practice may be best treated as an unfair trade practice according to Article 41, while another practice may fall within the terms of Article 40. It is also quite possible that a particular practice may fall under the provisions of both Articles where, for example, an unfair trade practice as between competitors is also injurious to competition. Each separate set of facts needs to be analysed to determine which SACU treaty article it is covered by.

Any attempt at a categorization of practices as they relate to the different SACU provisions must also take account of the relationship between trade laws, competition laws, and unfair trade practice laws themselves. These relationships are viewed in the context of a customs union plan where there is an intent to eliminate tariff duties, and to also disarm member contingent trade laws as a favoured remedial device. At the same time, the inherent territorial limitations of competition laws must be noted in order to appreciate what competition law can and cannot do in supporting a free movement exercise. Where abuse of dominance is a factor in the integration, it also becomes somewhat more clear that cooperation approaches focusing upon market access strategies do not fully address the practices flowing from dominant positions.

III.3.1 Territorial nature of competition laws

“Jurisdiction” is the legal basis upon which a state acts by its laws. It is the power to take action as foreseen by the law. National competition laws operate on the basis of territory jurisdiction. By referring to territory, national competition laws seek to protect the quality of the competition within the territory itself. The nationality of actors is not the deciding factor, and the modern trend in domestic systems is to allow the reach of a national law to foreign actors when their practices affect a local territory. What is addressed by the laws are those practices, by actors regardless of whether domestic or foreign, that are impeding or restricting competition within the territory of the state.

It is possible in a customs union to draw a broader territory area for the purpose of

competition law enforcement, but this has not been prescribed in the SACU treaty. As above, the provisions of Article 40 focus upon each Member State having a law and then engaging in cooperation for enforcement. This suggests that the point of reference for territory application in the SACU remains the individual states as they are responsible for their individual territories within the customs union.

III.3.2 Affecting competition and affecting trade

“Practices” may affect competition generally within the territory, and competition laws recite the types of practices that have detrimental effects upon competition, *i.e.*, anti-competitive agreements and cartels, abuses of dominant positions, *et al.*

These same anti-competitive practices may also affect trade between Member States by imposing restrictions or charges to trade that have the effects of tariff duties or quantitative restrictions. In these cases there is a strong complementarity between the objective of eliminating trade barriers and the application of national competition laws. However, it is also understood that many of the practices subject to competition laws do not affect external trade with other states, or may not affect trade in goods at all, but other forms of commerce.

Likewise, a number of practices that impose restrictions or charges by private actions also affect trade between the member states. At the same time, these practices may not fall under a domestic competition law where the effects upon trade do not injure competition in the market.

III.3.3 Relationship between trade objectives and competition objectives.

The trade agreement provisions of SACU seek to create the conditions for free trade, specifically by eliminating government created tariff duties and quantitative restrictions. The SACU treaty does not express a prohibition against private practices that are constituted to have the same effect as these government practices. Instead, there is an approach described by common policies for competition law cooperation and action against unfair trade practices.

In all trade agreements referring to competition policies, the issue of interpretation that is raised on the treatment of practices affecting trade, but do not fall within competition law violations, as well as practices that do fall within competition laws, but do not necessarily affect trade. A 2000 study by the International Competition Policy Advisory Committee (ICPAC) highlighted this distinction as, “not all restraints are anti-competitive and not all competition problems that are global in nature are by definition matters of relevance for international trade policy.”⁸

As to the SACU itself, it may be first considered whether the call for cooperation on competition law imposes some additional requirement for members to assume responsibility for trade-affecting practices that do not fall within their own competition laws. This has occurred in other customs union plans where the “affecting trade between the members” standard has been raised as a basis for an independent “area” set of rules. As in the EC, this establishes a separate basis for actions, and this distinct jurisdictional custom union law is also then required to be applied by the courts of each member state. For SACU, it is not apparent that this structure has been raised for consideration, as is evident by Article 40’s limitations and reliance on the laws of individual members, as well as the absence in the agreement of a common area-wide standard for anti-competitive practices.

The overlap between “affecting trade” and “affecting competition” has also been the subject of some extensive discussions. The ICPAC report concluded that, “the intersection of trade and competition policy ...focuses... on anti-competitive or exclusionary restraints on trade and investment that hamper the ability of firms to gain access to or compete in foreign markets.”⁹

However, the separate components that may fall into this intersection should also be considered. Jenny considered that there were two types of international problems at the point of interface between trade and competition. The first (Type 1, anti-competitive practices) are those originating in one country but which have anti-competitive effects in another. This

grouping includes export cartels, transnational mergers, cross-border abuses of dominant positions, and international cartels. The second (Type 2) are those which have a “market foreclosure” effect, including import cartels, restrictive vertical agreements, exclusionary standards and domestic abuses of dominant positions.¹⁰ These are internal practices directed to restricting market access.

From the workshop notations above, SACU members might well search for an approach that is capable of addressing both sets of problems in an equal manner. It may also be the case that dealing squarely with the first category may generate more resonance for the integration process than even the second.

A related consideration is the scope of the national laws actually required. What practices have to be addressed in order to comply with SACU provisions? To the extent that the laws of Member States are “required” to be adopted by each one of them, the question is raised as to whether these laws deal with matters that do not fall within the limited trade objectives of the SACU Treaty? The answer is, probably not. If the SACU common policies are viewed as supporting the objectives of the Treaty in the narrow sense, then a member’s competition law as only applied to practices affecting the sale of goods should be legally sufficient to meet the requirements of SACU cooperation. This is regardless of whether the better economic policy would suggest more broadly constructed competition laws for other purposes.

Third, and not least, are those practices that can affect trade but do not fall within the standards of a competition law. This would be the case when individual competitors or consumers suffer a distinct injury, but competition in the broader sense of the domestic market is not itself injured to such a degree that the law can be successfully invoked and applied. In the SACU, Article 41 appears to be provided to ensure that these practices can also be captured for common action. A narrow reading of the SACU objectives would lead to the conclusion that the scope of the practices that can be captured here would also include those that affect the trade in goods between the Member States. As suggested above, this scope should also include measures dealing with restrictions

⁸ ICPAC, Final Report, p. 210, at www.usdoj.gov/atr/icpac, in Marsden P., “Preliminary Study on Exclusion and Business Practices”, paper available at the SACU workshop, UNCTAD, 2004, p. 10.

⁹ *Ibid.*

¹⁰ Jenny, F., “Globalization, Competition and Trade Policy”, 1999, p. 14, cited in Marsden P. *op. cit.*, p. 11.

upon importation- and exportation-imposed fiscal instruments or quantitative restrictions, and arguably, charges or measures having those same effects.

Overall, the practices considered for treatment would also include those that fall under Article 40 as they affect trade and competition, as well as those that fall within Article 41 as they are categorized as “unfair” and affect trade. An interpretation of the agreement along these lines would provide that the combined purposes of Articles 40 and 41 are to allow for the expansion of trade by making these practices actionable.¹¹

Marsden’s paper was circulated at the workshop when discussing competition and trade practices. His priority listing of exclusionary business practices is as follows:

- Collective refusal to deal/import cartels;
- Abuse of dominance;
- Abuse of intellectual property rights;
- Exclusive purchasing agreements;
- Exclusive supply agreements;
- Standard setting.
- Mergers.¹²

This listing is not constructed in such a manner as to be divided between Jenny’s “Type 1” and “Type 2” categories. It is, however, possible to draw a scheme that takes into account the practices that affect trade by referring to those that affect “export” or “import” behaviour, as well as those possible responses that the different types of domestic laws may play in addressing them.

The following matrix is provided. The left column lists practices in two categories, those raising prices and those lowering prices, both as to actions taken upon exportation and upon importation. The following columns organize the legal responses possible by trade laws, competition laws of both the export and import country, and import country unfair trade practices laws.

¹¹ There are also internal regulatory barriers to trade, not treated here. The SACU Agreement refers this category of practice to WTO covered agreements.

¹² Marsden P. *op cit.*, discussion from pages 37 to 62.

III.3.4 Figure two: trade practices, country responses

Domestic response >>	Trade law response – import or export country response	Competition law response – export country response	Competition law response – import country response	Unfair trading laws, domestic selling laws – import country response
<p>Private practice and country of origin:</p> <p><i>“Restrictive behaviour”</i></p>				
<p><u>Export country origin</u> imposing quotas/ export cartel</p>	No redress by import country trade laws	No territory jurisdiction unless origin country injury	Domestic law has jurisdiction but practices or actors are foreign	Domestic law has jurisdiction for unfair trading but practices or actors are foreign
<p><u>Import country origin</u> imposing quotas / exclusionary practices</p>	Extra-territorial unfair practices claim, (i.e., US. 301)	No redress by export country competition law	Foreign firm may invoke domestic competition law if non-discriminatory	Foreign firm may invoke domestic unfair trade practice law if non-discriminatory
<p><i>Under pricing/ “dumping”</i></p>				
<p><u>Export country origin: predatory pricing</u></p>	Anti-dumping duties, except for prohibition on duties as between customs union members	Jurisdiction possible if vertical restrain or cartel also causes domestic injury	Effects doctrine possible based on predatory pricing. Actors are foreign.	Laws for minimum mark up or prohibiting sales below cost apply to foreign and domestic
<p><u>Export country origin: dumping (non-predatory)</u></p>	Anti-dumping duties, except for custom union prohibition on duties	Jurisdiction possible if vertical restrain or cartel also causes domestic injury	Competition law does not apply if no anti-competitive effects shown	Laws for minimum mark up or prohibiting sales below cost apply to foreign and domestic

III.3.5 “Restrictions” export and import barriers.

To the extent that private firms successfully re-enact these types restraints in order to secure a foreign market or protect their domestic market, the government’s actions in eliminating the use of quantitative restrictions has been undermined. To the extent that “charges” are applied to effect the restrictions, (rather than quantitative restrictions), then government tariff revenue which was not earned as a result of its free trade commitment has also now shifted to benefit restrictive firms rather than private consumers. One of the principal objectives of a customs union plan is to provide supportive policies, in common or in cooperation, in order to act against private restrictions to trade between the members that raise prices or reduce output.

