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Chapter XII: Competition Cooperation in Regional Integration Agreements, a SACU Example

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Chapter XII

COMPETITION COOPERATION IN REGIONAL INTEGRATION AGREEMENTS, A SACU EXAMPLE

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1. Regional Integration and Competition Policy

Although not a new phenomenon, the use of competition policy instruments in regional integration agreements has become common practice, and some greater diversity of approach is also becoming evident. The traditional argument for reinforcing trade liberalization with anti-trust rules has a monumental status as revealed by the structure of the original EEC Rome Treaty. This required the termination of national anti-dumping measures (within the competition policy chapter) at a time when the common competition policy became institutionally effective. With the EC competition policy in place, the early cases of the European Court of Justice ruled on its scope to deal first with vertical segmentation as these exclusive arrangements were "affecting trade" between the member states. Without intending to be exhaustive, the early academic case for regional competition policy action can be summarized as follows:

- Where private restraints operate to segment the market, firms may dump goods across borders but avoid the risk of undercutting re-importation (arbitrage). Regional competition rules can act as a substitute for trade measures that States would otherwise see as necessary to employ (elimination of internal trade measures).
- As government barriers (tariffs and quotas) are reduced according to a plan and schedule, private barriers that segment national markets are either uncovered, or newly constructed as private firms respond to free trade (market segmentation, vertical restraints).
- An open regional market may allow firms to more easily draw horizontal arrangements that negatively affect competition over the entire market, or to allocate portions of the market between firms (area distortions, cartels).

As regional trade agreements (RTAs) have broadened in scope to include services and investment movements, the older arguments are supplemented by some additional considerations, including the following:

- Single markets (common markets) for labour, services and investment require territory legal structures for doing business in and across the market. "Area-wide" commerce requires sufficiency in common rules, or closely harmonized national rules, to provide legal certainly. The internal quality of the market overall determines the capacity for facilitating movements both within the market and inward bound (merger control, investment measures, State aids).

[129] The chapter expands upon a presentation made by the author at the sixth session of the Intergovernmental Group of Experts on Competition Law and Policy, UNCTAD, Geneva, 8 November 2004. Portions of this paper are also drawn from a study prepared by the author for SACU at the request of Lesotho, and was partly sponsored by UNCTAD.

- The region has the capacity to represent itself externally to the extent it develops sufficient internal institutional power binding together a cohesive internal market. A regional grouping can have a larger voice in establishing cooperative linkages with other regional groupings and primary markets to facilitate investigation and enforcement (external and international cartels, external dominant positions, efficiency reducing mergers and acquisitions.)

The newer emphasis on regional agreements broadens the application of competition policy regardless of whether effected at the regional level or by national cooperation instruments. While external pressures demand market access for the elimination of barriers to services and investment, the need for functional competition law and policy increases to ensure a resulting (overall) competitive internal market. A mere plea for the benefits of import competition is no more sufficient to secure rivalry at the regional level than it is at the domestic level.

1.1 Relation of policies to treaty objectives

A particular trade arrangement may address in an *ad hoc* manner one or more of the considerations noted above. A characterization of a particular agreement's treatment of competition law arrangements as related to the quality and scope of economic movement can normally be disclosed by its preamble objectives in connection with its free movement provisions, the provisions regarding competition law and policy, and its institutional structure.

The relationship between competition policy provisions and free movement objectives is clearly of importance. Hypothetically, it is possible to conceive of an arrangement whereby a strong emphasis on free trade commits member States to make actionable all public and private interferences with cross-border movement, regardless of whether or not these impediments would violate a member's domestic competition law (regional legal enforcement). At the other extreme, it is not difficult to imagine an arrangement that calls for domestic competition law enforcement according only to domestic considerations, thus without any references or linkages to those acts, which actually "affect" or "distort" trade between members or within the regional area.

In the first case, free trade objectives may effectively expand competition law to encompass external commercial policy as a strongest point of reinforcement for free movement. In the second case, obligations to assume competition law and policy are taken up more generally as a convergence exercise, but have just incidentally been included in a treaty that also commits members to a measure of free trade from tariffs and quantitative restrictions.

A middle course approach also emerges which relies upon domestic law and policy, but it is designed to ensure or promote domestic action for those anti-competitive practices that do affect trade between members. This arrangement only acts as an affirmation of what domestic competition law can do anyway, but focuses a zone of enforcement upon those aspects that have cross-border implications. In this context, questions of common principles applied by domestic jurisdiction authorities, essentially coordination and cooperation, emerge to determine whether such structures can actually reinforce the integration objectives. The question of what instruments to apply rests on a balance between necessity and sufficiency that is played on two levels, internal within the market, and external as to the rest of the world.

