Evolution and Development of the Legal Framework for the Southern African Customs Union

Clement Ng'ong'ola*

ABSTRACT

For the entire period of its existence as an independent state; in fact, from not long after its founding as British Protectorate, Botswana has been party to the Southern African Customs Union (SACU). SACU is reputed to be the oldest, functioning customs union (CU) in the world today. Some would also claim that by virtue of its longevity it must be the most successful and cohesive regional trade agreement (RTA) in Africa. This paper reviews the SACU legal framework, as revised and modulated over the years, for elements that may or may not have contributed to its longevity and apparent success. The paper also takes note of the fact that the last substantial revision of the SACU legal code, in 2002, attempted to remould SACU into a twenty first (21st) Century CU, "aligned with current developments in international trade relations." How successfully was this effort? The paper deliberately has a distinct legal flavour, in order to shift the discourse on SACU from fiscal and developmental gains or costs from the arrangement for South Africa (SA), the largest and most advanced economy, on one side, and Botswana, Lesotho, Namibia and Swaziland (BLNS), the less advanced economies in the arrangement, on the other side. The paper in effect contends that some legal aspects of SACU deserve as much attention as the vexed issue of pooling and sharing of customs revenue in academic discourses on Africa's oldest RTA.

1 INTRODUCTION

The Southern African Customs Union (SACU) turned one hundred years old on 29th June 2010. It is now reputed to be the oldest customs union (CU) agreement still in existence.[1] As part of its centenary celebrations, SACU leaders reportedly began to contemplate ways of deepening cooperation and improving the

* LLM (Exeter), PhD (London), Professor, Department of Law, University Botswana.

1 See WTO, *Factual Presentation, Southern African Customs Union, Report by the Secretariat*, WT/REG231/2/Rev.1, 29 April 2009, p. 1, Para. 1.

arrangement. As in previous reviews, top of the reform agenda is the formula for sharing and distribution of revenue collected and pooled in the common revenue pool (CRP), an issue which even academic discourses on SACU are inordinately concerned with.[2] The importance of this issue notwithstanding, this paper contends that the review and improvement of SACU must begin with the legal superstructure. The paper recalls from the preamble of the current SACU Agreement, signed at Gaborone, Botswana, on 21 October 2002, that the parties had come to the conclusion that the 1969 SACU Agreement "no longer adequately caters for the needs of a customs union in the 21st century", and was in need of alignment "with current developments in international trade relations". To what extent has the 2002 SACU Agreement improved and modernized SACU, and rendered it fit for the 21st century, and consistent with trends in international trade relations reflected in the law of the World Trade Organization (WTO)? These are some of the questions to be interrogated in this somewhat long overdue review and assessment of the 2002 SACU Agreement.

2. PREVIOUS SACU AGREEMENTS

As suggested above, there have been three SACU agreements in the one hundred years of its existence, concluded in 1910, 1969 and 2002. Each of these agreements was negotiated and concluded in a particular political context. The first SACU Agreement was concluded after the formation of the Union of South Africa in 1910. It was not the first customs agreement in the sub region.[3] It replaced a customs union formed in 1889 between the Cape of Good Hope and the Orange Free State, which was enlarged and reformatted at the end of the Anglo – Boer war in 1903, and, over time, drew in as participants the High Commission Territories (HCTs) of Basutoland (1891), Bechuanaland Protectorate (1893), and Swaziland (1904). The 1969 Agreement was a re-negotiation and revision of the 1910 Agreement after the HCTs attained independence from the United Kingdom as the Kingdom of Lesotho, the Republic of Botswana and the Kingdom of Swaziland. The political backdrop

2 See, for example, Frank Flatters and Mathew Stern, "SACU Revenue Sharing: Issues and Options", USAID Supported Policy Brief, August 2006; and C. McCarthy, "The Challenge of Reconciling Revenue Distribution and Industrial development in the Southern African Customs Union", Institute for Global Dialogue, Workshop on Developmental integration and the Harmonization of Industrial policies in SACU, Pretoria, South Africa, 25 October 2006.

3 D. J. Hudson, "Brief Chronology of Customs Agreements in Southern Africa, 1855 – 1979", 11 (1979) *Botswana Notes and Records*, pp. 89- 95.

to the negotiation of the 2002 agreement was the constitutional dispensation in South Africa which led to the end of the policy of apartheid and the replacement of a white minority regime with a democratically elected government formed by the African National Congress. Before that, in 1990, the mandated territory of South West Africa had gained independence as Namibia and acceded to the 1969 Agreement.

2.1 The 1910 Customs Union Agreement

Although spanning only some six articles, the 1910 Agreement established a trade arrangement between the parties, the Union of South Africa (SA), on one hand, and the HCTs of Basutoland, Bechuanaland and Swaziland, on the other hand, which in today's parlance would qualify as a CU.[4] As will be discussed in more detail below, a CU under WTO law must provide for (a) the liberalization of substantially all trade among the participants, and for (b) the application of substantially the same duties and other regulations of commerce by the participants to the trade of countries outside the arrangement.[5] It must in short establish a free trade area (FTA), and provide for application of a common external tariff (CET) for imports from outside the FTA.

Article II of the 1910 Agreement satisfied the first requirement by stipulating that "there shall be free interchange of the products and manufactures of the Union and the Territories with the exception of spirits and beer …," on which, however, customs and excise duties to be levied in the HCTs would be the same as those in force in the Union. Article I partly satisfied the second requirement, by stipulating that "the Customs Union Tariff, as it at present exists, shall be maintained between the contracting parties until altered by legislation enacted by the Union or the [HCTs]." This ensured application in the HCTs of a basic tariff of 15 per cent *ad valorem* applied by the Union of South Africa to third country imports.[6] In addition, Article IV specifically required that the HCTs "shall, as far as possible, conform to the laws and regulations for the time being in force within the Union in respect [of] refunds, rebates, abatements, suspensions, methylation, prohibitions, removals in bonds or otherwise, and interpretations of the tariff."

4 The 1910 Customs Agreement was published in Bechuanaland Protectorate, High Commissioner's Notice No. 127 of 1914, Printed on 17th December 1914.

5 Article XXIV: 8 (a) of the General Agreement on Tariffs and Trade (GATT) 1994.

6 D.J Hudson, *op cit.* p. 1.

Complementing provisions requiring the application of South African tariffs, laws and regulations to imports from third countries, Article III of the 1910 Agreement in part provided that:

> "... There shall be paid into the Treasury of the Union all duties of customs levied on dutiable articles imported into and consumed in the Territories, and there shall be paid out of the Treasury annually towards the cost of administration of each Territory a sum in respect of such duties which shall bear to the total customs revenue of the Union in respect of each financial year the same proportion as the average amount of the customs revenue of such Territory for the three completed financial years last preceding the taking effect of this Act bore to the average amount of the whole customs revenue for all the colonies and territories included in the Union received during the same period."

In the light of this provision, initial shares of the revenue pool were determined as follows: Basutoland, 0.88575%; Bechuanaland Protectorate, 0.27622%; Swaziland, 0.14900%; and, South Africa, 98. 68903%.[7]

The 1910 Agreement was set to operate from 1st July 1910 to 30th June 1911, and, thereafter, for rolling periods of twelve months, if a party did not "retire" from the arrangement.[8] A party could retire from the arrangement by giving not less than three months' notice of its intention to do so before the 30th June of any year. Further, the HCTs were at liberty to retire forthwith from the arrangement if the Legislature of the Union amended the customs tariff or took any steps in conflict with the spirit and intent of the Agreement. Similarly, the Union was at liberty to retire forthwith from the Agreement if any of the HCTs amended the customs tariff or took any steps in conflict with the spirit and intent of the Agreement.

As noted in the introduction, the Agreement was signed on 29th June 1910. It was, remarkably, signed four times by Lord Gladstone: once, as Governor-General of the Union, and three times as High Commissioner for the HCTs.

From the manner of its execution, and some of the language employed in the provision on sharing of revenue from the customs pool, (Article III), it would appear that the 1910 Agreement was a colonial imposition upon the HCTs, motivated not by trade integration theories or arguments, but by the

7 *Ibid*
8 Article VI

desire to shift the financial burden of administering the HCTs from the colonial treasury in London to the Union Treasury.

It was another remarkable oddity of SACU that the 1910 Agreement endured in substantially the same form until the end of colonial rule for the HCTs. The British Colonial Office saw no need to revisit the arrangement, even when legislative activity by the apartheid Union Government could have triggered the right of the HCTs to "retire" from the arrangement in terms of Article VI.[9]

2.2 The 1969 SACU Agreement

The 1969 Agreement initially spanned some twenty two (22) articles, many of which were expounded and interpreted in what was supposed to be a "secret memorandum of understanding" (MOU). The 23rd provision, on admission of new members, was added to the text in 1990, paving the way for the admission of Namibia as a full Member in the same year. The original 22 articles retained the following as the core elements of the SACU: free interchange of goods grown or produced within the Union; application of SA's duties, laws and regulations as the SACU CET; collection of duties levied in the entire SACU area in a common pool, to be managed by SA's Treasury; and periodic calculation and disbursement from the pool of shares for the former HCTs. But the 1969 Agreement attempted to qualify and modulate these features in order to provide for the economic development of the former HCTs and to compensate them for some of the ills of being in a CU with South Africa.[10]

2.2.1 Free Interchange of Goods

Free interchange of goods was described in the 1969 Agreement as requiring, first, that goods grown or produced within SACU shall not be subject to application or imposition of quantitative restrictions and duties upon importation into the territory of any party;[11] and, secondly, that goods imported from outside SACU shall also not be subject to duties after duties have been paid upon first

9 See U. Kumar, "Southern African Customs Union and BLS – Countries (Botswana, Lesotho and Swaziland)", 24, 3 (1990) *Journal of World Trade*, pp. 31 – 53 at p. 32.

