THE POSSIBLE INTERACTION BETWEEN COMPETITION AND ANTI-DUMPING POLICY SUITABLE FOR THE SOUTHERN AFRICAN CUSTOMS UNION (SACU)

by

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Abstract

Recently countries have become more aware of the potential anti-competitive effects of anti-dumping measures. This is mostly due to the view that anti-dumping measures, as trade policy instruments, are at odds with the objectives of competition policy. According to many economic writers the only rational economic justification for anti-dumping measures is predatory dumping as an extreme form of price discrimination. Apart from the dramatic change in the economic justification for the use of anti-dumping measures over the last decades, there has also been a significant change in the countries that implement these measures. Since the Uruguay Round of Multilateral Trade Negotiations there has been a shift from developed countries to developing countries being the main users of these policy tools. In the last couple of years the member countries of the Southern African Customs Union have been under increased pressure by private firms to enable the use of anti-dumping measures on intra-regional goods trade. However, the appropriateness of utilising these measures on intra-regional trade in the context of a custom union has been a contentious issue in recent economic debate. These measures erect trade barriers among the member states which are against the basic premise of a customs union. This has resulted in most economists calling for the prohibition and replacement of anti-dumping measure with either coordinated domestic or harmonised regional competition policies.

In developing the regional and national policies on anti-dumping the SACU member states can follow two main stream approaches. The first is the incorporation of various competition principles into anti-dumping rules to limit the negative welfare and anti-competitive effects of utilising anti-dumping measures, while the second is the abolition of anti-dumping measures in the region which is then replaced by competition policy. The option best suited for SACU depends on the differing viewpoints on implementing anti-dumping measures in a customs union. However, irrespective of which policy combination is chosen, regional and national polices and authorities will have to be created, adapted and/or amended in order to have an effective interaction between anti-dumping and competition policies applicable to intra-regional trade.

Opsomming

Lande het ontlangs meer bewus geword van die moontlike negatiewe uitwerking wat maatreëls teen storting van goedere in markte kan hê op plaaslike en internasionale mededinging. Dit is hoofsaaklik as gevolg van die siening dat teen-stortingsmaatreëls, as instrumente van handelsbeleid, se doelwitte teenstrydig is met die van mededingingsbeleid. Volgens vele ekonomiese skrywers is die enigste rasionele ekonomiese regverdiging vir teen-stortingsmaatreëls predatoriese storting as ‘n uiterse vorm van prysdiskriminasie. Afgesien van die dramatiese verandering in die ekonomiese regverdiging vir die gebruik van teen-storingsmaatreëls oor die laaste dekades, het daar ook ‘n beduidende verandering plaasgevind in die lande wat hierdie maatreëls om goedere handel implementeer. Sedert die Uruguay Rondte van Multi-laterale Handelsooreenkomste het daar ‘n verskuiwing plaasgevind van ontwikkelde lande na ontwikkellende lande as die belangrikste gebruikers van hierdie beleidsinstrumente. In die laaste paar jaar het private firmas die lidlande van die Suider-Afrikaanse Doeane-Unie onder toenemede druk begin plaas vir die gebruik van teen-storingsmaatreëls op invoere vanaf die res van die streek. Alhoewel, huidiglik is die toepaslikehid van die gebruik van hierdie maatreëls op handel, in die konteks van ‘n doeane-unie, steeds ‘n omstrede kwessie binne ekonomiese dabatte. Hierdie maatreëls rig handelsversperrings tussen lidlande op wat teen die basiese veronderstelling van ‘n doeane-unie is. As gevolg hiervan is die meeste ekonome van die opinie dat teen-storingsmaatreëls vervang moet word met óf gekoördineerde binnelandse of geharmoniseerde streeks-mededingingsbeleid.

Die SADU-lidlande kan twee benaderings volg in die ontwikkeling van streeks- en nasionale beleid oor teen-storingsmaatreëls. Die eerste is the insluiting van verskillende mededingingsbeginsels in bepalings wat handel oor teen-storingsmaatreëls om sodoende die moontlike negatiewe gevolge van hierdie maatreëls te beperk. Die tweede opsie is om teen-storingsmaatreëls op streeks-invoere met bededingingsbeleid te vervang. Die mees gepasde opsie sal af hang van die verskillende standpunte rondom die toepaslikheid van teen-stortingsmaatreëls in ‘n doeane-unie. Alhoewel, ongeag die beleidskombinasie wat gekies word sal nasionale en streeks-beleid en owerhede geskep, aangepas en/of gewysig moet word ten einde ‘n effektiewe interaksie tussen teen-storingsmaatreëls en mededingingsbeleid binne SADU te verseker.

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1.1 Introduction

Recently countries have become more concerned about the potential anti-competitive effects of anti-dumping measures. This has mostly emerged form the view that anti-dumping measures, as a trade policy instrument, are at odds with the objectives of competition policy. The relationship between trade and competition policy is complex due to the overlapping effects of these policies. Commonly stated, while competition policy aims to reduce the power of domestic producers, trade policy aims to ensure the market power of the domestic producers in order to shift economic rents from foreign suppliers to the domestic government and producers at the cost of consumer welfare and the overall welfare of society. Although it is commonly stated that these policies have differing objectives, there are also a degree of complementarity between trade and competition policies, based on a theoretical common foundation as a reference point: the theory of free trade and perfectly competitive markets in order to achieve economic efficiency in the allocation of resources.

The debate surrounding the interaction between competition and trade policy is based on three main contentions:

- trade liberalisation can be frustrated by inefficient national competition policy;
- trade policies can have in itself uncompetitive effects in the domestic and international market; and
- government regulation can frustrate the objectives of both trade and competition policies

Anti-dumping measures, as a tool of trade policy, can also be formulated in such a manner that it is at odds with the objectives of competition policy: competition protect the consumer from anti-competitive behaviour by firms and governments in the market, while anti-dumping law protects domestic firms and the factors of production employed in the relevant domestic market. Anti-dumping measures do not prohibit specific actions, like price fixing and resale price maintenance which would otherwise be prohibited under competition policy. On the other hand anti-dumping does prohibit competition through price differentiation which is generally legitimate competitive behaviour under competition policy.

As pricing strategies, the use of anti-dumping measures has been justified to address price discrimination and predatory pricing. Dumping as price discrimination entails a foreign firm

being able to segment the home and export market according to the willingness of the consumers to pay in the differing markets. The firms are thus able to maximise its profits by charging different prices in the different markets according to different elasticity's of demand. Predatory pricing has been the most commonly used argument to justify the implementation of anti-dumping measures. In terms of dumping, predatory pricing implies that a foreign firm has the ability to export a product at a lower price than the price of the product in the exporting market in order to eliminate competitors and deter new entrants in the importing market. If the exporting firm is successful in achieving its goal and gain monopoly power in the importing market, the monopolist can recoup losses by increasing prices to monopoly price levels.

The main objective of a regional trade agreement is the removal of trade barriers in order to enhance the development of the trading partners and integrate the individual economies of the countries into the global economy. However, the elimination of tariffs and non-tariff barriers among trading partners can place new demands on governments to protect struggling domestic industries due to increased trade liberalisation efforts. Anti-dumping measures are generally included in a regional agreement to satisfy the bureaucracies to protect import-competing sectors and to meet political demands for protectionism if the trade liberalisation process is perceived as a threat to the domestic economy. Retaining anti-dumping measures in a regional trade agreement can have some unintended consequences for consumers and intermediate product users in the domestic market. From the perspective of the consumer the use of anti-dumping measures are economically irrational due to the negative impact it can have on consumer welfare.

The argument has been made that there is no room in a regional trade agreement for anti-dumping, due to anti-dumping measures being against the basic principles of a regional trade agreement in the context of the General Agreement on Tariffs and Trade (GATT) 1994 and the World Trade Organisation (WTO). Whether Article XXIV of the GATT 1994 allows the retention of anti-dumping measures in a customs union is a contentious issue among economic and legal authors in the field. The arguments around this issue have been based on three main questions: whether Article XXIV mandates anti-dumping measures to be eliminated from intra-regional trade in a customs union or allow the trading partners to either maintain or eliminate anti-dumping measures in a customs union. Currently there are only a few regional arrangements which have been successful in abolishing anti-dumping measures

from the regional arrangements, including the European Community, European Economic Area and the Australia-New Zealand Closer Economic Relations Agreement.

The Southern African Customs Union (SACU) is a customs union with South Africa, Botswana, Lesotho, Namibia and Swaziland as member countries. The 2002 SACU Agreement allows for anti-dumping measures (as unfair trade practices) and competition policy in the agreement. However, the ambit of these provisions is quite limited. There is also a lack of anti-dumping law and competition policies in some of the member countries. This can pose a challenge for SACU countries to cooperate on the basis of competition policies or eliminate the use of anti-dumping measures from the regional trade agreement. There are various options SACU can consider in order to remove anti-dumping measures from the regional agreement: the complete replacement of anti-dumping measures with competition policy, the simultaneous implementation of completion policy and anti-dumping law, utilising competition principles in the anti-dumping investigation or using anti-dumping as a measure of last resort. However, the SACU member countries will need to consider a number of factors in order to determine the most efficient policy combination: the institutions available in SACU and the member countries, the different developmental goals of the individual countries, the position of the countries in the current global economy and the overall goal of SACU as a regional arrangement.

1.2 Background

Globalisation and trade liberalisation have highlighted the issue of fair competition in international trade. The opening up of markets can increase competition from foreign firms, but also creates the addition issue of dumping excess output by developed and developing countries. There is the growing concern that anti-competitive behaviour by private firms can harm international trade which requires national policies to promote the conditions of competition (Economic Commission for Africa, 2000:3).

The first country to adopt anti-dumping legislation in 1904 was Canada, followed by Australia in 1906 and various other countries up to the 1920s. After this first flurry of countries adopting anti-dumping laws Viner (1923) provided the first comprehensive analysis of anti-dumping measures and its economic rationale as a measure for addressing discriminatory pricing and cartels. In the 1950s anti-dumping laws gained more world-wide status with increasingly more countries adopting and implementing these laws. At the end of

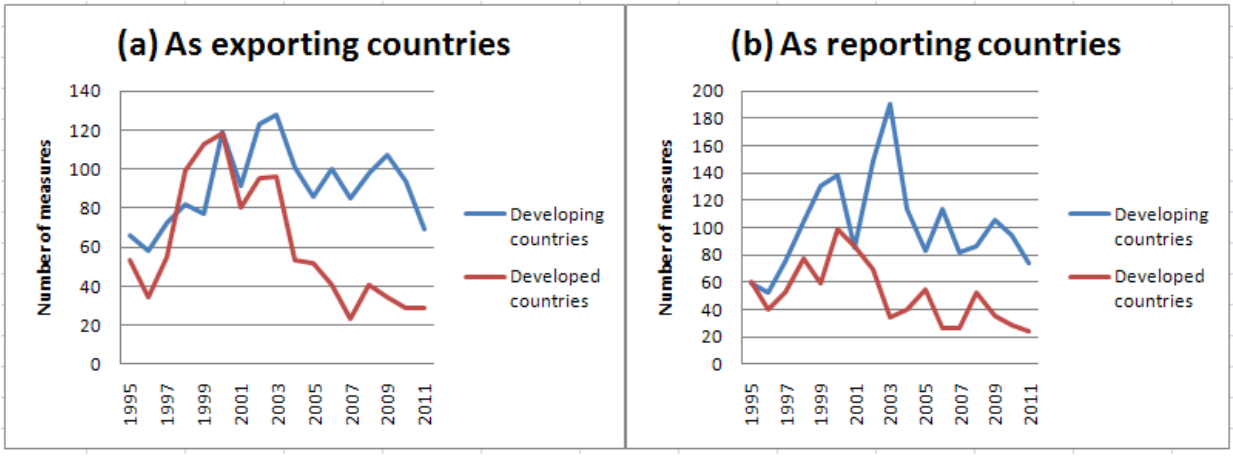
2001 94 countries had domestic anti-dumping laws in place (Wooton & Zanardi, 2002:4). This initial rationale for anti-dumping measures has changed drastically over the years. According to many economic writers the only rational economic justification for anti-dumping measures is predatory dumping. This is an extreme form of price discrimination where a dominant firm intentionally lowers prices to the extent that competitors will be driven from the market, leaving the initial dominant firm as the only remaining firm in the market. However, this concern has been dwindling in recent years with many economists seeing the modern day implementation of anti-dumping measures as having less to do with predation and more as a protectionist tool which is detached from any behaviour associated with dumping (Wooton & Zanardi, 2002:12). Anti-dumping measures are seen as a mere substitute for tariff protection as trade liberalisation has increased or a pure protectionist tool used by the traditional users of anti-dumping measures to protect their market share (Wooton & Zanardi, 2002:13).

Apart from a dramatic change in the economic rationale and justification for the use of anti-dumping measures over the last decades, there has also been a significant change in the countries that implement and are affected by anti-dumping measures. Since the Uruguay Round of Multilateral Trade Negotiations was launched and the WTO Agreement on anti-dumping measures entered into force there has been a drastic change in the number and variety of countries using anti-dumping measures. Prior to the Uruguay Round the primary users of anti-dumping measures were developed countries, including Australia, the EU and the United States. Between 1990 and 1999 50 percent of the anti-dumping investigations were initiated by the EU, Australia, the United States and Canada. Developing countries accounted for 39 percent of the anti-dumping investigations over the same time period. However, it seems that the imports of developing countries have always been the target of anti-dumping investigations. Between 1990 and 1999 anti-dumping investigations targeted the exports of developed countries in 35 percent of all cases, while 66 percent of investigations were against the exports from developing countries (UNCTAD Secretariat, 2000:4).

The WTO statistical database on implemented anti-dumping measures gives an indication of how the composition of countries utilising anti-dumping measures have changed over the last decades. The database provides anti-dumping data from 1995 to 2011 (investigations and measures under the WTO) according to exporting (affected countries) and reporting

(implementing countries) countries. The data was then divided into developing and developed countries according to the country classifications utilised by the United Nations (See Addendum B). The figure below shows two graphs. The first indicates the number of anti-dumping measures which have been implemented against the imports of developing versus developed countries over the time period. The second shows the dynamics between developed exporting and reporting countries and developing exporting and reporting countries.

Figure 1: Anti-dumping measures by exporting and reporting countries



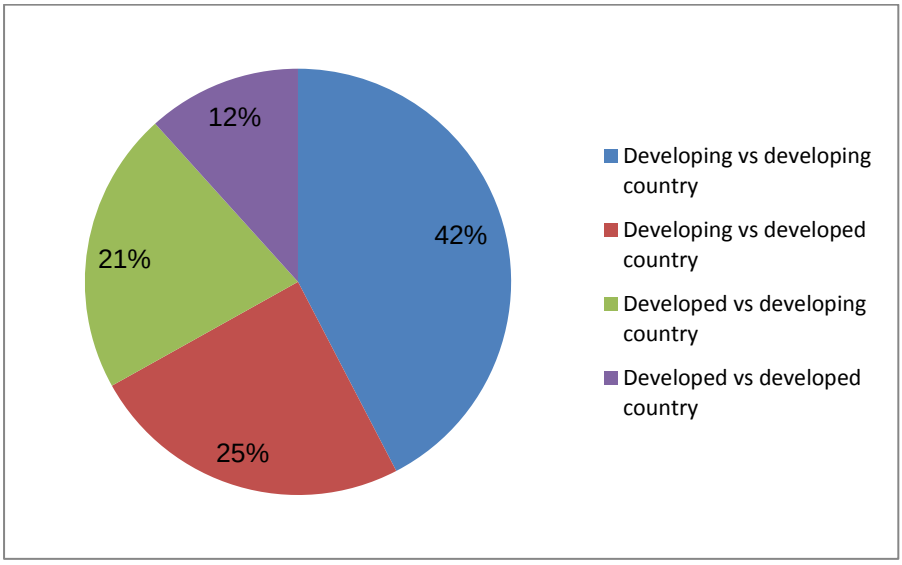
Source: WTO Statistics on anti-dumping measures (2012)

Figure 1(a) shows how developed and developing countries have been affected by the implementation of anti-dumping measures. Between 1995 and 2011 anti-dumping measures were implemented on the exports of developing countries in 60 percent of all cases, while 40 percent of all measures were implemented on the exports of developed countries. Over the time period the exports of developing countries have been the main target of anti-dumping duties, except in 1998 and 1999 when anti-dumping measures on developed country exports surpassed measures on developing country exports. Exports from China have mainly been targeted by anti-dumping measures, accounting for 24 percent of duties imposed over the time period.

Figure 1(b) shows that there has been a shift from the traditional users of anti-dumping measures. Prior to 1995 developed countries were the main users of these measures. However, there has been a significant increase in the amount of anti-dumping duties implemented by developing countries. Between 1995 and 2011 developing countries

implemented 67 percent of all anti-dumping measures, while developed countries accounted for only 33 percent of all final anti-dumping duties. India, Argentina and China are the three developing countries which have utilised anti-dumping measures most, accounting for 32 percent of all anti-dumping duties from 1995 to 2011.

Figure 2: Anti-dumping measures: developing versus developed countries



Source: WTO Statistics on anti-dumping measures (2012)

Although exports from developing countries have always been a target for anti-dumping investigations, traditionally these measures were imposed by developed countries. This dynamic has also changed drastically over the last decades. Figure 2 shows that there has been a shift from developed countries targeting the exports of developing countries to developing countries targeting the exports of other developing countries. Out of all the anti-dumping measures implemented between 1995 and 2011 42 percent of these measures were implemented by developing countries on the exports of other developing countries, while in 25 percent of all cases developing countries targeted the exports of developed countries. Developing countries exports are still the main target of anti-dumping measures by developed countries (21 percent of all anti-dumping measures) with developed countries targeting the exports of other developed countries in only 12 percent of all anti-dumping measures implemented over the time period.

Many regional trade agreements include provisions on anti-dumping measures and competition issues. Although there are also those trade agreements with limited to no

provisions made for utilising these measures on the intra-regional level. According Rey (2012:7-10) at the end of November 2010 just over 192 regional trade agreements were notified to the GATT/WTO as being in force with approximately 78 percent of these agreements containing specific provisions on anti-dumping measures.

According to Wooton and Zanardi (2002:33) the combination of anti-dumping and competition policy and the degree of coordination or harmonisation of policies depend on the degree of bilateral or regional integration countries want to achieve. The table below shows the interaction among anti-dumping and competition policy combinations as the level of integration progresses linear from shallow to deeper regional integration. As countries move from no formal bilateral or regional relationships with trading partners to shallow regional integration agreements (free trade agreement) and finally the deepest form of regional integration, a common market, increasing demands are placed on effective interaction among trade and competition policy and the coordination and harmonisation of trade policy and competition law among the trading partners. This creates a challenge for any regional relationship with the aim of deepening integration, especially those regional arrangements which are faced by different levels of economic development, legal frameworks and institutional capabilities and capacity.

Table 1: Trade and competition policy according to the level of regional integration

Level of integration	**Trade Policy**	**Competition Policy**
No bilateral/regional integration	Unilateral tariffs and national anti-dumping policy	National competition policy
Free Trade Agreement	Free flow of intra-regional goods; national trade policy on extra-regional trade in goods; no supra-national or regional bodies; possible removal of intra-regional anti-dumping measures	National competition policy
Customs Union	Common external tariff; common external anti-dumping policy; regional bodies; elimination of anti-dumping measures on intra-regional trade	Harmonised or coordinated competition policy on intra-regional trade
Common Market	Common external tariff; elimination of intra-regional anti-dumping measures; common external anti-dumping policy; supra-national bodies	Harmonised/common competition policy with supra-national laws and authority

Source: Wooton & Zanardi (2002:33)

Competition policy and the interaction between competition policy and international trade are seen as one of the 'new trade issues' which must be considered by WTO member countries on the multilateral level (Hoekman & Holmes, 1999:1). Hoekman and Holmes (1999:10) states that one of the main reasons for multilateral trade policy and coordination through the WTO is that member countries might be driven by unilateral incentives to deviate from the goal of free trade. Recently the same type of argument has been put forward by some WTO members to coordinate competition policy on the multilateral level. The openness of a country does not necessarily guarantee product market competition and the erosion of monopolies requiring multilateral competition policy as a complement to multilateral trade policy. A firm's monopoly power can be eroded through either increased imports or through increased entry by other firms into the domestic market. While the first falls under trade policy, the second forms part of national competition policy. According to Hoekman and Movroidis (1994:11), if the WTO functions properly the free flow of imports into a domestic market can be the best way to guarantee consumer welfare and the profitability of firms in the market. The free flow of imports will not only reduce domestic prices (benefitting the domestic consumer), but also domestic wages (reducing input costs and increasing profitability). This will reduce the distortions in both the domestic labour and product markets. However, increased domestic competition, without increased import competition, will only remove distortions in the product market and leave any distortions in the labour market in place (Hoekman & Mavroidis, 1994:11). According to Hoekman and Mavroidis (1994:12) due to the potential of import competition to reduce both product and labour market distortions, multilateral trade and competition policy can be used as complementary policies to reduce labour market imperfections and move domestic markets to be more competitive.

According to Bilal and Olarreaga (1998:153) competition and trade policy are imperfect substitutes due to the manner in which these policies affect market openness and structure. While different trade policy measures can be ranked according to their impact on welfare, the merit of competition rules depend on the objectives the political authorities aim to attain by utilising these rules. These policies have some common features:

- Competition policies recognise that there can be some inefficiency when there is imperfect competition in the market.

- Competition policy aims to prevent uncompetitive behaviour which can arise in the imperfect competitive market through the control of collusion and mergers among firms and the abuse of a dominant position in the market.
- In principle the aim of competition policy is not to address market power, but rather to deter a firm which have market power from abusing its dominant position in order to ensure market access conditions in the market and fair competition (Bilal & Olarreaga, 1998:154).

The concern for international competition has led to two different approaches to integrate trade and competition policy. The first is to use trade policy measures to ensure international competition through encouraging trade liberalisation and foreign direct investment to promote competition. Trade policy authorities can also incorporate some trade principles into existing trade policies. The second premise is to promote competition through utilising multilateral competition rules. This will rely on the co-ordination of national competition policies or the harmonisation of policies among countries or an agreement on internationally acceptable competition rules on the multilateral level (Bilal & Olarreaga, 1998:17).

1.3 Problem statement

In recent years the significant increase in the use of anti-dumping measures has been a cause of concern among WTO member countries. In the last couple of years the member countries of SACU have been under increased pressure by private firms to enable the use of anti-dumping measures on intra- and extra-regional goods trade. However, SACU is a customs union under Article XXIV of the GATT 1994 with Botswana, Lesotho, Namibia, South Africa and Swaziland forming the five member countries of the customs area. The main aim of the SACU arrangement is to allow for the free trade in goods among the member states and a common external tariff which applies to all extra-regional trade in goods. Free trade in the context of SACU means that the member countries aim to eliminate tariffs and quantitative restrictions on all intra-regional trade in goods. Over the years economists have been, and are still, debating the appropriateness of anti-dumping measures on intra-regional trade in the context of a free trade agreement and a customs union. Especially in the case of a customs union, where there are no internal borders to trade and a common policy regarding trade with third party countries. In this context the use of anti-dumping measures on intra-regional trade can be difficult to implement and justify. These measures erect trade barriers

among the member countries which are against the basic premise of a customs union. For this reason most economists have suggested that anti-dumping measures have no place in a customs union and should be prohibited and replaced with either coordinated or harmonised competition policies.

Accordingly, this research examine the appropriate interaction between anti-dumping policy, as a trade policy measure, and competition policy in SACU by looking at the theory of dumping under both policy instruments, the function and suitability of anti-dumping measures in the context of a customs union, those regional arrangements which have prohibited the use of anti-dumping measures on intra-regional trade, the regional and domestic anti-dumping and competition mandates and the policy options available for the effective interaction among anti-dumping and competition policy on intra-SACU trade. Based on the findings of the research and experiences of other regional arrangement this research also provides recommendations and conclusions.

1.4 Significance of the research

This research will contribute to the body of knowledge, especially in the case of anti-dumping measures on intra-SACU trade on which the literature is very limited. Furthermore, it will inform policy formulation and decision making on the national level in Botswana, Lesotho, Namibia, South Africa and Swaziland and on the SACU level. Finally, the research investigates the national and regional challenges for intra-SACU anti-dumping measures and will add to current discussions on incorporating multi-lateral anti-dumping measures into the regional agreement without detracting from the goal of deeper regional integration.

1.5 Literature review

It seems that the main distinction between trade and competition policy are due to the distinct objectives of these two policies. National competition policy can be defined as ‘the set of rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or to the abuse of a dominant position’ (Hoekman & Mavroidis (1994)). The underlying objective of competition law tends to be the maximisation of national welfare through the efficient allocation of resources (Hoekman & Mavroidis (1994)).