1.2 Elements for regional capacity

While a more detailed checklist could be prepared, some elements that indicate the nature of regional capacity to cope with competition law and policy can be noted. A first listing is *de jure*, the components residing on face of the treaty. A second listing provided is more functional and deals with the positions of the parties themselves, and the circumstances of their particular markets as they interact within the context of regional integration.

1.2.1 Treaty (institutional) factors

If competition law and policy cooperation is connected to a regional trade agreement, then the treaty itself forms the legal context for the scope of the suggested cooperation, and raises the parameters for what can be accomplished in the design of more specific cooperation instruments.

Legal form - Customs Union / FTA

> A customs union requires a functioning external tariff. There is some additional pressure to alleviate internal trade measures in a customs union as well as a necessity to establish an operating common external commercial policy.[130] Both have implications for appropriate competition law cooperation and some loss of domestic sovereignty over competition policy may be intrinsic to the integration exercise even when no common institutional approach is provided.
>
> For either free-trade areas or customs unions, competition law cooperation should be a facilitating factor in achieving the quality of the formation dictated by the treaty. Even in a free-trade area, the problem of trade measures between members remains. Thus, what level of cooperation can eliminate or reduce the use of trade measures, and is the treaty structure sufficient to permit instruments to deliver this component?

Other movements and/or area-wide treatment

> If the treaty encompasses other movements (labour, capital, services, investment), then competition cooperation should reflect these treaty objectives as well. This not only informs cooperation, but may also suggest the scope of domestic competition law to be enacted and applied.
>
> The notion of area-wide treatment for the movement of goods or other factors may also suggest that state-sponsored distortions in the form of subsidies and other industrial policies are also to be considered. This further implies that some additional authority at a regional level may also be appropriate — at least in order to facilitate common definitions and assist in coordinating member responses.

[130] The relationship between competition law and the form of integration has been noted by others. “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. …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.” S. Bilal and M. Olarreaga, *Regionalism, Competition Policy and Abuse of Dominant Position*, European Institute of Public Administration (EIPA), Maastricht, 1998, pg. 5.

Effective provisions, rights of states / persons

> What right of access do member states have to enforce treaty provisions, including cooperation provisions? Are private parties given any rights of access to petition authorities or present dispute settlement claims? Are there significant variations as between the members' own laws regarding rights of access and enforcement that could undermine cooperation? While these aspects may be raised within a cooperation instrument, a treaty's dispute settlement provisions may also apply to aspects of cooperation.

Provision for regional executive authority

> Assuming that a treaty is not providing for a common competition policy at the regional level, a primary question in the consideration of cooperation instruments is the role of a regional executive authority, and whether this authority may function with some supranational voting elements. If this is the case, evolution is possible in the treatment of area-wide practices, and possibly, State practices that distort the market (State aids).

Dispute mechanism – application to states / persons

> In cases where the treaty provides for dispute settlement, what might be the legal effects of rulings on competition policy provisions? Assuming that they are binding on the actual parties to the dispute, might they also generate important definitions regarding the powers of the institutions or member States? Related to this, is it possible that the treaty is according a form of individual rights so that, when invoked, national courts are obliged to apply treaty law?

1.2.2 Functional aspects and practices

The character of individual members form an additional context to provide an overview for what might be accomplished by instruments to promote competition cooperation. Again, the listing is only indicative:

Size of group

> A larger group of States suggests approaches for a convergence of laws among them, with some mechanism to assist in facilitating such a convergence over time. A larger group may also imply that a peer review mechanism is either possible or advised.

Relative development levels

> A North-South agreement would indicate that the balance of reciprocity sought in the application of cooperation instruments has to be tailored to reflect the differences not only in the behaviour of markets, but also for practices to be treated and the institutional capacity of the members to respond. While "one size fits all" might be forced as a template upon a particular trade agreement, the parties may be so varied that the cooperation instruments applied should be tailored.

Market size

> Is it realistic to assume that the burden of domestic enforcement on "incoming" practices could reasonably be addressed by an authority in respect of a small national

market, especially in cases where the primary regional partner is a significant regional or a global economic power holding the greater concentration of regional firms?