10 See the discussion of Article 14 of the 1969 Agreement below.

11 Article 2 of the 1969 SACU Agreement.

importation into the SACU area.[12] Free interchange of goods, thus defined, was a heavily qualified obligation. For our purposes, the most notable qualifications were those relating to promotion of new industries, (Article 6); safeguards, (Article 17); prohibition or restriction of imports for economic, social, cultural or other reasons, (Article11); and marketing of agricultural products, (Article 12).

Article 6 permitted any of the parties other than SA to impose duties, but not quantitative restrictions, in order to enable a "new industry" in its area to meet competition from other producers or manufacturers in the CCA. A "new industry" was one in existence for a period of not more than eight years. Without prior consent of the other parties the period of protection could not be extended beyond the eight years. To the extent that protective duties could be levied "equally' on goods grown, produced or manufactured in any part of the CCA and to like products from outside the CCA, this provisions provided infant industry protection even from competition from products from the other BLS countries.

In addition to trade restrictions for purposes of protecting or promoting a new industry, Article 17 allowed any contracting party, not just BLS, to seek "safeguard restrictions." It provided for "bilateral consultations", as soon as possible, and the search for a mutually acceptable solution, "if as a result of unforeseen developments" any product was being introduced into the area of one of the parties "in such increased quantities and under such conditions as to cause or threaten serious injury to producers or manufacturers of like or directly competitive products" in its area. Article 17 did not provide any indication of measures that could be taken to forestall the problem, or what could be done if bilateral consultations, or wider consultations at SACU level, did not yield a mutually acceptable solution. It is mind boggling that, as drawn, even South Africa could seek safeguard measures against imports from any of the BLS parties. If safeguards were to be invoked only by the BLS, in their trade with each other, or in their trade with South Africa, the provision would still be out of place in an arrangement of this nature, which sought to liberalize substantially all trade among the parties. Could import surges be truly "unforeseen" in trade between countries party to a free trade area for such a long period?

Probably the most intriguing qualification to free interchange of goods within SACU was Article 11(1), which recognized the right of each party "to

12 Article 3

prohibit or restrict the importation into or exportation from its area of any goods for economic, social, cultural or other reasons." Art 11(2) further recognized the validity or supremacy of existing laws of a party which prohibited or restricted the importation or exportation of goods. Article 11(3) attempted to clarify that the right to prohibit or restrict trade could not and should not be used for purposes of protecting domestic industries. It could be extrapolated from this that prohibitions or restrictions, equally, could not be invoked for purposes or reasons specified in other provisions of the Agreement, such as Article 6 and 17 discussed above, or Article 18, providing for Zoo Sanitary and Phyto-Sanitary requirements for the protection of animals, plants and humans. Even with this elaboration or understanding, the right of SACU parties to restrict or prohibit intra SACU trade for economic, social, cultural or other reasons was unacceptably too widely drawn.

Whereas Article 11 (2) grandfathered or excluded from the scope of SACU existing import or export control legislation, Article 12 grandfathered existing arrangements for the marketing of agricultural products. Article 12 (1) required SACU parties to cooperate with each other's arrangement, cognizant of the advantages to be derived from the effective operation of such arrangements, and to ensure that regulations are applied on an equitable basis to similar commodities produced in any other part of the CCA. Existing arrangements had to be respected and complied with even if they did not permit free interchange of agricultural commodities.

2.2.2 Application of South African Laws, Duties and Regulations as the SACU CET

The 1969 Agreement essentially repeated the requirement under the 1910 Agreement that SA's CET must be regarded as SACU's CET. Article 4 in the 1969 Agreement more specifically required that customs and sales duties applied in SA from time to time shall be applied by the other parties to imports from outside the CCA. This also extended to application of any rebates, refunds or drawbacks of customs duty or sales duty. Article 8 provided that excise and sales duties applied by SA from time to time to goods grown, produced or manufactured in the CCA shall also be applied by the other parties. Article 10 more generally required BLS countries to apply "laws relating to customs, excise and sales duty similar to such laws in force in South Africa from time to

time."

An important and new qualification to these basic rules on SACU's CET, reflected in Article 4 (4), was that any party to the arrangement could grant a full rebate of customs and sales duties in respect of goods imported into its area (i) for the relief of distress of persons in cases of famine or other natural disaster; (ii) under any technical assistance agreement; and (iii) in terms of any multilateral trade agreement to which the country is or becomes a party. With the prior approval of other SACU parties, a full rebate of customs and sales duties could also be granted for purposes other than these.

As noted above, under Article 6, parties other than SA could also levy additional duties on imports from outside the CCA for the purpose of nurturing and protecting a "new industry". Also for the benefit of the BLS, Article 7 provided that any one of them could specify an industry "of major importance to its economy" and a period or periods of time, within which customs duties on goods from outside the CCA would not be decreased or abrogated by South Africa without the consent of the affected country. During the period or periods specified, the SA Government was also required to "give sympathetic consideration" to proposals by any other SACU party to increase any customs duty applicable to affected products or to afford relief of customs duty applicable to any material used directly in the production or manufacture of affected products, where the SACU party concerned regarded such an increase or relief as necessary to assist in the establishment of an industry or to prevent its contraction. The SA Government was required to do so "with due regard to the interests of the other contracting parties and to the criteria usually applied by it in the consideration of representations for tariff assistance and relief." The SA Government was in other words not legally obliged to act, having given the matter due sympathetic consideration.

Ad Article 7 in the Secret MOU provided an interpretation and clarification of Article 7 which rendered it highly unlikely that it could be invoked for the benefit of the BLS. It provided that to qualify for tariff protection affected BLS industries "should be able to supply the qualitative requirements of the common customs area and … to supply at least about sixty per cent of the quantitative requirements of the area …" As regards proposals from other BLS countries for an increase in customs duties or for relief of customs duties on raw materials, the SA Government was enjoined to consider them applying the same procedures and criteria it applied to consideration of such matters from SA

industries. It was also clarified that tariff relief for raw materials or and other requirements of industries should not be granted unless suitable materials or requirements were not available in the CCA.

2.2.3 Pooling and Sharing of Revenue

Under the 1910 Agreement it was primarily SA's responsibility to collect customs duties on imports into the CCA destined for the HCTs, and to transfer to each HCT annually its proportionate share of the duties collected and pooled. Article 13 of the 1969 Agreement made it the responsibility of every Member of the Union to collect not only customs duties but also excise, sales and additional duties, and to make quarterly remittances of revenues so collected to the Consolidated Revenue Fund of South Africa.

Article 14 provided for computation and transfer only to the BLS of their proportionate shares of the revenue pool in respect a financial year. As no provision was made for calculation of SA's share, it was entitled to what was left in the pool after transfers for BLS had been made. In Article 14 (2), the much discussed formula for computing shares for the BLS parties in part stated that the c.i.f value of imports into a particular country in any financial year, including customs duties collected thereon; the value of goods produced and consumed in the country on which excise and sales duties are payable; and excise and sales duties collected thereon, must be related to, or expressed as a proportion of the c.i.f. value of total imports into the SACU area; customs and sales duties on total imports into the SACU area; value of goods produced and consumed in the SACU area on which excise and sales duties are payable; and excise and sales duties collected or paid on dutiable goods produced and consumed in the entire SACU area. This part of the formula, like Article III of the 1910 Agreement, in effect suggested that each BLS country must receive as its basic share what it would have collected or be entitled to had there been no customs union.

Article 14 (2) additionally provided for enhancement of the basic share of each BLS party by a multiplier 1.42, ostensibly to compensate the BLS countries for certain disadvantages of the CU, including: (a) the price raising effect of South Africa's import control measures; (b) the price raising effect of South Africa's policy of protecting industries through tariffs; (c) the polarization of development brought about by a customs union between a more

developed economy and less developed economies; and (d) for loss of fiscal autonomy and discretion by the BLS countries.[13] The Secret MOU conceded that the parties were not in agreement as to whether the multiplier of 1.42 would provide adequate or scientifically measurable compensation for all these ills of SACU, and this issue was never resolved or settled throughout the life of the 1969 Agreement.

The 1969 Agreement was in due course amended to provide for stabilization of BLS receipts from the CRP at around 20 per cent of the value of their imports.[14] Article 14 (3) *bis* reportedly set a range of 17 to 23 per cent for BLS receipts from the CRP, with the multiplier becoming operative if the revenue sharing formula produced a revenue rate of precisely 20 per cent. The revenue rate was reportedly mostly lower than 20 per cent, and the stabilization factor effectively replaced the multiplier of 1.42 as the mechanism for enhancing incomes for the BLS countries.