As the figures shows, little response is possible with respect to trade laws, regardless of whether it is the export or import country that operates them. There is a theoretical response possible by an export country’s competition law as applied to an import country’s restrictions. But, but this is an extra-territorial application and controversial as the country can claim that its domestic consumers are being affected by another country’s import barriers.¹³

As to import country competition law responses, domestic law clearly has a jurisdictional power to address export country restrictions, except for the practical and serious difficulties of securing quality information on the actors and their practices, implemented as they are by firms resident in a foreign state. As can be gathered from the section below, the use of positive comity cooperation does not necessarily resolve this problem, though the use of notification may well help.

Domestic competition law can also be invoked on behalf of export country firms that are excluded by import country restrictive practices. Here, national laws are related to anti-competitive practices occurring on local markets. The nationality of the complainant is not relevant to the action as long as the law is applied by national treatment. It would make a

difference however, if that law provided no access for private parties (domestic or foreign) to make a complaint to the authority or tribunal.

To summarize, private restrictions may be applied on importation as well as upon exportation. However, the capacity of a competition law to address importation problems is far more adequate than those practices dealing with export and output restrictions. This follows from the territorial nature of competition laws themselves. In those cases where an internal practice excludes importation, it is possible for a foreign firm to make a domestic complaint under the importation territory law, and the domestic law may act to correct the practice where the infringing firms are within that territory.

As to output restrictions, the export territory where the actors are located does not assert any claim of responsibility for them, since the effects being complained of are located and felt outside its territory. However, there are cases when the use of these restrictions also affects a country’s export market, i.e. by taking action on a market, the export country authority also assisted breaking down the practice. The principal point to consider is that competition laws do not act according to the nationality of the actors, but as to the effects of the practices in respect of the domestic territory.

Domestic unfair trading laws need to be further examined for their capacity to address the problem of foreign actors who either impose restrictions or refuse to supply or deal. Article 41 could approach a treatment for these practices that are formed upon exportation without reference to competition law and policy. Most states maintain common law or codified laws dealing with the concept of “unconscionable” contract terms where there is significant disparity between the bargaining power of the parties concerned. For those situations where a party is not allowed to contract, most jurisdictions recognize a freedom to supply or not supply, and only designate a violation when the refusal to supply results in a substantial injury to competition, i.e. as an abuse of dominance. Generally, as with most laws prescribing injuries to competitors, the clearer trend in developed countries has been to criticize laws that are not connected to injuries to the larger competitive environment, or somehow to the ultimate consumers. This does not, however,

¹³ The United States maintains that this course of action is an unfair trading practice. This has also been suggested to be a reason explaining why some countries enter into cooperation agreements with the US.

exclude the possibility that such laws may find an appropriate basis for application in the context of a developing country.

III.3.6 Under-pricing, dumping and predation

When governments seek to eliminate tariff duties, they also are trying to avoid the re-introduction of tariff duties in the form anti-dumping trade measures as applied against the other regional members. Firms in dominant positions may be more likely to successfully engage in “predatory” dumping, a practice which is covered by competition law as an abuse of a dominant position, and therefore falling within the purview of competition law.¹⁴ However, conditions for successful predation are considered rare in most markets. Other dumping acts include “below normal pricing” or price discrimination/differentiation. They are considered normal competitive behaviour when engaged among competitors within a single domestic market. These practices do not fall within competition laws.

However, in international trade, these private practices, and the similar price undercutting caused by export subsidies undertaken by governments, are formally characterized as “unfair trade practices”. This is because according to GATT law, Article VI, Member States are permitted to suspend MFN treatment obligations in respect of the tariff duty charged, and then impose offsetting trade duties as a remedy against dumped goods, as based upon calculations of dumping and injury margins. There is no question that the injury is sustained to producers rather than to competition in these types of actions. To draw the simple point, what is considered unfair trade across borders is not considered to be very unfair trade within a single national market, unless competition is affected.

Custom union members seek a high degree of internal liberalization and external harmonization. They do not however establish a single internal market. Where customs union members are attempting to establish a common external tariff and external commercial policy, permitting the continuing use of anti-dumping duties as between regional members is a

¹⁴ If dominance is a characteristic of the SACU market, then predatory dumping may also be present. One factor is the external tariff duty rate, since the market must be sealed from potential entrants to effect a predatory monopoly.

seriously destabilizing factor both on the internal and external side. Thus, either the members have to draw on competition policy, or find some other substitute under the guise of unfair trading practices.

The remedy of competition laws on dumping, as a substitute for anti-dumping duties has been applied successfully in only a few regional trade agreements, e.g. EC, EEA and Anczerta. From the perspective of the EC, a complete substitution requires harmonization of all competition laws and absolute guarantees that there will be a uniform application of those laws. In the EC, the theory for substitution of a competition policy remedy for the trade remedy is the following. If goods are priced in the foreign market below their normal value (the price charged in the home market), they *should* then be able to be resold (i.e. re-exported) to the producer’s own home market. These goods can then undercut the home producer’s own higher domestic selling price and eliminate the advantage of cross-border dumping (price arbitrage).¹⁵

Since tariff duties have been eliminated in a customs union, there is no governmental trade barrier preventing this re-exportation of goods. However, if the original producer is able to restrict this parallel importation by the use of restrictive distribution agreements (vertical restraints) then downstream purchasers (wholesalers, distributors, retailers) cannot obtain access to these parallel goods, and the dumping strategy will succeed.

These internal restraints affect trade and could be addressed by a national or regional competition law depending upon the law’s provisions and its evolution. For the EC, there has been a long history of focus on vertical restraints as reflecting the EC Treaty objectives of economic integration of separate national markets. Other state jurisdictions pay far less attention to insuring a possibility of open vertical channels.

This redress by the use of a domestic competition law clearly falls within its scope of territorial jurisdiction, but whether any particular domestic law provides a remedy sufficiently satisfactory to replace the pressure on anti-dumping is a question for each juris-

¹⁵ This theory found expression in the EEC Rome Treaty (1957) where the prohibition on anti-dumping measures between members is found within the chapter on Competition Policy.

diction. As above, there is definitely a case to be made in a customs union plan that domestic laws should carry a stronger prohibition or right of action on vertical restraints when they affect trade than might otherwise be provided according to a domestic law.

Selling below cost or normal value is also addressed by a number of unfair trade laws, sometimes characterized as “minimum mark-up” or “sale below cost” laws. These laws are, however, controversial where they continue to persist in developed country jurisdictions. The stronger weight of academic and practitioner opinion is that, as these laws are directed to competitor injury rather than competition injury, they do not promote competition and are not consumer friendly enactments. Rather, they favour one class of competitors at the expense of another. The main argument used in their defence is that they do tend to frustrate the formation of dominant positions in the first place, or act provide an extra domestic (or more local) shield against the quick predatory pricing actions as directed to the smaller or independent competing sellers. Over time, it is argued that they provide a more competitive outcome, although this is admittedly a minority opinion.¹⁶

The SACU context for unfair trade laws against dumping has to be considered since the purpose of including Article 41 in the agreement, by all accounts, was to provide for a common basis for action against cross-border dumping. Thus the question arises, by what means are unfair trade laws intended to substitute for national anti-dumping laws, and whether such a substitution provides a positive outcome for the proper functioning of the customs union.

A detailed consideration of these points is beyond the scope of this report. However, a few factors can be flagged. The developing country dimension and market disparities in the SACU raise their own complexities on both hands, where consumers need low prices to survive and are penalized by minimum mark-ups or bans on below cost sales; but also where

¹⁶ Within the past several years, a few Federal States in the US have actually strengthened their own minimum mark-up laws. They are not so common, but can be found in consumer product lines, particularly in gasoline (petrol), tobacco, and grocery sectors. Some provide only for state regulatory action, while others provide for private actions by competitors and civil injury determinations.

small producers and enterprises are notably abundant and provide a significant share of domestic income and employment. It may be that it is easier in a developed and diversified economy to consider these problems within the realm of competition policy. However, just as competition policy responses were deemed not sufficient by many US jurisdictions to treat competitor abuse fifty years back, the conditions within SACU may resemble some of those earlier market conditions. If so, the legal response should be appropriate to the real market.

The treaty provisions also make it clear that in the absence of any common action undertaken according to Article 41, a SACU Member State is not prevented by any other treaty provision from maintaining its own domestic “sale below cost” law, as long as the remedy is not in the form of a tariff duty, and by extension, is not “origin-based” so that it only applies to foreign imported goods.

III.4 Part conclusion

If every member had a fully functional competition law for its own jurisdiction, a purely territorial approach to competition law enforcement would, in theory at least, be sufficient to address all the problems related to import and export restrictions. This, at least to the extent that the practices also affected competition as well as trade. As not all practices affect both trade and competition, there is a gap to the extent that the trade objectives of the treaty are attempting to be addressed by the common policies. This suggests a role for Article 41 that would be designed to “fill the gap” when competition is not so seriously affected so as to allow that type of remedy to come forward. While this moves the discussion to competitor protection rather than protection of competition, the elements unique to the SACU configuration should also be considered before action in this field is discounted or rejected. The problems identified during the workshop clearly are of a type to encourage trade tensions between the members. SACU is a legal construction intended to form a completed customs union. This is not the same as the conditions that operate within a single national market. It cannot be clearly held that, in the context of economic development and developing countries, efficiency standards are appropriate to the same degree as in highly developed and diversified market economies.

In addition, there are disparities between markets and authorities when attempting to deal with external practices that affect domestic markets. Even among equally matched developed territories, these actions are most difficult to raise and prosecute by invoking import country effects doctrines. To the extent that dominance is a feature of the market characteristics of SACU, an exploration would need to be made of what instruments (as appropriate within the context of Articles 40 and 41) could or should be used to facilitate the abuse of dominance issues within the customs union.

For this investigation, the discussion now turns to cooperation to determine what added value such instruments can add to the proper functioning of the customs union and to its capacity to meet its free trade objectives. It has been found that positive comity, as generally defined and applied in current agreements, enhances the potential for addressing import restrictions, including parallel import barriers. However, it can also be used to deal with foreign output restrictions, i.e. the “Type 1” anti-competitive practices described by Jenny. On the other hand, notification approaches do offer some constructive possibilities, particularly when Member States are able to implement functional competition laws and responsive authorities. For all approaches, a competition law becomes a functional prerequisite.