National capacity / existing law or authority

If cooperation is based upon communicating authorities, what are the implications when some members do not have the necessary law and/or capacity? Does this mean that there can be no cooperation? Or does it mean that different types of instruments can be considered that rely upon different agencies? Is it possible to consider that non-competition agencies dealing with trade, unfair business practices, or consumer protection, might also play some role in cooperation?

1.2.3 Trade practices in territories

While a functional aspect as well, the question of both internal and external practices is significant enough to warrant further discussion. In regional agreements where there are no common rules for the whole market, there is a strong tendency in treaty practice thus far to hold fast to the traditional territorial dimension of national members. This places an emphasis on promoting anti-trust remedies for import barriers.

A problem with this approach is that free trade encompasses the notion of eliminating restrictions on exports as well as imports. To the extent that export barriers are treated at all, the tendency of the instruments developed thus far has been to rely upon instruments that promote better market access issues (imports), or even less developed, purely voluntary, communications between authorities that have to then apply their own effects doctrines. Where there is a great disparity in functional factors, it is reasonable to question whether such instruments can give effect to eliminating the private restraints generated across national borders. As between developed and developing territories joined together in a regional agreement, the balance struck between importation and exportation is revealing as to the balance of concessions established overall.

A classification of competition law matters that relate to trade can be found in Jenny (1999).[131]

Type 1: "anti-competitive cross border" (exports). This includes export cartels, mergers, cross border abuse, international cartels. The effects felt in one market are directed by actors from another market.

Type 2: import restrictions (market access or exclusionary) – including import cartels, vertical restraints, exclusionary standards, domestic abuse. The practices within one market exclude entrants from trading into the market.[132]

Domestic competition laws deal with practices based in the domestic territory. They can reach foreign actors to the extent that their practices have domestic territorial effects. This means that regional members acting as individual authorities are better able to respond to Type 2 measures, since the actors and the practices are all engaged within the domestic territory.

Cooperation may facilitate capacity and communication for dealing with Type 2 measures, but essentially, all that is actually necessary is for each member to have a functional law that treats

[131] F. Jenny, "Globalization, Competition and Trade Policy", 1999, cited in P. Marsden, *Exclusionary Practices*, UNCTAD, 2004, p. 11
[132] F. Jenny, *ibid.*

Type 2 practices affecting trade, and to then ensure that this law applies on the basis of national treatment (non discrimination) as to complaints raised by foreign firms.

As for Type 1 measures the situation is more difficult. In the absence of a superior regional law, these practices must be handled by the authority in the territories where the anti-competitive effects are being experienced. However, for investigation and redress, the authority requires sufficient resources to reach foreign actors. There are inherent limitations as to what one authority can accomplish to nationals in another territory, even for developed authorities with high capacity.

An issue for cooperation emerges: what are the possible instruments for assisting in treating Type 1 practices? As a variation on this theme, where instruments are being provided to facilitate Type 2 enforcement, then what other regional arrangements can be raised to strike a better balance between Type 1 and 2 practices where Type 1 aspects are evident? This especially needs to be considered within a RTA where "free trade" means dealing with both exports and import restrictions, and between developed and developing territories.

2. Cooperation RTA mechanisms

A number of instruments are briefly noted and discussed in this section. An attempt has been made to establish an ascending ranking in respect of the degree of domestic sovereignty surrendered to render the approach effective, as well as to the capacity of such instruments to assist or extend enforcement "beyond territory" to deal with Type 1 anti-competitive practices restraining trade in exports.

2.1 Voluntary cooperation

The term "voluntary cooperation" applies 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:

- 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;

- case-specific cooperation; and
- cooperation typically considered to fall under the broad umbrella of capacity building and technical assistance.133

2.2 Traditional (negative) comity

"Out of territory" investigations were often met with resistance by the subject territory, and actions were taken to block investigation or enforcement in order to discourage exercise over nationals of the subject state. A traditional comity expression is essentially a "good neighbour" declaration and encourages jurisdictions to conduct their investigations in a manner that respects the interests of other jurisdictions. This can be fulfilled by notifying another country when its enforcement actions may affect their important interests, and to conduct its actions without harming those interests.

[133] OECD, *Modalities for Voluntary Cooperation*, 2003 Report, CCNM/GF/COMP/TR(2003)11.