Correct application of the revenue sharing formula was obviously dependent on the availability of reliable financial data, and Article 14 (3) suggested that this must be data for two years preceding the financial year for which the share was being computed. This added another controversial element to SACU revenue sharing. There was potentially a two- year time lag between the quarterly remittances to the Consolidated Revenue Fund of South Africa and the computation and transfer from the Fund of shares for the BLS countries.

2.2.4 Institutional Arrangements

The brief 1910 Customs Union Agreement did not provide or envisage any need for institutions to manage or administer the arrangement. In the circumstances then prevailing, the Colonial Office in London probably preferred the Union Government to administer the arrangement as it saw fit, as long as funds for the administration of the HCTs were periodically and regularly assured. The

13 Ad Article 14 (3) of the Secret Memorandum of Understanding.

14 There is no agreement among commentators as to when the SACU agreement was amended to provide for the "stabilization factor." Kumar and McCarthy refer to 1975/76, Gibb to 1976 and Hudson to 1977. See: Kumar *op. cit.* p. 46; C. McCarthy, "The Southern African Customs Union in a Changing Economic and Political Environment, 26, 4 (1992) *Journal of World Trade*, pp. 5-24 at p. 13; D. J. Hudson, "Botswana's Membership of the Southern African Customs Union", in P. Harvey (ed.), *Papers on the Economy of Botswana*, (Heinemann 1989), pp 131-157, at p. 137; and R. Gibb, "Regional Integration in Post –Apartheid Southern Africa: The Case of Renegotiating the Southern African Customs Union, 23, 1 (1997) *Journal of Southern African Studies*, pp. 67 – 86 at p. 77. Article 14 (3) *bis* itself referred to the 1976/ 77 financial year as the beginning of the application of the stabilization factor.

1969 Agreement, surprisingly, also proposed only rudimentary arrangements for administration of the CU.

Article 20 provided for the establishment of a CU Commission, comprising of representatives of all contracting parties, as the sole or main forum for "discussing any matter arising out of this Agreement."[15] The Commission was scheduled to meet at least once a year, preferably before the end of October, by rotation in each of the contracting parties.[16] It could also meet at any time at the request of a contracting party, which would then have the responsibility of organizing the meeting. The Commission was therefore serviced in turn by countries responsible for organizing and hosting its meetings. There was no SACU or Commission Secretariat. It was the responsibility of the organizing and hosting country to ensure that agenda, memoranda and records of discussions were prepared, circulated and kept. The Commission, in due course, arrogated to itself the power to establish subsidiary structures to facilitate its work, but these did not include a Secretariat. A Customs Technical Liaison Committee was reportedly established in 1970; a Trade and Industry Liaison Committee in 1973; and a Transport Liaison Committee in 1974.[17]

The Commission was much more than a High (Ministerial) level discussion forum. It was a rudimentary dispute settlement mechanism; a forum for consulting "on a matter which may affect the rights of the other parties under this Agreement …"[18] The mandate of the Commission on such matters was to "use its best endeavours to find a mutually agreeable solution to the particular problem or difficulty …" and for representatives "to report to their respective Governments for consideration of any remedial measures."[19] It was not envisaged that such problems or difficulties in SACU would require definitive resolution by independent arbiters.

3. THE 2002 SACU AGREEMENT

The 2002 SACU legal text was a significant expansion of the 1969 text. It initially spanned some 51 articles, arranged in 9 parts, and 1 Annex. Members

15 Article 20 (1).
16 Ad Article 20 (2) and 20 (5) in the Memorandum of Understanding.
17 Kumar *op. cit.* p. 48.
18 Article 20 (3). This article stated that this may include rights rising under Article 12 (on marketing of agricultural products); Article 17 (on Safeguard Measures); and Article 18 (on Zoo-Sanitary and Phyto-Sanitary Measures).
19 Article 20 (4).

are now considering amendments to institutionalize the Summit of Heads of State and Government as a SACU organ. The Annexes have also been increased, from one to five. The Annexes currently elaborate on the formula for sharing revenue, (Annex A); the Tariff Board (Annex B); National Bodies, (Annex C); SACU Single Origin and related rules and procedures, (Annex D); and Mutual Administrative Assistance, (Annex E). This expansion of the text notwithstanding, apart from the parts, provisions and annexes dealing with establishment of SACU as an international organization, common SACU institutions and common policies, much of the 2002 text replicated or elaborated on familiar SACU themes and issues, such as free interchange of goods within SACU, now described as free movement of domestic products; SACU's Common External Tariff; economic development of the BLNS countries; and collection, pooling and equitable sharing of customs revenue.

3.1 Establishment of SACU as an International Organization

Since the 1969 SACU Agreement was in law a treaty between four sovereign states, duly signed by four plenipotentiaries, and later acceded to by a fifth sovereign state, it should have provided for the administration and management of SACU affairs by an inter-governmental body. Addressing this shortcoming was the first task in transforming SACU into a 21st Century CU, aligned with modern trends in international trade relations. In Part Two of the 2002 Agreement, therefore, SACU is established as an international organization, whose headquarters shall be in Windhoek, Namibia,[20] with a legal personality and capacity distinct from that of Member States party to the Agreement.[21] Apart from the specification of the headquarters for the organization in a Treaty, which was strictly not necessary, and would require amendment of the Treaty should the need arise in future to relocate the headquarters, Part Two of 2002 Agreement is not controversial and requires no further commentary in this review.

20 Article 3. In this provision, SACU, like several other African regional integration arrangements, has effectively been given a permanent home in its founding treaty. It is never easy to relocate an international organization when the host city or country ceases to be a congenial or welcoming.

21 Article 4.

3.2 Common SACU Institutions

One of the objectives of the 2002 Agreement is to provide SACU, the international organization, with "effective, transparent and democratic institutions which will ensure equitable trade benefits to Member States."[22] Article 7 in Part Three initially established the following as the institutions of SACU: (a) Council of Ministers; (b) Customs Union Commission; (c) Secretariat; (d) Tariff Board; (e) Technical Liaison Committees; and (f) *Ad hoc* Tribunal. Also relevant to operations of SACU and to be discussed in this review are the Summit of Heads of State and Government and National Bodies to be established or designated in each of the Member States. For reasons that will become apparent, the review will not dwell on Technical Liaison Committees and the *Ad hoc* Tribunal.

3.2.1 Summit and Council of Ministers

After the SACU Centenary celebrations in 2010, the Council of Ministers has been replaced by the Summit (of Heads of State and Government) as the highest decision making organ of SACU.[23] The core mandate of the Summit is to provide political and strategic direction to SACU and, for this purpose, to receive reports on the work of the Council. The Summit shall meet at least once a year, and may hold other extraordinary meetings at the request of any Member State.

Before this role for Summit was created, SACU was unique among African regional integration arrangements to have a Council of Ministers as its "supreme decision making authority,"[24] responsible for "the overall policy direction and functioning of SACU institutions, including the formulation of policy mandates, procedures and guidelines for the SACU institutions."[25] Other notable powers and functions of the Council included appointment of the Executive Secretary; appointment of members of the Tariff Board; approval of budgets for SACU institutions; creation of additional Technical Liaison

22 Article 2 (b).

23 SACU Secretariat, Annual Report 2013, Windhoek, Namibia, accessed at http://sacu.unwembi.co.za/docs/reports on 24/07/2015, Ch. 5 at p 27 reports that amendments to the 2002 SACU Agreement, to institutionalize the SACU Summit in the above manner were adopted by the Council of Ministers on 10 April 2013 and signed by Heads of State and Government on 12 April 2013 in Gaborone Botswana, and are awaiting ratification by the Member States.

24 Article 8 (1).

25 Article 8 (2).

Committees and other additional SACU institutions;[26] and, approval, by unanimous decision, of the admission of new members to the organization.[27] It would appear that the Council still remains responsible for all such matters, but it must now defer to the political and strategic direction that the Summit is inclined to give. SACU in this way has lost some of its political innocence and succumbed to the imperative in African regional integration arrangements that politicians, not technocrats, must be seen to drive the process. For other African regional groupings with more members, Summits are expensive and difficult to organize, and political issues and dynamics tend to overshadow technical, integration matters. Direct involvement of heads of State and Government, on the other hand, ensures political support for the integration agenda at the highest level government in the Member States.

3.2.2 Customs Union Commission

In accordance with Article 9 of the 2002 Agreement, as amplified by Rules of Procedure of the SACU Commission, this body comprises of "at least one senior official at the level of Permanent Secretary, Director – General, Principal Secretary or equivalent rank from each Member State …" As noted above, the Commission under the 1969 Agreement was at one and the same time SACU's principal decision making and dispute settlement organ. It was the highest ranking institution on a SACU organogram. It has been downgraded under the 2002 Agreement to a subsidiary organ responsible for overseeing the working of SACU for and on behalf of the Council of Ministers. The Commission is notably responsible for implementation of the Agreement; implementation of decisions of Council; supervision of the work of the SACU Secretariat and for overseeing the management of the Common Revenue Pool in accordance with policy guidelines set by the Council.