Governments pursue trade policy tools for various reasons, including an increase in revenue, the protection of domestic industries and to attain certain foreign policy goals. Anti-dumping

policy is a component of trade policy which is applied in the case of unfair trade practices (Hoekman & Mavroidis (1994)). According to the GATT 1994 anti-dumping measures are utilised to address the exportation of a product at an export price below the normal value of the same product in the domestic market of the exporting firm. Anti-dumping policy is thus used to address either price discrimination or predatory pricing in the importing market (Florencio (2007)). Anti-dumping policy aims to redistribute income among markets to protect the domestic factors of production employed in a specific industry against foreign imports, often in an inefficient way. Otherwise stated the difference between competition and anti-dumping policy is that the first protects competition, while the latter protects competitors (Hoekman & Mavroidis (1994)). Codot, Grether & De Mellio (2000) is of the view that competition and trade policy are at odds with one another.

According to Hoekman and Holmes (1999), Jenny (1999) and Merrett (2003) there is also a matter of complementarity between competition and trade policy. Government policy should aim to protect the competitive process so that any excess profits can be eliminated through competition among firms. A liberal trade policy can be seen as the most effective and efficient competition policy instrument available to any national government to attain this objective. This is because import competition is important for market discipline, especially in countries with highly concentrated markets.

In a regional trade configuration the utilisation of anti-dumping policy can have a significant impact on the competitiveness of trade within the region. Anti-dumping rules are seen as being inefficient and disadvantage producers, exporters, importers and consumers (Hoekman (1998)). The argument has been made that anti-dumping rules are inherently protectionist just by being included in national legislation, but also leads to anti-competitive effects due to the manner these rules are implemented. Due to the potential welfare effects of anti-dumping measures Finger (1993), Bilal and Olarreaga (1998), Spinanger (2002), and Voon (2009) have called for the replacement of anti-dumping policy with competition rules, especially in terms of regional trade arrangements. Recently Mathis (2000), Gobbi and Horlick (2006), Emerson (2008) and Voon (2009) have stated that anti-dumping measures have no place in a customs union and are against the basic premise of a regional trade arrangement.

It is suggested that the elimination of anti-dumping measures and the harmonisation of competition policy can enhance economic welfare. However, the ability of a regional trade

arrangement to utilise competition policy will depend on the national and regional anti-dumping rules, competition principles and institutions and the level of integration present in the regional configuration (Prusa & Teh (2009)). In terms of abolishing anti-dumping rules from a regional trade arrangement, four configurations have been successful in eliminating anti-dumping measures. These are the European Union, the Closer Economic Relations Agreement between Australia and New Zealand, the European Economic Area between the European Union and the European Free Trade Association and the Canada-Chile Free Trade Agreement. The member countries of the Common Market of the South (MERCOSUR) have undertaken to eliminate anti-dumping duties on intra-regional trade and are still in the process of developing and harmonising common competition policy (Economic Laws Practice (2009)).

SACU is a customs union with the agenda for deeper regional integration among the member states. The 2002 SACU Agreement allows for a common regional policy in terms of anti-dumping, the establishment of a regional body to evaluate the implementation of any anti-dumping duties and national bodies in each member country to investigate any allegation of dumping in the region. In terms of competition policy the 2002 SACU Agreement only states that member countries should cooperation on issues of competition in terms of each country's domestic competition policy. Currently the common anti-dumping policy has not been developed, the regional body has not been established and no members, except South Africa, have implemented a national body and domestic legislation to address dumping. Thus far the South African national body, ITAC is undertaking all investigations pertaining to an allegation of dumping in the SACU domestic market. However, all member countries, except Lesotho, do have national competition policies in place.

According to the literature there are four possible options in terms of how anti-dumping polices and competition policy can function in unison. The first is the elimination of anti-dumping measures and the harmonisation or coordination of competition policies to address dumping (Hoekman (1998) and Florencio (2007)), the second is the simultaneous implementation of competition and anti-dumping policy (Messerlin (1994)), the third is using competition principles in the anti-dumping investigation (Florencio (2007) and Harriott (2010)) and the last option is to use anti-dumping measures as a mechanism of last resort (Hoekman & Mavroidis (1994)).

In terms of the literature the indication seems to be that the most suitable option for SACU depends on whether the member countries see anti-dumping measures as appropriate measures in the context of a customs union. Depending on the answer the policy options available to SACU are either the gradual incorporation of competition principles into anti-dumping rules or the prohibition of intra-SACU anti-dumping measures replaced by coordinated competition policies.

1.6 Methodology

The aim of the study is to evaluate the interaction between anti-dumping rules and competition policy in order to establish an ideal mixture of these policy instruments which SACU will be able to utilise. In order to attain this goal the approach in this research are descriptive, analytical and prescriptive. The descriptive approach is used to determine the current situation regarding the theory and practice of anti-dumping measures. The analytical approach is used to evaluate the sectoral composition of multilateral anti-dumping measures and the intra-regional trade patterns in SACU. The prescriptive approach is used to make recommendations regarding the most suitable policy options available to SACU member states at the national and regional level.

1.7 Proposed structure

Chapter one provides background to the research, research problem and methodology, literature review and the significance of the research.

Chapter two focuses on the interaction between trade and competition policy. This chapter explores the differences and complementarities of competition and trade policy, based on the different objectives of these policy instruments, the measures used to enforce them and the role trade and competition policy currently plays in the international trading system.

Chapter three is focused on the relationship between anti-dumping law and competition policy, especially the overlapping areas between these policies. The different approaches of price discrimination and predatory pricing in terms of competition policy and anti-dumping law are also explored.

Chapter four examines the regulation of anti-dumping measures and competition policy on the multilateral level. The chapter briefly highlights the regulation of dumping and anti-

dumping measures under the GATT 1994 and the WTO agreement on anti-dumping measures. Although the argument has been made for competition policy to also be regulated on a multilateral level, there has been no progress on this matter in the WTO.

Chapter five analyses the implementation and importance of anti-dumping law and competition policy in the context of regional integration, especially in the SACU agreement and member countries. The discussion firstly looks at the role anti-dumping plays in a regional arrangement and addresses the question whether the incorporation of these trade policy instruments can lead to anti-competitive effects in the importing and exporting country markets. Next the research approaches the question of whether anti-dumping is against the basic premise of a regional arrangement, especially against the principles of a customs union in terms of the GATT 1994 and the WTO. This is still a major point of contention amongst the economic and legal authors in the area, without a definitive answer being provided by the WTO dispute settlement mechanism. The discussion then flows to those few regional trade agreements which have been successful in the abolition of anti-dumping measures from intra-regional trade. This section highlights the efforts and accomplishments of the regional arrangements of the European Community, European Economic Area, the Australia-New Zealand Closer Economic Relations Agreement and the Common Market of the South.

Chapter six focuses on SACU as a regional trade agreement. This chapter provides a sector-specific analysis on anti-dumping measures and SACU intra-regional imports and an overview of the current regional and national anti-dumping and competition policies and institutions in SACU.

Chapter seven provides the possible theoretical policy options available for the effective interaction between anti-dumping and competition policies and institutions in the context of a regional trade arrangement.

Chapter eight examines the policy options most suitable for SACU, dependant on the role anti-dumping and competition policies can play in the customs union. If the SACU member states are of the view that anti-dumping measures have no role to play on intra-regional trade the best option is the replace intra-regional anti-dumping measures with coordinated competition policies. However, if the member states are of the opinion that anti-dumping

measures can play an important role to regulate trade in the customs union the best option is to develop anti-dumping policies based on existing competition principles.

Chapter nine gives a brief overview of and recommendations on the institutional developments that are required for the effective implementation of the chosen policy option on the national and regional level.

The last chapter draws the overall conclusions of the research.

2 Trade and competition policy

Trade liberalisation can have an impact on a range of economic policies which requires policy coherence among the various policy instruments. Trade and competition policies provide an incentive for firms and individuals to be more productive and for markets to be competitive and are supply side policies that can promote market efficiency and increase productivity growth. Trade liberalisation can generate welfare gains if markets are competitive and capital can move freely among trade partners (Bartok & Miroudot, 2008:4). The synergies between trade and competition polices can have a combined effect on economic efficiency and income growth. These synergies can be described as complementarities among the policy measures. Only through reforms in both areas can there be a positive impact on growth and development. The potential positive effects of trade liberalisation can be negated if there are anti-competitive effects in the market that allow firms to abuse their dominant position. Also the opening up of the domestic market will be negated if a domestic monopolist is replaced by a foreign monopolist. In order for countries to gain the full benefits associated with trade liberalisation and increased competition, trade and competition policies must be used to attain the same economic and development goals (Bartok & Miroudot, 2008:12)

2.1 The interface between trade and competition policy

In order to show the basic relationship between competition and trade policy Guasch and Rajapatirana (1998:1) state that 'from a normative standpoint, trade and competition policy share the common economic objective of attempting to reduce barriers to the competitive process and thus ensuing market access and presence, promoting efficiency. But, in practice, however, when other objectives are introduced from pressures from interest groups, there could be considerable friction in the trade and competition policy nexus.' Competition policy is used differently in different countries. Broadly speaking competition policy consists of measures and instruments governments use that determine the conditions of competition in the domestic market. In the narrows sense of the term competition policy is government measures that affect the behaviour of firms and the structure of the industry to promote efficiency and maximise welfare. On the other hand, trade policy is typically focused on removing trade barriers and increasing market access (Competition Commission of India, 2009:1).

2.2 The objectives of competition policy

National competition law can be seen as a set of rules and disciplines applicable to firms to restrict uncompetitive behaviour or the abuse of a firm's dominant position in the market. The object of competition law is to ensure the efficient allocation of resources to maximise national welfare. In order to reach this objective competition law aims to ensure that the competitive process is not distorted by firms engaging in uncompetitive behaviour which can be detrimental to the social welfare of the domestic economy (Hoekman, 1998:2).

According to Hoekman (1998:3) competition law is a component of competition policy. The author states that competition policy is a broader concept than that of competition law as a set of instruments and measures which governments can utilise to maintain the conditions of competition in a domestic market. The key difference between competition law and competition policy is that the first is only applicable to the behaviour of private firms, while the latter is applicable to the actions of both private firms and governments in the market. According to the World Bank (1998:2) the main objective of competition policy is to maintain the conditions of competition by removing the unreasonable restriction of the competitive process. Other associated objectives include the prevention of the abuse of a dominant position and the encouragement of allocative and dynamic efficiency in the market (World Bank, 1998:3).

Hoekman and Mavroidis (1994:2) state that the main focus of competition policy is the advancement of competition, which is reflected in the belief that competition is the most effective way in which to enhance, grow and foster economic efficiency in a domestic market. Competition policy is domestic in nature and is mostly concerned with national economic welfare within the borders of a specific country, subject to the domestic jurisdiction under national law without effective international adjustment and control. However, foreign business entities have increasingly become the target of competition policy, increasing the cases in which anti-competitive behaviour has cross-border effects.

However, according to the World Bank (1998:8) there are various other government policies which can either support or adversely affect the implementation of competition policy in the market. These include government policies in the areas of trade, industrial, regional development, intellectual property, privatisation, science and technology, investment and tax. In order to eliminate any inconsistencies between these policies, the World Bank (1998:8)

recommends that the formulation and implementation of any of these policies take into account the principles of competition.

2.3 The objectives of trade policy

Trade policies have traditionally been focused on the facilitation of market access through a reduction in tariffs and quantitative restrictions and the elimination of barriers to investment in order to increase output, efficiency and competition, while still maintaining some form of protection for troubled domestic industries. Governments pursue trade policy objectives for various reasons: tariffs increase government revenues; certain measures can be utilised to protect infant-industries from mature competitors; certain foreign policy or security goals can be attained; and import quotas, licenses and bans can limit the consumption of a specific foreign good in the domestic market (Hoekman & Mavroidis, 1994:2).

Trade policy is international in nature and aims to address barriers to trade and investment imposed by the governments of trading partners, while competition policy aims to remove mostly privately erected barriers to competition. In terms of trade policy trade and investment liberalisation have been attained by multilateral, regional and bilateral diplomatic negotiations with the emphasis on market access conditions and achieving a balance among countries with different levels of development. The focus of trade policy is on the export interest of supplies which can be coupled with the enhancement of national economic welfare (Hoekman & Mavroidis, 1994:2).

Trade policy tends to be more pro-active, it can involve subsidies in different forms which can either target or promote a specific industry, sector or region. Trade policy can also increase the barriers to foreign competitors through the utilisation of tariffs and non-tariff barriers. According to Guasch and Rajapatirana (1998:4) this shows that trade policy can either promote or impede the economic goals associated with competition policy.

2.4 The interface: complementarities

Some authors state that there is a degree of complementarity between trade and competition policies (Hoekman & Holmes, 1999:10). According to Hoekman and Holmes (1999:1) trade and competition policy has a theoretical common foundation as a reference point in terms of the theory of free trade and perfectly competitive markets for the achievement of economic efficiency in resource utilisation. The complementarity between these policies is based in the

common objectives to eliminate or reduce barriers to and distortions of domestic markets. According to Merrett (2003:246) the reduction and elimination of tariffs and non-tariff barriers is the most natural case of complementarity between trade and competition policy.

According to Jenny (1999:10) the goals of competition policy is consistent with those of trade policy. Trade policy allows for the possibility of increased competition, while competition policy ensures that private stakeholders in the market do not distort competition. According to Jenny (1999:13) the complementarity between trade and competition policy lies in the ultimate objectives of these policies: trade policy aims to remove government created barriers to international trade, while competition policy aims to eliminate barriers created by private businesses in the market which can affect market access conditions underlying trade liberalisation. The potential benefits of trade liberalisation cannot be attained if there is any anti-competitive behaviour in a national or the international market. The objectives of both trade and competition policy allow for the competitive process to improve the efficiency of countries' economies and not to give license to dominant firms and international cartels to abuse their dominant position in a market, erect barriers to entry and hinder innovation (Jenny, 1999:14).

On their own, trade and competition policies have their limitations to facilitate market access and maintain the conditions of competition in the global economy. Trade policy itself cannot ensure market access; market access also depends on the reciprocal commitments by government to eliminate barriers to trade, the market strategies of domestic firms and the national regulatory framework of trading nations. Competition policy on its own cannot always ensure efficient conditions of competition, competition in any country can be affected by the market strategies of international firms, over which domestic competition policy does not always have effective jurisdiction (Jenny, 1999:14).

2.5 The interface: differences

The relationship between trade and competition policy is complex due to the overlapping effects these policies can have. While competition policy aims to reduce the power of domestic producers, trade policy tries to ensure the market power of domestic producers by shifting economic rents from foreigner firms to the domestic government, consumers and producers. In this sense competition and trade policy are working towards overlapping purposes which are at odds with one another (Cadot, Grether & De Melio, 2000:7).

A number of differences between trade policy and competition policy have been identified. Trade policy addresses issues at the border, deals with government-imposed barriers to trade, is the subject of most multilateral and bilateral negotiations and operates under both national and international law. Competition policy on the other hand addresses issues pertaining to competition within a country's borders, deals with private sector barriers to competition, operates mainly under national law and there have only been minimal multilateral and bilateral negotiations on competition policy issues (Waverman, 1998:31-32).

Merrett (2003:242) divided the debate surrounding the interaction between competition and trade policy into three main areas of contention.

- The first is that trade policy liberalisation can be frustrated by a failure to enforce efficient domestic competition policy. The benefits trade liberalisation can have for consumers can be eroded by restrictive behaviour and practices by domestic firms in the liberalising market. Merrett (2003: 242) recognises that the competition policy choices of a government can alter market access conditions in the domestic market in a similar manner than tariffs can affect domestic market access.
- The second area of contention is that trade policy measures can in turn have highly uncompetitive effects. Import protection including tariffs and non-tariff barriers can reduce competition in the domestic market and reduce consumer welfare (Merrett, 2003:242). According to Hoekman and Mavroidis (1994:2) an active trade policy redistributes income among the different segments in the market by protecting specific industries and the factors of production employed in these sectors. However, this protection is often done in a very inefficient manner. Thus trade policy is seen as being inconsistent with the underlying objectives of competition policy. The incompatibility can be illustrated by the following: while competition policy aims to protect competition and economic efficiency in the domestic market, trade policy aims to protect the competitors and the factors of production employed in the domestic market.
- The last area of contention is that government regulation can also frustrate the objectives of both competition and trade policy. Through government failures in the effective enforcement of regulations, obstacles to trade liberalisation and improved conditions of competition can be created (Merrett, 2003:242).

Government policy should aim to protect the competitive process so that any excess profits can be eliminated through competition among firms. Due to the possible distortive effect an actively pursued trade policy can have on domestic competition, Hoekman and Mavroidis (1994:4) calls for a mechanism which will allow government to consider the competitive effects of actively pursuing a specific trade policy objective. The more restrictive the trade policy regime, the more important the role of competition policy to reduce any negative welfare effects caused by the restriction of the competitive markets. However, using competition policy to try and offset the possible distortion of domestic competition created by an active trade policy will not necessarily enhance welfare, being only a second best solution. The preferable policy option is to minimise the extent to which trade policy reduces the contestability of the domestic markets through a liberal external policy stance (Hoekman & Mavroidis, 1994:2). Hoekman and Holmes (1999:10) also see a liberal trade policy as the most effective and efficient competition policy instrument available to any national government to attain this objective. This is because import competition is important for market discipline, especially in countries with highly concentrated markets.

3. The relationship between anti-dumping measures as a trade policy tool and competition policy

Bayliss and Malhotra (2006:4) state that the objectives of anti-dumping and competition policy are at odds with one another: while competition policy aims to protect the consumer through limiting anti-competitive behaviour by firms and governments, the goal of anti-dumping measures is to protect domestic firms and the factors of production employed in the domestic industry.

Dumping is mainly associated with two forms of anti-competitive behaviour: price discrimination and predatory pricing. In order for dumping to exist in the first case the firm must be able to segment the international market into different categories according to their willingness to pay different prices. Furthermore the firm must be able to charge a higher price in the domestic market and a lower price in the foreign market, based on the difference in the elasticity of demand. In the case of predatory pricing the firm must have the intent and ability to price a product in the foreign market low enough to eliminate all competitors and deter any new entrants into the market in order to establish a monopoly (Florencio, 2007:18). In accordance with international trade law, actions by private firms, including predatory pricing or price discrimination can be classified as the unfair trade practice of dumping. This is due to Article VI of the GATT 1994, pertaining to anti-dumping measures, which allows for countries to impose anti-dumping duties when goods are sold in a foreign market at a price which is lower than the price in the domestic market of the exporting firm. However, not all cases of price discrimination and predatory pricing will incur a penalty for anti-competitive behaviour in terms of competition policy. According to Mathis (2005:20) this shows that pricing strategies which are not necessarily considered to be unfair trade within borders can be considered unfair trade practices across borders.

3.1 Overlap between anti-dumping and competition policy

The goal of competition policy is to promote and preserve the competitive environment in the domestic market in which products are traded within and across the national borders through restricting anti-competitive behaviour which has the effect of lessening competition. This includes the abuse of a firm's dominant position in the market, mergers and collusion among firms. Anti-dumping law is limited in terms of the conduct which it prohibits. Anti-dumping only prohibits dumping when it causes or threatens to cause material injury to the domestic industry. In order to establish whether there is the justification to implement anti-dumping

measures the investigating authority only considers the harm to the domestic producers, thus safeguarding the welfare of the domestic producer. On the other hand competition policy prohibits anti-competitive behaviour which can lessen consumer welfare in the domestic market (Harriott, 2010:2-6). According to Alavi and Ahamat (2004:80) in the injury and causal link investigation there is a lack of considering some competitive principles, including the inefficiency or efficiency of the complainant firm or the market power of the exporting firm. During the investigation process there is also a lack of considering any query about the industry configurations, the existence of entry barriers, market power and other conditions of competition in either the home or export market.

In a comparison between anti-dumping and competition policy Spinanger (2002:16) found that there is a vast difference between these two policies in different areas:

- While anti-dumping measures aims to protect domestic competitors, competition policy aims to protect domestic competition;
- Anti-dumping protects domestic competitors mostly from competition by foreign firms, while competition policy generally does not distinguish between anti-competitive behaviour by foreign and domestic firms;
- In an anti-dumping investigation the domestic authority does not investigate the motive which drives the decision to dump, while motivation and predatory intent is one of the important considerations during an anti-competitive investigation.

From a legal perspective anti-dumping measures do not prohibit firms to take actions which would otherwise be prohibited under competition policy. This includes quantitative restrictions, resale price maintenance and price fixing. However, anti-dumping does prohibit competition through price differentiation that is legitimate under competition policy (Tavares, 2001:7). Dumping is not per se a violation under competition policy. According to Nordstrom (2009:8) dumping is only a contravention of competition principles if the dumper has a dominant position in the market and abuses this dominant position, through selling below average cost, in an effort to remove any domestic and foreign competitors from the market or pre-empt any other competitors from entering the market. Tavares (2001:7) also highlights that from an economic perspective these policies also have conflicting objectives which can lead to conflicting solutions. Anti-dumping as a trade remedy protects a domestic industry from injury caused by import-competing foreign firms, competition policy on the other hand

aims to promote consumer welfare and productive efficiency by ensuring the contestability of the domestic market in which import-competition is a very important element. According to Finger and Zlate (2003:15) competition principles are more efficient in identifying those circumstances under which government intervention in the market will serve the national interest of the domestic market.

Tavares (2001:11) states that the difference between competition policy and anti-dumping as a trade remedy is highlighted in a communication by the United States government to the WTO which states: 'Contrary to the assumptions of some economists, the anti-dumping rules are not included as a remedy for the predatory pricing practices of firms or as a remedy for any other private anti-competitive practices typically condoned by competition laws. Rather, the anti-dumping rules are a trade remedy which WTO members have agreed is necessary to the maintenance of the multilateral trading system, without this and other trade remedies there could have been no agreement on broader GATT and later WTO packages of market-opening agreements, especially given imperfections which remain in the multilateral trading system.' This means that the main goal of anti-dumping measures is to act as a safety valve in an open trading system to ensure the on going support for furthering trade liberalisation, even in those countries where there are industries which do not want import competition from foreign firms (US Government, 1998:2).

Another area in which there is a clear distinction between these policies is in the manner the policies is enforced. Anti-dumping is defined under the assumption that the domestic industry is faced by a foreign monopolist or international cartel which causes or will cause harm to the domestic industry. However, during the anti-dumping investigation this assumption does not get tested, the data collected during the investigation process is limited to import figures, price comparisons and the performance of the domestic industry. During the investigation there is no room to take factors like barriers to entry, market power and other conditions of competition in the domestic and foreign market into account. The investigation process in a complaint of anti-competitive behaviour differs in that the starting point in any investigation is the proper definition of the market and the identification of the conditions of competition (Tavares, 2001:7-8).

In anti-dumping law the market is defined in a completely different manner and much broader than is the case under competition policy, as the geographically relevant market

under anti-dumping law is only the domestic market of the importing country. Product markets are also not defined in terms of the demand characteristics of the consumers in the market which is the case under competition policy. The product market is defined as an industrial concept with the technical similarities of a good rather than the substitutability of the good which is the method used by consumers to define the product market (Knorr, 2004:8-9).

According to Knorr (2004:10) anti-dumping law has serious procedural deficiencies by offering various means for discriminating against foreign producers. This includes the availability of different methods to calculate the export price and normal value and a partial analysis of the effect of dumping on the importing country. There is also no room for considering the benefits associated with dumping, mainly due to lower prices, for consumers and the competitiveness of domestic firms. The significant difference in the procedural requirements of anti-dumping law, compared with those of competition policy, also show that the potential exists for substantial discrimination. The investigating authority generally accepts the definition of the market as that of the complaining domestic industry without conducting an independent analysis of the applicable market. There is also no room for demonstrating that the dumping firm has a dominant position in the importing market (Knorr, 2004:11).

3.2 Price discrimination under anti-dumping and competition policy

National and international price discrimination exists when a firm charge different prices for a like product in a single-segmented market or between separated markets. The monopolist is able to maximise its profits through charging different prices in the different markets due to a difference in the elasticity of demand (Nicolaides, 1990:118). The firms is able to sell at a higher price in those markets where the consumers are willing and able to pay more for the product and charge a lower price in the market where the consumers are unwilling and unable to pay such a high price (Harriott, 2010:6).

There are various business reasons for a firm to practice price discrimination in the market (Marceau, 1994:12):

- When a firm with market power enters a new market which is divided by tariffs, transport costs and technical standards, the firm might want to maintain lower prices in the new market which is more competitive;

- If a firm expands into a new geographical area and prices are controlled by a cartel or government in the first market, the reduction in price associated with an increase in output might only be possible in the new market; and
- If a firm is present in two markets, but prices are regulated in one market through cartels or by government policy, a firm may only be able to lower its prices in the market where prices are not controlled when there is excess capacity.