2.3 Convergence

Convergence approaches either require or encourage members to have laws, and then to provide for some principles by which the laws may be governed. Two sub-categories are noted

2.3.1 Soft convergence

Several agreements seek to install general principles that are to be provided for in national competition laws, and then emphasize the types of practices that are likely to affect cross-border trade. In addition, these laws are noted to be subject to procedural and substantive guarantees that, over time, would assist in promoting a certain convergence between the parties in a trade-liberalizing supportive role of competition law and enforcement

An example of this pattern is a Canadian proposal for the "Free Trade Agreement of the Americas". One summation provides 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." [134]

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."

From this point forward, the emphasis is on the behaviour of the laws and authorities in respect of transparency, due process, and national treatment. Upon this convergence platform, it is suggested that parties can (bilaterally) go forward to initiate more formalized cooperation including positive comity agreements.

The soft convergence approach is clearly supportive of competition culture and also respects the positions in a large and diversified group. To the extent that national authorities become more operational, it also provides for better capacity to address the Type 2 problems. Incidentally, higher functioning authorities may be more able to respond to Type 1 issues as well, but soft convergence does not address on point any form for state responsibility that would treat export restrictions as they affect other regional member states.

2.3.2 "Top-down" convergence

Where the focus remains on national laws and national authorities, but the regional institutional level is operating in some type of an assist capacity, this form of convergence

[134] Canada, (FTAA), "Draft Chapter on Competition Policy, Canada´s Position and Proposal", Ministry web site. Canada also recommends provisions on state monopolies.

may be more viewed as “top-down”. The Mercosur common market appears to reflect some of these elements where there is some common definition for the area as a whole being sought to be established and some attention being drawn to anti-competitive practices with a “Mercosur dimension”. Based upon this, it is conceivable that external representation for the area can evolve, as well as the possibility of treating public anti-competitive practices that members will otherwise not resolve.

The potential for blending some regional institutional capacity together with member state authority has to be considered a prime area for experimentation to resolve those aspects that cannot be reasonably addressed by the single authorities. While this may include elements of supra-nationality, this may not necessarily be the case. Approaches can consider inter-authority committees dedicated to addressing cross-border and area-wide problems. Higher institutional levels may be more appropriate for state sponsored distortions and for external representation of the area as a whole. At the same time, these measures can be evolutionary and incremental as the regional structures derive experience.

While this category of top-down convergence seems more appropriate with respect to plans for a customs union or common market, some aspects might also be suitable for free-trade areas. What is perhaps more important from the outset is that a treaty plan does not unreasonably foreclose the potential for creating some area wide capacity even while emphasizing national authority cooperation.

2.4 Positive comity

The OECD provides an international instrument for a more proactive form of cooperation in the form of positive comity. Operating on the basis of an authority's request for assistance or action directed to another authority, the requested party may then:

> (1) give a 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.[135]

Positive comity provisions are often categorized as formal or informal, binding or voluntary, but attempts to categorize them may also confuse the definitional components more than assisting in clarification. Much of what occurs in practice is informal in nature and based upon relationships, regardless of whether or not a formal instrument is in place. The notion of binding cooperation is also in part a misnomer since no state will take action if it is deemed against its interests to do so.

For the regional aspect, what is more important than the classifications is the instrument’s reliance upon requests, and the point that the action is then only taken in respect of the laws of requested countries. This limits the instrument to Type 2 practices. While this certainly promotes the market access component of regional integration, there is a poor match resolved where positive comity provides so little potential for addressing Type 1 problems. As between a developed and developing country installing a positive comity provisions in an RTA, one can conclude that the developed party may get the better balance of the deal if this party has

[135] OECD, 1999 Report, *Ibid*, p. 11. Paraphrasing parts of the OECD 1995 Recommendations.

the greater interest in market access. [136] Finally, while seemingly highly appropriate for issues raised by mergers and acquisitions, the more restrictive environment for timelines to vet notifications appears to work against positive comity approaches.

2.5 Notification

A possible instrument for balancing positive comity is that of notification, whereby an authority informs another of possible violations of the latter's laws caused by nationals of the former. Since any action taken is still the responsibility of the territory where the effects are being experienced, notification still respects the traditional jurisdiction concept. What is added, however, is the element that, while authorities are going about their domestic business, they are also keeping an eye on activities that may fall under the violations of the partner regimes. The text below is from the US – Australia Agreement:

> "(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."[137]

The intent to provide such information certainly raises issues of confidentiality, and the US version of the instrument is heavily circumscribed with guarantees regarding business information. At the same time, however, the instrument also has some far-ranging features including the possibility of a domestic court securing additional evidence and testimony that could be used by the foreign authority.

