

# Namibia and the Southern African Customs Union

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## Introduction

When the Republic of Namibia was born into sovereign statehood in 1990, it joined the Southern African Customs Union (SACU) as its fifth member state.<sup>1</sup> It had, however, already been a *de facto* part of that arrangement for a considerable period of time. As the former German colony of South West Africa it became an integral part of the administration of the Union of South Africa after the First World War in 1919, when the League of Nations was formed. The colonies of Germany and the Ottoman Empire were then put under the League's Mandate System. Namibia was a Class C mandate, bringing it under the internal administration of South Africa. After the Second World War, when the United Nations was established, the Trusteeship Council replaced the Mandate System and became the international supervisory institution for these territories. South Africa refused to accept this new arrangement and a protracted struggle and several international court cases on the status of Namibia and the nature of South Africa's obligations followed. The final outcome was the gaining of independence by Namibia in 1990.

SACU has seen its own share of change since 1990. This process coincided with the demise of apartheid rule in South Africa and the arrival of democracy in 1994. It was in fact during the negotiations for the Namibian Constitution, in February 1990, that the dramatic announcement was made in the South African Parliament that the South African liberation movements would be unbanned and their leaders released from Robben Island.

This chapter provides an overview of SACU as a specific kind of regional trade organisation and will clarify certain aspects of the present Agreement. SACU has, from its inception, been a *sui generis* arrangement with its own historical context, while functioning under specific multilateral trade rules.<sup>2</sup> This general background is discussed and the difficulties which subsequently arose around aspects such as revenue-sharing and the adoption of common policies are explained.

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1 The other members of SACU are Botswana, Lesotho, South Africa and Swaziland.

2 The General Agreement on Tariffs and Trade (GATT) came into existence in 1947. It prohibits discriminatory trade practices, but does allow for the formation of free trade areas and customs unions – provided certain requirements (e.g. the liberalisation of substantially all trade among the member states and adherence to a common external tariff, or CET) are met.

South Africa is the dominant economy in SACU. Its interests and policy needs are of a specific kind and order; they tend to dictate what policies are adopted via SACU structures. This is reflected in the practices of SACU, which has not become a “democratic” organisation, as the 2002 Agreement promises. The adoption of common policies has remained an elusive goal. The smaller member states are, as a consequence, confronted with particular trade and foreign policy challenges and constraints. At the same time, membership of SACU brings important benefits, the most obvious of which is the revenue from the Common Revenue Pool, collected as part of the common external tariff (CET). The bulk of these imports is generated by South African imports.<sup>3</sup> It should also be noted that SACU is both a customs as well as an excise union.<sup>4</sup>

In addition, SACU members – with the exception of Botswana – belong to a common monetary arrangement which does not form part of SACU. The Common Monetary Area was enacted in July 1986; it originated from the Rand Monetary Area. The latter was established in 1974 and the signatories besides South Africa were Lesotho and Swaziland. The Common Monetary Area was replaced by the present Multilateral Monetary Area as of February 1992, when Namibia formally joined the arrangement.

## Basic features of customs unions

A customs union provides for preferential trade between its members. This constitutes discrimination with regard to goods originating in third states outside the arrangement, but also enjoying, on the multilateral level, the protection of the most-favoured-nation principle, which forbids discrimination. Nevertheless, customs unions (and free trade areas<sup>5</sup>) will be allowed under the applicable rules of the General Agreement on Tariffs and Trade (GATT)<sup>6</sup> if substantially all trade among the members of the union is liberalised, and no new restrictions on trade with other World Trade Organization (WTO) members are introduced. A customs union is also obliged to have a CET and a single customs territory.

The administration of the CET requires specific joint policies and measures by the member states. They are required to act jointly in trade negotiations with third parties and they are not free to unilaterally impose tariff changes, safeguard measures or trade

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3 See also the discussion below on revenue-sharing in SACU.

4 The excise component of the revenue-sharing formula is explained in Article 34(4) of the SACU Agreement. Each member state’s share of the excise component is calculated from the value of its gross domestic product. Unless otherwise indicated, all references to provisions in the SACU Agreement refer to the 2002 SACU Agreement.

5 In a free trade area, the level of integration is lower and there is no CET. Members retain a larger degree of policy freedom to determine their trade policy and tariffs with respect to third states.

6 As embodied in Article XXIV, GATT.

remedies in order to protect their domestic industries. Their policy space for independent action in these areas is, as a consequence, curtailed.