Under competition policy, price discrimination with an adverse affect on competition and consumer welfare is prohibited. This is normally referred to as unfair or discriminatory pricing. However, if it can be shown that price discrimination is adopted to meet the needs of competition and does not affect the conditions of competition in an adverse manner, price discrimination will not attract any sanctions. However, under anti-dumping law every form of price discrimination is prohibited. Price discrimination is investigated under the parameters of injury to the domestic industry and once dumping and injury are established, broader economic concerns, like consumer welfare, are not taken into account (Competition Commission of India, 2004:12).

In order for dumping to exist in terms of international price discrimination the firm must be able to divide its market into the domestic and foreign markets with a different willingness to pay for a similar product. The firm must also have sufficient market power in order to influence the price of the product and the price elasticity of demand needs to be higher in the export market than in the home market. If this takes place the firm might be able to charge a lower price in the export market than the domestic market. If a firm can successfully segment the market in order to price discriminate, Tharakan (2000:73) states that the negative welfare affect on the aggregate economic welfare will then be present in the domestic industry, due to consumers paying artificially high prices. However, there can also be some adverse effects on the producer surplus and employment in the foreign market (Tharakan, 2000:73).

Florencio (2007:18), states that the global welfare affects of price discrimination is uncertain. Price discrimination can be welfare enhancing by promoting an overall increase in output as a result of the opportunity to sell a product at different prices in different markets. It has long been recognised that price discrimination will not necessarily have an anti-competitive affect on a market. The ability of a firm to ask different prices in different markets is not necessarily

an abuse of market power that will harm competition in the domestic industry. This can just be a natural consequence of a highly competitive market which can increase the contestability of the markets in a country. Whether the net effect of price discrimination is welfare enhancing depends on the trade-off between the increased consumer welfare and the competitiveness of the intermediate users of a good and the possible loss of an uncompetitive domestic industry.

3.3 Predatory pricing under anti-dumping and competition policy

Predatory pricing can be defined as a monopolist selling its product at prices which do not maximise profits, thus selling at a price where marginal revenue is less than marginal cost (Nicolaides, 1990:122). A monopolist can be motivated to sell at prices lower than marginal cost and forego profit maximisation in the short-run in order to discourage competitors from entering the market in order to gain profits in the long-run. Predatory pricing is the most commonly used argument for the justification of anti-dumping actions. In the context of dumping predation implies the ability of a firm to export a product at a low price with the intention to eliminate competitors and deter new entrants in the importing country to obtain monopoly power (Tharakan, 2000:82). The monopolist will then be able to recoup previous losses by the exploitation of its market power, increasing prices in the market of the importing country (Hoekman & Mavroidis, 1994:3).

According to Florencio (2007:18) predatory pricing requires an analysis of three elements: determining whether the price of a good is at a non-remuneration level, whether the firm has a dominant position in the market, and whether the firm will be able to eliminate competitors from the market and subsequently be able to charge highly uncompetitive prices. In order to address predatory pricing under competition policy the competition authority first needs to define the relevant market. The market definition traditionally includes all the existing and potential suppliers of the specific good in the market. The market definition is mostly limited by a geographical component. This reflects the possibility that the market can be restricted through the existence of natural barriers, like transportation costs or tariffs and non-tariff barriers to trade (Knorr, 2004:6). In the next step of the competition investigation the authority must determine whether the firm accused of predation has market power or is dominant in the domestic market. A firm can be considered to be dominant if there are either no competitors or no substantial competition in the defined market. Factors which the investigating authority will consider in order to establish dominance, including the market

share of the firm in question, its financial position, its linkages to other firms, entry barriers in the market, actual and potential competition in the market and the availability of substitutes to the relevant product in the market (Knorr, 2004:7). The last step in the determination is the establishment whether the dominant firm has abused its market power by practicing predatory pricing. In order to determine a predator pricing-suspicion the authority will compare the sales price of the product in dispute with the production costs of the product (Knorr, 2004:7).

A comparison between these elements and the anti-dumping provision in the GATT 1994 and the WTO Anti-Dumping Agreement reveals that predatory pricing and anti-dumping policy are intrinsically at odds with one another (Florencio, 2007:18). The table below shows that there are various differences between predatory pricing, governed by competition law and dumping governed by international trade law.

Table 2: Comparing predatory pricing and dumping

Predatory Pricing	Dumping
Requires a firm to be dominant in the market	Dominance not a requirement, but imports must be above a certain minimum threshold
Intention to eliminate competition from the market	Intent to required
Predatory pricing takes place when sales are below variable costs	Dumping takes place when the sales price/export price is below the normal value in the home market
Predation must effect competition in the market adversely	Dumping must cause or threaten material injury to the domestic industry of the like product in the importing market
Punitive remedies available	Anti-dumping duties are remedial measures
Governed by national legislation and subject to domestic courts	Governed by WTO law incorporated into national laws and subject to the WTO dispute settlement process

Source: Competition Commission of India (2009:1)

In order to equate predatory pricing with dumping, defined as an export price below normal value of a like product in the domestic market, the normal value should be considered as an adequate remuneration level for the firm, like average cost. However, the definition of normal value as the price in 'the ordinary course of trade' shows that this is not the case. A further incompatibility is due to predation requiring proof of dominance and a firms ability to recoup its losses once existing competitors have been eliminated from the market. During an anti-dumping investigation these elements need not be considered. This has led most authors

(Florencio, 2007:19; Tavares, 2001:) to state that the only justification for the retention of anti-dumping measures in trade policy is as a safety valve to ensure further future trade liberalisation.

Hoekman (1998:9) holds the view that current anti-dumping practices have very little to do with the need to address predatory behaviour in the domestic market. In the real world predation is the exception rather than the rule. According to Hoekman and Mavroidis (1994:3) the justification of anti-dumping action in the case of predatory pricing requires the dominant firm to establish global dominance in the production of the product or lobby government to pursue a policy stance which supports or tolerate entry restrictions. Nicolaides (1990:123) states that the monopolist will only be able to abuse its dominant position in the domestic market of the importing country if there are no alternative domestic or foreign suppliers of the specific product in the domestic market and if there are existing barriers to entry which reduces the possible contestability of the market. Both these are very difficult to establish in practice (Hoekman & Mavroidis, 1994:3).

Nordstrom (2009:116) has identified other barriers to a firm establishing an international monopoly, including the difficulty of preventing consumers to stockpile goods during the predatory pricing phase, the need for quick exit levels and high elasticity's of demand for the dumped product to prevent consumers switching to a substitute product. The existence of international competition is one of the most significant barriers to the establishment of an international monopolist – the monopolist must not only drive the domestic competitors from the importing market, but also foreign competitors. The cumulative effect of all these barriers leads to the conclusion that the establishment of an international monopolist through predatory pricing is highly unlikely (Nordstrom, 2009:116). Nordstrom (2009:117) states that anti-dumping measures can more likely be used to protect the domestic industry against sporadic dumping.

Sporadic dumping means that dumping is not sustained over a long period of time but rather takes place over short time period intervals. During the periods of sporadic dumping the producers in the domestic market are forced to either exit the market or temporarily restrict production to protect themselves against lower cost imports until the dumping firm leaves the market. The higher costs associated with the domestic producers' attempt to retain their market share during the time of the dumping will be passed on to the consumers through

higher prices. If the lost in welfare for the consumers outweighs the benefit of the sporadic dumping anti-dumping measures can be justified from a consumer welfare perspective that the costs associated with the sporadic dumping has a long-term impact on consumers (Nordstrom, 2009:118).

4. Multilateral legal framework

On the multilateral level there are comprehensive trade policy rules governing the implementation of anti-dumping measures by WTO member countries under the GATT 1994 and the WTO Anti-Dumping Agreement. Whether competition policy should be regulated on the multilateral level is still a matter of contention among the WTO member states.

Although competition issues have not directly been included into the multilateral legal framework, Merrett (2003:246) identifies various multilateral trade provisions in the GATT 1994 and the General Agreement on Trade in Services (GATS) which have an impact on competition policy or market distortion issues.

- Article II of the GATT 1994 states the fundamental obligation of the WTO is to ensure the national treatment of goods traded by WTO members. In terms of this obligation a WTO member must treat import products the same as domestic products once it has entered the border. According to Merrett (2003:247) national treatment is fundamentally about maintaining the competitive conditions in the domestic market which is independent on actual trade effects.
- Article VI of the GATT 1994 pertains to the implementation of anti-dumping measures and countervailing duties on imports which harm the domestic industry. According to Merrett (2003:246) anti-dumping measures, as a trade remedy to protect domestic firms from import-competing foreign firms, are inherently anti-competitive.
- State trading enterprises provided for in Article XVII of the GATT 1994 also create serious obstacles to competition due to the benefits these enterprises receive from exclusive or special privileges and the obligations imposed on the conduct of WTO member countries.
- In the GATS Article VIII monopoly suppliers to not abuse their monopoly position when they are competing in the supply of services stemming from their monopoly rights, while Article IX allows for certain business practices of service providers, other than those falling in article VIII to restrain competition.

According to Merrett (2003:248) these provisions either create the inherent obligation on WTO members to implement competition policy or create loopholes in competition policies disguised as trade policy requirements.

4.1 Anti-dumping law under GATT 1994 and the WTO agreement

Since 1 January 1995 dumping and the implementation of anti-dumping measures have been regulated on the multilateral level by Article VI of the GATT 1994 and under the WTO by the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, generally referred to as the WTO Anti-Dumping Agreement. Article VI of the GATT 1994 contains basic provisions relating anti-dumping measures and the implementation of these measures, while the Anti-Dumping Agreement contains detailed provisions regarding the substantive and procedural requirements associated with these measures (Czako et al, 2003:2). These legal instruments must be read and applied in conjunction with one another. The GATT 1994/WTO does not prohibit dumping; dumping is only condemned if it causes harm to the domestic industry of the like product. The WTO cannot prohibit dumping as dumping is an action by private firms in the exporting market. The WTO only regulates the action of governments of member countries and not the behaviour of private firms. This shows the inability of the WTO to prohibit dumping (Knorr, 2004:7).

Both the GATT 1994 and the WTO agreement provide specific conditions which must be adhered to by the affected country to be successful with the implementation of an anti-dumping duty. There are three main requirements which must be in place for a country to justify the utilisation of anti-dumping protection: dumping must be present, there must be material injury or the threat of material injury to the domestic industry of the like product and the dumping must be the cause of the harm to the domestic industry (Knorr, 2004:7). Article VI defines dumping as the introduction of a specific good by a firm into the commerce of another country at an export price which is lower than the normal value of the good.

The WTO Anti-Dumping Agreement introduced some procedural changes to Article VI of the GATT 1994 which redefined the circumstances under which anti-dumping investigation can be taken, the method of calculating anti-dumping duties and procedures. The WTO agreement indicates that the profits, selling and administrative costs should be based on actual data. If actual data is not available, data from other exporters of a similar product can be used. However, even under the WTO agreement importing countries still have a wide discretion to construct export prices and the normal value and to find differences in export prices and domestic costs. The provisions of the agreement have also removed some biases which were present under the provisions of the GATT, including the overstatement of

domestic costs by allowing the use of a weighted average normal value in the home market with the weighted average of all the comparable exports, or on a transaction to transaction basis (Gausch & Rajapatirana, 1998:9). When exporters from more than one country are involved in an anti-dumping investigation the home county can take the cumulative effect of the injury into account. Cumulation is allowed if the share of each exporter exceeds more than three percent of the importing country market. The agreement also includes a *de minimis* requirement for when an anti-dumping investigation needs to come to an end. According to the agreement an anti-dumping investigation must be halted if the margin between the cost of production and the export price is less than two percent. One of the most significant changes the WTO agreement introduced into the multilateral law is a sunset review clause. In terms of this clause any anti-dumping measure automatically expires after it has been implemented for five years, unless a review shows that the dumping and/or injury to the domestic industry will continue if the anti-dumping measure is allowed to expire. This provision has enforced the idea of anti-dumping measures as only a temporary trade remedy (Gausch & Rajapatirana, 1998:10).

Although all members of the WTO are also a party to the Anti-Dumping Agreement, it is not mandatory for all WTO member countries to have a domestic legal framework in place or take action when dumping has taken place. However, if a member country does decide to implement an anti-dumping measure the measure must be implemented in a manner which is consistent with the rules specific in the WTO Anti-Dumping Agreement which has been incorporated into the domestic laws of a WTO member country. The implementation of an anti-dumping duty by a WTO member country is thus subject to various conditions: an investigation in accordance with the procedural requirement set out in the WTO agreement and that the investigation found evidence of imports being dumped, the domestic industry in the like product has suffered harm and the harm to the domestic industry was caused by the dumping in the domestic market (Czako et al, 2003:3). If, at the conclusion of the investigation the domestic authority finds in favour of implementing an anti-dumping measure, the Anti-Dumping Agreement allows for the implementation of provisional measures, definitive anti-dumping duties and price undertakings as instruments to remedy the injury caused by dumping. However, these measures can only be applied on a temporary basis and to the extent to correct the harm suffered by the domestic industry.

4.2 The lack of multilateral competition policy

Currently there is no clear consensus among WTO member states on whether competition policy should be included in the multilateral trade negotiations (Hoekman & Holmes, 1999:1).

According to Paasman (1999:30-31) various attempts have been made to negotiate and establish multilateral rules on competition over the last few decades, but all attempts have failed:

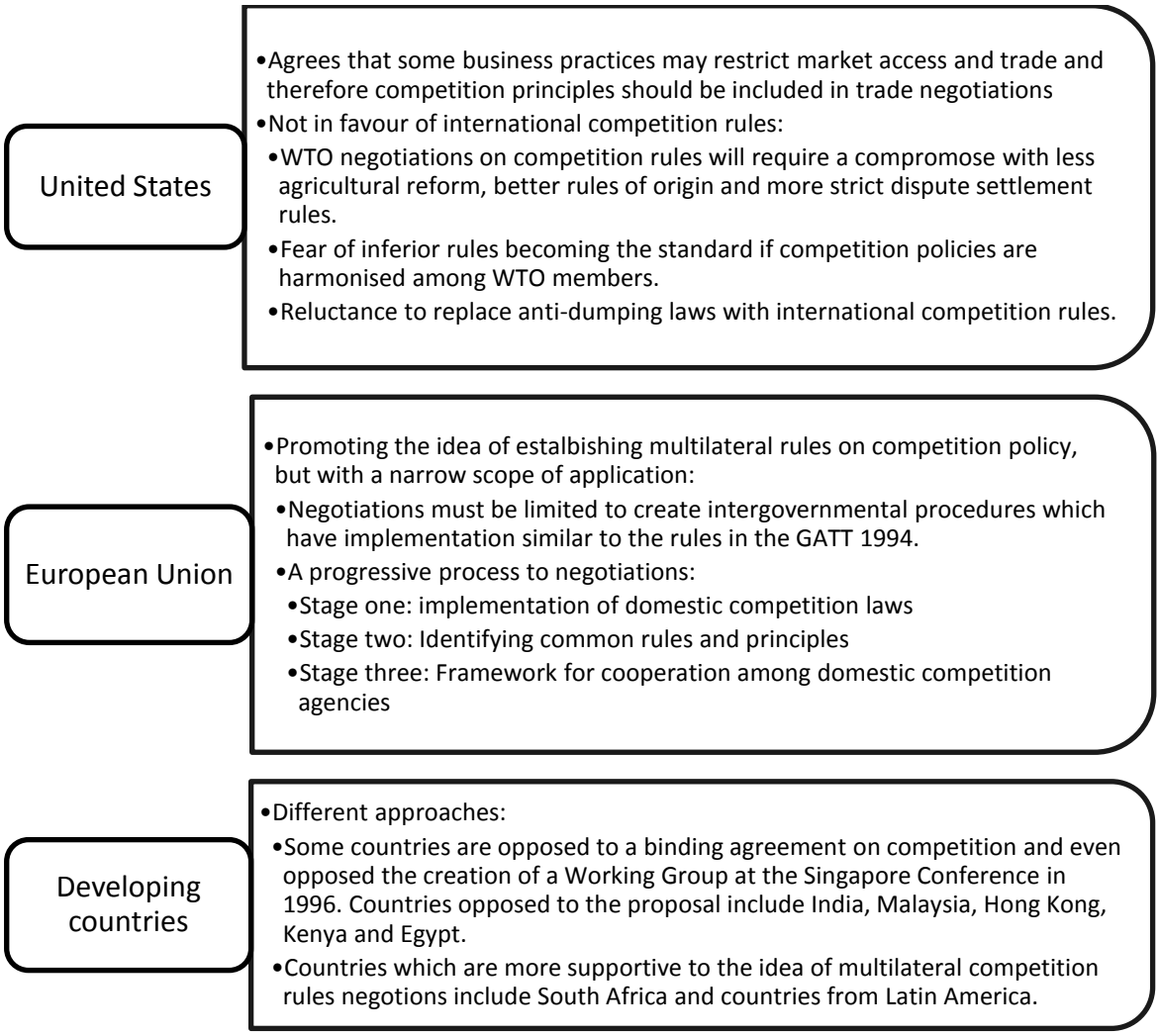
- In 1948 the Havana Charter on the International Trade Organisation (ITO) included a section on competition in an attempt to prevent firms from engaging in practices that could adversely affect international trade and market access or create and nurture monopolies. However, the Charter was never ratified and the ITO never came into existence mainly due to opposition from the United States Senate that feared the ITO would greatly interfere with sovereignty.
- At a meeting of the United Nations Economic and Social Council (ECOSOC) in 1953 an international convention on competition was proposed. The aim of the convention was to create a mechanism for countries to challenge any anti-competitive behaviour that affect international trade. Once again firms in the United States greatly opposed this convention due to the strict anti-trust policies already in existence in the country.
- In 1972 an expert group was established by the United Nations Conference on Trade and Development (UNCTAD) to identify multilateral rules and principles on restrictive business practices. As a result of the work done by the expert group a resolution was adopted in 1980 by the General Assembly of the United Nations. However, the resolution has no binding effect among member countries.
- Under the GATT various attempts have been made to establish multilateral competition principles and policies. In 1955 rules that allow for ad-hoc notification and consultation on conflicts of interest between countries due to anti-competitive practices was adopted. However, these rules have never been applied in practice. In the 1960s and 1970s discussions on multilateral competition rules were resumed without any clear results.

After the WTO Ministerial Conference in Singapore 1996 the Working Group on the Interaction between Trade and Competition Policy was established to determine the role the

WTO and the multilateral trading system can play in the regulation of competition in member countries. The Doha WTO Ministerial Declaration of 2001 recognised the importance of competition policy to international trade and development and the need for capacity building and technical assistance on this issue in developing and least-developed countries. This created the need for a multilateral framework to enhance the contribution of competition policy to trade and development. According to the Declaration, WTO member countries reached consensus to negotiate competition policy issues on the multilateral level and instruction was given to the Working Group to focus on the clarification of the core principles of competition policies to be negotiated, the modalities for voluntary cooperation and to identify capacity-building projects in developing and least-developed countries (WTO Ministerial Declaration (2001).

The figure below shows the approach of the United States, the European Union and various developing countries to the proposed multilateral negotiations. The United States is greatly opposed to include competition issues in multilateral negotiations, while the member countries of the European Union are supportive of the proposal if the scope of negotiations is limited to intergovernmental procedures. Various developing countries have submitted opinions on the issue with countries divided between those supporting the proposal and those strongly opposed to the idea.

Figure 3: Approaches to the multilateral negotiations: the US, EU and developing countries



Source: Paasman (1999)

In 2004 the General Council of the WTO decided that the multilateral role competition policy can play in international trade will no longer form part of the Doha Development Agenda. Since the decision the work of the Working Group has come to a complete standstill (Interaction between trade and competition policy, 2011).

5. Anti-dumping measures in regional trade agreements

The main objective of a regional trade arrangement is the removal of barriers on intra-regional trade (Prusa & Skeath, 2001). However, the elimination of intra-regional tariffs and non-tariff barriers can create new demands for the protective effects of trade remedies, especially anti-dumping measures (Teh, et al, 2007). Due to this new demand for the protection of domestic industries, anti-dumping measures are often used as a tool to restrict foreign imports into a domestic market under a regional trade arrangement. Thus anti-dumping measures are used as a kind of fall back or safety valve when countries experience difficulty due to increased trade liberalisation and improved access to domestic markets (Spinanger, 2002:2).

Anti-dumping measures are seen as being inefficient, disadvantage the producers and exporters of the specific product on which it is imposed, reduces consumer welfare and have a negative impact on the industrial users of those products in the importing market. This has led to some countries calling for the replacement of anti-dumping measures through the utilisation of competition principles (Voon, 2009:5), especially in terms of regional trade arrangements (Economic Law Practice, 2009:19).

According to Bilal and Olarreaga (1998:158) for trade liberalisation in a regional arrangement to be effective the use of trade remedies, especially anti-dumping must be limited or preferable removed from the regional agreement. Although the retention of anti-dumping measures can be justified as a measure to protect a domestic industry against predation, the authors see anti-dumping as being an inherent protectionist device which is justified through its reliance on the rhetoric of protecting fair trade. Any potential benefits trading partners can receive through the conclusion of a regional trade agreement can be withered away by the use of anti-dumping measures among the trading partners. Bilal and Olarreaga (1998:159) also states that anti-dumping measures entail anti-competitive biases: anti-dumping measures generally distort competition because these measures target the most efficient foreign supplier in the domestic market. Anti-dumping is also an instrument which actually favours the firms with a dominant position in the domestic market through the standing requirement and is only applied if the firms with market power want to remove foreign suppliers from the domestic market.

Teh et al (2007:11) state that the removal of anti-dumping measures from a regional trade agreement may not necessarily lead to an increase in welfare. There is the possibility that the abolition of anti-dumping measures can lead to negative trade diversion effects which outweigh the positive effects of trade creation among member states. Eliminating anti-dumping measures on intra-regional member states can create the preference for intra-regional goods leading to increased trade among the member countries of the regional trade agreement. However, the preference for intra-regional goods can be at the expense of cheaper sources of imports from non-member countries. This creates the danger that the expansion of intra-regional trade, can lead to the increased use of anti-dumping measures against non-member country imports. Thus there is the risk of trade diversion: the removal of anti-dumping measures on intra-regional trade looks good for increased intra-regional trade, but can lead to intra-regional imports purely being substituted for cheaper imports from non-member countries. In other words measures implemented with the aim of increasing economic efficiency can actually have the opposite effect (Teh et al, 2007:13)

5.1 The purpose of anti-dumping measures in regional trade agreements

Anti-dumping measures are commonly justified as a means to take action against trade partners which engage in unfair trade practices which cause material injury to the domestic industry of the importing country (Teh et al, 2007:4). Anti-dumping duties enable a country to temporarily increase trade protection available to a domestic industry when a trading partner sells a product below its normal value in the importing market (Teh et al, 2007:3). The premise behind this flexibility measure built into a regional arrangement highlights the two main reasons for retaining anti-dumping measures in a regional trade agreement (Teh et al, 2007:4). The first relates to the political economy of protectionism and the second the political demand for protectionism in regional trade liberalisation.

In terms of the political economy of protectionism Teh et al (2007:4) makes the argument that anti-dumping measures in regional agreements are required to satisfy the bureaucracies, which administers the use of these measures, to protect the import-competing sectors in the domestic market. The reduction of import duties provides import-competing sectors with an incentive to lobby government for protection against foreign competitors through any means possible. Although anti-dumping measures are administered by bureaucracies, normally isolated from political pressure, they can be influenced indirectly by the laws and regulations which govern their work. Anti-dumping measures are also inherently biased in favour of

domestic industries, because measures are channelled through complaints regarding the excess of import competition in the domestic market and not the absence of foreign competing firms (Teh et al, 2007:8). Anti-dumping measures can also be incorporated into regional agreements as a strategic policy tool to affect the terms of trade of a trading partner. If countries aim to achieve free trade through regional integration, there is always the concern that a trading partner will use alternative instruments, like subsidies, to circumvent the achievement of free trade. Thus anti-dumping measures can be used as a safety valve to offset any strategic use of policies by other countries to reduce domestic welfare (Hoekman, 1998:10).

The second reason for retaining anti-dumping provisions lies in the ability of these measures to meet political demands for protectionism if trade liberalisation is perceived as a threat to the domestic economy. Trade liberalisation is inherently associated with some adjustment costs, which if not managed, can lead to the political demand to protect the domestic industry against these costs. These adjustment costs can be defined as those costs involved in the transition from one state to another or transferring resources from one sector to another, including labour and capital adjustment costs. Including anti-dumping provisions in a regional trade agreement can possibly deflate any political pressure which may arise during the regional trade liberalisation process. An anti-dumping duty has a cushioning effect, providing a specific set of condition under which regional liberalisation can be temporarily suspended or reversed. Although the temporary reversal of the trade liberalisation process can lead to short-term welfare losses, the increased trade liberalisation efforts these measures can facilitate may lead to long-term welfare gains which can outweigh any short-term losses. Anti-dumping measures thus have a very important purpose to fulfil in a regional trade agreement as a safety valve to rally the necessary political support to conclude any trade agreement under negotiation (Teh et al, 2007:5).