Another example appears in the Canada – Costa Rica provisions. While commencing with a traditional (negative) comity notification clause, what is defined as "affecting the interests of the other" is broadened to include both:

- 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; and
- involv(ing) remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at conduct in that territory… [138]

The appropriateness of this type of good neighbour policy is indicated where the parties have already committed themselves to a free trade agreement seeking to eliminate restrictions on imports and exports. As such, this agency cooperation provides some assurances that, in respect of private practices, there may be some meaningful capacity for governments to also deal with them respectively. Although enforcement remains territory-based as to effects, the importance of self-discovery and request is diminished as each authority commences to look out for the other. In this sense there is some additional capacity that is passed to the acting authority to pursue the Type 1 practices since the information given to this authority is likely to include acts by foreign parties upon the market of the receiving authority.

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[136] There are two caveats: the instrument may be used for export restrictions where there are evident internal effects; and the instrument could be used to address vertical restrictions against dumped goods being re-exported to the home market.

[137] US – Australia Antitrust Mutual Assistance Agreement, ABA web site, International Practice Section. Authorized by, 15 USC 88, section 6201, et. seq.

[138] 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, Article XI.3.

By removing the necessity of taking own domestic action as a condition to notification, one can see the emergence of this more enlightened view that authorities should just be given the freedom to notify each other of violations occurring in the other's territory, as a matter of course and certainly as a supportive instrument for free trade.

2.6 Delegation

An additional category deals with cases where one authority agrees to take account of the other territory in its market analyses. An example is found in the merger control field for the European Community's regulation of concentrations. The European Commission receives notification of mergers according to established thresholds for those having a community dimension. In addition, a member State may also request the Commission to review a proposed merger or concentration in light of the national market.[139]

While this example refers to a regional authority, this may not be a prerequisite. Where a regional grouping has one large state with a merger notification requirement, it is conceivable that reviews can be made in respect of the other regional members, or also by delegation, for the area as a whole.

2.7 Actions "out of territory", or power over nationals abroad

These final two concepts address jurisdictional issues by either extending domestic jurisdiction to actors resident elsewhere, or extending jurisdiction for domestic actors for their practices committed abroad. While these approaches are understood to not respect the limits of traditional domestic competition law and policy jurisdictional power, such powers can be accorded by state obligation (state responsibility) in the context of a regional trade agreement. The result is that either an extension of competition law jurisdiction is created, or power may be invested in trade agencies dealing with external relations law.

A regional trade agreement example incorporating elements of actions out of territory is found in the ANZCERTA agreement between Australia and New Zealand, a free-trade area but with provisions also for investment, services and regulatory harmonization. According to Hoekman, the goal of eliminating anti-dumping between the members required 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 behavior 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 judgments of Courts or authorities of one country are enforceable in the other country.[140]

[139] Art. 22 of the original European Merger Control Regulation, the so-called Dutch clause.
[140] B. Hoekman, *Competition Policy and Preferential Trade Agreements*, World Bank and CEPR, Citing Ahdar, (1991).

These techniques clearly require some significant relinquishment of domestic state power over domestic nationals. In this case, it is well known that the purpose 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.

The flip side of the ANCZERTA approach is for a state to exercise jurisdiction over its nationals as they commit infractions abroad. There are no regional trade agreement examples of this "nationality" jurisdiction in the competition law context, although examples from areas of enforcement are known. For the United States, these include tax law jurisdiction where citizens are subject to US income taxes regardless of whether they live or earn in the United States. A more pertinent example is in the area of bribery and corruption, where according to the authorizing OECD Convention, US nationals violate US law for their illegal acts committed abroad.

A possible legal basis for this form of jurisdiction in the regional competition policy arena could be a treaty prohibition on export cartels, or other private export private restraints affecting a partner's trade in imports. This could allow for a state-to-state action that was resolved in an order of termination directed by one state over its domestic actors.[141]

3. The Southern African Customs Union (SACU) example

With the above inventory in hand, this section considers competition policy instruments for the Southern African Customs Union (SACU); it first outlines treaty components to set an interpretation for the competition provision, and then briefly notes the functional aspects for the SACU members before concluding with recommendations for instruments.