IV COOPERATION MECHANISMS

IV.1 Introduction

The term “cooperation” in the context of competition law and policy has received most attention as it is used in bilateral (state to state) cooperation agreements, and more recently, in the WTO Doha Development Round, paragraph 25, which provides for cooperation as a subject for discussion in the WTO Working Group. OECD recommendations describing the conditions for cooperation date back to 1975; the 1995 recommendations provide a legal instrument or platform with which states can directly engage in cooperation.

The OECD defines the term “voluntary cooperation” as applying, “to the entire range of actions by which one or more jurisdictions may assist, coordinate or communicate with each other. In this general sense, the principal modalities include:

(i) informal cooperation relating to analytical issues, practices, policies and procedures, as well as obtaining feedback on proposed laws and regulations, or on potential amendments to existing laws or regulations;

(ii) case-specific cooperation;

(iii) cooperation typically considered to fall under the broad umbrella of capacity building and technical assistance.”¹⁷

The term “voluntary cooperation” is seen to contain three main components, at least in the OECD context. A report issued in 1999 defines these components as:

“1. The first, based on traditional comity concepts, encourages jurisdictions to conduct their investigations in a manner that respects the interests of other jurisdictions: ‘... negative comity may be described as the principle that a country should: (i) notify other countries when its enforcement proceedings may have an effect on their important interests; and (ii) give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming those interests.’”¹⁸

¹⁷ OECD, Modalities for Voluntary Cooperation, CCNM/GF/COMP/TR(2003)11.
¹⁸ OECD, 1999 Report on Positive Comity, Making International Markets more efficient through “positive comity” in competition law enforcement, OECD J. Competition L&P, Vol. 1, No. 3, page 38 (1999).

2. The second and third mechanisms – investigatory assistance and positive comity – are two basic instruments contained in the OECD recommendations. They can be used in a jurisdiction in which anti-competitive conduct may occur in a country that perceives itself as being harmed by that conduct.

“... investigatory assistance may be described as cooperation with another country's law enforcement proceeding. Such assistance may include gathering information on behalf of the requesting country, sharing information with the requesting country, and discussing relevant facts and legal theories.”

“... positive comity may be described as the principle that a country should (1) give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests, and (2) take whatever remedial action it deems appropriate on a voluntary basis and in considering its legitimate interests.”¹⁹

IV.2 Comity principles

Comity is a principle of respect between nations, describing the degree of recognition one state accords to the laws and territorial integrity of another.

“In public international law the notion of ‘Comity of Nations’ (*comitas gentium*) is the most appropriate phrase to express the foundation and extent of the obligation of the laws of one nation within the territory of another. “Comity” is that body of rules which sovereign States observe towards one another reaching from courtesy to mutual convenience, although they do not form part of international law.”²⁰

Comity is a principle based on “good neighbourliness” and used to deal with tensions at the boundaries of jurisdiction and sovereignty. Traditional (or negative) comity

¹⁹ OECD, 1999 Report, *Ibid*, p. 11, paraphrasing parts of the OECD 1995 Recommendations.

²⁰ Grewlich, A., *Globalisation and Conflict in Competition Law Elements of Possible Solutions*, World Competition, 24(3): pp. 367–404, 2001. The author cites several international law treatises to support this definition.

responded to the use of competition laws to actors who were based outside the enforcing territory. While the acting country can claim a basis for jurisdiction based upon the effects of foreign actors on the quality of the domestic market, there is a conflict presented where those actors are nationals of other states and living in those states. Negative comity expresses the notion that before a state can take action under its own laws vis-à-vis foreign actors or to the other important interests of another state, it needs to first consider the interests of those other states.

Positive comity in the antitrust context is also a descriptive creation of the earlier OECD documents, and has gradually found its way into a number of bilateral agreements. The concept, at least as the OECD applies it, is closely tied to the notion of “requesting”, whereby one country requests another to provide information, investigatory assistance, or to initiate action itself. It applies to cases where the requesting country can identify the possible harmful effects to its territory (its exporters or possibly consumers), and that the activities may predominantly take place in another state and that this “requested” state can then act to assist the requesting party. This eliminates the risks of jurisdictional conflict since the requested state, by taking some action, may avoid the situation where its firms are being acted against by the requestor.

Positive comity provisions are often categorized as both formal or informal, binding or voluntary; however, any attempt to categorize them can lead to confusion rather than clarification. Although some countries maintain “formal” positive comity provisions, much of what occurs by actual cooperation is decidedly “informal” in nature. Even in the most developed positive comity agreements, there are few “official” requests. However, the existence of a formalized document is said to facilitate the informal process, since agency officials have the legal cover of an international agreement when challenged by their own firms for responding to foreign requests for cooperation.

The notion of “binding” cooperation is also not quite precise as no state will (or is able to) take any enforcement action if there is no violation shown by the practices in respect to its own market. Similar, even in a so-called instrument, what is actually being obligated is more an obligation of good faith to consider the request, and even in these instruments, states reserve the right to not take actions that they

deem requests to be against their own interests as to investigations and prosecutions. Non-voluntary elements might be seen to apply to the extent that parties may be obliged to provide certain information regarding case actions and notifications of proceedings.

What would be suggested as a meaningful binding element would be the obligation to provide information to the requester to the extent that such information demonstrates a violation of the requestor’s own competition law. Technically, however, this type of activity may not be “cooperation” as it appears to be defined as only applying when there is an arguable violation of the requested party’s laws which are having some effects upon the requesting party’s market.

This is an important limitation to positive comity in that the party requested cannot take action under its own laws unless there is an actual violation of its own laws. Since competition laws are territorial by nature, this means that – as also indicated by the OECD – the optimal application of this instrument is in those cases where there is a domestic restraint that is frustrating the requesting party’s export trade. The case that comes to mind would be that of a domestic vertical restraint that is frustrating market access. As also indicated by OECD, the instrument, as it is now used, cannot be applied to an export cartel organized in the requested party territory where such a cartel does not violate domestic law.²¹ In addition, positive comity, while seemingly highly appropriate for issues raised by mergers and acquisitions, has some lesser capacity to address those issues because of the more restrictive timelines and procedures applied on notifications, and confidentiality issues.

At the same time, positive comity provisions do appear to provide for some functional cover under a written agreement between states to give legal basis for states to engage in cross-border communications and exchange information on their respective problems.

²¹ It might, however, be able to be used for export restrictions, where these often have internal consumption effects, and many authorities believe that the capacity to formulate export (output) restrictions is a certain indicator that effects will also be found in the domestic market. However, there is a distinct jurisdictional difference whereby an authority can legitimately claim that its own domestic law is limited to actions affecting its own territory.

This also identifies one of the more striking preconditions, namely that countries have competition laws in order to have an institutional and substantive basis for cooperation, both as requesting and as requested parties.

However, in addition to this requirement, the parties need to determine whether a cooperation instrument is appropriate or suffices in the SACU context. The parameters that relate to this question include the objective of customs union formation, with its emphasis on trade, practices of concern, and the differing capacities between the members.

IV.3 Examples of cooperation on positive comity

IV.3.1 EC / US

The positive comity clause appears in its more advanced form in the EC-US cooperation agreement, and as this instrument was revised by a 1998 Supplement. “Article III of the Supplement provides that either party may request the other ‘to investigate and, if warranted, to remedy anticompetitive conduct.’ Article IV(1) provides that the parties ‘may agree’ that the requesting country will defer or suspend activities during the pendency of the requested country’s enforcement activities.”²²

This second provision allows an allocation between functioning authorities to allow one to take the lead, at least for two types of cases, where harm is done to the requesting countries exporters, and when the violations complained of “occur principally in and are directed principally towards” the requested country’s territory. Thus, as in other positive comity instruments, it does not deal with “outward bound” or export cartel activities. As the OECD summarises,

“The competition authorities of many OECD Members lack the experience and mutual trust and confidence necessary to expand positive comity in this manner. Nevertheless, the presumption mechanism is important because it expresses a long-standing, well respected, but ‘fuzzy’ principle in operational terms. This step can both contribute to an operational system and provide momentum that may permit positive comity to be tried as a means of improving the effectiveness of competition

²² OECD, 1999 Report, at 19.

enforcement and avoiding jurisdictional disputes.”²³

Between a state with large firms and one with small firms, it is difficult to see how the enhancement of allocating actions among authorities as used above would necessarily be of service, except in those cases where the violation at issue also fell under the laws of the larger state. The allocation concept would appear to be at its most serviceable as between somewhat equally matched and active authorities where the problems of jurisdictional conflict would be most likely to arise.

IV.3.2 EC / SA

The provisions found in the Trade, Development and Cooperation Agreement (TDCA)²⁴ between the EC and SA provide a different expression of comity, this time within the context of a trade agreement and a free trade objective. The Agreement’s provisions first describe the types of practices that are incompatible with the proper functioning, in so far as they may affect trade between the parties. As provided in Article 35, these include:

“(a) agreements and concerted practices between firms in horizontal relationships, decisions by associations of firms, and agreements between firms in vertical relationships, which have the effect of substantially preventing or lessening competition in the territory of the European Community or of South Africa, unless the firms can demonstrate that the anti-competitive effects are outweighed by pro-competitive ones;

(b) abuse by one or more firms of market power in the territory of the Community or of South Africa as a whole or in a substantial part thereof.”

The requirement to have a functional law is clearly indicated by Article 36, which grants a three-year period to establish implementation.

²³ OECD, 1999 Report, at para. 44.

²⁴ Competition-related extracts from the Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part Council Decision of 29 July 1999 (99/753/EC).

“If, at the entry into force of this Agreement, either Party has not yet adopted the necessary laws and regulations for the implementation of Article 35, in their jurisdictions it shall do so within a period of three years.”

The positive comity provision is located in Article 38. It is keyed by a request when one of the authorities has reason to believe that:

“...that anti-competitive practices, defined under Article 35, are taking place within the territory of the other authority and are substantially affecting important interests of the Parties.”