Similar considerations apply with regard to the single customs territory aspect of a customs union. Trade between the members has to be tariff-free with respect to substantially all trade between them. Thus, there are no customs controls at the internal borders with respect to such goods. This does not mean that internal border controls will disappear: in SACU, different national fiscal regimes are maintained, which requires certain types of border controls. The same applies to sanitary and phytosanitary matters, immigration, health and standards. Nevertheless, the members of a customs union are obliged to eliminate substantially all other restrictive regulations of commerce between them.<sup>7</sup>

All the regional economic communities in southern Africa strive to become customs unions. They have adopted a ‘linear’ approach with regard to their deeper regional integration plans, moving from free trade areas to customs unions, common markets and, eventually, monetary unions at particular dates which are normally announced in advance.<sup>8</sup> This has proved to be an arduous road. Customs unions and common markets are sophisticated arrangements whose members have to be prepared to sacrifice a large degree of autonomy over trade and economic policies – as the experience in the European Union has demonstrated. Supranational institutions and firm legal rules are required to ensure coherence and to prevent fragmentation. African states have not succeeded in implementing their ambitious plans on deeper integration.<sup>9</sup>

SACU is in a different category and is a functional customs union. The reason has to do with its long and special history – as the next section will show. At present, SACU members do not entertain formal plans to move to a higher level of integration, although they are committed to the adoption of certain common policies.

## SACU’s historical development and the 1910 and 1969 Agreements

The history of SACU is at the same time also the storyline of the special economic relationship between its members. SACU has been around since 1910 – it is in fact the world’s oldest functioning customs union – and has been the formal embodiment of economic interdependence in the region. The importance for Botswana, Lesotho, Namibia and Swaziland (the BLNS countries) of revenue from SACU’s revenue-sharing arrangement, the strength of the South African economy, and the dominant position of South Africa in economic policy matters constitute essential features of the relationship between the member states. These factors impact directly on the foreign policy space of the smaller countries in particular.

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7 GATT Article XXIV (8).

8 McCarthy (2011).

9 For a further discussion, see WTO (2011).

At the time of writing this chapter, important changes are under discussion in SACU. These include possible changes to the revenue-sharing formula, formalising the Summit of Heads of State and Government, and the conclusion of new trade agreements with third parties. These developments will be mentioned and their political consequences, as well as the foreign policy implications for Namibia, will be discussed.

SACU dates back to the formation of the Union of South Africa in 1910. Colin McCarthy has written extensively about this history and the technical aspects of SACU.<sup>10</sup> This part of the present chapter borrows directly from his writings. He has emphasised the colonial foundations of the original arrangement, and has explained the technical and political difficulties under the 1969 SACU Agreement. These difficulties resulted mainly from the dominance of the South African economy and the manner in which Pretoria used SACU's CET as an instrument to promote its own industrial and trade policies.

The 1910 SACU Agreement provided the first formal framework for the operation of this customs union, which then included the former British Protectorates of Basutoland, Bechuanaland and Swaziland. When they became independent in the 1960s, a reassessment of the SACU Agreement was required. This resulted in the adoption of the 1969 SACU Agreement, concluded on 11 December 1969 and becoming operational on 1 March 1970. Revenue-sharing was, from the outset, the principal issue. Botswana, Lesotho and Swaziland were concerned that they were not getting a fair share of customs union revenue, basing their views on the argument that the fixed percentage shares in revenue which came their way under the 1910 Agreement did not compensate for the effects of trade diversion that arose from the protective tariff designed to serve South African industrial interests.

The 1969 Agreement provided for free trade among the members, while administering a CET for trade with third parties. However, it was envisaged that free trade within the common customs territory would, in terms of the preamble to this Agreement, be managed in a way that was to –<sup>11</sup>

... ensure the continued economic development of the customs area as a whole, and to ensure in particular that these arrangements encourage the development of the less advanced members of the customs union and the diversification of their economies, and afford to all parties equitable benefits arising from trade among themselves and with other countries.

Asymmetry was, in McCarthy's words,<sup>12</sup> built into the arrangement from the beginning, with industrial development being concentrated in the high-growth metropolitan areas of South Africa as a result of economic agglomeration.

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10 McCarthy (2006).