Although anti-dumping measures can fulfil a specific function in a regional trade agreement, the question remains whether these measures are the best available option to address the circumvention of trade liberalisation by trading partners. Hoekman (1998:10) states that the suitability of anti-dumping as a strategic policy tool depends on the source of the problem: are anti-dumping measures utilised to address high trade barriers or industrial policy measures implemented in the domestic market of the exporting firm?

In the case of foreign firms benefitting from high trade barriers in their own domestic market, anti-dumping measures can be used as an effective policy tool to put pressure on foreign governments to remove domestic trade barriers protecting local producers. This argument has widely been used to justify the use of anti-dumping as an instrument for offsetting market access restrictions in the home market of the exporting firm which enables foreign firms to dump in the importing market. This creates the gap for anti-dumping measures to function as an instrument to correct competitive differences created by governments in different trading partners (Hoekman & Mavroidis, 1994:25).

On the other hand Hoekman (1998:12) states that if the source of the problem is applicable industrial policies, the use of anti-dumping measures as a strategic policy tool is inefficient. This includes the use of anti-dumping measures to address subsidies and state-trading enterprises in the market of the exporting firm. In this case the use of anti-dumping measures can lead to a decrease in welfare of the consumers in the importing country without providing a real motivation for foreign governments to change their protective ways.

5.2 Anti-competitive effect of anti-dumping rules

The debate surrounding the validity of retaining anti-dumping measures in a regional trade arrangement can be summarised by the following question by Spinanger (2002) and plausible reactions from Finger (1993) and Lloyd (2005). In an effort to explain that the incorporation of anti-dumping measures into regional trade agreements are against the basic premise of trade liberalisation and improved market access Spinanger (2002:2) asked the following question: why should the initial step by countries to decrease trade barriers and improve their integration into the world economy immediately be accompanied by measures to ensure that the integration process be negated by maintaining anti-dumping measures in the regional agreements? On this question Finger (1993:56) would probably have responded that anti-dumping measures are ‘a trouble-making diplomacy, stupid economics and unprincipled law’, while Lloyd (2005:73) would have answered that ‘anti-dumping is the fox put in charge of the henhouse: trade restrictions certified by GATT. The fox is clever enough not only to eat the hens, but also to convince the farmer that it is the way things ought to be. Anti-dumping is ordinary protection with a grand public relations program.’

Maintaining anti-dumping measures in regional trade agreements can have two diverse effects. The first is that as liberalisation among the regional partners increase, the member

countries can increase the utilisation of anti-dumping measures among member countries, decreasing the intended benefit of liberalisation in the first place. The second consequence is that the member countries of the regional agreement increasingly implement anti-dumping measures against imports from non-member countries as regional integration among the member states deepens (Spinanger, 2002:11).

Tavares (2001:15) states that anti-dumping measures can have various unintended consequences, which imply welfare costs for domestic consumers which are higher than the costs associated with traditional trade barriers. Anti-dumping duties increase the price of imported goods, can reduce the competitiveness of the domestic market and provide incentives for collusion among firms, trade diversion and the transfer of protection rents to trading partners. In a regional trade configuration the utilisation of anti-dumping policy can have a significant impact on the competitiveness of trade within the region. Anti-dumping rules are seen as being inefficient and disadvantage producers, exporters, importers and consumers (Hoekman, 1998:3). The argument has been made that anti-dumping rules are inherently protectionist not just by being included in national legislation, but also leads to anti-competitive effects due to the manner these rules are implemented.

From the perspective of the consumers in the importing country the use of anti-dumping measures are economically irrational due to the negative impact it can have on consumer welfare through the increase in prices in the domestic market. According to Voon (2009:6) the higher prices paid by consumers and its negative impact outweighs the benefit which the domestic industry receives through the specific protection. According to Alavi and Ahamat (2004:62) if dumping injures the domestic industry, then anti-dumping measures can be seen to harm the domestic consumers and intermediate users of the specific good. Anti-dumping measures can be detrimental to the interest of the consumers and intermediate users if these market participants have benefitted from the availability of cheap imports in the market as a result of dumping. Applying anti-dumping measures on these goods increase the prices in the domestic market and reduce consumer surplus. The intermediate users of the import product will also be affected adversely due to higher priced intermediate product that must be incorporated into further production processes. This decreases the competitiveness of firms due to an increase in the cost of production that can drive producers from the market in the long-run (Alavi & Ahamat, 2004:76-77).

If anti-dumping measures are utilised to protect inefficient domestic producers, the cost to the consumers and intermediate users will outweigh the benefit which will accrue to the domestic producers through the protection. Inefficiency is in itself damaging to domestic producers in that these firms are unable to compete in the global market without being protected. This means that anti-dumping measures can protect inefficient domestic industries which can not compete with foreign suppliers, potentially seeking to capture the domestic market by utilising the protectionism to become a monopolist in the market (Alavi & Ahamat, 2004:78). If there are no possible substitutes available in the market, whether domestically produced or imported, consumers and intermediate users will have no other available option than to purchase the imported goods at the higher price (Alavi & Ahamat, 2004:77).

Gausch and Rajapatirana (1998:5) also state that anti-dumping measures can have a detrimental effect on exporters. Anti-dumping law can create two distinct incentives for the exporters of a specific product. The first is the distortion of the marketing decisions of the exporter. An exporter faced by the threat of anti-dumping measures can decide to limit its exports to the complainant market and increase its supply to its home market. In turn the price of the product in the exporting market will increase, while the increased supply of the product in the domestic market will lead to a decrease in the price of the product in the domestic market. The second incentive to the exporter will depend on the importance of the complainant market as an export destination to the exporting firm. If the complainant market is a significant market for the exporting firm, the firm can change its foreign direct investment decision by deciding to relocate its production processes to the particular importing market in order to avoid the implementation of an anti-dumping duty.

It is suggested that the elimination of anti-dumping measures and the harmonisation of competition policy can enhance economic welfare. However, the ability of a regional trade arrangement to utilise competition policy will depend on the national and regional anti-dumping rules, competition principles and institutions and the level of integration present in the regional configuration (Prusa and Teh, 2009:8).

5.3 Are anti-dumping measures against the principles of a regional trade arrangement?

Over the years there has been an ongoing debate whether the implementation of anti-dumping measures are suitable in the context of intra-regional trade in a customs union. This has been

a multi-dimensional debate, focussing on the different elements of the definition of a customs union in terms of Article XXIV of the GATT 1994. Questions which have been relevant to the debate include: (i) are countries prohibited from implementing anti-dumping measures against intra-regional trading partners in a customs union under WTO law and (ii) are provisions which preclude custom union member countries from implementing anti-dumping measures against each other mandatory, permissible or prohibited by the WTO rules (Voon, 2009:21)?

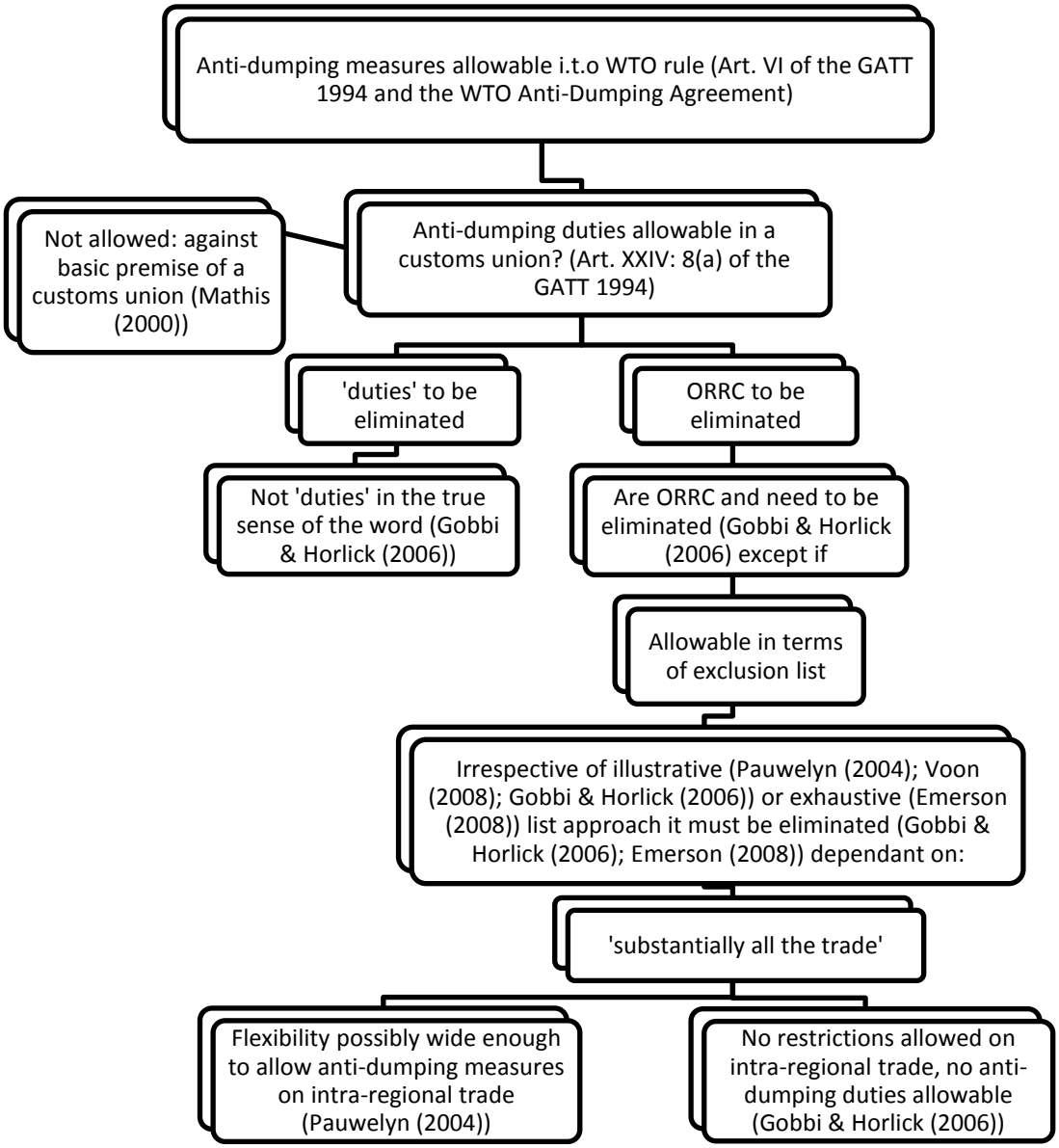
According to Mathis (2000:47) anti-dumping measures seem to be inconsistent with the basic idea of a customs union as a single territory. When trading partners agree to become a customs union and to have a harmonised external trade policy and free intra-regional circulation of goods, by mere definition of a customs union the member states should also forego their legal ability to apply anti-dumping measures to the goods of other member countries. Once goods have entered the single territory there is no need to establish the origin of the goods, making it impractical for countries to implement trade policy measures on goods from countries a party to the customs union. If intra-regional anti-dumping measures were to be permitted then rules of origin are needed to determine which goods will be subject to these duties. However, this will result in a failure of free circulation of intra-regional goods which is the basic premise of a customs union. Mathis (2000:48) states that anti-dumping duties on internal trade must be prohibited as of the end of the transition period of a regional trade arrangement and replaced by regional competition policies as an alternative method to remedy dumping.

Although there has been no definitive finding on these questions by the WTO dispute settlement body, Gobbi and Horlick (2006:911) take the view that there is a number of statements which the WTO Appellate Body made regarding Article XXIV:8 of the GATT 1994 in the Turkey-Textile case which may shed some light on the ability of countries to utilise anti-dumping measures in a customs union. The Appellate Body decision provides some guidance on the issue of Article XXIV:8 of the GATT 1994 either mandating or simply allowing trade remedies to be eliminated from regional trade agreements.

Figure 4 below shows a graphical representation of the arguments and questions surrounding the debate on the role anti-dumping measures should and could play in a customs union.

In answering the question of whether the retention of anti-dumping measures is against the basic premise of a customs union we have to focus on the two distinct exceptions to the WTO rule in the question: the first being a customs union in itself being and exception and the second being the use of anti-dumping measures to temporarily negate trade liberalisation. According to Article XXIV:8(a) of the GATT 1994 countries can only benefit from the customs union exception if the level of internal trade liberalisation is such that any duties and other type of restrictions are eliminated with respect to substantially all the intra-regional trade. A customs union are thus only allowed to maintain a limited number of trade restriction as listed in the article, including certain measures to safeguard a country's balance of payments, exchange arrangements and measures to protect animal, human and plant life (Gobbi & Horlick, 2006:910). The article seems to imply that all contingent protection measures, including anti-dumping measures should be eliminated from the internal trade of a customs union in order to fulfil the requirements set out in the article (Emerson, 2008:11-12).

Figure 4: Anti-dumping measures in regional trade agreements



5.3.1 Customs union as an exception to the rule

According to Article XXIV:8(a) of the GATT 1994 a customs union is 'the substitution of a single customs territory for two or more customs territories so that: (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all trade in products originating in such territories….'

One of the basic principles of the WTO is the principle of Most-Favoured Nation (MFN) treatment. In terms of trade in goods this principle means that a WTO member country must extend any benefit it gives to the products of one country to the products of all WTO members. However, regional trade agreements are an exception to this basic principle where preferential treatment is granted to the products of the regional trade arrangement member countries, without having to extend the benefit to other WTO countries not a party to the regional arrangement (Voon, 2009:4). Regional trade agreements are allowable exceptions under the WTO rules, given their potential to facilitate the transition to greater multilateral liberalisation (Voon, 2009:27). Thus a customs unions as a regional trade agreement can be reconciled with the principles of the GATT 1994 as facilitating wider and deeper liberalisation in regional and multilateral trade (Marceau, 1994:).

5.3.2 The WTO exception of anti-dumping measures

In terms of trade remedies, anti-dumping measures in themselves violate the MFN rule. By implementing an anti-dumping measure a WTO member can levy a higher import duty on a specific product imported from another specific WTO member, discriminating against the imports of that specific trading partner which now receives less favourable treatment than the imports of that specific product from any other country due to a higher import duty being levied (Voon, 2009:5). Given the exception in Article VI of the GATT 1994 and the WTO Anti-Dumping Agreement allowing WTO member countries to utilise anti-dumping measures in specific circumstances, WTO member states are able to utilise a measure which would otherwise have been inconsistent with WTO rules.

5.3.2.1 Anti-dumping measures as ‘duties and other restrictive regulations of commerce’ listed in article XXIV:8(a)

According to Article XXIV: 8(a)(i) any duties or other restrictive measures must be eliminated, except for those which are allowed in the exception list. The question on how to precisely interpret this part of the article has resulted in three points of contention: (a) are anti-dumping measures ‘duties or restrictive regulations of commerce’ as meant by the article; (b) should anti-dumping measures be read into the exclusion list of allowable restrictions; and (c) whether maintaining anti-dumping measures in a customs union are contrary to the requirements of ‘substantially all trade’. Although Article VI of the GATT 1994 is not explicitly included into the list the argument has been made that the list is only illustrative and not exhaustive of the allowable measures in a customs union. So far no

consensus and definitive clarification of the interpretation of this section has been provided by either WTO member states or the WTO dispute settlement process (Gobbi & Horlick, 2006:911).

a) 'duties and other restrictive regulations of commerce'

According to Gobbi & Horlick (2006:914) anti-dumping measures cannot be interpreted to fall within the true definition and meaning of 'duties'. According to the authors the English version of Article XXIV: 8(a)(i) of the GATT uses the term 'duties', while the Spanish and French versions utilises the term 'customs duties' in the same article. Thus according to the article, customs duties need to be eliminated in order to comply with the requirements for a customs union. While anti-dumping measures might be seen as an additional duty levied on the importation of a specific product, the authors state that it cannot be interpreted to have the meaning of a customs duty, defined as a tariff, in the true sense of the word.

The other aspect which must be considered is whether anti-dumping measures can be seen as 'other restrictive regulations of commerce' (ORRC) in terms of the GATT 1994. If anti-dumping measures cannot be defined as ORRC then there is no obligation on the members of a customs union to eliminate these measures on intra-regional trade. (Voon, 2009:34).

According to Gobbi and Horlick (2006:918) ORRC include regulations which have a restrictive impact on trade, including border measures and internal regulations which affect imports adversely when compared to the domestic products not subject to the same measures. This interpretation of ORRC includes anti-dumping duties which are levied on imports at the border and not applicable to domestically produced products. Thus and anti-dumping duty is an additional duty levied on an import product which can restrict the importation of the specific good, justifying the inclusion of anti-dumping measures in the meaning of ORRC. In terms of Article XXIV of the GATT 1994 this means anti-dumping measures are part of those restriction which have to be eliminated to fulfil the internal trade liberalisation requirements of a customs union; depending on whether Article VI of the GATT 1994 falls in the ambit of the exclusion list applicable to Article XXIV: 8(a)(i) of the GATT 1994 (Gobbi & Horlick, 2006:919).

b) The exclusion list in Article XXIV: 8(a)(i)

The debate regarding whether or not anti-dumping measures are included in the list of measures which are excluded from the internal trade liberalisation requirements is focused on the following argument: the list of measures which do not have to be liberalised regarding 'substantially' all internal trade is only an illustrative list of these exceptions allowed in a customs union and not an exhaustive list of the only allowable exclusions. Pauwelyn (2004:126-127) states that the mere fact that Article VI of the GATT is not included in the exclusion list does not mean that it is not allowed in a customs union. The author's argument that the exclusion list is mere illustrative is based on the fact that Article XV dealing with trade restrictions when a country is experiencing balance of payment difficulties are included in the list, while Article XVIIIB of the GATT 1994 dealing with allowable trade restrictions when specific developing countries have balance of payment difficulties are not included in the list. For the author this clearly indicates that the list was only meant to be illustrative as it will be irrational to include one provision dealing with restriction for balance of payment difficulties while excluding another.

Voon (2009:34) follows the same type of argument by focussing on the purpose of anti-dumping measures. The author states that anti-dumping measures have the legitimate purpose of protecting a domestic industry against unfair trade practices (dumping). However, Article VI of the GATT 1994 is not included in the exclusion list, while Article XX of the GATT 1994 with the legitimate purpose of protecting human and animal health is included in the exclusion list and thus allowed in a customs union. According to the author it is illogical to allow one restriction for a legitimate purpose in a customs union, while another is excluded; except if the basic premise of the list is to only illustrate the types of restrictions which is allowed in a customs union (Voon, 2009:35).

Gobbi and Horlick (2006:921) also classify the exclusion list as being illustrative, but focus their discussion on the possible ways to interpret the exclusion list. According to the authors, the exclusion list can possibly be interpreted in any of the following three ways. A WTO member country:

i. must apply the excepted provisions to the regional trading partners and may eliminate trade remedies from the regional agreement; or
ii. may apply the excepted provisions to regional members and must eliminate trade remedies; or

iii. the excepted provisions may be applied against trade partners and countries may eliminate trade remedy provisions.

The authors state that the foundation for answering this question can be found in the ruling by the WTO Appellate Body in the Turkey-Textiles case. In this case the Appellate Body found that 'subparagraph 8(a)(i) of Article XXIV of the GATT 1994 establishes the standard for the internal trade between constituent Members in order to satisfy the definition of a customs union. The article requires member countries of a customs union to eliminate 'duties and other restrictive regulations of commerce' with respect to 'substantially all the trade' between them. The Appellate Body went on the find that 'the terms of the subparagraph 8(a)(i) provide that members of a customs union may maintain, where necessary, in their internal trade, certain restrictive regulations of commerce that are otherwise permitted under Articles XI through XV and under Article XX of the GATT 1994.'

According to Gobbi and Horlick (2006:933) this paragraph endorses the 'may' interpretation pertaining to the exclusion list, thus member countries may apply the excepted provisions to their trading partners, but not mandated to do so. However, this still leaves two options on how to interpret the implementation of anti-dumping measures in a regional agreement: countries may apply the exclusions to trading partners and must eliminate trade remedies on intra-regional trade and countries may apply the exclusions and trade remedies to trading partners (Gobbi and Horlick, 2006: 933). The authors however, feel that the may-may approach will leave the exception list meaningless and inconsistent with the true intent of the article leaving the only possible explanation that Article XXIV:8(a) of the GATT 1994 places an obligations on trading partners in a customs union to eliminate any other duties or restrictive regulations from the customs union, including the utilisation of anti-dumping measures (Gobbi and Horlick, 2006:935).

Emerson (2008:12) however, is not convinced by the arguments of the other authors that the exclusion list is purely illustrative and holds the firm belief that the drafters of Article XXIV of the GATT 1994 intended the exclusion list to be an exhaustive list of duties and other restrictive regulations allowable in a customs union. The argument follows that the mere fact that the drafters did not include Article VI of the GATT 1994 in the exclusion list shows their intention that anti-dumping measures fall in the ambit of those measures which need to be

eliminated from a customs union to make the customs union an allowable exception to the basic principles of the WTO rule.

Although there has been no definitive answer on whether the exclusion list is exhaustive or purely illustrative, following the interpretations of both Gobbi and Horlick (2006) and Emerson (2008) which have different views on the nature of the exclusion list, the conclusion remains the same: anti-dumping measures on intra-regional trade need to be eliminated for a regional arrangement to comply with the requirements for a customs union.

5.3.2.2 'substantially all trade'

The last contentious element of Article XXIV:8(a) of the GATT 1994 is that of whether anti-dumping measures can be retained in a customs union, given the requirement that restrictive regulations, other than those in the exclusion list, must be eliminated in terms of 'substantially all trade' of the regional arrangement.

Pauwelyn (2004:127) states that the requirement in Article XXIV:8(a) of the GATT 1994 is that duties and trade restrictions be eliminated on 'substantially all trade' and not the elimination of all trade restrictions except those seen as being necessary under the exception list included in the article. Neither under GATT 1994 nor the WTO has member countries come to a definitive conclusion regarding the meaning of 'substantially all trade' in this article. However, the author states that it is clear that 'substantially all trade' does not mean the same as a requirement to eliminate duties and trade restrictions on all the intra-regional trade. On the other hand, 'substantially all trade' can also be interpreted to mean considerably more than just some of the intra-regional trade of a customs union. However, subparagraph 8(a)(i) of Article XXIV of the GATT 1994 allows for some flexibility in the liberalisation of the internal trade of a customs union by allowing the trade restrictions in the exclusion list. This leads Pauwelyn (2004:127) to conclude that Article XXIV of the GATT 1994 allows countries some flexibility when liberalising intra-customs union trade, which is a degree of flexibility possibly wide enough to allow for the implementation of anti-dumping measures on intra-regional trade.

Gobbi and Horlick (2006:937) follow a very strict approach to the elimination of duties and restrictive regulations on intra-regional trade. According to the authors all duties and restrictive regulations must be eliminated from substantially all the intra-regional trade,

meaning the complete removal or expulsion of those duties and restrictive regulations not in the exclusion list. Duties and restrictive regulations must be completely eliminated from that part of the internal trade of the customs union which is covered by the trade liberalisation program in the customs union. This means that no trade restrictions can be in place on any part of the intra-regional trade that is intended to satisfy the 'substantially all trade' threshold (Gobbi & Horlick, 2006:938).

Compiling all the arguments above leads to the following conclusion: anti-dumping measures are allowable trade measures in terms of WTO law and cannot be interpreted as 'duties' that must be eliminated in a customs union in terms of Article XXIV: 8(a) of the GATT 1994. However, anti-dumping measures can be interpreted as falling outside the exclusion list of allowable restrictive regulations in a customs union and need to be eliminated with respect to 'substantially all the trade' among trading partners. 'Substantially all the trade' provides the only flexibility for possibly allowing anti-dumping measures in a customs union, however according to Mathis (2000:48) even an anti-dumping duty on goods falling outside the ambit of 'substantially all the trade' is still against the basic premise of a customs union.

5.4 Regional trade arrangements in which anti-dumping measures have been abolished

Although many regional and bilateral trade agreements have been concluded over the years, the elimination of anti-dumping measures on intra-regional trade combined with the harmonisation or coordination of competition policies among member countries have in general not played a major role in bilateral and regional trade negotiations. The abolition of anti-dumping measures among countries is difficult to achieve. In those regional trade agreements which have eliminated anti-dumping measures from intra-regional trade, the European Commission, European Economic Area, Australia-New Zealand Closer Economic Relations Trade Agreement and the Canada-Chile Free Trade Agreement, the process included a measured approach from the liberalisation of goods, services and factors of production to the coordination and in some cases the harmonisation of competition policies (Hoekman & Mavroidis, 1994:13).