The Party may then:

“... request the other Party's competition authority to take appropriate remedial action in terms of that authority's rules governing competition.”

Given that the practices listed in Article 35 include vertical relationships that substantially prevent or lessen competition in a party's territory, the strong market access aspect of the provisions is evident when coupled with the requesting power to take action. However, it should probably be presumed from the provisions that there is no separate right established that would require an authority to respond to a request that was not otherwise operating as a violation of the requested country's own laws.

The instrument is most appropriate for market foreclosure activities where the practices involved have the effect of frustrating exports to that market. It is a somewhat strong cooperation instrument, however limited to this purpose.

IV.4 Positive comity and assessment

The use of this instrument appears to be most favoured between developed territories where both can see the exchange possible to enhance respective market access.

The relationship between the positive comity approach and market access issues is made fairly clear in the US example.

“The application of US antitrust law to protect US exporters from exclusionary conduct abroad remains controversial. In addition, there are practical limitations to the ability of enforcement officials to apply US law unilaterally in this manner. These limits have encouraged discussion of alternative ways of

addressing market access problems, leading to an expanding interest in the so-called ‘positive comity’ mechanism.”²⁵

It has to be considered whether placing emphasis upon positive comity addresses the types of problems encountered in the SACU. It may be that there would be many cases where the requesting party is seeking assistance on practices that in any case would fall under the South African law as violations in respect of its own territory. If so, the instrument would have value, assuming that the SA authority has the capacity and is willing to take up and process requests, with the knowledge that the requesting parties may not be in position to reciprocate as equal parties either in the medium-term or over a longer period of time.

Depending upon the national legal approach to vertical restraints, positive comity can also possibly assist in disarming trade measures on dumping cases. This is because when a requested party can take action against a vertical restraint, the alternative remedy of price arbitrage may be realized. However, it is also noted that the degree of surveillance over vertical restraints may not be adequate within a single national law to adequately reflect the “affecting trade” aspect, as a domestic jurisdiction may not place emphasis on this integration objective.

IV.5 Notification approaches

Notification is not the same as positive comity as the information or action taken is not necessarily made only in response to a request. While the idea of notification is more closely connected to the notion of negative or traditional comity, there is some extension considered in the approaches where the parties provide some detailed criteria for what is being notified when the interests of another territory are being affected. To the extent that this type of notice only occurs at the time when the domestic authority is taking some action anyway, this does appear to place the concept within traditional or negative comity. Most of the negative comity provisions in the competition law context related to informing another territory of actions being taken against its important interests, including the notified party's nationals, i.e. when the notifying party

²⁵ Fullerton L., and Mazard C., *International Antitrust Cooperation Agreements*, World Competition, 24(3): pp., 405–423, 2001, p. 412.

is invoking the effects doctrine. What we observe in the examples below is that while one of them does not trigger notification unless a party is taking action, information is being notified that clearly relates to possible violations of the notified country's laws. Furthermore, the second example appears to go beyond the requirement of "taking action" and simply allows one party to notify another when it has reason to believe that the second party's laws are being broken.

IV.5.1 Canada / Costa Rica

This instrument is also found in the context of a free-trade area regional trade agreement. It has been submitted for consideration by the parties as one that is appropriate for countries at different levels of development. The first component of the arrangement is based upon convergence of laws.

"Chapter XI of the CCRFTA includes an obligation on Parties to adopt or maintain legal measures to proscribe the carrying out of anti-competitive business activities, including – in a non-exhaustive list – cartels, abuse of dominance and anti-competitive mergers."²⁶

The notification provisions are detailed, but as they are relevant to the type of arrangement that may be interesting in the SACU context, they are also cited in full:

"...each Party shall notify the other Party with respect to its enforcement actions that may affect that other Party's important interests, and shall give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming those interests. For the purpose of this Chapter, enforcement actions that may affect the important interests of the other Party and therefore will ordinarily require notification include those that:

²⁶ Joint Submission by Costa Rica and Canada The Canada-Costa-Rica Free Trade Agreement, unctad.org/en/subsites/cpolicy/docs/crica. Agreement text available at: <http://www.dfait-maeci.gc.ca/tna-nac/11-en.asp>. The agreement's competition provisions are trade and cooperation related, "to ensure that the benefits of trade liberalization are not undermined by anticompetitive activities and to promote cooperation and coordination between the competition authorities of the Parties."

-are relevant to enforcement actions of the other Party;

-involve anti-competitive activities, other than mergers or acquisitions, carried out in whole or in part in the territory of the other Party and that may be significant for that Party;

-involve mergers or acquisitions in which one or more of the enterprises involved in the transaction, or an enterprise controlling one or more of the enterprises to the transaction, is incorporated or organized under the laws of the other Party or one of its provinces;

-involve remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at conduct in that territory; or

-involve the seeking of information located in the territory of the other Party, whether by personal visits by officials of a Party or otherwise, except with respect to telephone contacts with a person in the territory of the other Party where that person is not the subject of enforcement action and the contact seeks only an oral response on a voluntary basis."²⁷

While this is a traditional comity mechanism that only triggers notification when the informing party is, in any case, acting on its own laws, there is some specificity that is introduced, and a clear expression regarding anti-competitive practices that may be significant for the informed state and where practices are being engaged there that are relevant for that other state's enforcement actions. In this sense, this is a "good neighbour" policy as the burden to obtain information may no longer necessarily lie with the requesting party to determine in the first instance that violations upon its own territory may be occurring. This particular agreement also contemplates the possibility of adding additional comity and cooperation agreements at a later stage.

By removing the necessity of taking own domestic action as a condition to notification, one could move directly to a rather enlightened viewpoint that authorities should just be given the freedom to notify each other of violations occurring in the other territory, as a matter of course.

²⁷ Article XI.3, all italics added.

IV.5.2 US / Australia

The United States has initiated such an approach by its “antitrust mutual assistance agreement”. The US-Australia Agreement states that, “(T)he Parties intend to assist one another and to cooperate on a reciprocal basis in providing or obtaining antitrust evidence that may assist in determining whether a person has violated, or is about to violate, their respective antitrust laws, or in facilitating the administration or enforcement of such antitrust laws.”

As can be seen from the extracts that follow, US law authorizes the conditions for this practice:

“In accordance with an antitrust mutual assistance agreement in effect under this Act...the Attorney General of the United States and the [Federal Trade] Commission may provide to a foreign antitrust authority with respect to which such agreement is in effect under the Act, antitrust evidence to assist the foreign antitrust authority;

(1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority;” or

(2) in enforcing any of such foreign antitrust laws.”

This provision has the advantage that while each party is responsible for prosecuting practices as they effect its own territory, the authorities in question can go beyond the “requesting” requirement, and even consider going beyond the “acting” requirement, as a function of mutual assistance. To the extent that a positive comity response might only also entail the passage of information, the approach here is more an institutional enhancement. Where a positive comity provision did allow for the requested authority to take some action by investigation or enforcement, then that aspect of positive comity goes beyond the approach described above.

It might also be considered whether or not it is entirely necessary to have a functioning authority in place to receive notifications. It could be the case that where competition law provisions have passed into domestic law, that this is sufficient to trigger notification, as it is the problem of the notified state to either take action or not take action. Learning about the

reality of the market is one incentive for implementing a law.

Similarly, it could be possible to consider that, within the existing structures of the SACU provisions, notification might occur as to unfair trade practices that are not captured by competition laws at all, when such identified practices fell within the listed practices provided for by Article 41. There are other domestic agencies besides competition authorities that deal with practices, both on the notifying and notified sides. Also, some authorities have single agencies with jurisdiction over both competition and unfair trade practices.

With the above two approaches in mind, it could also be considered how a US-styled notification provision would function together with a positive comity instrument. In those cases where the notifying party is also taking action under its own laws, a follow-up request for assistance could then generate beneficial investigation and possibly over time, allocated or shared enforcement procedures that would serve as a remedy for both parties. This sort of interaction would fulfil the SACU cooperation provision at a highly functional level. However, underlying this sort of interaction is the rather significant precondition that there are laws and authorities to deal with them.

IV.6 Convergence approaches

On either side of the spectrum of cooperation and notification instruments are concepts that use neither. At one end of the spectrum are the convergence approaches that either require or encourage members to have laws, and then provide for some principles by which the laws should be governed. This type of approach also falls within the parameters of Article 40 of the SACU agreement, although one should note that the first paragraph of the Article does not appear to require a harmonization of the national laws.

IV.6.1 Soft convergence - Canada/FTAA proposals, WTO working group proposals

Several agreements operate without cooperation or notification, but rather install general principles that are to be provided for in national competition laws, and which then go on to emphasize the types of practices that are likely to affect cross-border trade. In addition, these laws are subject to procedural and

substantive guarantees that, over time, promote a certain convergence between the parties on competition law and enforcement in a trade liberalising supportive role.

This is a similar approach to that proposed by the European Community in the multilateral WTO discussion on a competition policy framework. In this example, the parties would be asked (or compelled) to pass into domestic law a prohibition against certain hard-core cartels. This law would be subject to a certain degree of transparency and due process requirements, as well as the requirements of national treatment with regard to providing other nationals access to invoke the law either before an authority or domestic tribunals. Other WTO Members have suggested modifications arguing for a softer convergence approach where the general principles of competition policy are given and the members are encouraged to apply due process and transparency. Various forms of committee interaction or peer review have also been attached to these proposals.

One example of this kind of regional trade agreement is the Canada proposals for the Free Trade of the Americas (FTAA). A summary of the practices section states that:

“Canada is of the view that there should be an obligation on each country in the FTAA region to adopt or maintain a competition law that promotes economic efficiency and consumer welfare. Such laws should prohibit, at a minimum, certain key anti-competitive behaviours that are most likely to adversely affect cross-border trade or trade within the FTAA region; namely, cartels, abuse of market power, and anti-competitive mergers and acquisitions.”²⁸

In addition, each member should have a competition authority, “that is independent and authorized to take appropriate enforcement action and to advocate pro-competitive solutions in the design, development and implementation of government policy and legislation.”