3.1 Treaty aspects

The SACU Agreement has two provisions that establish reference to anti-competitive private practices. Article 40 requires members to have competition policies and to then engage in cooperation for the enforcement of laws. Article 41 is directed to unfair trade practices and requires the SACU Council to develop policies to address these practices. The context for the meaning and scope of these provisions is provided by the balance of the treaty including its preamble, objectives, established institutions and movement provisions.

3.1.1 Preamble

The governing treaty is the Southern African Customs Union Agreement[142] as signed by the Heads of State (or representatives of Member States) on 21 October 2002. The Preamble recognizes that the predecessor agreement of 1969 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's primary legal objective is the

[141] Little attention was paid to the actual legal effect of establishing an international prohibition against hard core cartels in WTO Working Group discussions. The EC has no external authority to penalize cartels for any effect they may have in non-EC markets, but anecdotal evidence suggests that an "international" prohibition might raise some external basis for the Community to adjust penalties and termination orders on behalf of other WTO Members.

[142] 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.

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.

3.1.2 Stated objectives

The stated objectives of the agreement provided in Article 2 provide additional detail on the legal objectives of the agreement as they relate to the subject matter of Articles 40 and 41. More directly:[143]

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

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

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

3.1.3 Free movement provisions

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 established the "Southern African Customs Union". This customs union shall have the status of an international organization with 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 Common Customs Area, 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).

The external dimension of the customs union is established by Article 31, Trade Relations with Third Parties. Members may maintain existing agreements with third countries, but shall

[143] 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.

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.

3.1.4 SACU institutions

The legislative function in SACU is provided by the Council of Ministers, consisting of at least one Minister from each country; this Council 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 and 6).

The Customs Union Commission, composed of officials from the Member States, has an executive function in the SACU. It is responsible for ensuring the implementation of the Council's decisions and for the implementation of the agreement. (Article 9, paras. 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 support mechanism is provided by Article 12 of the Treaty, which establishes the several Technical Liaison Committees. These committees have been created 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 their terms. For competition and unfair trade practices, the subject area of trade and industry may be broad enough to encompass these aspects 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).

3.1.5 Summation for the objectives of the SACU agreement

Taken together, these provisions establish a clear but narrow scope for SACU as the agreement is dedicated to the formation of a customs union for trade in goods. 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 does not contain provisions for either the free movement of persons or the free movement of capital between Members. Although the objectives refer to enhancing inward investment in the Common Customs Area, as free movement provisions are not provided for investment or services, a common area in this sense is not provided as an objective. Likewise, the CCA itself is not being granted the power to represent the member states in external agreements relating to services, labour movements, or investment.

In light of these articles and objectives in respect of customs union formation, the meaning and scope of common policies provided for in the agreement should be interpreted in this more limited context as well, suggesting that such policies as they may be undertaken should not (or need not) be drawn to exceed the scope of the objectives as to free trade in goods.

3.1.6 SACU's common policies

The Agreement provides a separate part dedicated to the four following "Common Policies":

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

The provisions for Articles 40 and 41 also provide for:

1. Member States agree that there shall be competition policies in each Member State (Article 40 Competition Policy)
2. Member States shall co-operate with each other with respect to the enforcement of competition laws and regulations (Article 40 Competition Policy)
3. The Council shall, on the advice of the Commission, develop policies and instruments to address unfair trade practices between Member States. These policies and measures shall be annexed to this Agreement (Article 41 Unfair Trade Practices).

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 is titled by the term "Policy", but only one of them uses the term "common policies". It should not be presumed that because the title of the Part refers to common policies, that common SACU rules or a superior SACU law is being 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.

The Articles relating to Industrial Development and Unfair Trade Practices emerge as the strongest substantive and institutional provisions in the common policies title. The Industrial Development provision (Article 38) specifically refers to the creation of common policies. The Article on 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 policies and instruments to address unfair trade practices between member States…"

The Competition Policy Article (Article 40) also refers to "policies," but does not suggest 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. Here the objective of realizing policies is applicable to Member States by their own agreement, agreeing to each have a competition policy. This is not a reference to common policies but to national policies. While these may be subject to convergence of some type by the process of cooperation between members, they are not designated at the outset by the Treaty to have the character of single legal acts established at the SACU level nor by SACU institutions.

This interpretation suggests that while Articles 40 and 41 are "common policies" according to the title of Part Eight, there are different avenues being pursued in order to achieve this

commonality. The first avenue is the establishment of "area" rules and policies for investment and unfair trade practices; the second path is active cooperation between national rules and policies for agriculture and competition.