Competition provisions included in regional trade agreements generally fall into two categories, these provisions are either NAFTA-type or EU-type provisions. NAFTA-type provisions are characterised by the fact that there are no substantive rules included in the

provisions on competition issues. The application of the relevant competition policy is the responsibility of the national competition authority of each member state according to the applicable domestic legislation in a trading partner. This requires each member country to have domestic competition policy in place and a mechanism for coordination among the individual competition authorities in the member states. The EU-type provisions create supra-national competition laws with an enforcement mechanism which is applicable to all member countries (Matsushita, 2010:19).

Although limited, the number of regional trade agreements in which anti-dumping measures where successfully eliminated and competition policies coordinated or harmonised can provide valuable information on the conditions needed to remove anti-dumping measures from intra-regional trade (Hoekman & Mavroidis, 1994:8).

5.4.1 European Community (EC)

Hoekman (1998:14) sees the EC as a unique regional arrangement in that it requires the complete liberalisation of trade in goods, services, labour and capital. The regional arrangement is also distinct in the extent and reach of constraints placed on member countries in terms of the regulatory policies which can have an impact on intra-regional trade. Common principles related to subsidies, monopolies, government procurement and competition are imposed on all members. These disciplines are also enforced by supranational and national bodies, including the European Commission and the European Court of Justice. One of the consequences of liberalising the markets and adopting common competition policies among all member states is the explicit prohibition of anti-dumping measures in the common market (Hoekman & Mavroidis, 1994:9).

The Treaty of Rome (Article 85 and 86) prohibits the use of competition restrictive or distortive practices and the abuse of a dominant position in terms of intra-European trade. Article 85 of the Treaty prohibits agreements and practices which will restrict or distort intra-regional competition and affect intra-EC trade negatively (Hoekman, 2002:4). Article 86 states that the abuse of a dominant position is prohibited, with dominance being determined on the basis of the relevant product and geographical area. The article also contains an illustrative list of possible abuses, including unfair trading, price discrimination and restricting output or the access to markets. The Treaty explicitly states that the use of contingent protection measures, including anti-dumping measures have no place in the

common market. Article 91 of the Treaty allowed for the implementation of anti-dumping measures only during the 12 year transition period to the full implementation of the Treaty which have already expired (Hoekman, 2002:6).

However, this does not mean that member countries cannot take action against dumping, but rather that they cannot implement anti-dumping measures. Anti-dumping measures are allowable only in the case of dumping by a third party country. The EC supranational competition rules and authority applies to both private firms and the government (Hoekman & Mavroidis, 1994:13). Although competition policies are used the address unfair trade practices in the EC, the Treaty do not establish a link between the use of competition policies as a substitute for anti-dumping measures. Instead the argument seems to follow that once all trade barriers were removed among member countries there was no justification for maintaining anti-dumping measures. Competition provisions are seen as necessary in the creation of an integrated market in Europe (Hoekman, 2002:6).

To initiate an action against alleged intra-regional dumping a member state must file a petition under the Community's competition policy to the competition authority under the Directorate-General for Competition. If a violation is found the offending firm will be ordered to take action to correct the injury caused by the abuse of the dominant position subject to a fine (Nordstrom, 2009: 7).

Although there seems to be a division in addressing intra-regional dumping versus dumping by a third party country, competition policy can actually be used on both occasions. However, anti-dumping measures are only available to take action against dumping by third party countries. The EC Treaty is 'blind to nationality' in the application of their competition policy. Thus the EC competition policy can be applied to unfair trade practices irrespective of the geographical location of the registered office, headquarters or shareholders of the firm. Firms of third party countries can be held accountable for injury caused by dumping in the EC under the competition policy of the EC. However, the member countries still prefer to implement anti-dumping measures against importers from non-member countries. This is mainly due to the legal standard in anti-dumping proceedings being lower than that of competition proceedings in the EC (Nordstrom, 2009:8).

5.4.2 Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)

ANZCERTA is a free trade agreement between Australia and New Zealand which was established in 1983. In 1983 the two countries had vast differing competition policies with those of Australia based on the United States model, while the competition principles of New Zealand more in line with the approach in the United Kingdom. New Zealand enacted new competition legislation in 1986 which was consistent with that of the Australian competition system. This facilitated the discussions between governments to eliminate bilateral anti-dumping measures (Hoekman, 1998:24-25). According to Marceau (1994:209) ANZCERTA is quite interesting because it is so far the only free trade arrangements which have been successful in the elimination of anti-dumping measures without the adoption of supranational legislation or authority regarding competition policy to control restrictive business practices which may arise in the bilateral arrangement. The countries followed a two-step procedure to fully eliminate anti-dumping measures between them. The first was the recognition that full trade liberalisation is not sufficient to eliminate the incentives for firms to dump and governments to implement anti-dumping measures. The second step was to provide further motivation for the elimination of anti-dumping measures through the development and enforcement of agreed competition laws between the countries (Hoekman & Mavroidis, 1994:11).

The Preamble of the Protocol in Acceleration of Free Trade in Goods (1988) describes the use of anti-dumping measures between the two countries as being ‘inappropriate’ in the strive for full trade liberalisation in the trade of goods between them. Article 4 of the free trade area slightly modifies the Preamble and states ‘the 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.’ The article also obliges the countries to take the necessary steps to ensure that their competition policies are consistent with the principles and objectives of the free trade area (Hoekman, 2002:9). The competition authorities also concluded a bilateral Cooperation and Coordination Agreement in 1994 to remove any inconsistencies in apply the law (Hoekman, 1998:26).

Australia and New Zealand agreed to enforce similar competition laws with the jurisdiction of the respective national competition authorities extended to matters related to Australia-New Zealand trade, allowing for the extra-territorial application of national competition policy. In terms of the countries' competition policies nationals of one country can be made the subject of an investigation by the authority of the other state, including market power in either one of the national markets or the combined Australia-New Zealand market. Courts can also sit in the other country, orders can be served in the other country and court judgements are enforceable in both countries (Hoekman, 1998:25). This means that a dominant firm in New Zealand, selling at price below cost in Australia can contravene the law in Australia, even if the firm did not have market power in the Australian market, if the business practice affected the market of Australia (Marceau, 1994:213).

5.4.3 The Agreement on the European Economic Area (EEA)

The EEA was negotiated by the European Free Trade Association states (excluding Switzerland) and the EU in 1992 (Hoekman, 1998:20). The agreement brings together the 27 member countries of the EC with three EFTA states, Norway, Iceland and Lichtenstein, in a single market known as the Internal Market (Hoekman, 2002:6) and was build from the free trade arrangement negotiated between these regional configurations in the 1970's (Hoekman, 1998:20). During the bilateral negotiations the EFTA-states agreed to adopt the majority of the EC's policies, including the competition policies of the EC and a wide range of EC legislation (Hoekman, 2002:6).

Article 26 of the EEA eliminates the use of anti-dumping measures and countervailing duties on trade between the contracting parties (Hoekman, 1998:20). According to Article 26 of the EEA the use of anti-dumping measures against illicit commercial practices shall not be applied among the contracting parties, unless it is otherwise specified in the agreement (Hoekman & Mavroidis, 1994:10). The only exception to the non-implementation of anti-dumping measures among member countries is trade of farm and fish product.

The elimination of anti-dumping measures was encouraged under the auspice of the desire of the EEA and its member countries to encourage good forms of competitions while discouraging bad forms (Nordstrom, 2009: 9). EEA countries have also adopted and implemented common competition rules, which are the EC competition rules, to counteract the elimination of anti-dumping measures among member countries which applies to all

private firms and the government (Hoekman & Mavroidis, 1994:10). Supranational bodies, the European Commission and the EFTA Surveillance Body, are responsible for the enforcement of the EEA competition principles. The latter has jurisdiction if at least one third of the turnover of a firm which is subject to an anti-competitive complaint is in an EFTA state (Hoekman, 1998:21).

In the true sense the EFTA states did not adopt the common policies of the EC, the EC rather extended full free trade in goods, services and factors of production to the EFTA countries (Hoekman, 2002:6).

5.4.4 Canada-Chile Free Trade Agreement (CCFTA)

The free trade agreement between Canada and Chile was signed in December 1996 and entered into force on 5 July 1997 (Holmes et al, 2005:82). According to Holmes et al (2005:83) the CCFTA has two main features of trade liberalisation. The first was the immediate duty-free entry of 85 percent of Canada's exports into Chile and the second was the elimination of Chile's 11 percent import duties on all other goods over a period of five years. Both parties also committed to further trade liberalisation focused on the elimination of various non-tariff barriers, including qualitative restrictions, licensing requirements and other non-discriminatory measures.

The CCFTA also includes basic provisions on competition policy and cooperation with general provisions on notification, consultation and the exchange of information. In 2001 the parties signed a detailed Memorandum of Understanding (MOU) on competition issues, including provisions on cooperation and coordination, the avoidance of conflicts procedures and regular meetings among competition officials (Holmes et al, 2005:83).

The CCFTA also provides for the elimination of anti-dumping investigations and duties between the parties by January 2003. Articles M-01, M-02 and M-03 of the CCFTA states that member countries will not initiate any new anti-dumping investigation and reviews or apply any new anti-dumping measure after January 2003 and also calls for all existing investigations, reviews and measures to be discontinued as from the beginning of 2003 (Holmes et al, 2005:84).

The CCFTA has been able to eliminate the use of anti-dumping measures between the partner countries without the harmonisation of competition policies and the creation of a supra-national competition body. The CCFTA only requires the parties to have a designated contact point which can facilitate communication between the parties in the matters related to the CCFTA, including competition issues (Holmes et al, 2005:85)

5.4.5 Common Market of the South (MERCOSUR)

MERCOSUR was established in 1991 as a common market with a common external tariff among four South American countries: Argentina, Brazil, Paraguay and Uruguay. The common external tariff was implemented in 1995 (Hoekman, 1998:29). Although MERCOSUR is referred to as a customs union, Florencio (2007:7) states that it is actually an imperfect customs union and can be classified as in an intermediate position between a free trade arrangement and a customs union. This is mostly due to some existing exception to the common external tariff: imported goods are still charged the common external tariff each time the goods cross the border into another member country. Anti-dumping duties can also still be applied on intra-regional trade (Florencio, 2007:8). It seems that the MERCOSUR countries are following an approach similar to Australia and New Zealand in ANZCERTA, not creating common competition policies, but rather ensuring that competition policies among members are similar. So far there is no explicit commitment or requirement for countries to eliminate intra-regional anti-dumping measures, but it is on the agenda (Hoekman, 2002:11). Member countries have initiated a process to harmonise their various national competition policies and create a mechanism to coordinate actions against anti-competitive practices (Hoekman, 1998:30).

MERCOSUR differs in its approach to decision-making in comparison with decision making in the EC. There is no supranational decision-making body in MERCOSUR with the decision making process taking place on consensus among member states. According to Article 4 of the Treaty of Asunción one of the main objectives of MERCOSUR is to coordinate the national policies of each member state to ensure the establishment of common legislation on trade and competition issues. In order to attain this goal a working group was selected to establish common legislation on competition policy. The proposal made by the working group was concluded and officially approved in 1996. However, only Brazil and Paraguay have incorporated the common legislation into their domestic laws (Florencio, 2007:11).

According to the MERCOSUR Treaty anti-dumping measures on internal trade remains in force, with the intention of eliminating these measures once the Common Rules on the Defence of Internal Competition is implemented. In December 1996 a Protocol for the Defence of Competition within MERCOSUR was adopted. This Protocol states that actions by member countries which distort or restrict intra-regional competition and trade are prohibited. The implementation of these intra-regional rules remains the responsibility of the various national competition authorities, although the enforcement of the rules is in the hands of the MERCOSUR institutions. In 2000 the MERCOSUR Commerce Commission was given the task to establish a phase-out program for the complete elimination of anti-dumping measures. However, currently the progress on the abolition of anti-dumping duties in MERCOSUR is unclear (Florencio, 2007:13).

6. SACU as a regional trade agreement

SACU is the oldest customs union, dating back to 1889 when the Customs Union Convention was brought into being between the British Colony of the Cape of Good Hope and the Orange Free State. The first agreement which also incorporated Botswana, Lesotho, Namibia and Swaziland (BLNS) was signed in 1910. The 1910 SACU Agreement was in effect until 1969 with the purpose of establishing a common external tariff (CET), free movement of goods within the customs territory and a revenue-sharing formula for the distribution of customs revenues among member states. The 1969 SACU Agreement made two fundamental changes to the 1910 Agreement: excise duties were included into the revenue pool and a multiplier was included into the revenue-sharing formula to increase the revenues of the BLNS countries. No provision was made for a joint-decision making process in the customs union; South Africa had the sole decision-making power over customs policies (History of SACU, 2007).

Negotiations to craft a new SACU Agreement commenced in 1994. This led to the 2002 SACU Agreement which is currently in force. The Heads of State of the member countries signed the 2002 SACU Agreement on 21 October 2002 and it entered into force in 2004 (Mathis, 2005:4). The agreement consists of a Preamble, nine parts and one Annex. This Agreement allows for a joint-decision making process, various SACU institutional bodies, a new revenue-sharing formula and a common negotiating mechanism for negotiating trade agreement with third party countries.

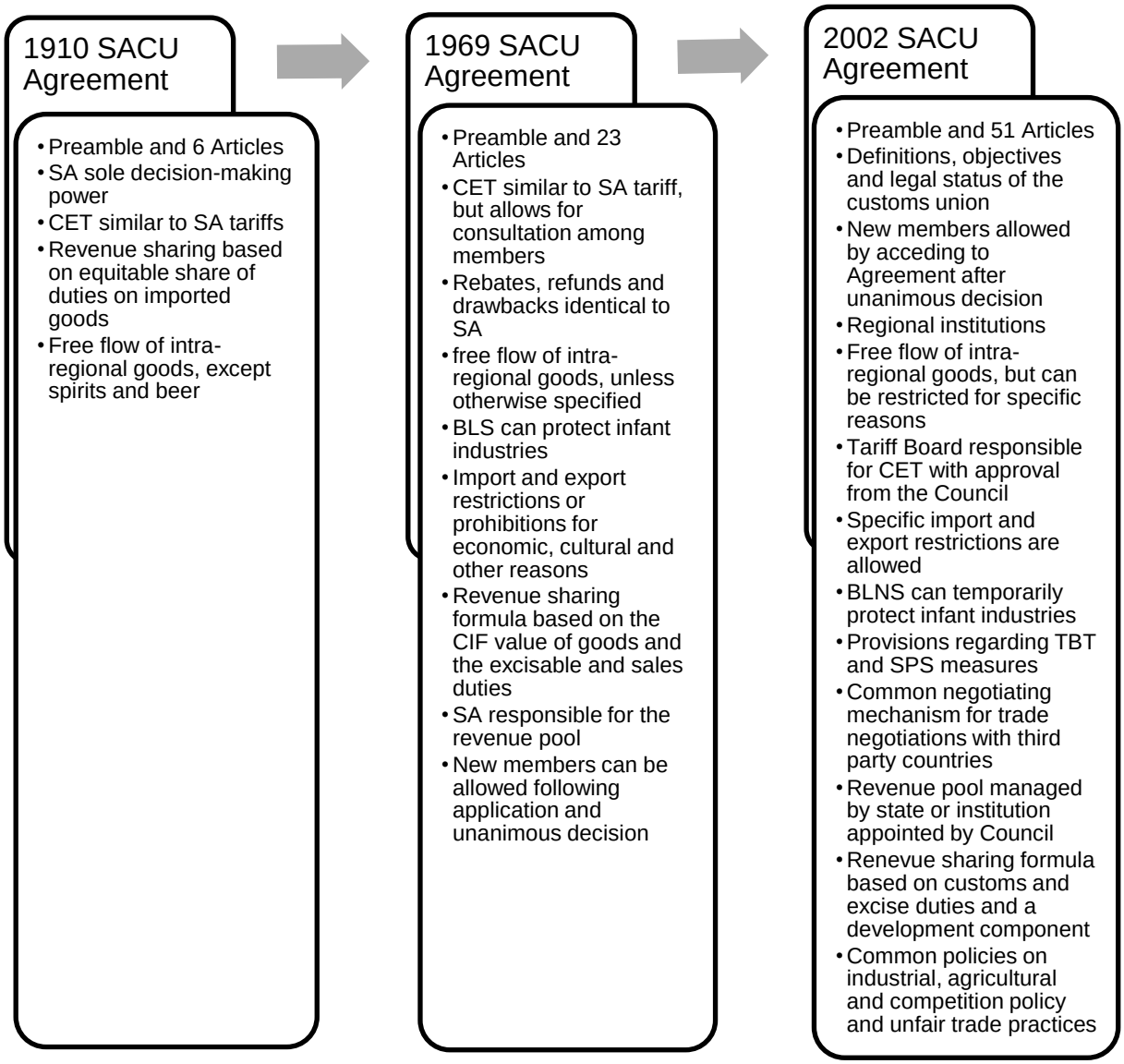
The Preamble of the 2002 Agreement recognises its predecessor as being no longer effective to cater for the different needs of the member states, especially in light of the absence of common policies and institutions in the 1969 Agreement and the different levels of development of the various member states.

The 2002 Agreement allows for the creation of various SACU institutions. The Council of Ministers are the body responsible for the legislative function in the customs union. The Council is responsible for the overall policy direction of SACU and the functioning of all SACU institutions. This includes the formulation of policies, mandates, procedures and guidelines and ensuring the implementation of SACU policies. The executive function of SACU is the responsibility of the Customs Union Commission. The Commission is responsible for implementing the decisions made by the Council and the provisions of the

SACU Treaty, including the mandate for implementing certain common policies (Mathis, 2005:6). The Secretariat is responsible for the day-to-day administration of the customs union. Five Technical Liaison Committees have also been created by the agreement with the aim of assisting and advising the Commission in various areas important to the Common Customs Area. These areas include agriculture, customs, trade and industry, transport and finance. The Liaison Committee on Trade and Industry will have various duties, including assisting the Commission in the development and implementation of common policies and the development of those policies and instruments needed for cooperation in the area of competition policy. The Tariff Board is also yet to be established, but once established will consist of experts from the different member countries. The responsibilities of the Tariff Board will include making recommendations to the Council regarding the implementation of anti-dumping measures to imports for outside the Common Customs Area. The agreement also provides for the creation of a Tribunal, composed of three members. The tasks of the Tribunal will include the adjudication of issues arising from the interpretation and implementation of the 2002 SACU Agreement (SACU, 2007).

Figure 5 below shows the progression of the provision of the different SACU Agreements from 1910 to 2002.

Figure 5: Development of the provisions of the SACU Agreement



Source: SACU (2012)

The 2002 Agreement also focuses on deeper regional integration and the enhancement of cooperation among member states. The SACU Treaty contains a section pertaining to common policies in the customs union. These are applicable in the areas of industrial development (Article 38), agriculture policy (Article 39), competition policy (Article 40) and unfair trade practices (Article 41). However, Mathis (2005:8) states that the interpretation of common policies in the context of SACU does not necessarily entail the creation of common policies in the true sense of the word. Article 41 regarding unfair trade practices does not refer to common policies within the article, but rather places an obligation on the SACU institutions to develop policies and instruments needed to address unfair trade practise among

the member states. Article 40 regarding competition policies also does not refer to common policies to be created among member countries. The article instead states that the individual member countries must have national competition policies and calls for the cooperation among members to ensure the effective implementation of these domestic competition rules.

6.1 Sector-specific analysis of anti-dumping measures and SACU intra-regional trade

South Africa is the only country in SACU which is an active user of anti-dumping measures and have been affected by the implementation of anti-dumping duties by other countries. The other member states have hardly ever been the subject of an anti-dumping investigation or used anti-dumping measures on intra- or extra-regional trade. Most African countries, including Botswana, Lesotho, Namibia and Swaziland are excluded for the application of multilateral anti-dumping measures due to the Special and Differential Treatment provisions for developing and least developed countries provided for in the GATT 1994 and the WTO Anti-Dumping Agreement. Another possible reason why the rest of SACU have not been affected by the implementation of anti-dumping measures by third party countries is due to the nature of the products these countries export to the rest of the world. SACU countries have also not been targeted by anti-dumping measures implemented by other member states. This can be explained by the following argument. South Africa is the only SACU country which has implemented anti-dumping measures. However, South African legislation only allows for the use of anti-dumping measures on imports from third party countries into the SACU domestic industry. There is a caveat in the legislation regarding anti-dumping measures implemented by South Africa on intra-SACU trade. Even if legislation did somehow allow for intra-regional anti-dumping measures, the percentage of exports from the rest of SACU to South Africa is too small to warrant action to protect the domestic industry.

On the import side the lack of use of anti-dumping measures by SACU countries (excluding South Africa) can be for various reasons. Regarding intra- and extra-regional trade, there is the lack of national legislation in all SACU countries (except South Africa) which enable the countries to implement anti-dumping measures. In terms of intra-SACU trade the question arise whether anti-dumping measures can be implemented on trade in a customs union. If we assume that anti-dumping measures are possible on intra-SACU trade and member countries have the required legislation the last factor which plays an important role is the aspect the sector-specific analysis will focus on. This is the sectoral composition of SACU imports and

the question whether the products the member states import are mostly those not susceptible to anti-dumping measures.

6.1.1 Methodology

The sector-specific analysis aims to establish whether there is a need for anti-dumping measures (or similar protection) on intra-SACU trade based on a comparison between intra-regional import data for all member countries and those product sectors mostly affected by anti-dumping measures. The comparison is based on data obtained from two distinct sources. The intra-regional import data was sourced at the two digit level of the Harmonised System Codes of Commodity Classification (HS2) from the ITC TradeMap database which is based on UN COMTRADE Statistics, while data on the sector specific anti-dumping measures were sourced from the WTO statistical database. The data on anti-dumping measures include data from 2002 to 2011, while the trade data differs from country to country due to the availability of reported data:

- Data on Botswana and South Africa is for the years 2002 to 2011;
- The data for Lesotho and Swaziland include data from 2002 to 2007; and
- Namibian import data is from 2002 to 2008.

After the trade data was sourced at the HS2 level the data was aggregated into product sector classifications (Addendum A) in accordance with the data on anti-dumping measures which was sourced at the product sector level. The HS2 level trade data was aggregated according to the following concordance table:

Table 3: HS2 and product sector concordance table

HS2 Chapters	Concordant Product Sector	Product Sector Description
Ch 01 - 05	C01	Live animals, animal products
Ch 06 - 14	C02	Vegetable products
Ch 15	C03	Animal or vegetable fats & oils
Ch 16 - 24	C04	Food, beverages & tobacco
Ch 25 - 27	C05	Mineral products
Ch 28 - 38	C06	Chemical products
Ch 39 - 40	C07	Plastic products
Ch 41 - 43	C08	Raw hides
Ch 44 - 46	C09	Wood products
Ch 47 - 49	C10	Paper products
Ch 50 - 63	C11	Textiles & clothing
Ch 64 - 67	C12	Footwear
Ch 68 - 70	C13	Non-metallic minerals
Ch 71	C14	Precious stones and metals
Ch 72 - 83	C15	Base metals
Ch 84 - 85	C16	Machinery
Ch 86 - 89	C17	Transport equipment
Ch 90 - 92	C18	Specialised equipment
Ch 93	C19	Arms & ammunition
Ch 94 - 96	C20	Misc manufactured articles
Ch 97	C21	Collectors' pieces & antiques
Ch 98 - 99	C22	Other unclassified goods
	C23	Spec class/parts for motor vehicles

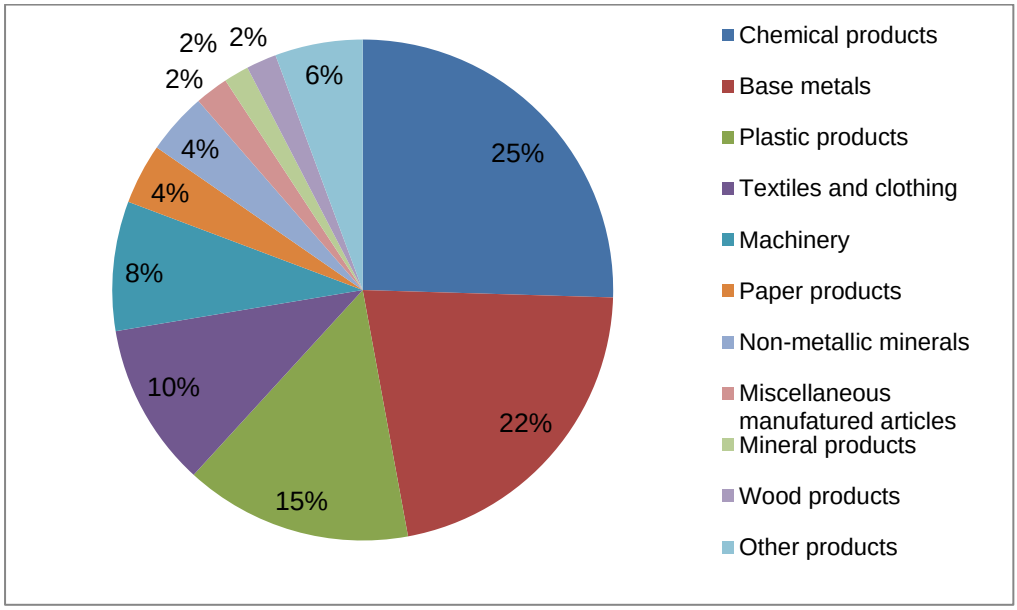
Source: WTO (2012)

This allowed for the comparison between intra-SACU import data and data on anti-dumping measures, both at the aggregated sectoral level.