As a body that is primarily responsible and accountable to the Council for the effective functioning of SACU as an international organization, it is to be expected that detailed provisions on the composition of the Commission and the conduct or discharge its business would be a replication of what is provided for the Council. Thus, the Council shall be chaired for a period of 12 calendar

26 Article 8 (3)..
27 Article 6 (2).

months by a Minister from each Member State, rotating in alphabetical order,[28] and the Commission "shall at all times" be chaired by "the Member State which is also the chair of the Council."[29] Both the Council and the Commission shall meet at least once in each quarter of a financial year, but as often as it shall be necessary for the effective discharge of each body's responsibilities.[30] The venue of meetings shall be confirmed by the Executive Secretary based on a simple rotation of all the Member States as determined by the Council.[31] The quorum at meetings shall be at least one Minister from each Member State for the Council, and at least one Member from each Member State for the Commission.[32] At both the Council and the Commission, as required by Article 17 of the 2002 Agreement, decisions shall be taken by consensus.[33]

These provisions, among others, have replicated for SACU what has been identified as an organizational challenge in studies of other African regional integration arrangements. During any operational period, SACU will be as well led, or as poorly led, as would be the quality of political and technocratic leadership available from the Member State chairing the Council and the Commission, if the Secretariat is not sufficiently empowered to drive the agenda of the organization.[34] On the other hand, because of SACU's historical pre-occupation with management of the common revenue pool and the sharing of revenue, Ministers and Technocrats with responsibilities over SACU have tended to be from Finance or Economic or Development Planning, not from Trade or External or International Relations. These SACU institutions are therefore likely to have more professional leadership and be better led.

28 Rule 4 (a) of the Rules of Procedure of the SACU Council of Ministers, elaborating on Article 8 (10) of the 2002 SACU Agreement.

29 Rule 4 (a) and (b) of the Rules of Procedure of the SACU Commission, elaborating on Article 9 (7) of the 2002 SACU Agreement.

30 Rule 6(a) of the Rules of Procedure of the SACU Council, and Rules of Procedure of the SACU Commission, elaborating on Articles 8(9) and 9(8) of the 2002 Agreement.

31 Rule 5 of the Rules of Procedure of the SACU Council, and Rules of Procedure of the SACU Commission.

32 Rule 8 of both the Rules of Procedure of the SACU Council and Rules of Procedure of the SACU Commission

33 Article 17 requires consensus for the taking of decisions at all meetings of SACU institutions, except where the Agreement otherwise provides. The Agreement notably provides in Article 6 (2) that the admission of new members "shall be approved by a unanimous decision of the Council".

34 See C. Ng'ong'ola, "The Legal Framework for Regional Integration in the Southern African Development Community" 8 *UBLJ* (2008) p. 24.

3.2.3 Technical Liaison Committees

To assist and advise the Commission in its work, Article 12 of the 2002 Agreement provides for the establishment of at least four Technical Liaison Committees, being: the Agricultural Liaison Committee; Customs Technical Liaison Committee; Trade and Industry Liaison Committee; and the Transport Liaison Committee. As noted above, the last three were also the technical committees established to assist the SACU Commission in terms of Article 20 of the 1969 Agreement. It should be recalled that the Commission under the 1969 Agreement was an inter-ministerial committee, but it is now a committee for senior officials at the level of Permanent Secretaries, Directors General, Principal Secretaries or equivalent.

The Rules of Procedure for SACU Technical Liaison Committees incorporate an innovation on meetings. It is provided that each Committee shall meet as often as it may be necessary for the effective discharge of its responsibilities, but meetings must be held at least 28 days prior to meetings of the Commission. The venue shall be confirmed by the Secretariat, and shall rotate from one Member State to the other, in alphabetical order, at least every quarter of the year.[35] Meetings will be chaired by the person appointed by the Member State hosting meeting.[36] The possibility therefore exists under the these rules that Committee meetings will not be held in the Member State hosting the Council and the Commission, and will be chaired by persons other than those from the Member State chairing the Council and the Commission. This is a slightly better organizational arrangement.

3.2.4 The Secretariat

Article 10 of the 2002 Agreement provides for a SACU Secretariat, headed by an Executive Secretary, who shall be a citizen of a Member State, and lists some obvious and not so obvious responsibilities for the Secretariat. The obvious responsibilities include day-to-day administration of SACU; implementation of all decisions of the Council and the Commission; arranging meetings, dissemination of information, and keeping minutes of meetings and records of SACU institutions; and discharging such other duties and responsibilities

35 Rule 5 of the Rules of Procedure for the SACU Technical liaison Committees.
36 Rule 4

as shall be assigned to it by the Council. The not so obvious duties and responsibilities include assisting in the harmonization of national policies and strategies of Member States in so far as they relate to SACU; keeping record of all transactions into and out of the Common Revenue Pool; and assisting in the negotiation of trade agreements with third parties. The tone of the relevant paragraphs of Article 10 covering responsibilities that are not so obvious suggests that the Secretariat should not take the lead in these matters. It is for the Council, as advised by the Commission, to manage the CRP; to oversee the negotiation of trade agreements with third parties; and endeavor to harmonize national policies and strategies. SACU, like other African regional integration arrangements, does not have a Secretariat sufficiently empowered to drive the integration agenda. The 2002 Agreement betrays familiar reluctance on the part of Member States to cede sufficient sovereignty over integration matters to the international organization.

3.2.5 Tariff Board and National Bodies

Article 11 provides for the establishment of a Tariff Board, consisting of experts drawn from Member States, whose main responsibility shall be to make recommendations to the Council on desired changes to the SACU CET, and on the need for the imposition of trade remedies against some non-SACU imports. To assist and complement the Tariff Board in its work, Article 14 provides for the establishment of National Bodies in Member States that do not have such institutions, to be responsible for receiving requests for tariff changes or the imposition of trade remedies, investigating and assessing such requests, and recommending appropriate action to the Tariff Board. National Bodies are also mandated to independently study, investigate and determine the impact of tariffs within respective Member States and propose such changes as may be necessary and make recommendations to the Commission through the Secretariat.

Annex B to the 2002 Agreement expounds on the constitution and composition of the Tariff Board and on the conduct of its meetings. Article 4 of the Annex provides that the Tariff Board shall consist of a Chairperson, Deputy Chairperson and three additional permanent members. Permanent members are those appointed by the Council to serve on the Board on a full time basis. For each Permanent Member, each Member State is also required to nominate for appointment by the Council an Alternate Member, who shall serve on an *ad*

hoc basis if the Permanent Member from the Member State is for any treason not available. The Chairperson of the Board shall be the Permanent Member from the Member State that at any time is chairing the Council of Ministers, and the Deputy Chairperson shall be from the Member State which, on the basis of rotation will take over the chairing of the Council. Member States will thus take turns to chair the Tariff Board every 12 months, but the term of office for Members of the Board shall not exceed three years, renewable only once for another term which shall not exceed six consecutive years in total.

Although nominated for appointment to the Board by Member States, Tariff Board Members will not be representatives of their nominees. The Board is required and expected to be independent, a truly supra-national SACU body, reporting and accountable only to the Council of Ministers. To underscore this, Article 4.7 of Annex B provides that a Permanent Member appointed on a full time basis shall be stationed at the headquarters of SACU. If not appointed on a full time basis, the Member State nominating such a Member must "be confident that the nominee's activities shall not adversely affect his or her responsibilities as a Board Member". Further, to be eligible for appointment and to continue to hold office as a Member, a person shall be resident in the CCA and have suitable qualifications or experience in economics, accounting, law, commerce, agriculture, industry or public affairs.[37]

Meetings of the Board normally should take place at the SACU headquarters. Ordinary meetings should be convened at least once a month and extra ordinary meetings as often as may be necessary. A simple majority of Permanent Members of the Board shall constitute a quorum.[38] Decisions of the Tariff Board, as is required for all SACU institutions, shall ordinarily be taken by consensus.[39] In cases where consensus cannot be reached, Article 9.7 of Annex B enjoins the Tariff Board to "immediately furnish the Council with a report on the matter, stating clearly and with full motivation in each case, the different opinions and recommendations of Members." The Council shall then take a decision, also by consensus! This is likely to be a challenge if SACU does not develop or evolve a common industrial development policy, which will provide a common platform for determining levels of SACU tariffs or the need for imposition of trade remedies. Serious and insurmountable differences

37 Article 6.1 of Annex B

38 These details on meetings and decisions of the Tariff Board are encoded in Article 9 of Annex B.

39 Article 17 of the 2002 SACU Agreement, however indicates the Agreement may provide for other methods of decisions taking.

between South Africa and its less industrialized partners in the arrangement over the use of protective tariffs, and trade defenses, as an industrial development strategy, evident in the operation of the 1969 SACU Agreement,[40] are likely to persist or re-surface.