²⁸Free Trade Area of the Americas (FTAA), Draft Chapter on Competition Policy - Canada's Position and Proposal, Canada's Position, <http://www.dfait-maeci.gc.ca/tna-nac/CP-P&P-en.asp>, last visited 08/10/05. Canada also recommends provisions on state monopolies.

From this point forward, the emphasis is on how the law and authorities function in relation to transparency, due process, and national treatment. For cooperation, a voluntary provision is suggested with the latitude that the parties may go forward to initiate bilateral cooperation agreements.

Thus, in this large regional grouping, convergence is a basis upon which parties build additional layers of cooperation. The fact that there are conduct parameters placed upon laws and authorities is probably viewed as a set of preconditions for additional cooperation. The soft convergence approach is clearly supportive of competition culture; however, to the extent that its authorities becomes functional, it provides assurances for a better measure of market access, and may not add that much to the “export” side of the equation without additional cooperation in play.

IV.6.2 “Top down” convergence, Mercosur approach

The Mercosur approach to customs union and common market to competition policy has gone through a process of evolution. What appears to have adopted is a Member State-oriented mechanism, not dissimilar to Canada's FTAA proposals, but with a more directional “top down” intention. This is reflected in the Mercosur common definitions for the area as extending beyond individual Member States, a concept of practices with a “Mercosur dimension”; the potential to develop an external representation on behalf of Member States in antitrust matters; an emphasis on convergent laws as to similar conditions; and not incidentally, a public policy surveillance mechanism for state actions that also act to distort competition and affect trade. This evolution reflects the structure of Mercosur as a common market plan, and also the difficulties of internal trade measures that are being sought to be addressed by competition policy. As related to the SACU, this type of approach might be viewed as going beyond what is initially possible in Article 40.

However, it is also possible that additional member agreements on the role of national laws could entertain some of the Mercosur features. Where Mercosur has been intent upon finding its own approach to competition policy and shares some the institutional and market characteristics of the SACU region, some additional investigation into the details

of Mercosur integration could be of continuing interest.

Extending territory, “nationality” jurisdiction

At the other end of the spectrum are advanced systems in which one state allows another to take actions upon its territory, or takes responsibility to review agreements or deal with practices affecting another territory. In these latter cases, a different theory of jurisdiction is applied to competition law. Rather than “territorial” jurisdiction, these systems move more toward a concept of “nationality” jurisdiction, assuming state responsibility for domestic actors even if the effects of the practices are experienced in another state.

IV.6.3 Australia – Tasman territory

The ANZCERTA agreement between Australia and New Zealand, a free trade area but with elements for investment, services and regulatory harmonization, introduced an “out of territory” approach oriented to resolving issues of dominance and in relation to anti-dumping between the partners. According to Hoekman, in 1988 Article 4 of the ANZCERTA was modified to read:

“Member States agree that anti-dumping measures in respect of goods originating in the territory of the other Member States are not appropriate from time of achievement of both free trade in goods between the Member States on 1 July 1990, and the application of their competition laws to relevant anti-competitive conduct affecting trans-Tasman trade in goods.... Each Member State shall take such actions as are appropriate to achieve the application of its competition law by 1 July 1990 to [anticompetitive conduct affecting trans-Tasman trade] in a manner consistent with the principles and objectives of the Agreement”.²⁹

Citing Ahdar (1991), the goal of eliminating anti-dumping between members passed through the active enforcement of similar competition laws, but in addition, that:

“An agreement that the jurisdiction of competition agencies extend to matters

affecting trade between New Zealand and Australia. In this connection it was agreed that nationals of one state could be made the subject of an enquiry by the competition authorities of the other state and be required to respond to requests for information.

Australian (New Zealand) antitrust legislation was amended to extend its scope to the behaviour of Australian and/or New Zealand firms with market power on either one of the national markets or the combined Australia/New Zealand market.

Courts were empowered to sit in the other country; orders may be served in the other country; and judgements of Courts or authorities of one country are enforceable in the other country. In 1994 the competition authorities of the two countries concluded a bilateral Cooperation and Coordination Agreement to reduce the possibility for inconsistencies in the application of legislation in instances where this is not required by statutory provisions (WTO 1996).”

What characterizes this approach is the opening of the territorial limitations that allow one party to take actions in the territory of another. The parties do not assume nationality jurisdiction for their firms as they act abroad, but permit the other jurisdictions to operate in their market to such an extent that the handicap factor of crossing jurisdictions for investigation and prosecution is diminished.

This is a somewhat advanced form of regulatory cooperation. It is well known that the purpose of extending territory jurisdiction in this agreement relates to the significant difference in economic levels between the two markets involved, and to the presence of significant dominance in one of the partner markets. It also has an orientation to substitute competition for anti-dumping actions.

IV.6.4 Delegation of territory / nationality jurisdiction

An additional category deals with cases where one authority agrees to act on behalf of another territory. An example is found in the merger control field for the European Community’s merger control regulation. The European Commission receives notification of mergers according to established thresholds for those mergers considered as having a community dimension. In addition, a Member State may also request the Commission to review a

²⁹ Hoekman, B., “Competition Policy and Preferential Trade Agreements”, World Bank and Center for Economic Policy Research, 1998.

proposed merger or concentration in light of the national market (the so-called Dutch clause, Article 22 of the European Merger Control Regulation).

Some Member States do not generally prohibit export cartels, as these are not deemed by most laws to have domestic effects; however, some of these states have established these prohibitions in their domestic laws. Although the SACU treaty does not call for such a prohibition, the treaty does prohibit government export restrictions. If SACU Member States agreed that a prohibition on export cartels should form part of the agreement, this provides a treaty law basis to take action against export cartels.

Finally, a treaty law basis could also be provided to allow an authority the power to terminate practices and agreements in respect of their effects upon other Member States, when acting to terminate the same in respect of the domestic territory. This possibility has been raised as a dimension of the international hard-core cartel prohibition scheme proposed for the WTO. While the EC has no external authority under the Rome Treaty to penalize or terminate cartels for their effects on non-EC markets, it has been suggested that a new “international” prohibition could provide a basis for the EC to adjust penalties and termination orders on behalf of other WTO Members while acting on its own behalf. A specific example is where the EC is collecting a fine. With the international prohibition in place, the EC can negotiate a lower fine if the cartel members agree to terminate practices in respect of other WTO Members. As an enforcement authority, what the EC is deriving here is a certain international legal reference, or “legal cover” if one prefers, to have some arguable basis for taken an extra-territorial action. The same concept can be recognized in a regional treaty framework, which is also international law as to its signatory member states, and then allowing a single jurisdiction a legal possibility of acting on behalf of other regional members.

IV.7 Conclusion, Article 40 summation of options

It is possible to summarize the different approach listed above with reference to some of the “pros and cons” associated with each approach. For this purpose, the order is provided from less to more “invasive” as regarding the burden adopted by a national

authority in relation to other members of the regional grouping.

IV.7.1 Convergence

Pros:

- allows for some common principles to emerge across the market;
- allows for some activities to commence while authorities are implementing;
- provides a basis for creating actual network activities;
- provides a basis for additional cooperation and notification.

Cons:

- no legal basis to render actual assistance as between authorities;
- purely “effects” based;
- no common redress, if authorities do not develop, then practices are unevenly treated among jurisdictions.

IV.7.2 Positive-comity

Pros:

- provides legal mechanism and “cover” to pass actual information;
- has the potential to limit trade frictions by substituting enforcement;
- can evolve to investigatory and enforcement actions on behalf of requestor;
- respects traditional jurisdictional concepts for competition laws;
- can treat domestic market foreclosures as an anti-dumping substitute.

Cons:

- party must request, burden is upon requesting party to discern practices;
- allows cooperation only when requested party’s law is also violated;
- a market-access oriented concept, does not treat export cartels;
- works best among well-developed authorities with enforcement records;
- may be best for territories with equivalent export-oriented producers.

IV.7.3 Notification

Pros:

- allows for receipt of information without the need to request it;
- not limited to information that only violates notifying party’s domestic law;
- can treat by information export problems affecting other markets;
- provides all authorities information about the larger territory market;

- potential to pass information governed by Article 40 and 41;
- receiving party may not need to have a functioning authority.

Cons:

- traditional comity version requires informing authority “to be acting”;
- if extended, authorities would have to survey other member’s laws;
- more burden falls on largest market where actors are based;
- does not treat issues related to market-access.

IV.7.4 Beyond “territory”

Pros:

- potential to eliminate trade measures without supranational institutions;
- allows for “area” treatment on mergers/acquisitions, where local authorities do not have the capacity or market to address, eliminates multiple filings;
- can promote consistency of interpretation and application of laws;
- can address export practices with actual enforcement where actors reside;
- possible treaty law basis for action on behalf of other member states.

Cons:

- more complex regulatory cooperation, longer term project to develop;
- loss of territorial sovereignty over resident actors;
- requires well-trained and functioning tribunals.

V. UNFAIR TRADE PRACTICES AND SACU ARTICLE 41

It was suggested above that a division between Articles 40 and 41 could be devised in reference to the free trade objectives of the SACU agreement. Those practices affecting trade importation or exportation between the members that do not violate a national competition law could be designated as listed practices for inclusion in Article 41. These activities are noted first in this section and most relate to the (fair) treatment of competitors. In addition, domestic laws dealing with unfair trading practices often have a strong consumer protection orientation, and for this purpose, there is also an international framework that provides some guidelines.

V.1 The UN Set of Principles and unfair trade practices

The United Nations Set of Principles and Rules on Competition provides a listing of practices that would qualify as unfair trade practices. This listing provides an international source for the types of practices that could form the basis for treatment according to Article 41. The SACU workshop session on Article 41 dealt in some detail with the listing as provided by the UN Set. The introductory section for Part D (4) of the Set refers to the practices in cases where there are abuses of dominant position, limited access to markets or unduly restrained competition, with adverse effects upon international trade and economic development.³⁰ While the listed practices all have competition policy ramifications, they also have resonance within the range of unfair trading practices.