6.1.2 Sectoral anti-dumping analysis

The data shows that chemical products (25 percent), base metals (22 percent), plastic products (15 percent), textiles and clothing (10 percent) and machinery (8 percent) are the product sectors which have mostly been affected by anti-dumping measures between 2002 and 2011. The product sectors least affected by anti-dumping duties over the time period are raw hides (0.06 percent), animal or vegetable fats and oils (0.13 percent), footwear (0.47 percent), transport equipment (1 percent) and live animals, animal products (1 percent).

Figure 6: Anti-dumping measures by product sector



Source: WTO statistical database on anti-dumping measures (2012)

The data also indicates that the products sectors in developing countries mostly affected by anti-dumping measures are base metals (15 percent), chemical products (11 percent), plastic products (8 percent), textiles and clothing (7 percent) and machinery (6 percent), while developing countries have mainly applied anti-dumping duties on chemical products (16 percent), base metals (14 percent), plastic products (10 percent), textiles and clothing (7 percent) and machinery (6 percent). Developed countries have mainly been affected by anti-dumping measures on base metals (13 percent), chemical products (10 percent), plastic products (5 percent), machinery (3 percent) and paper products (2 percent), while the majority of measures implemented by developed countries have been on base metals (14 percent), chemical products (5 percent), plastic products (2 percent), machinery (2 percent) and textiles and clothing (2 percent).

6.1.3 Intra-regional trade data analysis

The table below shows the results of the intra-regional import data analysis. The data is aggregated to show each product sector as a percentage of total intra-SACU imports over the given time period.

Table 4: Intra-SACU import data

		Botswana	Lesotho	Namibia	South Africa	Swaziland
		Imports from the rest of SACU				
Sector	Sector Description	2002-2011	2002-2007	2002-2008	2002-2011	2002-2007
C01	Live animals, animal products	2%	0%	3%	0%	4%
C02	Vegetable products	5%	1%	3%	0%	7%
C03	Animal or vegetable fats & oils	1%	0%	1%	0%	1%
C04	Food, beverages & tobacco	8%	2%	**10%**	0%	7%
C05	Mineral products	**20%**	**19%**	9%	0%	**14%**
C06	Chemical products	8%	0%	**10%**	0%	**19%**
C07	Plastic products	4%	0%	4%	0%	4%
C08	Raw hides	0%	0%	0%	0%	0%
C09	Wood products	1%	2%	1%	0%	1%
C10	Paper products	3%	0%	4%	0%	4%
C11	Textiles & clothing	4%	**57%**	5%	0%	5%
C12	Footwear	1%	0%	1%	0%	1%
C13	Non-metallic minerals	2%	0%	2%	0%	1%
C14	Precious stones and metals	0%	0%	0%	**100%**	0%
C15	Base metals	9%	0%	9%	0%	7%
C16	Machinery	**16%**	1%	**18%**	0%	**14%**
C17	Transport equipment	**12%**	1%	**15%**	0%	7%
C18	Specialised equipment	1%	0%	1%	0%	1%
C19	Arms & ammunition	0%	0%	0%	0%	0%
C20	Misc manufactured articles	2%	**17%**	2%	0%	2%
C21	Collectors' pieces & antiques	0%	0%	0%	0%	0%
C22	Other unclassified goods	1%	0%	0%	0%	0%

Source: ITC TradeMap based on UN COMTRADE (2012)

The results indicate the following trade patterns in intra-SACU imports over the last years:

- Between 2002 and 2011 Botswana mainly imported mineral products, machinery and transport equipment from the other SACU member states, with South Africa being Botswana's main trading partner during the time period.
- Lesotho's major product sectors, imported mainly from Swaziland, were textiles and clothing, mineral products and miscellaneous manufactured articles between 2002 and 2007.
- Namibia mainly imported machinery, transport equipment and food, beverages and tobacco products from South Africa from 2002 to 2008.

- Between 2002 and 2011 South Africa mainly imported precious stones and metals from Botswana.
- Swaziland's main intra-SACU trading partner, between 2002 and 2007, was South Africa. Over the time period Swaziland imported chemical products, mineral products and machinery.

6.1.4 Comparing the sectoral analysis with import data

Comparing intra-SACU imports with the product sectors in which anti-dumping measures have been implemented can provide a possible explanation for the lack of intra-regional anti-dumping measures purely due to the nature of the main intra-regional import products of the member countries. This can also provide an explanation for the lack of anti-dumping legislation in the member states, especially legislation governing intra-regional anti-dumping measures. The table shows that the main intra-SACU import products from 2002 to 2011 were machinery, mineral products and transport equipment, while anti-dumping duties were mainly levied on chemical products, base metals and plastic products during the same time period.

Table 5: Comparing anti-dumping measures and intra-SACU import data

			Botswana	Lesotho	Namibia	South Africa	Swaziland
		Anti-dumping measures	Import from the rest of SACU (US$ millions)				
Section	Description	2002-2011	2002-2011	2002-2007	2002-2008	2002-2011	2002-2007
C01	Live animals, animal products	1%	716.56	0.00	436.42	2.05	268.60
C02	Vegetable products	1%	1,649.12	0.42	496.92	0.05	474.83
C03	Animal or vegetable fats & oils	0%	334.16	0.00	129.83	0.11	76.18
C04	Food, beverages & tobacco	1%	2,724.76	1.02	**1,504.27**	0.19	514.09
C05	Mineral products	2%	**6,756.27**	**8.62**	1,295.22	0.00	**986.26**
C06	Chemical products	**25%**	2,805.50	0.00	1,444.07	1.57	**1,344.53**
C07	Plastic products	**15%**	1,455.32	0.13	642.67	0.02	300.90
C08	Raw hides	0%	58.41	0.00	51.89	0.47	11.29
C09	Wood products	2%	494.75	0.73	194.71	0.02	82.06
C10	Paper products	4%	1,126.58	0.21	531.30	0.01	250.57
C11	Textiles & clothing	11%	1,221.65	**25.98**	779.24	0.27	384.43
C12	Footwear	0%	398.84	0.01	215.26	0.19	74.25
C13	Non-metallic minerals	4%	584.95	0.00	336.38	0.15	84.91
C14	Precious stones and metals	0%	89.11	0.00	43.70	**2,022.67**	4.94
C15	Base metals	**22%**	2,928.90	0.17	1,294.12	0.21	487.09
C16	Machinery	8%	**5,456.07**	0.32	**2,690.90**	1.49	**971.00**
C17	Transport equipment	1%	**3,945.28**	0.31	**2,298.99**	0.32	505.40
C18	Specialised equipment	1%	400.73	0.00	223.05	0.27	56.75
C19	Arms & ammunition	0%	9.58	0.00	17.36	0.02	1.41
C20	Misc manufactured articles	2%	851.90	**7.78**	374.31	0.06	116.55
C21	Collectors' pieces & antiques	0%	2.43	0.00	3.20	0.03	0.52
C22	Other unclassified goods	0%	182.91	0.12	22.12	0.03	23.20

Source: ITC TradeMap based on UN COMTRADE (2012); WTO statistical database on anti-dumping measures (2012)

The only product sector in which there is an overlap between a major import sector and anti-dumping measures is chemical products in the case of Swaziland. Chemical products are the main import product for Swaziland and also the product sector which attracted the most anti-

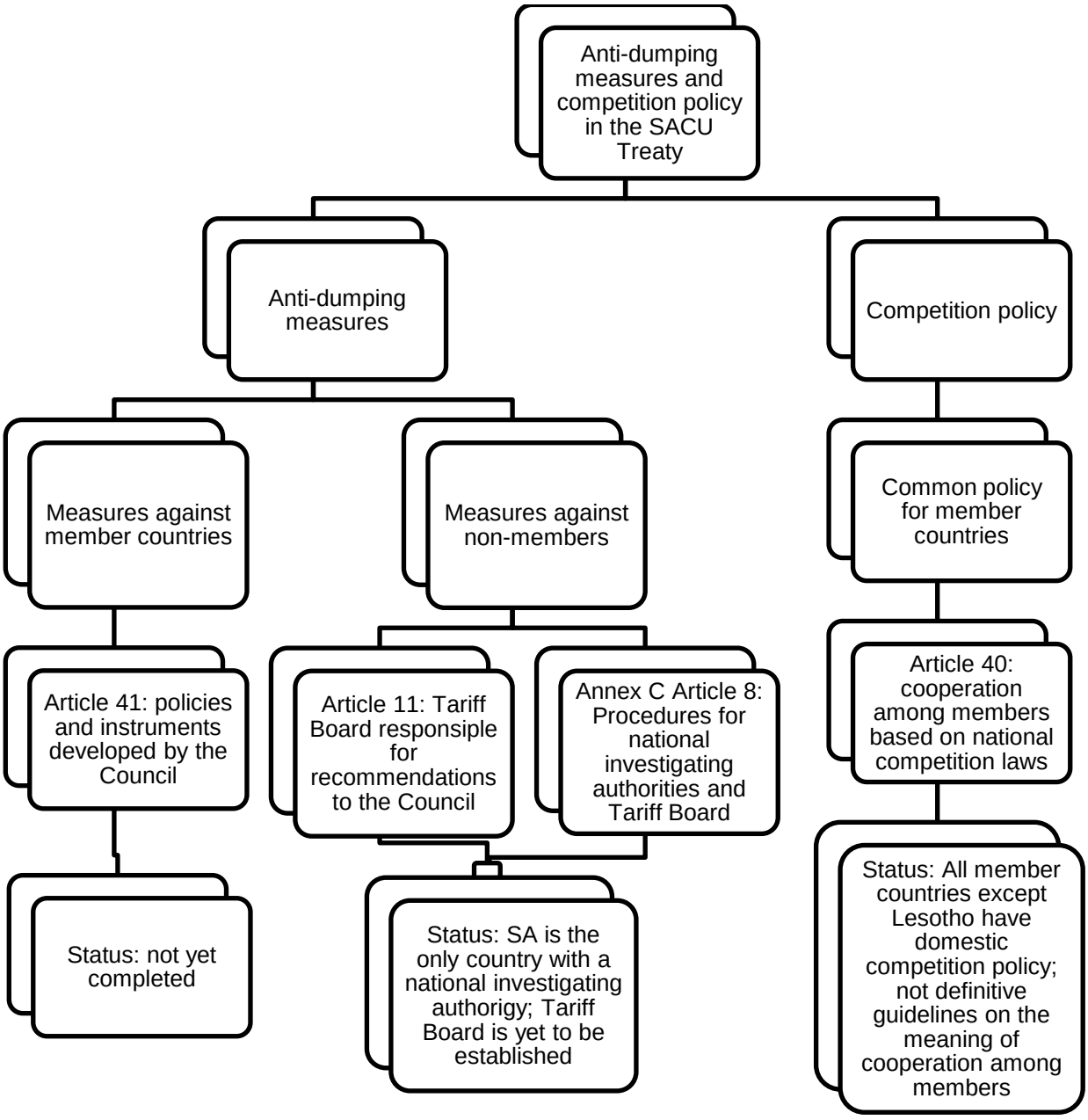
dumping duties between 2002 and 2011. South Africa is also the main source of chemical imports into Swaziland, accounting for 82 percent of Swaziland's total chemical product imports in 2007. However, Swaziland is also an exporter of chemical products to South Africa. In 2007 99 percent of all chemical products exported by Swaziland were to South Africa. Analysing the import data between Swaziland and South Africa in more detail shows that the major chemical product imported by Swaziland from South Africa forms a small percentage of the total Swaziland-South Africa import products. At the HS6 level the most important chemical products Swaziland imported from South Africa between 2002 and 2007 were mixtures of odoriferous substances for food or drink (HS 330210) and citric acid (HS 291814). However, these products only accounted for 10 percent of Swaziland's total imports from South Africa over the time period (ITC TradeMap, 2012). The number of HS codes covered under the category of chemical products; instead of the value of imports can be the reason for chemical products being Swaziland's main import product from 2002 to 2007.

According to the data, the nature of intra-SACU imports can explain why there is a lack of intra-regional anti-dumping legislation and urgency to create the required legislation and implement intra-regional measures. According to the data analysis the main intra-SACU import products are those not greatly affected by multilateral anti-dumping measures. The only exception is in the case of chemical product imports by Swaziland, mainly from South Africa. This might be a concern for Swaziland which will require them to establish a mechanism to address possibly dumping in this product sector.

6.2 Regional anti-dumping and competition policies and institutions in SACU

Competition policy and unfair trade practices are included in part 8 of the 2002 SACU Agreement. This is the section of the agreement pertaining to the common policies in the Common Customs Area. The SACU Treaty does not allow for the creation and implementation of common competition policies, but rather calls for the cooperation among the governments of member states for the effective implementation of the national competition policies of the individual countries (Mathis, 2005:1). Figure 2 below shows the various provisions of the 2002 SACU Agreement applicable to intra- and extra-regional anti-dumping measures and intra-regional competition policy cooperation.

Figure 7: Regional anti-dumping and competition policy



Source: 2002 SACU Agreement

Mathis (2005:4) identifies those SACU objectives pertaining to the cooperation among countries in the area of competition policies and the treatment of unfair trade practices to be the following:

- Facilitating the intra-regional movement of goods;
- Creating SACU institutions which will ensure an equitable distribution of trade benefits among members;
- Promoting the conditions of fair competition;

- Enhancing investment opportunities;
- Improving economic development, diversification, industrialisation and competitiveness of the individual member countries;
- Integrating members into the global economy through enhanced trade and investment; and
- Developing common policies and strategies.

6.2.1 Anti-dumping policy

Anti-dumping measures in the SACU Agreement falls under Article 41 of the agreement pertaining to unfair trade practices in the Common Customs Area. The article only states that the Council need to develop the required policies and instrument to address unfair trade practices between members. These policies and instruments will then be annexed to the agreement. However, this annex is yet to be completed.

Article 41 only refers to unfair trade practices among member states. However, the article does not provide either a definition or explanation of the meaning of unfair trade practices in context of the Agreement nor makes reference to addressing unfair trade practices by third party countries.

The implementation of trade remedies is included in the Agreement under Annex C Article 8 which supplements Article 11 of the Agreement regarding the Tariff Board. However, both these articles are only applicable in the case of trade remedies applied on goods imported from outside the Common Customs Area. According to Article 11 the Tariff Board must make recommendations to the Council on anti-dumping, countervailing and safeguard duties to be implemented on goods imported from third party countries. This shows that the Tariff Board has no authority when it comes to anti-dumping duties on intra-regional trade. Annex C Article 8 also seems to strengthen this approach.

Article 8 of Annex C is applicable to the considerations which the national investigating authorities of each individual member country and the Tariff Board must take into account prior to implementing anti-dumping measures on goods being imported into the Common Customs Area. According to Annex C Article 8 each member state must have its own domestic investigating authority to make recommendations on anti-dumping measures to the

Tariff Board. The Tariff Board will then make further recommendations to the Council of Ministers which is taxed with making the final decision on the implementation of an anti-dumping duty. The national investigating authorities must ensure that the implementation of anti-dumping measures is considered in accordance with Article VI of the GATT 1994 and the WTO Anti-Dumping Agreement. After a complaint has been launched the national body has the authority to decide whether there will be an investigation into the alleged dumping. If the national authority does decide to investigate the allegation, the Secretariat must be informed of the allegation and the decision to investigate the matter (SACU Agreement, 2002).

Evaluating the provisions on anti-dumping measures and unfair trade practices in the 2002 SACU Agreement, leads to the conclusion that there is currently a gap in the SACU provisions when it comes to the intra-regional implementation of anti-dumping measures, countervailing duties and safeguards. The Tariff Board and procedures in Annex C Article 8 are only applicable to trade remedies on extra-regional imports, leaving intra-regional unfair trade practices to be governed by Article 41 of the 2002 SACU Agreement and an Annex which is not yet in existence.

6.2.2 Competition policy

Article 40 of the agreement has a very basic approach to competition policy in the customs union. According to the article member countries agreed that each member state shall have competition policies in place. The article also places an obligation on the member countries to cooperate with each other in terms of the enforcement of the domestic competition laws in each individual member state. The Agreement does not explicitly call for the development of a common competition policy to regulate competition within the whole SACU region, but rather that each member state must enforce domestic competition laws and cooperate with one another to ensure the efficient implementation of these laws (Mathis, 2005:8).

6.3 Anti-dumping and competition policies and institutions in member countries

South Africa is the only SACU member with domestic anti-dumping law and a domestic investigating authority. None of the other member countries have any rules, regulations or legislation in place to govern the implementation of anti-dumping measure. The International Trade Administration Commission (ITAC) in South Africa is currently undertaking all anti-

dumping investigations regarding allegations of dumping of goods into the Common Customs Area.

Currently South Africa, Botswana, Namibia and Swaziland have national competition laws and South Africa, Namibia and Swaziland have already established national competition authorities. Lesotho currently does not have any domestic competition laws or regulatory authority (US Bureau of Economic, Energy and Business Affairs, 2009).

6.3.1 South Africa

The South African Competition Act of 1999 is a comprehensive act which allows for the creation of different levels of domestic competition authorities. The Act focuses on two main areas of anti-competitive behaviour: prohibited practices and merger control. Those practices which are prohibited by the Act include restrictive horizontal practices, restrictive vertical practices, the abuse of dominance and price discrimination by a dominant firm.

The domestic authorities responsible for the implementation of the competition policy in South Africa are the Competition Commission, Competition Tribunal and the Competition Appeals Court. The Commission is the party responsible for ensuring the enforcement of the competition policy and investigating any allegations of anti-competitive behaviour. The Tribunal adjudicates any disputes arising from a decision by the Commission, while the Appeals Court can review any decision made by the Tribunal (SA Competition Act, 1999).

6.3.2 Botswana

The Competition Bill of 2009 has replaced its predecessor, the National Competition Policy of Botswana of 2005. One of the most significant changes the Competition Bill has introduced is the creation of the Competition Authority.

The Competition Bill is quite comprehensive and consists out of various parts, including the function of the competition authority, restrictive arrangements and the abuse of dominance, the prohibition of horizontal and vertical agreements and the control of mergers (Botswana Competition Bill, 2009).

6.3.3 Lesotho

Lesotho is the only SACU member country which does not currently have either national anti-dumping law or competition policy. However, Lesotho has drafted a draft national competition policy which has not yet been implemented. In accordance with the draft national policy a Competition Directorate, for the efficient implementation of the competition law, will also be created. The Directorate will fall under the jurisdiction of the Ministry of Trade and Industry, Cooperatives and Marketing (Koto, 2010:14-18). Currently economic entities are regulated in terms of the provisions contained within the Industrial Property Order, No. 5, 1989. However, this Order is mainly focused on the registration and protection of trademarks, patents, utility model certificates and industrial designs (Industrial Property Order, 1989:2).

6.3.4 Namibia

The Competition Act of 2003 enshrines the competition laws of Namibia. Prior to the enactment of this legislation, competition issues were addressed by the Regulation of Monopolistic Conditions Amendment Act of 1959. However, this was a piece of South African legislation which has not been applied since the independence of Namibia from South Africa. The Competition Commission of Namibia was also launched in 2009.

The Competition Act addressed concerns regarding anti-competitive agreements and collusion, the abuse of dominance and anti-competitive mergers. The main objectives of the Competition Act are to promote the efficiency, adaptability and development of the Namibian economy, increase competitive prices and choices, promote employment, expand Namibia's participation in the global market and improve the spread of ownership (Namibian Competition Act, 2003).

6.3.5 Swaziland

The Competition Act of Swaziland was enacted in 2007. The Act allows for the creation of a domestic competition authority and regulates various anti-competitive behaviour in the domestic market. The Competition Commission consists out of the Board and Secretariat. While the Board is the decision-making body, the Secretariat is responsible for the investigation of allegations of anti-competitive behaviour in the domestic industry.

The Competition Act regulates anti-competitive trade practices, unfair trading, the abuse of dominance, mergers and acquisitions, monopolies and the concentration of economic power.

The Competition Act prohibits anti-competitive behaviour, like price fixing, collusion and the collective action to enforce agreements and unfair trading practices, including the exclusion of liability for defective products and false representation (Swaziland Competition Act, 2007).

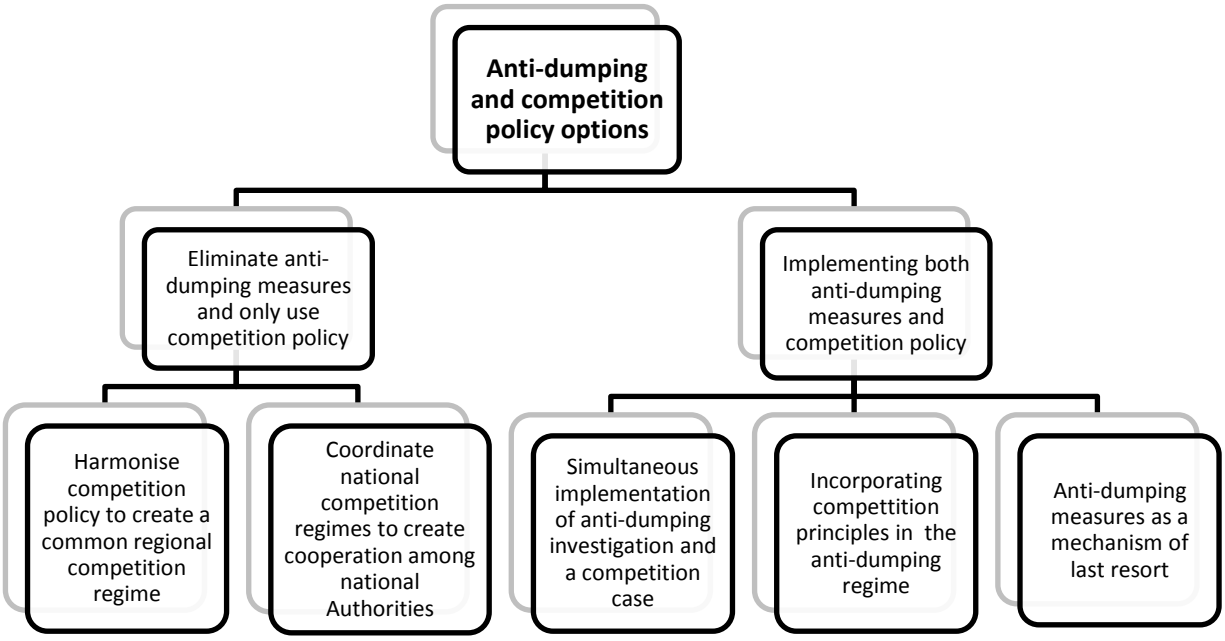
7. Policy options for interaction between anti-dumping and competition policies and institutions

Over the last decade there has been an increased dissatisfaction with the manner in which anti-dumping actions have been implemented, as well as the proliferation of anti-dumping measures, especially by developing countries. According to Messerlin (1994:352) the suggested solution in order to solve this problem is to replace anti-dumping policies with competition rules. However, this will require multilateral competition rules. Thus two other policy options have been suggested: the simultaneous implementation of anti-dumping and competition policies or the utilisation of competition policy principles in the anti-dumping process (Messerlin, 1994:366).

Trade liberalisation through regional integration can impose adjustment costs on the trading partners, especially if the regional arrangement is among developing countries. These adjustment costs can motivate firms to behave in an anti-competitive manner which can decrease the possible short-term benefits countries can get from the regional trade liberalisation. However, if governments try to address the anti-competitive behaviour through strict trade and competition policies it can significantly increase the burden on these firms which are already struggling to adjust to the changes in the market. This creates the potential risk that firms will not support any further efforts to reduce trade barriers, harming overall trade liberalisation efforts (Bilal & Olerreaga, 1998:164).