Annex C to the 2002 Agreement expounds mainly on conduct of investigations and consideration of the imposition of trade remedies by a National body. Although Article 14(1) of the 2002 Agreement envisages that National Bodies shall be "specialized, independent and dedicated" entities, Annex C does not dwell on how they shall be constituted or composed. Each Member State shall presumably design its body in accordance with its legal, constitutional, administrative or other imperatives. The model, nevertheless, is likely to be the International Trade Administration Commission (ITAC), the institution designated by South Africa as its national body for these purposes.[41]

Among the issues adequately dealt with in Annex C, it is notable, first, that each National Body shall have the standing to appear before the Tariff Board, and to make representations to any other SACU institution, subject only to the authority granted to the Body by the relevant Member State, and the rules of procedure of the relevant SACU institution. Annex C, secondly, requires each National Body, upon receipt of a request for change to the SACU CET or the imposition of trade remedies, to "immediately notify the SACU Secretariat" of the request and its disposition of the matter.[42] The Secretariat shall compile notices so received, and forward each notice to the National Body of each Member State and to the Tariff Board within five (5) working days. Each National Body is also enjoined to discharge its mandate in a manner conforming to standards agreed from time to time.by Member States;[43] to respond positively, within a reasonable period of time, to requests for information from the Secretariat or one or more member States;[44] to engage with any institution of SACU or National Bodies of other Member States in cooperative activities relating investigations, research, publication, education,

40 See the discussion in part 2.2.3 above, on Pooling and Sharing of Revenue under the 1969 Agreement, and referring to Ad Article 14 (3) in the Secret MOU attached to the 1969 Agreement.

41 ITAC is established under the South African International Trade Administration Act, No. 71 of 2002. The long title of the Act acknowledges that the functions of the Commission established thereunder shall include implementation of relevant aspects of the SACU 2002 Agreement in the Republic.

42 Article 3 of Annex C to the 2002 SACU Agreement.

43 Article 4 of Annex C

44 Article 5 of Annex C

staff development and training and technical assistance;[45] and, most notably, when considering the imposition of trade remedies, to ensure that procedures followed and recommendations made to the Tariff Board are consistent with relevant WTO legal instruments.[46]

In December 2007, a report for the 13th SACU Council of Ministers referred to the establishment of the Tariff Board and the Tribunal as the main challenges in the institutional development of the organization. As at the end of June 2016, the Tariff Board and National Bodies are still not in place, and the Annex on the Tribunal is yet to be finalized and presented to the Council for consideration. The passing and implementation of legislation on National Bodies in the BLNS countries is probably the main explanation for the delay in the establishment of the Tariff Board. It would also appear that South Africa, whose national body, ITAC, has filled in the void, and continued to provide the forum for the processing of requests for changes to SACU tariffs and for imposition of trade remedies, is not keen to see a change in the status quo.

3.2.6 The Tribunal

A definitive assessment of the law on this SACU institution must obviously await finalization, approval and publication of the Annex on the Tribunal, a draft of which has apparently been existence for some time. For the purposes of this essay, it will suffice to note that some paragraphs of Article 13 replicate some elements of WTO dispute settlement, and one paragraph in particular incorporates a standard feature of dispute settlement mechanisms in other African regional trade arrangements. First, Article 13 (1) envisages an *ad hoc* Tribunal, tasked with the resolution of disputes regarding interpretation or application of the SACU Agreement, referred to it by the Council. Except where the Council otherwise determines, the Tribunal shall normally comprise of three members, to be selected by the parties from amongst a pool of names, approved by the Council, and kept by the Secretariat.[47] These elements resemble some of the elements of WTO dispute settlement at the panel stage, as is the requirement

45 Article 6 Of Annex C

46 Article 8 of Annex C. The WTO legal Instruments in question are the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994, (Anti-dumping Agreement); the Agreement on Subsidies and Countervailing Measures; and the Agreement on Safeguards, which are all listed in Annex 1A of the Marrakesh Agreement Establishing the WTO, covering Multilateral Agreements on Trade in Goods..

47 Article 13 paragraphs (2) and (5) of the 2002 SACU Agreement.

in Article 13 (6) that SCAU Member States must attempt to settle a dispute amicably before seeking a reference of the matter to the Tribunal.[48] Typical of dispute settlement mechanisms in African RTAs, Article 13 (3) stipulates the Tribunal shall decide by a majority of votes and "its decisions shall be final and binding." This assertion contradicts and confounds the obligation assumed by all WTO Members to resort to WTO dispute settlement for resolution of disputes relating to WTO Agreements.[49] If a dispute before the SACU Tribunal relates to a matter covered by both the SACU Agreement and WTO Agreements, a SACU Member State cannot be prevented from resorting to WTO dispute settlement. A decision on the matter by the Tribunal, therefore, will not necessarily be final and binding.

The finalization of the Annex on the Tribunal apparently has been held up partly by lack of consensus on the issue of its jurisdiction.[50] Should, for example, the Tribunal process, like the WTO process, be a members' only dispute settlement process, or should SACU be bold, depart from the WTO tradition, and grant persons (non –state actors) access to the forum? The roles of the Council, Tariff Board, and National Bodies in the determination of SACU tariffs suggests the need for boldness on this matter.

3.3 Common Policies

Articles 38 to 41 in Part Eight of the 2002 Agreement identify the following as potential areas for the development of common policies: industrial development;[51] agriculture; [52] competition;[53] and what is termed "unfair trade practices"[54]. The Agreement in this respect implicitly suggests that these are priority sectors for the development of common policies. It is not clear what compelled the identification or prioritization of these areas, but it could not have been the imperative of transforming SACU into a 21st Century

48 See generally Articles 3, 6 and * of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in the WTO.

49 Article 23 (1) of the DSU, as read with Article II: 2 of the Marrakesh Agreement Establishing the WTO.

50 See SACU, *2013 Annual Report*, Windhoek, Namibia, Ch. 5, p 28 and *2014 Annual Report*, Windhoek, Namibia, Ch. 5, p 25.

51 Article 38.

52 Article 39.

53 Article 40.

54 Article 41 uses the term "unfair trade practices" probably to refer to practices that distort or inhibit free trade, such as subsidization of products or dumping, and not those that weigh heavily on consumers, such as unfair contract terms.

arrangement. SACU is a trade in goods arrangement. In modern international trade law, the scope of such arrangements now includes trade in services and intellectual property rights. Further, in the typology of these arrangements, SACU should evolve from a CU into a common market and, eventually, into an economic union. A common market entails harmonization or unification of laws, regulations and policies relating to doing business, including, among the issues broached elsewhere in the 2002 Agreement, standards and technical regulations,[55] marketing of agricultural products[56] and sanitary and phyto-sanitary (SPS) measures.[57]

What motivated the identification or prioritization of only four policy action areas in Part Eight of the Agreement is but a minor quibble. The more serious criticism of this part of the Agreement is that what needs to be done in the four areas is not the same and, for some of the areas, the Agreement falls short of committing Member States to the development of common policies. Article 38 clearly commits SACU Member States to the development of a common industrial development policy. Article 41 also clearly calls for the development of "policies and instruments to address unfair trade practices between Member States." This must be done by the Council, acting on the advice of the Commission. SACU, in other words, will have its own legal regime for addressing issues such as subsidies and dumping. Given the challenges encountered in the establishment of the Tariff Board and National Bodies, this is not likely to be soon. Articles 39 and 40, on the other hand, shy away from calling for development of common policies on agriculture and competition. In Article 39 (2), Member States merely "agree to cooperate on agricultural policies in order to ensure the coordinated development of the agricultural sector" within SACU. In Article 40, Member States agree that "there shall be competition policies in each Member State", and that they "shall cooperate with each other with respect to the enforcement of competition laws and regulations." The Agreement thus only envisages comity between national competition regulators, but not the formulation of a

55 Article 28 obliges SACU Member States to apply product standards and technical regulations in accordance with the WTO Agreement on Technical Barriers to Trade, and then states that they should "strive to harmonize" SACU product standards and technical regulations.

56 Article 29. Para 5 of this article states that "wherever possible, agricultural trade formalities and documents shall be simplified and harmonized, and all Member States shall work towards the harmonization of standards".

57 Article 30. This provision does not even call for harmonization of SPS measures. Para 2 specifically reserves the right of each Member State to apply SPS measures in accordance with its national SPS laws and international standards.

SACU competition policy or law.[58]

3.4. Trade and Revenue Dimensions

Revision and improvement or modernization of the trade and revenue elements of SACU is attempted in Parts Five, Six and Seven of the 2002 Agreement. Part Five, entitled Trade liberalization, covers the two core elements that qualify the arrangement as a CU. These, it should be recalled, are free trade among the SACU Member States, and the application of the same duties, laws and regulation to imports from outside SACU area. Part Five also deals with economic development of the BLNS parties, through derogations to the rules on free trade and application of a CET. Parts Six and Seven respectively deal with the pooling of revenue from duties collected within SACU and the subsequent distribution or sharing of the revenue.