“(a) Predatory behaviour towards competitors, such as using below cost pricing to eliminate competitors;

(b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods and services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;

(c) Mergers, takeovers, joint ventures or other acquisitions of control, whether of a horizontal, vertical or a conglomerate nature;

(d) Fixing the prices at which goods exported can be resold in importing countries;

(e) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical, or similar to the importing country where the trademarks in question are of the same origin, i.e. to ensure that the goods belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence and where the purpose of such restrictions is to maintain artificially high prices;

(f) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:

(f)(i) Partial or complete refusals to deal on the enterprise's customary commercial terms;

(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;

(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;

(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee.”

A number of practices listed above can fall within both Article 40 and 41, and the introductory section refers both to competition injuries as well as interruption to trade. There would seem to be little question that certain practices as effected between competitors can affect competition and fall within a competition law. There is also no apparent reason to restrict the application of either Article in those cases where both can be applied. The Articles can have cumulative application in the circumstances where the conditions are met for both. Each Article has its own respective sphere of influence, but some commonality and overlap should not necessarily be discouraged as long as the residual scope for each Article is clear.

³⁰ Footnotes to the Set are deleted.

V.2 Practices regarding dumping

The reason for seeking to eliminate anti-dumping in a customs union has already been discussed. GATT law treats dumping as an unfair trade practice, and it is well recognized that dumped goods do not infringe competition laws. In point, trade economists emphasize the consumer welfare benefits accorded by dumping and consider the practice to be more often pro-competitive, rather than the less common practice of predatory dumping.

Discussions also took place on whether non-predatory dumping competition law can play a role in those cases where the re-exportation of dumped goods back to the home market can undercut the dumper. It was suggested that this is assisted by a national law with provisions on vertical restraints and possibly, a right of private action to allow firms to take the remedies in the legal marketplace. Finally, positive comity was also suggested to being a possible assist in this activity, as this instrument works for market access barriers, assuming that the national law is also called into play on the restraint. Common expressions on competition laws can also deal with vertical restraints in relation to trade, as does the EC-SA Agreement, with its express statement regarding vertical relationships.

However, this is also an area of cumulative application between Article 40 and 41, and must therefore consider what can possibly be done under this second Article. The Article requires the Council to develop “policies and instruments”, which should, in principle, complement the objectives of the SACU Agreement.

One way to do this would be to set the parameters for domestic laws that prohibit or provide remedies for sales below cost. Essentially, this is also an “internal” or domestic anti-dumping action, except that they also need not necessarily be targeted only to foreign imported goods. To the extent that a law is non-origin specific, it also acts more as a truly domestic internal law. Likewise, to the extent that domestic laws may provide for penalties other than requiring a mark-up of the price, they must also vary from the traditional anti-dumping duty remedy. One such law in the United States foresees providing for treble damages, similar to the remedy provided for antitrust.

Obviously, in any competitor protection law, there is room for abuse in drawing or applying it in a manner that functions as economic

protectionism, i.e. the re-imposition of tariff duties or quantitative restrictions via the domestic internal law. The line between these two results is somewhat thin, and it would seem that the Council use this Article to set the parameters to ensure that the result is not an increased distortion in the customs union. This may be a reason why, among all of the common policy articles, a distinct role is foreseen for the Council. While this introduces a risk factor, the potential for abuse does not suffice to make an investigation on the appropriate parameters. This is especially so when there are no Article 41 parameters being established, when Member States are free to act in passing their domestic laws in any case.

A higher level would suggest a SACU authority to deal with dumping according to a single SACU law. To the extent that Article 41 does not call for *common* policies and instruments may not be determinative on this point. A more relevant issue is the degree to which a national law approach operating within SACU parameters is found, or believed to be so, insufficient that a common agency approach was deemed to be not workable. One argument that might suggest this possibility would relate, as in the case of normal anti-dumping investigations, to obtaining a cost basis to determine a violation in the first place. If an acting agency has the same cross-border information problems in competition cases, the question arises as to whether a below-cost sales law can be rendered effective. While it may be an easier route to simply enact a prohibition against sales at prices lower than those in the home market, this essentially outlaws all price discrimination, and much pro-competitive behaviour at the same time. Also similar to the anti-dumping context, if the law cannot be implemented quickly, then the point of securing competitor protection against unfair pricing is also lost. If the faster administrative response is centralized, this needs to be taken into consideration. Whether local or regional, there is a related consideration of efficient temporary or provisional measures imposed pending final investigation. What level is best qualified to operate this sort of regime? Similarly, if goods are dumped in more than one Member State, would it be more or less advisable that each state is acting on its own (effects doctrine), or is it more expedient to have a single agency response.

Finally, the level response is also related to the external dimension. It should be assumed that

for a competed customs union plan, that there is likely a single commercial defence instrument applied against third country dumping. If so, although this may not be a typical approach, if intra customs union dumping is a significant problem, then is it possible that the agency dealing with external trade may also deal with issues of internal trade. The legal basis in the treaty is not the same for each, but the expertise and procedures for both are similar.

Many of these same considerations on the institutional level of response are also raised by other policy areas that may be brought within Article 41. The discussion here turns to those dealing with consumer protection.

V.3 Consumer protection

Many state laws refer unfair trading practices to the category of consumer protection and some of examples of this are provided in this section. To start, however, an international point of reference is established by the United Nations Guidelines for Consumer Protection. The following general principles are recognized in the Guidelines, which are internationally recognized legitimate consumer protection objectives.³¹

“(a) The protection of consumers from hazards to their health and safety;

(b) The promotion and protection of the economic interests of consumers;

(c) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;

(d) Consumer education, including education on the environmental, social and economic impacts of consumer choice;

(e) Availability of effective consumer redress;

(f) Freedom to form consumer and other relevant groups or organizations, and the opportunity for such organizations to present their views in decision-making processes affecting them; and

(g) The promotion of sustainable consumption patterns.”

³¹ United Nations Guidelines For Consumer Protection, (as expanded in 1999), 2001, Article 3.

In the US, each state has laws for consumer protection which, in part, incorporate federal law but also includes elements of state law as well. The State of Illinois provides the following categories for descriptions.

“The Consumer Fraud Act prohibits intentional unfair acts, practices, and methods of competition, and deceptive acts or practices such as fraud or misrepresentation in the conduct of trade or commerce. ... The Illinois law also identifies particular acts that are violations, including wrongfully advertising a service as ‘factory authorized’.

The Uniform Deceptive Trade Practices Act enumerates various acts that constitute deceptive trade practices, including any conduct that “creates a likelihood of confusion or misunderstanding.”³²

From the Cornell legal summary, the following categories are provided as generally treated by US law and US State jurisdictions.³³

“What constitutes an “unfair” act varies with the context of the business, the action being examined, and the facts of the individual case. The most familiar example of unfair competition is trademark infringement. Another common form of unfair competition is misappropriation. This involves the unauthorized use of an intangible assets not protected by trademark or copyright laws. Other practices that fall into he area of unfair competition include: false advertising, ‘bait and switch’ selling tactics, unauthorized substitute of one brand of goods for another, use of confidential information by former employees to solicit customers, theft of trade secrets, breach of a restrictive covenant, trade libel, and false representation of products or services.”

A number of countries combine treatment of anti-competitive practices and unfair trade practices into a single legislative act with a single authority. The scope of Japan’s enacting legislation is as follows:

³² Law practice summation site, <http://www.weblocator.com/attorney/il/law/antitrust.html>.

³³ Legal Information Institute, (LLI), http://www.law.cornell.edu/topics/unfair_competition.html

“(4) Unfair Trade Practices

The term ‘unfair trade practices’ as used in this Law shall mean any act coming under any one of following paragraphs, which tends to impede fair competition and which is designated by the Fair Trade Commission as such:

- (i) Unjustly discriminating against other entrepreneurs;
- (ii) Dealing at unjust prices;
- (iii) Unjustly inducing or coercing customers of a competitor to deal with oneself;
- (iv) Dealing with another party on such terms as will restrict unjustly the business activities of the said party;
- (v) Dealing with another party by unjust use of one's bargaining position; or
- (vi) Unjustly interfering with a transaction between an entrepreneur who competes in Japan with oneself or the company of which oneself is a stockholder or an officer and his another transacting party; or, in case such entrepreneur is a company, unjustly inducing, instigating, or coercing a stockholder or an officer of such company to act against the interest of such company.”

Australia has one of the most extensive national acts. The table of content of the provisions of this unfair trade law (below) shows the breadth of coverage:³⁴

- Unconscionable conduct;
- Industry codes;
- Fair trading;
- Product safety and product information;
- Country of origin claims;
- Pyramid selling;
- Conditions and warranties in consumer transactions;
- Liability of manufacturers and importers for defective goods.

Proponents of this combination approach have argued that it is particularly appropriate for developing countries where authorities require time and expertise to move into competition law analysis. This approach also makes it possible for such authorities to more easily establish legal capacity to take action on practices affecting consumers.

To the extent that practices cross borders or distort the capacity to trade across markets, then these matters, as they fall within Article 41, are also entitled to receive treatment by the Council in regard to establishing policies and

instruments. As described above in relation to dumping practices, this requirement can be met by operations on differing national or regional levels. A first approach would consider that the Council spells out the practices that fall under the Article, and then seek to ensure that Member States have domestic laws that give legal effect to these policies. A next higher step is for the Council to generate certain common instruments in order to give effect to eliminating practices on the SACU market. The concept of “instruments” could even be understood to allow the establishment of a separate common authority functioning across the SACU market, or entrusting the cross-border unfair trade practices to the SACU Commission.

These determinations are inherently institutional and political. Some factors to consider might include:

- the seriousness of the practices in the markets;
- the degree of practices across more than one market;
- the capacity for domestic laws to adequately respond to cross-border practices; and
- the importance of centralization in this area relative to other policies.

³⁴ Australia Trade Practices Act (1974).

VI THE EXTERNAL DIMENSION

Three issues are raised when examining the external dimension of regional competition law and policy cooperation. The first is WTO's legal aspects of providing cooperation to regional members that are not provided to other WTO members. The second is the question of how a single member's cooperation instruments completed with a third party should relate to the cooperation being considered within the customs union. The last and related aspect is the representation of the customs union as a single entity with respect to international restrictive practices and relations with other regions and states.