If this interpretation is correct, then the Article 40 provision must be read in this more restrictive context as not requiring the establishment of an independent customs union area competition law or policy, that the member states are responsible for establishing domestic competition policies, and that the member states shall then further co-operate in respect the enforcement of their separate laws and regulations.

3.2 Functional aspects in the SACU area

A workshop session for SACU members provided an opportunity for participants to describe practices of concern in the region. Attention was mostly directed to the problems of small members, in contrast with the largest member, as to the difficulties of domestic firms attempting to compete in their own markets against the larger South African (SA) firms. Concerns were also expressed about high market concentrations of individual firms; local firms finding it difficult to access supply chains in their own territorial markets; refusal to deal (to supply or purchase); dumping (below normal prices); and investment flows possibly affected by restrictive business practices. An analogy was made that while the SACU meant that all parties were present in the theatre, all the best seats in the cinema were already occupied by firms from the largest country.

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

All the members indicated that their national laws, if they them, suffered from implementation problems with respect to capacity, the lack of provisions to attend to the practices, and the issue of competing resources.

From the perspective of the larger SACU member, the problems of other members were indicative of its own problems, whereby its domestic market was somewhat characterized by dominant firms. Most of the major complaints pertained to monopolies, together with the problems faced by new entrants. While this Member State has a functioning authority, firms' anti-competitive activities can outpace authority resources. Although cartel actions had not been pre-eminent, more activities related to cartels were also emerging.

At the same time, however, when 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. As well, a number of practices did not fall under the scope of an individual member's competition law, including predatory dumping.[144]

3.3 Practices as applied to the Treaty

SACU has a large country (South Africa) together with the smaller members, namely Botswana, Lesotho, Namibia and Swaziland (BLNS). Most of the examples raised related to dominance and the cross-border effects of dominant practices on other markets, either as to domestic competitors and/or consumers, or as to 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 would have to be analyzed in order to determine which Article of the SACU treaty is related.

Table 1

Trade competition and unfair trade laws – relation to export and import practices

Domestic response **Country and Practice:**	**Trade law response – Import or export country**	**Competition law response – export country**	**Competition law response – import country**	**Unfair trading laws, domestic selling laws – import country**
"Restrictive behaviour"				
Export country: quotas/ export cartel	No redress by import country trade laws	Extra-territorial claim, (U.S. 301)	Domestic law acts on local effects, but actors are foreign	Competitor injury refusal to supply or deal / unfair pricing or terms
Import country: quantitative restriction/ import cartel/ exclusionary	No redress by export country trade laws	Extra-territorial claim, (U.S. 301)	Foreign firm invokes domestic competition law	Foreign firm invokes unfair trade law if applicable
Under pricing/ Dumping				
Export country: predatory pricing	Anti-dumping duties, except for customs union prohibition on duties	No territory jurisdiction, but re-importation barriers claim (vert. restraint)	Effects based on abuse of monopoly	Minimum mark up laws, prohibition on sales below cost
Export country: dumping (non - predation)	Anti-dumping duties, except for custom union prohibition on duties	No territory jurisdiction, but re-importation barriers (vert. restraints)	Law applies, but no anti-competitive effects shown.	Minimum mark up laws, prohibition on sales below cost

[144] It could be presumed that this practice would not fall under the law because its effects are targeted to another jurisdiction.

Any attempt at a categorization of practices as relating to the different SACU provisions must also take account of the relationship between trade laws, competition laws, and unfair trade practice laws themselves (see Table 1). 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 clearer that cooperation approaches focusing upon market access strategies do not address in full measure the practices flowing from dominant positions.

The treaty objectives for the free trade in goods and the establishment of a customs union are clear, and the treaty likewise has an explicit competition law and policy cooperation provision based upon a member state obligation to have competition policies in place. However, the linkage between competition cooperation and the treaty objectives overall are not explicitly stated, nor are the practices which are subject of national competition law. One can infer a relationship whereby these laws should be functional for those matters affecting trade between the members and which fall as actionable between the national laws. As the SACU is a customs union it is also possible to envision some stronger relationship to trade in order to address practices that affect trade even while not in violation of a national competition law, although members have certainly not explicitly agreed to establish such a relationship in the treaty. The preamble, objectives and free movement provisions more implicitly indicate a common customs area treatment for the movement of goods, and this does suggest some basis for broader cooperation for practices distorting trade within the area or over a substantial portion of it.