3.4.1 Free Movement of Domestic Products

Except for the slight change in the terminology, from "free interchange of goods" to "free movement of domestic products", the 2002 Agreement provides for the existence or continuation of the SACU FTA in exactly the same manner as under the 1969 Agreement. The core rules are that goods grown, produced or manufactured within SACU "shall be free of customs duties or quantitative restrictions" upon importation from one Member State to another; [59] and goods imported from outside SACU shall also be free of duty when imported from one Member State to another, after duty has been paid upon first importation.[60] These core rules are subject to qualifications and derogations, some new and others reproduced from the 1969 Agreement.

Article 18(2), for example, introduces an exception to free movement of domestic products which was not in the 1969 Agreement. It states that "Member States shall have the right to impose restrictions on imports or exports in accordance with national laws and regulations for the protection of [the following]: (a) health of humans, animals or plants; (b) the environment;

58 It is reported on the SACU website http://www.sacu.int/show.php?id=406 that draft annexes on unfair trade practices a cooperating mechanism on competition policy are currently being finalized in terms of Articles 40 and 41.

59 Article 18 (1).

60 Article 19.

(c) treasures of artistic, historic or archeological value; (d) public morals; (e) intellectual property rights; (f) national security; and (g) exhaustible natural resources."

This, clearly, was an attempt to replicate Article XX of the General Agreement on Tariffs and Trade (GATT) 1994, the general exceptions clause for the trade in goods regime of the WTO. This, however, was not a faithful reproduction of the WTO provision. First, Article XX has a longer list of purposes which could be invoked to justify trade restrictions. It has paragraphs (a) to (j). But national security and intellectual property rights are not specified in the article. This may be because national security is comprehended by Article XXI, the security exceptions clause, and protection of intellectual property rights is a primary objective of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Protection of the environment is also subsumed under conservation of exhaustible natural resources in Article XX.

It would further appear that the replication of Article XX of GATT 1994 in the 2002 Agreement did not draw from analyses of the article in GATT/ WTO jurisprudence. Successful invocation of Article XX depends on the strict wording of the paragraph which is relied upon, and on satisfying requirements in the opening paragraph of the article, commonly referred to as its *chapeau*. Many of the paragraphs of Article XX impose a necessity or other requirement for the imposition of trade restrictive measures. It must be shown, for example, that the restrictions imposed were "necessary" for the protection of human, animal or plant life or the protection of public morals; or that they "related" to the conservation of exhaustible natural resources, the importation or exportation of gold or silver, or to the products of prison labour; or that they were "essential" to the acquisition or distribution of products in short supply. There are no such qualifiers in Article 18 (2). There is also no *chapeau* in the provision. The *chapeau* of Article XX imposes a good faith as well as a non-discrimination requirement. Trade restrictions comprehended under the provision should not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade …" Without a chapeau and other qualifiers, therefore, Article 18 (2) of the 2002 Agreement is a severely neutered general exceptions clause, which may justify trade restrictions within SACU that would not otherwise pass muster in modern international trade law.

The inclusion of a weak, attenuated and highly permissive general exceptions clause in the 2002 Agreement was not in itself sufficient, as it should have been. Article 25 repeated the recognition in Article 11 of the 1969 Agreement of the right of each Member State "to prohibit or restrict the importation into or exportation from its area of any goods for economic, social, cultural or other reasons." As under the 1969 Agreement, there is no elaboration in Article 25 of what such economic, social or cultural reasons might be. Article 25(1) merely enlarges Article 11(1) in the 1969 Agreement by specifying that "other reasons", which are not economic, social or cultural, may be agreed upon by the Council. Article 25(2) repeats the proposition in Article 11(2) that free trade rules and requirements in SACU do not suspend or supersede domestic legislation prohibiting or restricting importation or exportation of goods. Article 25(3) again repeats, without elaboration, the suggestion in Article 11 (3) that import or export restrictions or prohibitions under this provision shall not be resorted to for the purpose of protecting domestic industries producing affected goods. Article 25 (4), on the other hand, elaborates on Article 11 (4), which called upon Member states to cooperate and collaborate in the enforcement of each other's import or export prohibitions or restrictions. The elaboration is that "prohibited or restricted goods include second hand goods imported from outside the Common Customs Area." A blanket prohibition or restriction of "second hand imports", for reasons which may not be justified under the paragraphs Article XX or its chapeau, might be inconsistent with multilateral trade rules, especially Article XI of GATT 1994.[61]

Also in need of alignment with multilateral trade rules are Article 26 on protection of infant industries for the BLNS, and Article 29 on marketing of agricultural products. Article 26 substantially reproduces Article 6 of the 1969 Agreement, permitting the BLNS countries to levy additional duties on goods imported from within SACU or from outside SACU for the purpose of nurturing a new industry, defined as one which has been existence for not more than eight years. This must be done in a manner consistent with multilateral trade rules expounded in Article XVII of GATT 1994.

Article 29 recalls but does not entirely repeat Article 12 of the 1969 Agreement. It recalls and repeats that part of Article 12 calling upon SACU Member states to respect and cooperate with the implementation of regulations for the marketing of any agricultural commodity that is in operation in any part

61 This provision calls for "general elimination of quantitative restrictions in international trade".

of the SACU area, and to ensure that such regulations are applied on a non-discriminatory basis to similar commodities produced in any SACU Member State.[62] Article 29(2) also repeats Article 12 (2) of the 1969 Agreement in calling for consultations from time to time on matters affecting production and consumption of agricultural commodities and the improvement and extension of marketing arrangements. But Article 29(3) introduces a new element on marketing of agricultural commodities, which was not reflected in Article 12. It recognizes the right of each Member State to impose regulations for marketing an agricultural commodity within its borders, but provides that "this shall not restrict free trade of agricultural products between Member States," except in a few instances that are indicated. Free trade may be excluded for: (a) emergent agriculture and related agro-industries; or (b) any other purpose as agreed upon between Member States. It is also stated that measures adopted for such purposes would have negotiated sunset conditions. The scope for duty-free and quota-free trade between and among SACU parties under the 2002 Agreement thus now embraces agricultural products, but subject to some loosely framed infant industry protection requirement. One can only hope that SACU Member States invoking Article 29(3) will do so fully cognizant of their obligations under the WTO's Agreement on Agriculture.

3.4.2 Application of the Same Duties, Laws and Regulations to Third Country Imports

The revised or modernized rules for the SACU CET are in Articles 20, 21 and 22 of the 2002 Agreement. The obvious important departure from comparable provisions in the 1969 Agreement is that the BLNS countries are no longer required to apply South African duties, laws and regulations to imports from outside SACU, but all SACU Member States are to apply the same or identical duties and similar laws and regulations, developed or agreed upon at SACU level. Article 20, as already noted, indicates that it shall be the responsibility of the Council, acting on the recommendation of the Tariff Board, to approve customs duties to be applied to goods imported from outside SACU. Article 21, on the other hand, states that Ministers responsible for Finance in all Member States shall meet and agree on rates of specific and *ad valorem* excise duties to be applied on domestic goods, and specific and *ad valorem* customs duties

62 See Article 29(1) of the 2002 Agreement, and compare with Article 12(1) of the 1969 Agreement.

to be applied on imported goods. Since the SACU Council is historically and traditionally composed of Ministers responsible for Finance, it is not clear from these provisions whether this should be a separate meeting, or whether they can also meet as Council in terms of Article 20.

Under the new dispensation of a SACU CET, as opposed to a CET contrived mainly by South Africa, it is not necessary to retain in the 2002 Agreement provisions of the 1969 Agreement which attempted to restrain South Africa from amending its CET in a manner adversely affecting specified BLNS industries or interests.[63] But the main derogation from the rules on the CET, retained in the 2002 Agreement, is that each Member State may grant a full rebate of customs duties in respect of goods imported into is area for purposes such as relief of the distress of persons in cases of famine or natural disasters; a technical assistance agreement; compliance with an obligation under a multilateral agreement; or for such other purpose as may be agreed upon.[64]

3.4.3 Pooling and Sharing of Revenue

The 2002 Agreement revisited mainly the timing of payments into and out of the CRP; the management of the pool; and the calculation of shares to be paid to each Member State from the pool. These, as highlighted above, were among the most contentious elements of pooling and sharing of revenue under the 1969 Agreement.

Article 32 in Part Six of the 2002 Agreement reiterates the obligation of SACU Member States to pay into a CRP "all customs, excise and additional duties collected in the CCA." This must be done within three months of the first quarter of a financial year. Calculation and payment out of the pool of each member's share must also be timely. Article 37 in Part Seven states that payments "shall be made on the first day of each of a financial year to all Member States …" This must be done for all Member States, including that which may be entrusted with management of the pool.

Article 33 (1) in Part Six empowers the Council to appoint a Member State or a SACU institution to manage the CRP, which shall report and account to the Secretariat on all transactions into and out of the pool.[65] Article 33 (4)

63 See, for example, Articles 5, 7 and 9 of the 1969 Agreement

64 See Article 20(3) of the 2002 Agreement, and compare with Article 4(4) of the 1969 Agreement.

65 Article 33 (2)

further provides that South Africa shall manage the pool for a transitional period of two years from the entry into force of the 2002 Agreement. Although over a decade has passed after the entry into force of the Agreement, it would appear that Council has not found another Member State or SACU institutions with the wherewithal to take over this responsibility from SA.[66]

Article 34 in Part Seven, as amplified in Annex A of the Agreement, introduced a new formula for calculating the share of each Member State to be paid out of the CRP. There are three distinct components from which shares of each Member State must be computed, namely: the customs component; the excise component; and the development component. Before each member's share is computed, the budgeted cost of financing the Secretariat, Tariff Board and the Tribunal for the related financial year must be subtracted from the component. The SACU institutional edifice, therefore, is to be financed from the CRP and not from contributions to be directly paid by Member States.