VI.1 WTO aspects

All laws subject to national treatment under GATT law are also covered by the most-favoured nation (MFN) obligation. Domestic laws are covered by national treatment to the extent they affect the *internal* sale of goods. While the area of cooperation is complex in relation to regional trade agreements, a summary would indicate that while cooperation is made in respect to *external* sales of goods, the activities do not at all fall under GATT law.³⁵ Thus, if practices in my jurisdiction affected another jurisdiction (sales occurred in their market, and not in my market), then my choice to pass them information and assistance is not something I would be obliged to extend to all other WTO Members.

A variation that may raise GATT law issues is the request and action sequence found in the positive comity provisions. Here by agreement, a party agrees to respond to requests and to take action to eliminate certain practices that affect the sale of goods on the requested party's market. The question is whether this agreement to respond to the requesting party is a form of more favourable treatment than that being offered to other WTO Members. However, there is a limiting factor present where the requested party agrees to take action only in respect of its own laws in any case, and as the practice would in any case be a violation of

its own domestic law. There is a sense of discretionary right to investigate and prosecute in these agreements, as discretion is generally also maintained in domestic prosecution laws. It may be more favourable treatment to the requesting party, but the acting party is not taking any action that did not otherwise have a right to take according to its own laws. In summary, what the requestor has done is to simply notify the acting party that there may be a violation of the acting party's laws.

A number of parties in the WTO Working Group dealing with competition policy have been fairly adamant that if there are MFN issues involved, the framework resolved in the WTO should not accord MFN. The emphasis in submissions by parties active in bilateral cooperation has been on preserving the voluntary character of these activities, in other words, not making any provisions for MFN. As a practical matter, if this were raised as a trade issue, one would imagine that the more active parties would be more likely targeted, or would at least have some significant interest in defending the limitations on MFN as third party interveners.

VI.2 Member State bilateral agreements, EC/SA considerations

The SACU Agreement provides that SACU shall be an international organization and have a legal personality (Article 4). For external representation, Article 31 provides that Member States may maintain existing agreements with third countries, but shall also establish a common negotiating mechanism and shall not enter new agreements or amend existing ones with third states without the consent of the other SACU Members.

A "filling in" exercise is necessary to determine what aspects this external power applies in granting SACU a single voice in external negotiations and agreements. Since the agreement forms a customs union, those matters falling within the concept of customs union are a part of this external power. This would include agreements on tariffs and trade in international organizations, as well as with other states and territories. The power would also be reasonably extended to measures undertaken for commercial defence, including anti-dumping and safeguard actions. As according to Article 31, future or amended agreements with third countries dealing with these matters should be undertaken by SACU in respect of its international legal personality.

35 More information can be obtained in: Mathis, J., (2003), (WTO) Core Principles and Prohibition: Obligations Relating to Private Practices, National Competition Laws, and Implications for a Competition Policy Framework, UNCTAD Series on Issues in Competition Law and Policy, United Nations, Geneva.

This is not necessarily the case for “trade related” aspects, including agreements to treat anti-competitive practices affecting trade. The SACU neither established a single competition law nor a single authority for enforcement. The area is significantly left to the member states to engage their own national laws as according to Article 40. While Article 40 obliges Member States to cooperate, it does not refer to any common external approach on these issues. It is reasonable to conclude that while the members could develop a common SACU position by consensus in order to form an external agreement on cooperation matters, there is no requirement to do so under the SACU treaty.

To the extent that any future SACU external trade agreement might incorporate trade-related matters, this resulting agreement should probably be best characterized as “mixed”. Those parts dealing directly with trade would be under the competence of SACU, while those dealing with other matters fall under the authority of the individual SACU members. Although the agreement may be contained in a single document, the signatures and ratifications of individual SACU members would apply to bind them as to the non-trade components of the agreement.

The provisions of the existing EC/SA agreement should be taken up in this context.³⁶ That agreement has the status of a pre-existing arrangement and has continued legal force as a function of SACU Article 31. The two parties to the EC/SA agreement have undertaken substantial obligations in regard to competition law cooperation. An apparent difficulty is presented because South African authorities have committed themselves to taking actions on behalf of the EC in relation to anti-competitive practices that affect the trade. To the extent that the SA authority has not likewise extended this treatment by formal agreement to the other members of the customs union might place them at a disadvantage relative to actions that can be undertaken by or

on behalf of the EC as an aspect of that free-trade area agreement.

However, if the above analysis is correct, the subject matter does not fall within SACU’s external competence in any case, then the individual parties to the SACU remain free to initiate competition law and policy cooperation with third countries as they wish. There may be strong arguments to have these types of agreements concluded jointly by all parties, particularly in third country trade agreements where the trade provisions are common to all. While this may be advisable, it is apparently not a legal requirement in the SACU and SACU Member States cannot be confined to act only within the context of SACU.³⁷

Where the other SACU members are not parties to any cooperation agreement, what practical aspects can be learnt from this situation? For the EC/SA provisions in particular, this cooperation mechanism is strongly oriented to dealing with any problems relating to imports. To the extent that importation by the other SACU members to South Africa is or is not an issue between them would determine what actual damage might result from granting the EC some superior request and cooperation rights. One area to consider, as raised above, deals with vertical restraints. The EC/SA agreement specifically refers to vertical relationships as an area for cooperation as to, “...agreements between firms in vertical relationships, which have the effect of substantially preventing or lessening competition in the territory of the Community or of South Africa, unless the firms can demonstrate that the anti-competitive effects are outweighed by pro-competitive ones.”

If there is a possibility that the SA authority has undertaken an obligation to address vertical restraints on behalf of the Community to any degree that would exceed the right of action provided as a matter of course within the scope of the SA competition law, then there is a possibility of some more favourable treatment having been extended on behalf of the EC. To the extent that action on a vertical

³⁶ “Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part”, (EC – South Africa Trade, Development, and Co-operation Agreement), text available at: http://europa.eu.int/comm/trade/issues/bilateral/countries/southafrica/index_en.htm.

³⁷ This same consideration applies to those other areas that do not fall within the customs union plan, including trade in services and investment agreements, as well as other “trade-related” areas including intellectual property rights, investment measures, etc. A common approach might well be beneficial, but it is not required as an external legal element of the SACU formation.

restraint may be desirable for a SACU member, for example in the intra-SACU dumping and re-exportation context, then other SACU members should seek to secure a similar right of redress within the customs union. Both the institutional and substantive components should be considered. The institutional aspect is raised to the extent that the EC is given the power of request to activate the SA authority's power to review, this needs to be compared against the complaint procedures otherwise provided in the SA competition law. A substantive aspect is raised if the rule of reason analysis undertaken by the authority regarding vertical restraints is tilted in any way in favour of the EC's market access rights as a function of these EC/SA provisions. It has already been noted above that in this particular area of restraints, that there could be some reason to believe that market objectives should be given some weight in the analysis the practice.

A second area of concern covered by the EC/SA agreement is that of public aid. Article 41 of that treaty provides that:

"1. In so far as it may affect trade between the European Community and South Africa, public aid favouring certain firms or the production of certain goods, which distorts or threatens to distort competition, and which does not support a specific public policy objective or objectives of either Party, is incompatible with the proper functioning of this Agreement.

2. The Parties agree that it is in their interests to ensure that public aid is granted in a fair, equitable and transparent manner."

To the extent that obligations are incurred by the provision that exceed similar treatment in the SACU treaty, the same considerations as above are raised.

The analysis is not undertaken here. What is raised is that if there is a divergence in treatment that is more favourable in respect of a third country, then some effort can be undertaken to ameliorate it. Although the SACU treaty does not itself contain a non-discrimination clause insuring that SACU parties will always receive the best treatment being offered, the type of cooperation undertaken as between SACU members can reduce the likelihood of trade tensions that might result from actions upon request taken in favour of third parties. One device would be that of notification as the interests of another

SACU member might be affected by actions taken on behalf of an EC request.

VI.3 External representation

The absence of a common external mechanism for SACU representation in trade-related areas will ensure that the question of divergent obligations will continue to be raised as the regional dimension in southern and eastern Africa evolves. South African authority will, in the future, need to become involved in additional cooperation in the region, notably in the context of the SADC, COMESA, and the EAC. As the SADC has not developed a common policy on competition matters either, SACU Member States form part of a distinct customs union territory within the larger free-trade area, each member retains its own policies vis-à-vis the SADC except to the extent that SADC itself undertakes common policies and cooperation. As the SADC moves towards establishing a customs union, increased discussion and resulting approaches to competition policy issues in that forum as well.

The COMESA situation is not the same. The plan for customs union is based on the provisions of the EC Rome Treaty, and there are strong supra-national elements behind common policies, including the question of competition. The COMESA treaty provides for a distinct legal framework for practices affecting trade between Member States as well as the institutional and juridical framework to apply this policy as a superior law within the territory. As such, the COMESA structure has a certain potential to invest a single representative competence on behalf of the territory in competition matters dealing with third countries, to the extent that practices affect the trade or distort the market.

To the extent that future discussions may entertain cooperation on these policy areas as between the COMESA and SACU, the SACU members would be likely advised to attempt a common approach so that the customs union integrity of the SACU is also preserved and given its broadest legal effect. Since South Africa has its own competence to engage in external agreements and cooperation with the COMESA, if this subject matter area proceeds, then many the considerations raised in the EC/SA context would also be applicable for comment to these activities as well.

VII CONCLUSION

As mentioned above, the inclusion of competition provisions in a trade agreement has implications on the scope of the competition rules in relation to the trade objectives being pursued. There is a difference between an agreement limited to the free movement of goods and one that establishes a common or internal market for all factors. What Member States are obligated to achieve in the first case is to pursue competition law to the extent that it supports free trade in goods. This may touch upon services such as distribution, but the purpose of the competition provisions themselves is not to address restrictions on services or investment in their own right. As a corollary, free trade agreements emphasize movement “as between” Member States, establishing this as a jurisdictional limitation. If an anti-competitive practice does not actually affect trade between Member States, one should not assume that action is required just because there is treaty reference to competition.