Cadot et al (2000:16) states that regional integration can have important implications for the conduct of competition policy. On the one hand the elimination of trade barriers among trading partners can increase the ability of foreign competitors to enter a domestic market, this can reduce the need for domestic competition policies. However, on the other hand for trading partners to achieve the full benefits associated with regional integration and internal free trade, the member countries must prevent firms in the integrated market from using other restrictive practices as a substitute for the reduction in internal barriers. This enforces the argument that a regional trade arrangement must incorporate coordinated or harmonised competition policies to ensure efficient competition in the regional market. The figure below indicates the different possible forms of interaction between anti-dumping policy and competition law.

Figure 8: Anti-dumping and competition policy options



7.1 The complete replacement of anti-dumping policy by competition policy

The basic premise of substituting competition policy for anti-dumping measures is that once anti-dumping measures are removed from a regional arrangement there should be a piece of common legislation to counteract any restrictive business practices which may arise. If there is no such common competition legislation, countries will have to rely on the extra-territorial application of national competition policies to address any restrictive business practices among the member countries. Not all countries allow for the extra-territorial application of their domestic competition policies. Also in many trade agreements, including SACU, there are some member countries which do not have any domestic competition rules. If the extra-territorial application of domestic laws are possible it can cause conflict among the trading partner and harm regional competition. Florencio (2007:21) also states that if competition rules are diverse among the member countries it can cause imbalance and disruptions to the integration efforts. If a country in the regional context is more leniet in its action towards a specific anti-competitive behaviour it can harm the country's trade performance.

Considering the potential advantages a common competition policy can have in a regional arrangement the implementation of common policies to replace anti-dumping law has gained some popularity. This has mostly been drawn from successful regional arrangements, like the

EC in the abolition of anti-dumping measures through establishing common competition legislation (Florencio, 2007:22). However, in these successful regional arrangements member countries have had a previous degree of coordination among their public policies, a level of institutional commitment and a credible environment to implement these common regional provisions. In these situations common competition legislation has the high probability to maintain the conditions of competitions among the member countries, without unilateral national policies and behaviour undermining the goals of the common policy (Florencio, 2007:22).

According to Vautier and Lloyd (1997:13) many of the anti-dumping actions currently undertaken will not be possible if competition policy is substituted for anti-dumping policies. The authors state that the best option available for addressing the proliferation of anti-dumping measures are the removal of anti-dumping regulations from the WTO and regional trade agreements because dumping is not a trade problem, but a pricing problem which is best addressed by competition policy (Vautier & Lloyd, 1997:14).

In the context of a regional trade agreement among various countries with different national policies and public policy interests the complete removal of anti-dumping policy from the arrangement will ultimately require a common competition policy to address anti-competitive business practices (Florencio, 2007:22). In his distinction between shallow and deeper regional integration Hoekman (1998:4) illustrates the potential benefit of including mutually recognised or harmonised competition policies in a regional arrangement. The author sees shallow integration when trading partner aim to eliminate discrimination between foreign and domestic firms which includes the elimination of border measures and trade remedies. On the other hand deeper integration is defined as the deliberate action by governments in the various trading partners to either mutually recognise or harmonise national policies. Competition policy is one of the policies which can be included into a deeper regional trade agenda. Hoekman (1998:5) then continues to illustrate the potential benefit of including competition policies in a regional arrangement by equating the situation to a zero sum game. On the one hand national competition policies which are efficiently enforced can reduce the welfare of a trading partner, while on the other hand there is adjustment costs associated with moving from a national competition policy to a mutually recognised or harmonised regional regime. In the short term when a country moves away from its current regime a welfare loss

can be imposed on the society, but the joint welfare can be increased in the long-run through these coordinated competition policies (Hoekman, 1998:6).

However, Hoekman and Mavroidis (1994:25) give three conditions which are needed to fully eliminate the use of anti-dumping measures in a regional arrangement:

a) free trade and the freedom of investment;
b) the existence of disciplines for governments to be able to assist firms and industries in their own territory, and
c) existing and enforceable competition legislation.

According to the authors these conditions will implicitly guarantee market access and maintain the conditions of competition in the regional market.

7.2 Simultaneous implementation of competition and anti-dumping policies

This option requires that a competition case be launched at the same time an anti-dumping investigation is initiated (Messerlin, 1994:366). This process can follow the following sequence:

1. With the request of an anti-dumping investigation by the domestic industry the anti-dumping investigating authority need to inform the competition authority of the request for the investigation.
2. The competition authority will then investigate the conditions of competition in the exporter's home market and the contestability of the relevant domestic market, investigating the prevailing market conditions, extent of competition and regulatory environment and whether the exporting firm is engaged in anti-competitive behaviour or has abuse its dominant position.
3. The anti-dumping investigating authority will have to be kept fully informed on all the findings of the competition authority and be given all the available information (Hoekman & Mavroidis, 1994:18).

However, due to the differences between anti-dumping and competition rules this approach is seen as being high unlikely. The possibility exists that there will be a significant difference in the time periods required for the two investigation processes, mainly due to the constraint of confidentiality. Any confidential information used in respect of the anti-dumping action can not be utilised during the anti-competitive investigation and vice versa. This can result in

asymmetric behaviour with firms being cooperative in the anti-dumping investigation while reluctant to cooperate and provide information on the situation of their domestic market for the anti-competitive investigation (Messerlin, 1994:366).

7.3 Utilising competition principles in the anti-dumping investigation process

This option will require the gradual use of competition principles in anti-dumping proceedings. However, this does not require that all cases of dumping be investigated as predatory pricing or price discrimination, but rather that competition policy will ensure that competitive conditions in the regional arrangements are not distorted due to inconsistent and different public policies (Florencio, 2007:25).

Competition principles are an important part of anti-dumping proceedings, especially in the context of a regional trade arrangement, because the applicable remedies can have a significant impact on the competitive conditions in the regional configuration. The gradual utilisation of competition policy in anti-dumping investigations is expected to promote a concern of the different public policy objectives among members and the importance of competitive conditions in the regional arrangement (Florencio, 2007:26). By incorporating competition principles into anti-dumping law the focus can be moved away from determining the injury to the domestic industry as competitors, towards the injury to domestic competition (Hoekman & Mavroidis, 1994:22). This can lead to anti-dumping duties only being implemented after a cost-benefit analysis reveals that the advantage for the domestic economy of imposing anti-dumping duties outweighs the potential disadvantages of higher duties.

In terms of conforming anti-dumping law with competition policy there are some important competition concepts which need to be incorporated into anti-dumping law, the most important being that of defining the market and dumping (Harriott, 2010:7).

7.3.1 Defining the market

In the context of anti-dumping law the market is defined in terms of the domestic producers currently in the domestic market which excludes the current and future exporters in the market (Harriott, 2010:7). Hoekman and Mavroidis (1994:25) also state that anti-dumping law defines the domestic market in terms of the like product in the domestic industry. If the like product is defined too strict it can lead to an overestimation of the effects of dumping.

This can lead to allowing the imposition of anti-dumping duties in those cases where anti-dumping duties are not actually justified (Hoekman & Mavroidis, 1994:25).

This is inconsistent with the definition of the market in competition policy which defines the market in such a manner as to identify the set of products which can be affected by anti-competitive behaviour. If the market is incorrectly defined then it is unlikely that the competitive or anti-competitive effect of the challenged conduct can be correctly identified (Harriott, 2010:7). According to Harriott (2010:8) the market can be defined as "a product or group of products and a geographical area in which it is produced or sold…" This definition recognises the important role both existing and potential importers and import products play in correctly defining the market. The definition is also consumer orientated in that it identifies the set of products the consumers perceive to be substitutable in order to satisfy a specific need. The technology used to produce and market a specific product is of little significance to the definition of the market, *ceteris paribus*.

7.3.2 Dumping

In terms of anti-dumping law dumping occurs when the export price of a product is less than the price of the like product in the home market. Dumping is prohibited when it causes injury to the domestic producers of the like product in the export market. However, in terms of competition policy dumping can be defined as price discrimination which can be either beneficial or detrimental to the welfare of consumers, depending on the conditions of a particular market.

According to Harriott (2010:9) dumping should actually be challenged based on the potential adverse effect dumping as price discrimination or predatory pricing can have on competition in the domestic market. The test to determine whether dumping is prohibited in a particular case needs to be sufficient to identify those conditions under which dumping will actually be beneficial to the domestic consumers. However, this is not currently the case in anti-dumping law which can challenge conduct which is not likely to harm the domestic market. In order to successfully harmonise existing anti-dumping and competition principles the method used to determine whether dumping is potentially harmful must be improved in order to filter that conduct which has the potential to harm to domestic industry from the conduct which is unlikely to cause harm.

In applying the theory of price discrimination the price tends to be lower in the market where the consumers are more sensitive to higher prices. Thus the anti-dumping investigation will need to compare the characteristics of the consumers in the home market with that of the consumers in the export market. This comparison will need to take an important factor into account, which is that of transaction costs associated with acquiring a specific product. Generally transaction costs for the consumers in the export market will be higher when they are acquiring an imported product. This is due to shipping costs, including insurance and freight and the costs associated with the product clearing the border, including tariffs, duties and fees. The demand for an import product can be derived based on the fact that the foreign firms will only export the product if the importers in the export market can resell the product at a profit to the consumers in the domestic market. If the importers of the product compete with domestic producers which are not faced by the challenge of transaction costs then the exporting firms need to offer the import products at a discount in the export market in order to stimulate the derived demand in the export market (Harriott, 2010:10). The importers of a specific product are also more likely to be sensitive to price increases than the domestic consumers of the same product in the home market. It is thus reasonable to expect that the price in the export market is lower than the price in the home market. According to Harriott (2010:11) the argument can then be made that dumping is necessary in most cases to stimulate the demand for a specific product in the export market and maintain the contestability of the export market.

7.3.3 Determination of injury

In an anti-dumping investigation injury can be determined if the investigating authority finds that price depression or price undercutting has taken place in the domestic market. However, if the complainant is a firm with market power in the domestic firm entry by foreign firms can lead to a reduction in price and a decline in the market share and profits of the domestic dominant firm. Thus the test to determine whether dumping has caused injury in the market is more associated with protecting a dominant producer in the market, rather than protecting the domestic market itself. According to Harriott (2010:12-13) the very conditions which serve as evidence that dumping has caused material injury is one of the consequences which naturally flows from increased and enhanced competition in the market.

The mere fact that the price in the export market is lower than the price in the home market of a firm is no more indicative of the potential harm to the domestic industry than if the export

price was higher than the normal value. A more useful benchmark will be to establish the extent to which the export price is below the cost of making the product available to the consumer in the home market of the producer, thus establishing the resale below cost price (Harriott, 2010:14). In order to establish that dumping causes harm to the domestic industry, the investigating authority will have to demonstrate that the resale below cost price is likely to cause injury to competition in the domestic market, not necessarily the domestic producers. In order to establish harm to competition, harm to the consumer and equally efficient producers competing in the export market will need to be demonstrated (Harriott, 2010:15).

7.3.4 Public interest clause

Hoekman and Mavroidis (1994:22) state that a public interest clause can also be included into anti-dumping law. This will require the investigating authority to examine the impact of anti-dumping duties on the intermediate users of the imported product and the final consumers. Effectively, the anti-dumping investigation will then allow for those that will be affected negatively by the implementation of an anti-dumping duty to defend their interests by giving them the opportunity to present their arguments to the investigating authority with the legal standing to do so.

7.3.5 *De minimis* requirements

According to Hoekman and Mavroidis (1994:24) the *de minimis* requirements currently in the GATT 1994 and the WTO Anti-Dumping Agreement can be increased. Although this is not strictly linked to standard competition principles, by increasing these current requirements there can be enhanced competition by limiting the space for applying anti-dumping measures. The current *de minimis* requirements are quite low, if these are increased, then the situations in which anti-dumping measures can be implemented will severely be limited.

The existing definitions of dumping and the market in anti-dumping law, as well as the test for determining injury during the investigation is against the basic premise of economic theory associated with increased competition in an imperfectly competitive market (Harriott, 2010:14). In order for anti-dumping law and competition policy to be harmonised the definition of the market under anti-dumping law must be expanded to include all current and potential suppliers of the specific product in the market, regardless of whether the product is domestically produced or imported. The circumstances under which dumping can be challenged and the evidence associated with establishing material injury to the domestic

market must also be revised. Competition policy provides a better benchmark for challenging a specific pricing strategy. Prices are determined by the characteristic of the market in which the product is sold. Thus if the market is characterised by consumers which are more sensitive to price increased the price will be lower and vice versa.

7.4 Anti-dumping measures as a mechanism of last resort

Hoekman and Mavroidis (1994:25) create a fourth option for the possible interaction between competition and anti-dumping option: securing an agreement among the trading partners that anti-dumping measures will only be used as a mechanism of last resort. In order for this to be achieved there needs to be an arrangement among the countries that any allegation of dumping first be investigated by the competition authority. The objective of the initial investigation is to establish whether the exporting firm is able to dump in the importing market either through engaging in anti-competitive behaviour or due to benefits received from government created or supported barriers to entry. If the first is found, Hoekman and Mavroidis (1994:26) state that the standard competition remedies will apply, including cease and desist orders or fines. Only if the competition authority finds the existence of entry barriers will an anti-dumping investigation be initiated.

8. Suitable policy options for SACU

SACU is a customs union with the agenda for deeper regional integration among the member states. The 2002 SACU Agreement allows for a common regional policy in terms of anti-dumping, the establishment of a regional body to evaluate the implementation of any anti-dumping duties and national bodies in each member country to investigate any allegation of dumping in the region. In terms of competition policy the 2002 SACU Agreement only states that member countries should cooperation on issues of competition in terms of each country's domestic competition policy. Currently the common anti-dumping policy has not been developed, the regional body has not been established and no members, except South Africa, have implemented a national body and domestic legislation to address dumping. Thus far the South African national body, ITAC is undertaking all investigations pertaining to an allegation of dumping in the SACU domestic market. However, all member countries, except Lesotho, have national competition policies in place.

This poses an opportunity for the SACU member countries, seeing that anti-dumping rules are a measure of protectionism and can decrease intra-regional trade and welfare. In developing the regional and national policies on anti-dumping the SACU member states can follow the two main stream approaches. The first is the incorporation of various competition principles into anti-dumping rules to limit the negative welfare and anti-competitive effects of utilising anti-dumping measures, while the second is the abolition of anti-dumping measures in the region which is then replaced by competition policy. The option best suited for SACU depends on the differing viewpoints on implementing anti-dumping measures in a customs union. If it is possible to implement anti-dumping measures on intra-regional trade, just as long as substantially all the trade in the customs union will remain free from restrictions, the most suitable option for SACU will be to incorporate competition principles into anti-dumping policies. If the SACU member countries are of the view that anti-dumping measures have no place in a customs union the current best option is the elimination of anti-dumping measures on intra-SACU trade and utilising coordinated competition policies to address dumping as price discrimination and predatory pricing.

8.1 Incorporating competition principles into anti-dumping policies

The first possible option allow for the gradual use of competition principles in anti-dumping proceedings. However, this does not require that all cases of dumping be investigated as predatory pricing or price discrimination, but rather that competition policy will ensure that

the competitive conditions in the regional arrangements are not distorted due to inconsistent and different public policies. Competition principles are an important part of anti-dumping proceedings, especially in the context of a regional trade arrangement because the applicable remedies can have a significant impact on the competitive conditions in the regional configuration. The gradual utilisation of competition policy in anti-dumping investigations is expected to promote a concern of the different public policy objectives among members and the importance of competitive conditions in the regional arrangement (Florencio, 2007:26).

The literature indicates that this seems to be the most suitable option to eliminate anti-dumping measures from a regional configuration where the member countries are active users of these instruments. Florencio (2007:26) for instance has suggested this option as the best solution in MERCOSUR, were member countries Brazil and Argentina are major users of anti-dumping measures with the majority of measures implemented against each other and other members (Paraguay and Uruguay) of the free trade arrangement. This is not quite the same situation in SACU. As previously stated SACU member countries, except South Africa, are not users of anti-dumping measures. South Africa has also not implemented anti-dumping measures on the imports from the rest of SACU. Although this can be for various reasons, the most significant contribution to the lack of intra-regional anti-dumping measures is the absence of national legislation and a regional mandate which enable countries to implement intra-regional anti-dumping measures. However, if the SACU member countries determine that they want to be able to implement anti-dumping measures on intra-regional trade various challenges must be overcome, especially regional and national institutional deficiencies. In order for SACU member countries to receive the full benefit of addressing dumping through the utilisation of rules which is in line with competition policies, rather than anti-dumping measures national and regional bodies and rules must be established through further trade negotiations.

The member countries within SACU have different national policies with different goals, objectives and public policy interests. The lack of anti-dumping policies in most member countries make it difficult to address dumping in the customs union, while the lack of competition policy in Lesotho hinders the ability of countries to address anti-competitive behaviour in the region. The utilisation of this option to gradually introduce competition principles in anti-dumping proceedings does not require a common competition policy, but the cooperation among member countries in terms of competition, but also public policy

objectives. The 2002 SACU Agreements require members to develop a common industrial policy and policy on unfair trade practices. This will encompass the public policy interests of each member state, while coordinating anti-dumping action among members. However, since these policies are still being developed competition policy principles can be included in the common policy on unfair trade practices which will enable all SACU member countries to address dumping and anti-competitive behaviour in the regional configuration.

8.2 Replacement of anti-dumping policies with common competition policy

If the SACU member countries decide that the most appropriate action to follow in terms of intra-regional anti-dumping measures are the elimination of these measures a common competition policy or coordination among competition authorities are required. If the use of anti-dumping policies are eliminated and there is a lack of a common competition policy it will be required that member countries apply national policies on an extra-territorial basis. However, due to a lack of competition policy in Lesotho this member state will not be able to address anti-competitive business practices, while the other member countries will be able to implement their domestic policies. The extra-territorial application of national laws can also create a high level of conflict of interest among SACU members and increase trade barriers due to different public policy objectives, procedures and penalties. This is inconsistent with the basic nature of a regional trade arrangement (Florencio, 2007:21).

The table below shows a comparison among the domestic competition policies of Botswana, Namibia, South Africa and Swaziland. The competition policies of all four countries include provisions on the abuse of a dominant position by a firm, the extra-territorial application of national law and cooperation among competition authorities in the different jurisdictions. The different provisions on extra-territorial application and cooperation are similar, while there are a number of differences in the various provisions about the abuse of a dominant position.

Table 6: Comparison among the Competition Acts in Botswana, Namibia, South Africa and Swaziland

Botswana	***Namibia***	***South Africa***	***Swaziland***
Competition Act, 2009	Competition Act, 2003	Competition Act, 1999	Competition Act, 2007
	Restrictive business practices		**Anti-competitive practices**
	• Decisions by firms to prevent or limit competition in trade in goods and services are prohibited		•Practices that prevent, restrict or distort competition are prohibited
Abuse of a dominant position			
• Any conduct by any firm is subject to prohibition if it is an abuse of a dominant position in any market • A dominant position is any firm with the economic strength to allow the firm to change prices or output without resistance from competitors	• Conduct by a firm(s) that is an abuse of a dominant position in the Namibian market is prohibited • An abuse of a dominant position include: (a) imposing unfair purchase or selling prices (b) limiting or restricting market access	• Price discrimination by a dominant firm is prohibited if the effect will lessen or prevent competition • Price discrimination involves discriminating between purchasers in terms of the price charged for goods and services • Price discrimination will not be prohibited if it is only due to cost differences or in good faith to meet the price of a competitor	•Firms will refrain from actions that limited market access, unduly restrain competition or adversely affect trade, including: (a) predatory behaviour (b) discriminatory pricing •A person in a dominant position shall not use its power to participate in anti-competitive practices
Extra-territorial application			
• The law is applicable to all economic activity in Botswana or having an effect in Botswana	• The law is applicable to all economy activity in Namibia or having an effect in Namibia	• The law is applicable to all economic activity in South Africa or having an effect in South Africa • If jurisdiction falls under another Regulatory Authority the law establishes concurrent jurisdiction over the matter	• The law is applicable to all economic activity in Swaziland or having an effect in Swaziland
Cooperation among Competition Authorities			
• The Competition Authority can liaise or exchange information, knowledge and expertise with a similar foreign Authority	• The Competition Commission can liaise or exchange information, knowledge and expertise with a similar foreign Authority	• The President may assign the Competition Commission with any duty in terms of an international agreement to exchange information with a similar foreign agency	• The Competition Commission can cooperate with similar regional and international bodies

Source: Competition Acts of Botswana, Namibia, South Africa and Swaziland

Currently no national legislation of the SACU member countries allow for the intra-regional application of anti-dumping measures. The 2002 SACU agreement only states that the provisions regarding intra-regional anti-dumping measures will be drawn up by member states and annexed to the agreement. However, no such annex is currently in existence. Thus if the SACU countries wish to eliminate the use of anti-dumping measures on intra-regional

trade no amendments need to be made to national anti-dumping legislation, although an amendment to the 2002 SACU agreement will be required. This will need to state that the use of anti-dumping measures on intra-SACU trade is prohibited and which mechanism will be used to protect member countries against the case of goods imported at an export price which is lower than the normal value in the exporting country. To use competition policy to address dumping will require either a common regional competition policy, like in the case of the European Union, or a regional coordination mechanism for coordinating national competition policies among member countries (similar to ANCZERTA).

Currently the 2002 SACU agreement does not allow for a harmonised regional competition policy, but coordination among the member states on competition issues. Thus the NAFTA-type intra-regional competition policies, for example policies applied in ANCZERTA and the Canada-Chile Free Trade Agreement, seem to be the best model for SACU to follow. Although this is simpler than the harmonisation of competition policies among the member states, there are still regional and national deficiencies that will need to be addressed in order to coordinate national competition policies among SACU members.

9. Institutional development required for effective implementation

In order to have an effective interaction between anti-dumping and competition policies, irrespective of which policy combination is chosen, regional and national policies and authorities will have to be created, adapted and/or amended. The required amendments will all depend on the policy option combination chosen by the SACU member states.

9.1 Regional institutions and policy

Depending on whether the choice is to retain the use of anti-dumping measures in accordance with competition principles or to eliminate intra-regional anti-dumping measures and coordinate national competition policies the following regional institutions and policies are required:

- If the SACU member countries choose to retain anti-dumping measures the SACU annex on intra-regional anti-dumping measures (unfair trade practices) will need to be developed and the Tariff Board established. The annex will have to include a detailed mechanism on how dumping will be determined and anti-dumping measures implemented in the context of a customs union. The basic rules and regulations on the implementation of anti-dumping measures will have to incorporate those previously stated competition principles, including the determination of dumping and injury and defining the market.
- If the decision is made to prohibited intra-SACU anti-dumping measures and coordinate competition policies limited changes need to made on the regional level. The 2002 SACU agreement already allows for coordination among domestic authorities on competition issues, but does not prohibit intra-regional anti-dumping measures. Thus the 2002 SACU agreement will require an amendment to explicitly prohibit the use of intra-SACU anti-dumping measures and an addition to clarify the specific nature of cooperation among national authorities. This can take the form of a Memorandum of Understanding as in the case of the Canada-Chile Free Trade Agreement.

9.2 National institutions and policy

Whether the SACU member states chose to continue to allow for the use of intra-regional anti-dumping measures or prohibit these measures will determine which national institutions and policies will have to be created and amended:

- If the first option is chosen various national legislation will have to be drafted and incorporated in order to effectively implement this policy option. None of SACU member states currently have national legislation in place to enable intra-SACU anti-dumping measures. This will require all countries to draft these national policies in accordance with the previously stated competition principles. Botswana, Namibia, Lesotho and Swaziland will also have to establish the required national authorities needed to implement and administer these measures.
- If the member countries chose to prohibit intra-SACU anti-dumping measures the member countries will have to ensure that domestic competition law and authorities are in place. Currently Lesotho does not have either domestic legislation or a national competition authority. This caveat will have to be addressed if countries wish to coordinate actions on the issues of competition. Although the rest of SACU does have domestic legislation in place, amendments might be required to create the mandate for effective coordination and notification among national authorities.

10. Conclusion

Trade and competition policy can be stated to be at odds with one another. Trade policy addresses issues at the border, deals with government-imposed trade barriers, has been negotiated on a multilateral and bilateral level and is enforced by both national and international law. Competition policy, on the other hand, addresses issues pertaining to competition in a country's borders, deals with private sector barriers to competition and operates mainly under national law. Competition and trade policy are imperfect substitutes in terms of the impact of these policies on market openness and structure. The goals of competition and trade policy can also be seen as being complementary. Trade policy allows for the possibility of increased competition, while competition policy ensures that private stakeholders do not distort competition. The more restrictive the trade policy regime in a country is, the more important the role of competition policy to reduce the possible negative welfare effects of reducing competition due to the restriction of competitive markets. However, using competition policy to offset the possible distortion of domestic competition created by an active trade policy will not necessarily enhance welfare. The preferable policy option is to minimise the extent to which trade policy reduces the contestability of the domestic market through a liberal external policy stance.