Overall, the limitation of the treaty as to movement of goods can be seen as a parameter both in the national laws required and in the forms of cooperation that are undertaken by the members. This may appear illogical in respect of the close relationship between goods, services and investment, but to the extent that the treaty is dictating the cooperation on competition policy, this is itself a limitation dictated by the treaty.

SACU members are highly divergent in respect of country and market size and the international operations of their firms. The customs union is characterized by a single “major” player, and then by intermediate and smaller markets. Also in respect of development levels, while all have significant informal and developing country market aspects, the larger territory also presents important developed country elements, including a fully functional competition law and policy institutional apparatus.

3.4 Cooperation instruments for SACU

No systematic study of restrictive business practices in SACU has been undertaken for this discussion. Anecdotal material submitted indicates, not surprisingly, that SACU members deal with issues of dominance and also place some emphasis on treating unfair trading practices, as indicated by the stronger institutional design of Article 41 of the treaty.

These factors suggest some outlines as to the instruments to consider for application. First, as the treaty requires Member States to have laws and cooperate on enforcement, a convergence approach, while not mandated, certainly follows this dictate. A protocol among members

outlining the practices to be treated by national laws and the procedural elements to contain within the laws would be reasonable.

To the extent that SACU is attempting to complete an internal area for movement of goods, some "top-down" convergence can also be imagined both for internal practices affecting SACU overall, but as well for the purpose of developing a common external voice on competition law and policy matters. This latter aspect would be supportive of the degree of external harmonization being realized for the common tariff and commercial policy. An avenue for commencing coordination at the SACU level might be accommodated by a technical liaison committee as the Council has the power to create or define the scope of treaty designated committees.

A positive comity instrument is not necessarily indicated, at least not at the outset. The instrument as commonly employed is based on reciprocity and not all SACU members are dealing with authorities that can either form or respond to requests. Given the stronger position of the larger member's firm across the SACU market, the implementation of the instrument without some balance to address Type 1 measures might also be viewed as a one-sided form of cooperation. While it is conceivable that a non-reciprocal positive comity could be undertaken by the larger member, it is also possible that very few of the practices affecting the smaller members would actually fall within the terms of violation of the larger member's competition law. One possible application, however, is the re-importation of dumped goods. To the extent that this has been highlighted by members as an unfair trade practice, positive comity request procedures might assist in addressing actionable vertical restraints that underpin the likelihood of giving effect to a successful price dumping strategy.

Further study might be advised to explore the viability of a notification instrument for SACU. Since the largest member has ongoing investigations in respect of its own firms in its own market, these actions could be communicated to the other members by cooperation based upon notification. While this is a resource intensive gesture for even a well-developed authority, it is also one that can stimulate, and strike the bargain for, the development of the laws and authorities of the other members as well. There is a significant gain for all SACU members where functioning authorities are capable of prosecuting in respect of their own markets based upon a strong signal to firms that information obtained in one is available to the others. It is certainly a concept that is well commensurate with the notion of customs union development.

A delegation instrument could also play a role in respect to the operations of the larger authority for both notified mergers and acquisitions. It may also serve as a bridge for the customs union in respect of external practices subject to investigation and treatment by the larger authority until an external representation could evolve via SACU institutions.

Out of territory approaches to cooperation would appear to require functioning authorities in the members, and this advanced approach would not be able to be considered in the absence of BNLS capacity.

On the other hand, nationality jurisdiction to permit South African authorities to terminate practices of domestic actors as they are committed in other member states is possible. This would be a significant gesture for one national authority to make in respect of its trade partners, and one might imagine that a sort of reciprocity would be required, perhaps in the form of fully functioning authorities activated in the other member states that could respond meaningfully to positive comity requests made by the larger authority.

4. Conclusion

Trade and competition are complementary for the positive effects on consumer welfare. But as also well-recognized, national trade objectives and domestic competition laws are not pieces of the integration puzzle that join so easily together. The degree to which trade objectives can or should dominate the exercise of domestic policy is a matter subject to balance and negotiation in the formation of a regional trade agreement. Since these domestic policies receive more emphasis in the absence of common regional competition rules, the relationship established between the mandate of national authorities and the regional trade objectives should be a conscious one. While this discussion has highlighted a few of the instruments available to assist in meeting regional objectives, innovation is occurring and one can expect to see additional policy instruments emerge over time.

Two areas noted here that deserve some greater study generally are "top-down" convergence and notification. Both hold interesting possibilities for regional trade agreements, and specifically, for agreements containing developed and developing members.