While free movement provisions can be seen to narrow the role of competition policy in a regional trade agreement, a second implication is noted in the relationship between free movement provisions and national competition laws. It can be suggested that free trade and market access objectives may require action even when national competition laws would not necessarily perceive a violation. There is clearly a difference in objectives being addressed as between “free trade” (market access), and the different goal of creating a market free of anti-competitive practices. There may be a large overlap between these two concepts, but they are not synonymous. Where an “excluded” party could have recourse under treaty free-trade provisions (violation of free movement), in the absence of the treaty, the same restriction may not be sufficient to establish any injury to competition in the territory market according to its own competition law. In contrast, when a bilateral competition (cooperation) agreement allows the parties to more efficiently pass information, investigate, and take actions, in order to eliminate anti-competitive practices falling under national competition laws, none of these activities necessarily need to have any relationship to problems affecting trade between Member States. Private measures raising trade problems, regardless of competition law considerations, stand at one end of the spectrum; on the other end are private measures causing competition

problems regardless of their trade effects. In between these two ends of the spectrum is an interface zone where actions dealing competition law are, in some measure, related to trade effects, because of their inclusion in a trade agreement.

The SACU agreement does not specify the intended relationship between cooperation among national competition policies and free movement provisions, except that the context of the common policies included in a customs union plan is fairly interpreted as being for the purpose of supporting the free trade. Ask however, whether this means that every action of cooperation undertaken by Member States must also be one that would be actionable under a national competition law in respect of its own territory application? If so, then this would have the result of setting the legal parameters for cooperation as residing wholly within the notion of “effects” in respect of each territory law. Each territory is responsible for its own market by its own law. Cooperation occurs for the purpose of mutual assistance to allow these laws to be more efficiently invoked in cases of market exclusionary practices, and in some cases, in respect of foreign practices. Here, the normal scope of a national competition law determines the scope of what can be addressed by cooperation in the context of trade, i.e. when trade is arguably affected.

This is a reasonable interpretation of a trade agreement with competition provisions, and the EC/SA Agreement has been cited as an advanced example of cooperation to deal with anti-competitive practices affecting trade between the states. However, the limitations of an “effects only” approach should also be recognized where trade is affected not only by import restrictions, but restrictions upon exports as well. Where a customs union, like a free-trade area, seeks to eliminate barriers to trade, the customs union external requirements also place some additional emphasis on a stable and “non-distorted” internal trade environment. While the positive comity instrument can assist in challenging distortions that deal primarily with importation exclusion problems, the export dimension could at least be noted for the possibilities of extending cooperation to deal with all private restrictions affecting trade. Except by centralizing authority across the market, trade agreements have not done much to deal with exportation problems, and the EC/SA Agreement reflects that lack of development as well.

If exportation problems are serious considerations in the trade between SACU Member States, then the traditional outlines of cooperation need, perhaps, to be revised, particularly in light of the fact that cooperation as a mechanism has been included in the trade agreement. A suggested enhancement is that the agreement is interpreted to provide an authority would provide information (and possibly assistance) for those practices that may violate the national laws of another member, irrespective of whether the same practices are violating the laws of the informing country. This form of cooperation remains centred on “effects” as it remains the responsibility of the informed territory to decide to either take or not take any action. A higher level moving beyond domestic effects would be where the members interpret the agreement to allow remedial actions in respect of other territories, enacting prohibitions against certain export-oriented behaviours, for example.

This broader interpretation is possible where the free-trade element is given some greater weight. Although a domestic law is limited to dealing with effects upon its own territory, the members can actually incur whatever obligations they wish as they deem it necessary to insure or bolster the free movement of goods. Although the SACU is limited to trade in goods, a customs union itself is not “low” integration. Significant external institutional power is possible to achieve under a single external commercial policy, but externally stable trade regimes require internally predictable free trade. While governments can manage to eliminate their own practices, the private dimension is on an altogether different level. Acts of “positive” integration taken to eliminate distortions within a customs union are not inconceivable for this type of regional integration, even while the trade agreement does not itself seek to establish a single internal or common market.

This possible emphasis upon export problems, and the difficulties of addressing foreign actors by domestic effects doctrine should not be used however as an argument against having a domestic competition law. In the absence of a domestic law, there is no legal basis for one Member State to take any action against practices organised in another Member State in respect of the effects upon its own territory, no matter how difficult it may be to actually enforce such a law against non-resident actors. Where positive comity does allow cooperation when the requested state also has an effects

violation, this assistance is not worth much if the requesting country has no laws in place. More to the point of finding a balance in cooperation, if it may be at all possible to discuss cooperation that extends beyond positive comity request procedures, one senses that a *quid pro quo* for receiving assistance on export restrictions would likely be related to a requesting country's ability to receive assistance on behalf of its exports as well. Without a law, the balance point is not so easy to ascertain.

In the SACU there is a great divergence between the size of territory markets, firms and administrative capacities. Given that competition laws are complex and require resources to render them effective, it is understandable that the smallest members of the SACU would see difficulties in balancing costs of having a functional law together with the prospective benefits of enforcement and cooperation.

However, the small country factor is not only a consideration for competition laws, as there are a host of other regulatory domestic systems that require resources. Somehow small countries are able to operate these other systems and do so effectively in their interests. In the case of SACU, there is no indication that Member States have chosen to delegate competition law and policy functions to any common institutions. In point, Article 40 indicates quite the contrary. As all SACU Member States have agreed to the terms of this Article, it can only be concluded that they have already decided to establish the domestic legal structures necessary to form the basis for enforcement cooperation in this competition law and policy field. The discussion of whether or not to have a law has been somewhat resolved by the treaty provision itself.

As to the content of a law, function should control form, and the end result sought in terms of functional capacity should be to realise the objectives of the treaty as this common policy has been designated to play a role in achieving them. This would require policies sufficient to support SACU's free-trade objectives, as it has sought to eliminate duties and quantitative restrictions between the members. The competition policy and cooperation function in this context should be ensure that private arrangements and practices are not permitted to duplicate the trade-restrictive effects of tariffs and quantitative restrictions.

The drafters considered two sets of policy cooperation instruments to deal with public and private practices affecting trade. Much emphasis here has been on the competition policy cooperation provisions of Article 40. Here the term “cooperation” in the regional trade agreement context opens a number of definitional possibilities and a rather extensive sorting exercise to categorize them for consideration. Dealing with Article 40 has comprised the larger portion of the exercise.

At the same time however, the balance between treating practices that affect imports and exports has not been limited to competition law cooperation by the drafters. It is clear that the stronger SACU institutional instrument has been called forward for unfair trade practices, those that also affect trade and would not be treatable by a domestic competition policy instrument, no matter the degree of cooperation engaged. To the extent that one seeks to find a balanced approach to private practices, the overall picture possible by the combination of Article 40 and 41 must also be considered, and actually, this makes things most interesting in respect of the possibilities. Since the anecdotal evidence indicates that Article 41 is in some significant aspect an anti-dumping provision, what has been suggested is that the Article could permit a centralised prohibition on dumping, or a grant of permission for the member states to initiate domestic “effect” doctrine instruments to deal with destructive below pricing practices.

Unlike the competition cooperation provisions, it is not clear from Article 41 itself whether the call for a common policy is for the purposes of providing a strong centralised instrument that could insure that dumping could be addressed and remedied in the customs union, or as also possible, to insure that the normal domestic responses to injurious dumping could be placed in parameters so that domestic “anti-dumping” actions would not undermine the entire customs union process. Both are possibilities in the same instance given the text of the Article and the state treaty objective of providing for conditions of fair competition within the customs area.

The possible relationship between the Articles in the larger context of the enterprise may provide some insight. If we take a narrow and somewhat modern view of the limitations of competition law actions in respect of those practices that only diminish efficiencies or

impact consumer welfare, the conclusion could be that a range of the practices discussed above may nevertheless be considered to be “unfair”, and therefore intended to be captured by this second Article. These are the matters affecting trade as among competitors even when no apparent competition injury is perceived by the modern tests.

Besides under-pricing, a host of consumer protection issues are also connected in other jurisdictions to the notion of unfair trade practices. While there are overlaps between the two Articles, e.g. predatory dumping actions, it seems that the best relationship to draw is one defined by what the common interests of the members can determine to be actionable in support of the customs union as a whole. The purpose of Article 41 is to provide that those matters which cannot be accommodated by competition laws be otherwise accommodated by other common action.

The section on Article 41 has also raised the issue of whether domestic responses to practices that affect competitors but not competition are desirable when injury to the ultimate consumer is not directly discernible. This is even a contentious issue in developed countries, and although the trend has been to criticize minimum pricing laws and similar enactments, laws where the competition regimes increasingly focus only upon efficiencies have gained some support. While some of the possibilities raised here are also controversial in view of the available critiques, it is also the case that if the primary problem to be addressed by Article 41 is injurious dumping, then the obvious alternative policy to trade laws is either a centralised legal framework, or a domestic law prohibiting certain below cost sales on a non-discriminatory basis (domestic and foreign alike).

While this raises the possibility of additional consumer injury by imposing higher prices, the development dimension should also be taken into consideration. This suggests some additional field of study, unfortunately beyond the scope of this paper, to identify the unique limitations of developing country markets as to producers and consumers that may argue for or against these types of enactments.

It is worth noting by way of a concluding comment is that governments, consumers and producers in developing countries do not have the same information tools and responsive capacities as their developed counterparts. Whether these laws are ultimately advised or

not depends upon the capacity of governments to respond to trade problems that reflect actual market realities, but also within the context of

their commitment to form a cohesive customs union arrangement built upon the free movement of goods.

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IX Abbreviations

ANCZERTA – Australia New Zealand Agreement
COMESA – Common Market for Eastern and Southern Africa
EAC – East African Community
EC – European Communities
EEA – European Economic Area
EMCR – European Merger Control Regulation
FTAA - Free Trade Agreement of the Americas
GATT – General Agreement on Tariffs and Trade
ICPAC – International Competition Policy Advisory Committee
MERCOSUR – Southern Common Market Agreement
OECD – Organisation for Economic Cooperation and Development
SADC – Southern African Development Community
WTO – World Trade Organisation