Each member's share of the customs component is derived from the gross amount of customs duties levied and collected on goods imported into the CCA, less the costs required to finance the specified SACU institutions. The share is computed from the value of goods imported from within the CCA in a specific year, as a percentage of total intra – SACU imports in such year. This is paradoxical, considering that customs duties are levied and collected on goods imported from outside the CCA. SACU in this way departs from use of what would be the standard and normal way of calculating such a share, that is, duties collected on imports from outside the CCA to the particular Member State, as a percentage total duties on all imports into the CCA.

The share of the excise component is derived from the gross amount of excise duties levied and collected on goods produced in the CCA, less the costs of financing the specified SACU institutions, and further deducting therefrom the amount to be set aside for the development component. The share is calculated from the value of a member's gross domestic product (GDP) in a specific year, as a percentage total SACU GDP in such year, This too is odd. The logical measure to employ probably should be the amount of excise duties collected in a Member State, as a percentage of total excise duties collected in the CCA.

The development component is derived from the fixed percentage to

66 The Agreement entered into force on 16 July 2014; and there is no indication in Annual or other official SACU Reports that the Common Revenue Pool is being managed other than by South Africa.

be deducted from the excise component after the costs of financing SACU institutions have been taken into account. Annex A provides that the component shall initially be set at 15% of the excise component, but shall be reviewed from time to time and adjusted by agreement of all Member States. The development status of each Member State shall be taken into consideration in the computation of its share. The following shall be the applicable formula:

> "(i) Calculate the relative difference of the member's GDP per capita (A) from that of the mean GDP per capita of all Member States (B), where the relative difference equals (A)/ (B) – 1;
> (ii) Deflate the relative difference by a factor of 10;
> (iii) Subtract from 1
> (iv) Multiply by 20."

Perhaps some of the most contentious aspects of the revenue pooling and sharing arrangements under the 1969 Agreement were the management of the pool solely by the South African Treasury; the calculation of shares for the BLNS, leaving the balance in the pool as South Africa's share; and allocation of shares to the BLNS, far exceeding their contribution to trading and economic activities in SACU, to compensate them for the deleterious effect of being in a CU with South Africa. The 2002 Agreement has successfully addressed only one of these issues – the calculation of the share for each Member State. By default, and not by design, the Pool continues to be managed from South Africa, well beyond the transitional period provided for in the Agreement. Further, by the time of the Centenary celebrations in 2010, South Africa had signaled the need to re-negotiate the formula in the 2002 Agreement, so as to revisit its redistributive effects.[67] These negotiations are on-going, and not likely to be concluded soon.

Other concerns with the formula in the 2002 Agreement are that the calculation of each member's share of the customs component and the excise component could be problematic in international trade law. The calculation of shares of the customs component effectively compels SACU Member States to increase imports from each other. This is not consistent with the requirement in international trade law that acceptable or tolerable RTAs must be trade creating and not trade diverting; they should aspire to liberalize trade among

67 O. Ruppel, "SACU 100: Reflections on the world's oldest customs union", 2, 2, 2010 *Namibia Law Journal*, pp. 121 -134, at p. 124.

the constituent parties, without raising barriers to trade with third countries.[68] The excise component properly qualifies SACU as not just a CU but a customs and excise union.[69] Yet, whereas elimination of customs duties in intra-SACU trade is envisaged in Article 18(1), elimination of excise or export duties is not. Indeed, basing the development component on excise duties has the unanticipated consequence of encouraging SACU Member States to levy more excise or export duties, to grow the development component.[70] Such duties are not popular in international trade law. They discourage exports and raise domestic consumer costs.[71]

4. CONSIDERATION OF THE 2002 AGREEMENT IN THE WTO

The 1969 SACU Agreement was concluded at a time when such matters were regulated under the General Agreement on Tariffs and Trade (GATT) 1947. But there is no record that the Agreement was notified and under GATT 1947.[72] South Africa, the only full or proper contracting party[73] to the GATT among the SACU members, should have notified the arrangement, but it would appear that this was overlooked. On the other hand, SA and all the other SACU Members were among the original members of the WTO,[74] hence the pronouncements

68 Article XXIV: 4 of GATT 1994, and J. Viner, *The Customs Union Issue*, Carnigie Endowment for International Peace, New York, 1950, Ch. 4, reprinted in J. Bhagwati, P. Khrishna and A. Panagariya (eds), *Trading Blocs, Alternative Approaches to Analyzing Preferential Trade Agreements*, MIT Press, Cambridge, Massachusetts, (1999), Ch. 3, pp. 105 - 118.

69 G. Erasmus, "Namibia and the Southern African Customs Union," p. 212, accessed at www.kas.de/upload publikationen/ 2014/ ... on 1 July 2015.

70 See F. Flatters and M. Stern, *SACU Revenue Sharing: Issues and Options*, USAID and RCSA Trade Policy Brief, Gaborone, August 2006.

71 The main excisable goods in SACU are apparently alcoholic beverages and tobacco. If so, the excise component and development are not likely grow exponentially.

72 The 1969 SACU Agreement does not feature on the official list of RTAs notified to the GATT from 1947 to 1994. See WTO, *Guide to GATT Law and Practice, Analytical Index, volume 2*, Geneva, (1995), Table V (B), pp. 858 -872.

73 The BLS countries applied the GATT de facto upon attainment of independence but were in each case admitted to GATT membership several years after independence. Botswana attained independence on 30 September 1966 and was admitted as a contracting party to the GATT on 28 August 1987; Lesotho attained independence on 4 October 1966, and was admitted to the GATT on 8 January 1988; and Swaziland attained independence on 6 August 1968, and was admitted to the GATT on 8 February 1993. See WTO, *Guide to GATT Law and Practice, Analytical Index, volume 2*, Geneva, (1995), Appendix Table VI (C), Succession to Contracting Party Status Under Article XXVI: 5 (c), pp. 1142-1144.

74 Article XI: 1 of the Marrakesh Agreement Establishing the WTO provides that contracting parties to GATT 1947 accepting the Marrakesh Agreement and submitting their Schedules of Concessions on Trade in Goods and Trade in Services within specified time frames shall become original Members of the WTO.

in the preamble of the 2002 Agreement that account had been taken the results of the Uruguay Round of Multilateral Trade Negotiations in the revision of the Agreement, and of the need to transform SACU into a 21st century customs union aligned with "current developments in international trade relations."

The 2002 Agreement was notified to the WTO under Article XXIV of GATT 1994 on 25 June 2007 and considered under the WTO's Transparency Mechanism between October 2008 and April 2009.[75] It is the second African RTA to be so notified and considered.[76] WTO rules permit the formation of RTAs between subsets of its Members by way of derogation from the general most favoured nation (MFN) treatment requirement, encoded in Article I of GATT 1994. This is a requirement for non-discrimination of WTO members in tariff treatment and related trade matters. Trade preferences for RTA partners inherently violate this requirement. But the formation of RTAs is permitted because of their potential for furthering multilateral trade liberalization.

In addition to the procedural or transparency (notification and interrogation) requirements, Article XXIV of GATT 1994 sets three substantive requirements to be attained by qualifying RTAs taking the form of a CU. First, there must be elimination of duties and other restrictive regulations of commerce with respect to substantially all trade in products originating from parties to the arrangement.[77] There must also be application of substantially the same duties and other regulations of commerce by the parties to products originating from countries outside the arrangement.[78] The third substantive requirement is that duties and other regulations of commerce imposed at the institution of the CU, on trade with non-members, should not, on the whole, be higher or more restrictive than their general incidence in the constituent territories prior to the inception of the CU.[79] In short, to qualify as an acceptable arrangement under WTO law, a CU must provide for liberalization of substantially all trade among the participants; must provide for adoption of CET; and must not lead to the

75 WTO, Factual Presentation of SACU (Goods), Report by the Secretariat, document WT/REG231/2/Rev.1 24 April 2009, para 11, p. 9, and related documents WT/REG231/3 dated 12 December 2008, and WT/REG231/3/Add.1 dated 17 March 2009.

76 The first African RTA to be notified under Article XXIV of GATT 1994 and considered under the Transparency Mechanism is the FTA established under the SADC Protocol on Trade. The preference hitherto has been to notify African RTAs under the so called Enabling Clause. This is the GATT Ministerial Decision on *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries of 28 November 1979*, (L/4903).

77 Article XXIV: 8 (a) (i) of GATT 1994.

78 Article XXIV: 8 (a) (ii).

79 Article XXIV: 5 (a).

raising barriers to trade with third parties. RTAs are an acceptable derogation from the MFN requirement if they liberalize trade among the participants, but without raising barriers to trade with non-participants.