The most commonly used arguments to justify the use of anti-dumping measures, as a trade policy instrument, are to address price discrimination and predatory pricing. However, it has long been recognised that price discrimination does not necessarily have anti-competitive affects on the market. The ability of a firm to charge different prices in segmented markets can just be a natural consequence of a highly competitive market. Although predation can be a viable argument for anti-dumping measure justification, predation is the exception rather than the rule in the real world. There are various barriers to a firm establishing global dominance: high elasticity's of demand; very low barriers to exit and the ability of the firm to eliminate both domestic and international competitors form the markets in a global market which are highly competitive and integrated. The inclusion of anti-dumping measures in a regional trade agreement, whether to protect against price discrimination or predatory pricing is seen as being against the basic premise of a trade liberalisation. Anti-dumping increases the prices of the specific product in the domestic market, can reduce the contestability of the domestic market, provide incentives for collusion among firms and lead to trade diversion. However, no definitive answer on the legitimacy of anti-dumping measures has been provided by the WTO, WTO member states or the WTO dispute settlement mechanism.

The 2002 SACU Agreement contains basic provisions on unfair trade practices and competition policy. However, these provisions do not provision for either the elimination of anti-dumping measures from intra-regional trade or the development and implementation of common competition policies among members. The agreement calls for the development of common anti-dumping policies and instrument, but these instruments are yet to be created. The agreement requires each member state to have its own domestic competition policies and require member states cooperate in order to ensure the efficient application of these domestic laws. Currently Lesotho does not have any domestic competition policies or domestic authority and South Africa is the only member country which has anti-dumping legislation and an investigating authority. There are various policy options available for SACU to create an efficient interaction between anti-dumping law and competition policies in intra-regional trade. However, the most suitable option will depend on the view of the SACU member states on the appropriateness of anti-dumping measures in a customs union. Irrespective of which policy option the SACU member countries chose a variety of regional and national institutions and policies will have to be created, amended and implemented to have an effective and efficient interaction between anti-dumping and competition policy. Member countries will need to meet around the negotiating table to determine the institutions, competition principles and the manner of cooperation and enforcement that will best serve the purpose of eliminating anti-dumping measures on intra-regional trade in the long-run.

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Multilateral Agreements

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The General Agreement on Tariffs and Trade (1994)

Regional Agreements

Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) (1983)

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Canada-Chile Free Trade Agreement (CCFTA) (1996)

Common Market of the South (MERCOSUR) Treaty of Asunción (1991)

Memorandum of Understanding between Canada and Chile on Competition Issues (2001)

Protocol for the Defence of Competition within MERCOSUR (1996)

Southern African Customs Union Agreement (2002)

The Agreement on the European Economic Area (EEA) (1992)

The Protocol of Free Trade in Goods between Australia and New Zealand (1988)

The Treaty of Rome (1957)

Domestic Legislation

Botswana Competition Act of 2009

Namibian Competition Act of 2003

South African Competition Act of 1999

Swaziland Competition Act of 2007

12. Addendum A: Applicable products and product sectors

Sector	Products in sector
I	Live animals; animal products
II	Vegetable products
IV	Prepared foodstuffs; beverages, spirits and vinegar; tobacco and manufactured tobacco substitutes
VI	Products of the chemical or allied industries
VII	Plastics and articles thereof; rubber and articles thereof
X	Pulp of wood or of other fibrous cellulosic material; recovered (waste and scrap) paper or paperboard; paper and paperboard
XI	Textiles and textile articles
XII	Footwear, headgear, umbrellas, sun umbrellas, walking-sticks, seat-sticks, whips, riding-crops and parts thereof; prepared feathers and articles made therewith; artificial flowers; articles of human hair
XIII	Articles of stone, plaster, cement, asbestos, mica or similar materials; ceramic products; glass and glassware
XV	Base metals and articles of base metal
XVI	Machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles
XVII	Vehicles, aircraft, vessels and associated transport equipment
XVIII	Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; clocks and watches; musical instruments; parts and accessories thereof
XX	Miscellaneous manufactured articles

13. Addendum B: Developing countries by region

North Africa	**East Asia**	**Caribbean**
Algeria	Brunei Darussalam	Barbados
Egypt	China	Cuba
Libya	Hong Kong	Dominican Republic
Morocco	Indonesia	Guyana
Tunisia	Malaysia	Haiti
Sub-Saharan Africa	Myanmar	Jamaica
Central Africa	Papua New Guinea	Trinidad and Tobago
Cameroon	Philippines	**Mexico and Central America**
Central African Republic	Republic of Korea	Costa Rica
Chad	Singapore	El Salvador
Congo	Taiwan Province of China	Guatemala
Equatorial Guinea	Thailand	Honduras
Gabon	Viet Nam	Mexico
Sao Tome and Principe	**South Asia**	Nicaragua
East Africa	Bangladesh	Panama
Burundi	India	**South America**
Comoros	Iran (Islamic Republic of)	Argentina
Democratic Republic of the Congo	Nepal	Bolivia
Djibouti	Pakistan	Brazil
Eritrea	Sri Lanka	Chile
Ethiopia	**Western Asia**	Colombia
Kenya	Bahrain	Ecuador
Madagascar	Iraq	Paraguay
Rwanda	Israel	Peru
Somalia	Jordan	Uruguay
Sudan	Kuwait	Venezuela
Uganda	Lebanon	
United Republic of Tanzania	Oman	
Southern Africa	Qatar	
Angola	Saudi Arabia	
Botswana	Syrian Arab Republic	
Lesotho	Turkey	
Malawi	United Arab Emirates	
Mauritius	Yemen	
Mozambique		
Namibia		
South Africa		
Zambia		
Zimbabwe		
West Africa		
Benin		
Burkina Faso		

Cape Verde		
Côte d'Ivoire		
Gambia		
Ghana		
Guinea		
Guinea-Bissau		
Liberia		
Mali		
Mauritania		
Niger		
Nigeria		
Senegal		
Sierra Leone		
Togo		

14. Addendum C: Anti-dumping measures by exporting countries

Developing Exporting Country	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
Algeria						1			1									2
Argentina	3				1	1	3	1	1		2	1	2		1	1	2	19
Bangladesh							1							1				2
Brazil	9	10	7	6	5	8	2	6	4	3	5	5	2	2	3	3	2	82
Chile		1	1	3			4	4	1	1		1	1				1	18
China	26	16	33	24	21	30	32	36	41	44	42	38	48	53	56	53	37	630
Colombia	1				1													2
Cuba						1												1
Dominican Republic								1										1
Ecuador	1								1		1							3
Egypt			2		2									1				5
Guatemala									1									1
Honduras					1													1
Hong Kong, China		3	1	1	1	1	1	2	2				1		2	1		16
India	4	1	5	7	9	7	6	6	7	10	2	12	3	6	4	2	3	94
Indonesia		2	4	7	4	11	5	9	12	2	7	10	3	6	7	8	4	101
Iran, Islamic Republic of						1	2		1	2	1				1			8
Israel	1				1		1	1	1							1		6
Jordan								1										1
Korea, Republic of	4	6	3	14	15	23	12	13	22	13	8	10	6	8	7	3	4	171
Kuwait																1		1
Libyan Arab Jamahiriya								1										1
Malawi							1											1
Malaysia	3	3	3	4	3	4	1	4	3	6	3	6	5	2	7	3	5	65
Mexico		3	4	1	3	4	1	4		3	2	1	2	1	1	2		32
Nepal								2										2
Nigeria										1								1
Oman								1								1		2
Pakistan	1		1				1		1	2								6
Paraguay	1				1											1		3
Peru															1			1
Philippines			1			1		1	1			3						7
Qatar								1										1
Saudi Arabia				1	1	1	1	1			1		1		1	2		10
Singapore				3		3		7	7	1		2	5	3		1		32
South Africa	2	3	2	2	3	4	3	7	8					4		1	1	40
Sri Lanka										1					1			2
Trinidad and Tobago			1					1										2
Turkey	1	1	1	2	4	3	3	3	2	2				3		1	2	28
United Arab Emirates							1	1		1	1	1		1	1		1	8

Uruguay							1				1			1				3
Venezuela, Bolivarian Republic of	4	1		1		2		1	2	1								12
Viet Nam				1		1	1		1	2	4	2	2	2	4	2		22
Zimbabwe			1															1
Thailand	5	8	2	5	1	12	8	8	8	6	6	8	4	4	10	7	7	109

Developed Exporting Country	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
Armenia															1			1
Australia			1	1	2	2			1	2				2		1		12
Austria	1			3		2							1		2			9
Belarus		1				3	4	3	1	1	1			1	1			16
Belgium		1		4	5			2	2		1				1		1	17
Bosnia and Herzegovina		1															1	2
Bulgaria	2		1		2	1	1	2		1		1	1			1		13
Canada	1			2	1			4	4	1			1	2	1			17
Croatia		2				1		1			1							5
Czech Republic	1	1	1		1	4	1	3	1	1					1			15
Denmark	1			1		1	1											4
Estonia					1			1	1									3
European Union			1	1	4	4	8	6	7	6	3	3	1	3	1	4	4	56
Faeroe Islands										1								1
Finland				1	1	2			1	2	2	1		1				11
Former Yugoslav Republic of Macedonia		1			1		1		1					1				5
France	1	1	2	5	7	3	4	1	1		2				2		1	30
Georgia									1									1
Germany	4	2	2	6	5	7	1	6	4			1		3	4			45
Greece				2				1	1						1			5
Hungary		1			2	2		2	1								1	9
Ireland					2							1						3
Italy	2	2	1	7	5	1	2	4	2		1				1		2	30
Japan	5	6	5	9	11	22	9	5	11	6	7	8	4	4		2	3	117
Kazakhstan			2	2	4		1	2	7				1	1				20
Latvia				1	1		4		1									7
Liechtenstein			1															1
Lithuania					1	1		1										3
Moldova	1						2	1										4
Netherlands	2		1	2	1	3	1	2	2		1				1	1		17
New Zealand				1			1		1							1		4
Norway			1							1		1					1	4
Poland	1	1	3	2	4	2	4	1	1	1	1							21
Portugal			1	1	1			1										4

Romania	2	1	1	2	2	4	1	4	5	2	1	1			1		1	28
Russian Federation	8	3	9	5	16	8	8	4	13	5	6	3	1	6		3	1	99
Serbia and Montenegro						1	1					1						3
Slovak Republic			1		2	1		2	1		1							8
Slovenia		1																1
Spain	3			4	4	3	3	3		1	1			1	1		1	25
Sweden				4	1	1			1		1	1		1	1			11
Switzerland				1						1			1					3
Taipei, Chinese	2	2	7	12	8	17	9	13	11	10	8	7	7	8	7	7	5	140
Ukraine	5	1	3	5	7	8	7	5	6		1	2	1			1		52
United Kingdom	3	1	2	3	3	1	2	5	1			1			2	1		25
United States	8	4	9	12	8	13	4	10	6	10	13	9	4	7	5	7	7	136
Uzbekistan										1								1
Yugoslavia, Socialist Federal Republic of		1																1

15. Addendum D: Anti-dumping measures by reporting countries

Developing Reporting Member	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
Argentina	13	20	11	12	9	15	16	22	20	1	8	5	10	6	15	15	8	206
Brazil	2	6	2	14	5	9	13	5	2	5	3		9	11	16	4	13	119
Chile	2		2	2									1		1	1		9
China				3	2	5		5	33	14	16	24	12	4	12	15	6	151
Colombia	1	1	1		6	2				1	1	1	7		3			24
Costa Rica									1				2					3
Dominican Republic																	1	1
Egypt				5	14	1	2	7	4	1		12	2	3		1	1	53
Guatemala			1															1
India	7	2	8	22	23	55	38	64	52	29	18	16	25	31	30	32	26	478
Indonesia			4	2	7		1		1	8	4	2		5	1	5	2	42
Israel	1			6	4		1	2		1		3	1			2	1	22
Jamaica							1	2		1								4
Korea, Republic of		5	10	8		5		1	4	10	3	8		12	4		2	72
Malaysia		2	2	4	1	1		1	7		7							25
Mexico	16	4	7	7	7	6	3	4	7	7	8	5			1	2	1	85
Nicaragua					1													1
Pakistan								1	2	4	1	6	4		6	5	7	36
Paraguay					1					1								2
Peru	2	2	3		3	4	1	7	7	8	3	4	1		2	1	1	49
Philippines		2	1	1	3	4												11
Singapore	2																	2
South Africa		8	18	13	36	13	5	15	1	4		7	1	3	3	1		128
Thailand			1	2				1	20	1	2		1		3		3	34
Trinidad and Tobago				2		1	2		1	1								7
Turkey	11				1	8	2	11	28	16	9	21	6	11	9	10	2	145
Uruguay				1														1
Venezuela, Bolivarian Republic of	2		4		8	9		1		1								25

Developed Reporting Member	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
Australia	1	1	1	20	6	5	11	9	10	4	3	5	1	3	2	2	5	89
Canada	7		7	10	10	14	19		5	8	4		3	3	2	3	1	96
Czech Republic						1												1
European Union	15	23	23	28	18	41	13	25	2	10	20	12	12	15	9	5	11	282
Japan	1							2						4				7
Latvia								1	1									2

Lithuania							7											7
New Zealand	3	4		1			2	1		2	4	2	3				2	24
Poland				1		6			2									9
Taipei, Chinese			1	5	1	1		2				1	1			2	1	15
Ukraine							1	2	2	2	6	2	1	5	7			28
United States	33	12	20	12	24	31	33	27	12	14	18	5	5	23	15	17	4	305

16. Addendum E: Intra-SACU imports

Botswana imports from the rest of SACU

Section	Description	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
C01	Live animals, animal products	63.42	69.53	66.39	66.73	56.27	63.54	74.58	74.29	93.62	88.19
C02	Vegetable products	195.16	172.80	155.64	130.26	128.46	148.56	174.42	170.83	178.30	194.68
C03	Animal or vegetable fats & oils	26.36	36.39	26.23	24.60	24.84	36.40	50.36	30.70	34.59	43.69
C04	Food, beverages & tobacco	206.22	268.86	204.42	196.88	192.34	253.14	302.87	318.33	376.08	405.63
C05	Mineral products	256.59	227.47	433.42	534.76	613.93	702.00	1,020.63	765.89	980.45	1,221.14
C06	Chemical products	192.98	296.19	223.27	226.95	250.61	286.25	289.96	309.63	348.53	381.12
C07	Plastic products	114.76	148.46	115.66	112.43	115.17	154.52	170.56	151.28	174.59	197.89
C08	Raw hides	4.35	5.42	4.22	4.81	5.41	5.60	7.04	7.26	7.28	7.02
C09	Wood products	44.60	53.01	39.67	41.23	32.22	42.20	58.56	58.01	60.30	64.97
C10	Paper products	127.65	264.44	80.39	76.26	76.08	88.23	91.95	100.10	105.63	115.85
C11	Textiles & clothing	95.18	148.46	107.74	96.61	96.82	114.08	119.94	133.85	145.72	163.24
C12	Footwear	29.69	45.84	33.43	30.36	31.53	35.84	40.16	45.67	51.34	54.99
C13	Non-metallic minerals	68.43	79.90	56.85	48.00	39.67	51.54	52.70	55.33	68.18	64.36
C14	Precious stones and metals	6.09	6.50	7.26	12.51	7.38	8.25	6.12	11.77	4.26	18.97
C15	Base metals	230.30	300.74	251.21	221.14	221.54	301.08	363.87	297.08	349.54	392.41
C16	Machinery	449.38	621.06	437.97	390.06	396.46	553.66	647.86	534.61	630.08	794.94
C17	Transport equipment	442.58	453.04	331.16	346.38	239.97	376.34	449.33	407.89	419.07	479.52
C18	Specialised equipment	36.12	52.45	34.13	28.22	30.46	36.60	39.46	45.57	50.22	47.50
C19	Arms & ammunition	0.87	1.09	0.89	0.64	0.69	0.78	1.82	1.13	0.71	0.97
C20	Misc manufactured articles	82.07	110.92	72.51	70.21	66.93	82.30	81.73	93.65	93.63	97.94
C21	Collectors' pieces & antiques	0.26	0.22	0.15	0.08	0.12	0.20	0.21	0.28	0.60	0.32
C22	Other unclassified goods	38.76	12.40	22.85	15.25	13.46	13.81	15.67	15.03	19.95	15.73

Lesotho imports from the rest of SACU

Section	Description	2002	2003	2004	2005	2006	2007
C01	Live animals, animal products	0.00	0.00	0.00	0.00	0.00	0.00
C02	Vegetable products	0.13	0.00	0.00	0.27	0.01	0.00
C03	Animal or vegetable fats & oils	0.00	0.00	0.00	0.00	0.00	0.00
C04	Food, beverages & tobacco	0.00	0.00	0.00	0.11	0.15	0.75

C05	Mineral products	0.00	8.54	0.01	0.07	0.00	0.00
C06	Chemical products	0.00	0.00	0.00	0.00	0.00	0.00
C07	Plastic products	0.00	0.00	0.00	0.00	0.03	0.10
C08	Raw hides	0.00	0.00	0.00	0.00	0.00	0.00
C09	Wood products	0.00	0.00	0.00	0.00	0.00	0.72
C10	Paper products	0.02	0.09	0.03	0.04	0.02	0.02
C11	Textiles & clothing	0.00	0.02	0.07	0.13	25.34	0.44
C12	Footwear	0.00	0.00	0.00	0.00	0.00	0.01
C13	Non-metallic minerals	0.00	0.00	0.00	0.00	0.00	0.00
C14	Precious stones and metals	0.00	0.00	0.00	0.00	0.00	0.00
C15	Base metals	0.00	0.02	0.00	0.01	0.00	0.14
C16	Machinery	0.05	0.03	0.00	0.03	0.22	0.00
C17	Transport equipment	0.06	0.04	0.09	0.03	0.03	0.06
C18	Specialised equipment	0.00	0.00	0.00	0.00	0.00	0.00
C19	Arms & ammunition	0.00	0.00	0.00	0.00	0.00	0.00
C20	Misc manufactured articles	0.00	0.00	0.01	7.65	0.07	0.05
C21	Collectors' pieces & antiques	0.00	0.00	0.00	0.00	0.00	0.00
C22	Other unclassified goods	0.00	0.07	0.01	0.01	0.02	0.01

Namibia imports from the rest of SACU

Section	Description	2002	2003	2004	2005	2006	2007	2008
C01	Live animals, animal products	26.492	31.232	63.221	62.112	67.682	85.202	100.482
C02	Vegetable products	33.359	38.413	77.882	72.139	73.293	97.236	104.6
C03	Animal or vegetable fats & oils	6.268	8.01	20.783	17.544	19.15	23.892	34.178
C04	Food, beverages & tobacco	71.638	101.089	232.847	240.403	237.12	333.116	288.054
C05	Mineral products	171.192	164.067	101.422	69.763	92.483	409.124	287.173
C06	Chemical products	80.823	91.397	237.202	210.97	233.815	281.095	308.763
C07	Plastic products	40.325	48.05	91.304	97.833	105.097	126.969	133.095
C08	Raw hides	3.313	2.45	5.336	6.976	8.491	12.954	12.374
C09	Wood products	10.272	13.581	25.967	31.12	33.322	39.656	40.794
C10	Paper products	36.979	43.93	86.158	85.376	83.554	96.941	98.359
C11	Textiles & clothing	48.264	46.739	106.768	115.561	120.194	164.013	177.696
C12	Footwear	13.862	13.137	28.12	32.432	34.803	48.182	44.723
C13	Non-metallic minerals	20.137	26.219	41.685	48.094	51.854	72.823	75.569
C14	Precious stones and metals	5.367	5.816	5.694	5.374	6.147	7.26	8.046
C15	Base metals	91.622	93.966	173.319	171.602	214.115	251.165	298.329
C16	Machinery	179.326	210.531	352.123	369.305	451.649	550.534	577.428
C17	Transport equipment	135.831	153.878	331.459	367.14	382.421	435.927	492.335

C18	Specialised equipment	14.597	17.464	33.452	34.398	34.957	47.177	41
C19	Arms & ammunition	0.583	10.406	0.946	1.199	1.539	1.529	1.153
C20	Miscellaneous manufactured articles	22.888	28.708	52.539	57.784	63.831	72.561	76.002
C21	Collectors' pieces & antiques	0.152	0.287	0.826	0.58	0.325	0.401	0.633
C22	Other unclassified goods	1.989	1.681	3.611	3.538	2.758	3.53	5.009

South Africa imports from the rest of SACU

Sector	Description	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
C01	Live animals, animal products	0.13	0.11	0.19	0.56	0.29	0.18	0.24	0.20	0.17	0.00
C02	Vegetable products	0.00	0.03	0.00	0.01	0.00	0.01	0.00	0.00	0.00	0.00
C03	Animal or vegetable fats & oils	0.00	0.00	0.00	0.11	0.00	0.00	0.00	0.00	0.00	0.00
C04	Food, beverages & tobacco	0.03	0.00	0.00	0.00	0.00	0.00	0.08	0.00	0.00	0.07
C05	Mineral products	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
C06	Chemical products	0.01	0.00	0.02	0.00	0.62	0.10	0.00	0.52	0.09	0.21
C07	Plastic products	0.00	0.00	0.00	0.00	0.01	0.00	0.00	0.00	0.00	0.00
C08	Raw hides	0.04	0.43	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
C09	Wood products	0.00	0.00	0.00	0.00	0.02	0.00	0.00	0.00	0.00	0.00
C10	Paper products	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
C11	Textiles & clothing	0.01	0.04	0.00	0.03	0.00	0.01	0.13	0.02	0.02	0.01
C12	Footwear	0.18	0.00	0.00	0.00	0.01	0.00	0.00	0.00	0.00	0.00
C13	Non-metallic minerals	0.00	0.00	0.09	0.01	0.00	0.05	0.00	0.00	0.00	0.00
C14	Precious stones and metals	0.00	3.71	0.38	430.13	398.39	349.79	263.35	149.95	216.67	210.30
C15	Base metals	0.00	0.00	0.00	0.00	0.01	0.09	0.00	0.00	0.10	0.01
C16	Machinery	0.08	0.11	0.01	0.05	0.15	0.44	0.55	0.02	0.03	0.07
C17	Transport equipment	0.01	0.25	0.01	0.00	0.00	0.02	0.01	0.00	0.01	0.01
C18	Specialised equipment	0.00	0.00	0.01	0.02	0.01	0.00	0.01	0.11	0.07	0.04
C19	Arms & ammunition	0.00	0.00	0.00	0.00	0.00	0.02	0.00	0.00	0.00	0.00
C20	Miscellaneous manufactured articles	0.00	0.01	0.00	0.00	0.00	0.01	0.01	0.03	0.00	0.00
C21	Collectors' pieces & antiques	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.02
C22	Other unclassified goods	0.00	0.00	0.00	0.00	0.00	0.02	0.00	0.00	0.00	0.00

Swaziland imports from the rest of SACU

Section	Description	2002	2003	2004	2005	2006	2007
C01	Live animals, animal products	35.93	42.17	64.18	58.69	33.67	33.97
C02	Vegetable products	60.61	73.36	89.13	75.18	64.09	112.46
C03	Animal or vegetable fats & oils	11.90	14.70	14.32	13.32	11.52	10.42

C04	Food, beverages & tobacco	59.88	87.06	112.49	103.69	66.55	84.42
C05	Mineral products	112.83	119.95	162.84	204.83	201.71	184.11
C06	Chemical products	158.97	221.99	442.90	283.05	112.74	124.87
C07	Plastic products	38.76	45.19	65.03	54.15	43.76	54.01
C08	Raw hides	1.13	1.80	2.45	1.91	1.22	2.78
C09	Wood products	9.29	12.99	18.04	16.77	11.84	13.14
C10	Paper products	34.33	45.31	53.02	42.91	37.45	37.55
C11	Textiles & clothing	56.17	59.06	86.33	64.67	58.56	59.64
C12	Footwear	7.56	13.31	18.82	13.82	9.80	10.94
C13	Non-metallic minerals	9.63	14.21	17.19	17.32	12.07	14.49
C14	Precious stones and metals	0.59	0.90	0.93	1.08	0.76	0.67
C15	Base metals	56.19	71.13	98.31	107.17	76.92	77.37
C16	Machinery	101.89	235.67	170.49	164.48	152.55	145.93
C17	Transport equipment	70.82	114.25	122.81	82.39	62.69	52.44
C18	Specialised equipment	6.30	8.96	8.94	12.07	8.97	11.51
C19	Arms & ammunitions	0.15	0.16	0.24	0.35	0.19	0.32
C20	Miscellaneous manufactured articles	16.28	19.68	23.35	23.34	15.63	18.28
C21	Collectors' pieces & antiques	0.02	0.05	0.11	0.18	0.05	0.12
C22	Other unclassified goods	0.15	0.99	0.36	0.25	21.43	0.03