Article XXIV: 7 of GATT 1994 initially envisaged that each notified RTA would be assessed by relevant GATT/ WTO bodies for consistency with the requirements in paragraphs 4, 5 and 8 of the Article, and, if need be, parties forming the arrangement called upon to revise their plans.[80] In practice, however, most notified arrangements were never positively or negatively assessed by the relevant GATT/ WTO bodies entrusted with this matter.[81] Ambiguities in the core rules to be applied were such that consensus could hardly be reached on whether or not a notified arrangement passed muster. In consequence, the Doha Ministerial Conference authorized "negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements", which were to "take into account the developmental aspects" of such arrangements.[82]

As with almost every item for negotiations on the Doha Ministerial Agenda, negotiations on clarification and improvement of the rules and disciplines on RTAs have rumbled on inconclusively for years, except for agreement and adoption by the WTO General Council in December 1976 of the so called Transparency Mechanism for RTAs.[83] The mechanism clarifies and improves procedural rules and disciplines on notification of RTAs. It more specifically provides for "early notification"; it clarifies the type of information and trade data that should be provided; it specifies time lines for consideration of each notified RTA; and provides for preparation by the WTO Secretariat of a factual presentation report, intended to assist WTO Members in the consideration of each notified RTA. Factual presentations may not contain any value judgements, and may not be used as a basis for dispute settlement. In the

80 Under GATT 1947 the practice was to establish a working party to examine a notified RTA and to report as appropriate to the GATT Council. In February 1996 the WTO established the Committee on Regional Trade Agreements (CRTA), to be responsible not only for assessment of notified RTAs, but also for monitoring and advising on the systemic implication of RTAs for the multilateral trading system. See WTO, Committee on Regional Trade Agreements, Decision of 6 February 1996, WT/L/127, 8 February 1996.

81 Out of hundreds of RTAs notified to the GATT/ WTO, it is reported that only one, the Czech Republic – Slovak Republic Customs Union, was positively assessed as conforming with GATT/ WTO rules in Article XXIV. See: WTO, , Synopsis of "Systemic" Issues Related to Regional Trade Agreements, CRTA, note by the Secretariat, WT/REG/W/37, 2 March 2000, P. 10, Para 21.

82 WTO, The Doha Ministerial Declaration, WT/MIN(01)/DEC1, 14 November 2001, Para 29.

83 WTO, Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006, WT/L/671, 18 December 2006.

consideration of over 100 RTAs that have so far been notified and processed under the arrangement, WTO Members too have also refrained from passing any value judgment on the arrangement. Factual Presentations have merely been taken as providing better and more organized information about the arrangement.

The Transparency Mechanism was all along being applied provisionally, but in December 2015 WTO Members agreed to work towards making it a permanent process, while continuing to discuss the systemic implications of the proliferation of RTAs for the multilateral; trading system.[84] This suggests that WTO Members have now come to an understanding that clarification of rules for RTAs in the Doha Negotiations may not be achieved soon, and it is no longer worthwhile to attempt to assess notified RTAs for consistency with rules and disciplines as yet unclarified. Improved notification processes under the Mechanism, like reports produced under the Trade Policy Review Mechanism (TPRM), are merely for compilation and noting of the information they yield.

Thus, as was the case with the earlier notification and processing in the WTO of the SADC Trade Protocol, the notification of the 2002 SACU Agreement under Article XXIV of GATT 1994, and its processing under the Transparency Mechanism were not excruciating experiences. As an old, very old arrangement, SACU probably long satisfied the substantive requirements in Article XXIV of GATT 1994. There is liberalization of substantially all trade among the participants; there is application of substantially the same duties, laws and regulations to imports from outside the CCA; and the revision of the 1969 Agreement could not have resulted in the raising of duties and other barriers to trade.

The Notification and consideration of the 2002 Agreement in the WTO essentially provided an opportunity to indicate aspects and elements of SACU that might require improvement. The report prepared by the WTO Secretariat for the factual presentation, for example, noted that there are no provisions in the 2002 Agreement on rules of origin; on elimination of export duties and charges and quantitative restrictions; on imposition of anti-dumping and countervailing measures on intra-SACU trade; and on subsidies and state aid. These are issues that ought to be addressed if SACU is to be truly transformed into a 21st Century CU, aligned with modern trends in international trade relations.

The questions raised by some Members in the deliberations in the

84 WTO, Nairobi Ministerial Declaration, Document WT/MIN (15)/DEC, 21 December 2015, para 28, p. 4

CRTA were also pointed indicators of some troublesome elements, some of which require fixing.[85] Questions and clarifications were, for example, sought on whether SACU has plans to advance to a common market; on provisions in the Agreement permitting the imposition of restrictions in intra SACU trade, and goods likely to be affected; on the current situation regarding management and operation of the CRP; on whether Article 26, on infant industry protection, is consistent with Article XXIV: 5 (a) of GATT 1994, and whether protection for a period of eight years qualifies as imposition of a temporary measure; on whether there has ever been any State showing intention to accede to the SACU Agreement, or whether any State has ever been invited to accede; on a common system of rules of origin for SACU; and on alignment of Article 30 with the WTO SPS Agreement.

Some of the clarifications and responses provided were not entirely satisfactory, but given the new, benign approach to the assessment RTAs in the WTO, Members were not inclined to press further. For example, on qualifications or derogations to duty free and quota free trade within SACU, there was no indication of any goods that are affected. On infant industry protection, SACU brazenly responded that protection for a period of 8 years qualifies as a "temporary" measure and, in the same breath, admitted the eight – year period has been extended by Council for UHT milk and pasta production industries in Namibia. On Article 30, the SACU response also brazenly suggested that reference in the preamble of the 2002 Agreement to the outcome of the Uruguay Round of multilateral trade negotiations was sufficient incorporation into the Agreement of Members' obligations under the WTO SPS Agreement.

5. CONCLUDING OBSERVATIONS

The 2002 Agreement proposed to transform SACU into a 21st Century CU, aligned with modern trends in international trade relations, primarily by providing for common institutions and common policies. It did not propose to revisit free interchange of goods within SACU or the SACU CET, except to require that it shall now be a SACU and not a South African CET. As on every occasion the SACU Agreement was renegotiated, the revenue sharing formula was substantially re-written, ostensibly to facilitate equitable revenue sharing.

85 See WTO, CRTA, Southern African Customs Union (Goods), Questions and Replies, Documents WT/REG231/3 12 December 2008, and WT/REG231/3/Add.1, 17 March 2009.

This review and assessment suggests that the common, supra-national institutions that should propel SACU into the 21st Century are the Secretariat, the Tariff Board, Tribunal and whatever entity is to be responsible for the management of the CRP. The Tariff Board and the Tribunal are not yet in place, over a decade after the entry into force of the Agreement. SA, by default rather than by design, is still managing the CRP as well as aspects of the CET, through ITAC. The Secretariat is not sufficiently empowered or capacitated to take the lead on issues such as trade negotiations with third parties or the formulation of common policies. Further, as of now, no single common policy has been developed. The much talked about industrial development policy is still in the pipeline, and there is no likelihood that policies will be developed in the near future on agriculture or on other sectors and issues that are required for the transformation of SACU into a modern CU. The conclusion is inescapable that that 2002 Agreement has failed to deliver on common institutions and common policies.

This review and assessment also suggest that although aspects of SACU relating to liberalization of substantially all trade among the Member States and application of a CET are likely to be found satisfactory in international trade law, there are features and elements of the Agreement on these issues that are likely to be frowned upon. These include protection of new industries in the BLNS countries; restriction or prohibition of trade in agricultural products; restriction or prohibition of trade for economic, cultural, social and other reasons; and the poor cutting and pasting into the Agreement of Article XX of GATT 1994, the general exceptions clause in the WTO. On some of these "trade elements" the conclusion is also inescapable that instead of modernizing the arrangement, the 2002 Agreement reached back into SACU's unedifying past.

Whether the re-writing of the revenue sharing formula in the 2002 Agreement has succeeded in facilitating equitable sharing of revenue is an open question. One strand of opinion, held by some on the side of SA, is that SA still is not entitled to as much as it deserves, given the contribution it makes to the CRP. On the side of the BLNS, the strongly held view is that they have never been adequately compensated, nor will they ever be, for the various ills of being in a CU with SA for such a long, long time. This review sidesteps this debate, and focusses on elements of the revenue sharing formula also likely to be frowned upon in international trade relations. It has been noted that the method given for calculating shares of the customs component could have the

effect of encouraging SACU parties to import more from each other and less from countries outside the arrangement. This is at odds with Article XXIV: 4 of GATT 1994. It has also been noted that the computation of both the excise and development components has the effect of encouraging levying and collection of excise duties, which are not popular in international trade law. Indeed, liberalization of trade at regional and multilateral levels must involve reduction and elimination of both customs and excise duties. The conclusion, therefore, is also inescapable that the 2002 Agreement has serious flaws in provisions describing some of the core elements of SACU as a CU or RTA. The revision of the Agreement, reportedly underway, should go beyond revenue sharing and reconsider the entire legal edifice.