11 See Republic of South Africa (1969:9).

12 McCarthy (2006:11).

SACU experienced many practical difficulties under the 1969 Agreement, such as operational problems with regard to time lags in the distribution of customs union revenue, and inadequate customs procedures and control measures. The management of the technical aspects of the customs union gave rise to further friction. South Africa managed the CET primarily in the interest of its own economy. Although Article 5(1) of the 1969 Agreement specified that South Africa had to give the other contracting parties “adequate opportunity for consultations before imposing, amending or abrogating any customs duty”, consent of the other parties was in fact not sought. The actual practice showed that implementation was not dependent on concurrence from the BLNS countries. Article 5(2) dispensed with the need to consult where interim measures were implemented to protect an industry, pending a full investigation of such measures by the South African authorities. South Africa could, in fact, change tariff levels unilaterally.

This state of affairs went to the heart of the criticism that SACU was undemocratic. McCarthy, quoting Schiff and Winters, notes that –<sup>13</sup>

[i]n the most hegemonic of customs unions, SACU, South Africa simply decided trade policy and compensated the smaller countries for the costs it imposed on them.

Since a customs union is obliged to have a CET, it follows that it also needs to have a trade policy that is common in all material aspects. This feature ironically enabled South Africa to adopt SACU tariff policies to be in line with its own national development objectives.

There were efforts to address these obvious inequalities. Certain practical arrangements and a special revenue-sharing formula – which guaranteed the BLNS states a minimum revenue rate of 17% on import values and excisable consumption and production – were adopted. The adequacy of the compensation built into the revenue-distribution formula and the effectiveness of the special provisions to encourage BLNS infant industries were questioned, but SACU did provide these countries with a reliable source of revenue.

The 1969 Agreement was premised on an understanding that the BLNS countries would sacrifice important elements of their control over fiscal and trade policy. South Africa managed these affairs as if they were all part of the South African economy. In exchange, and as compensation for the polarisation effect inherent in being part of a single customs territory dominated by a much larger member, BLNS countries received the payments provided for in the revenue-distribution formula. This system of customs union management had evolved historically and was embedded in the colonial experience of the region.

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13 Schiff & Winters (2003:85, cited in McCarthy 2006:8).

This was not a durable arrangement. South Africa's domestic political order of apartheid meant additional tensions and international isolation. All of this came to an end in 1994 with the election of a new government under a democratic dispensation. The newly elected African National Congress Government soon announced its preparedness to renegotiate the SACU Agreement.

## The 2002 SACU Agreement

The adoption of the 2002 SACU Agreement was a response to the organisation's historical legacy and regional political and economic changes during the 1990s. Namibia became independent in 1990 and joined SACU as a full member. The announcement, in the same year, that apartheid would be abolished, heralded the end of South Africa's international isolation. The outcome of GATT's Uruguay Round of multilateral trade negotiations took effect in 1995, and on 1 January that year, the WTO came into existence. The WTO constituted a rules-based international trade regime, to which all the SACU states belong.

Certain changes and some degree of innovation within SACU followed, but essential features of the previous regime such as the strong focus on tariff revenue-sharing were retained. The Common Revenue Pool and the transfer of revenue to the BLNS states remained the essential *raison d'être* of SACU. The new Agreement still covers only trade in goods: it does not mention trade in services. SACU did not evolve into a true regional integration mechanism or an instrument for promoting trade beyond the exchange of goods. A number of new building blocks and institutions<sup>14</sup> are mentioned in the 2002 Agreement and, when they become operational, there might be a new impetus towards deeper integration. This has not yet happened.

Nonetheless, the new SACU Agreement does alter the organisation's structure and some of its operational aspects. The 2002 Agreement now provides for an international organisation with legal personality,<sup>15</sup> specific institutions, rules on decision-making, the development of common policies, and the possibility of formal dispute resolution.<sup>16</sup> The 1969 Agreement noted that differences between the members had to be resolved through consultation. There was no provision for a regional court or tribunal.

The 1969 Agreement listed the free interchange of goods, the application of the same tariffs on goods imported from outside the common customs area, the amendment of customs duties, excise, the right to impose import and export prohibitions and

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14 The SACU Tariff Board, the ad hoc Tribunal and the Common Negotiating Mechanism are the most important ones.

15 2002 SACU Agreement, Article 4.

16 The settlement of disputes will require an operational Tribunal, but this has not yet been instituted.

restrictions, the marketing of agricultural products, and the “pool of customs, excise, sales and additional duties”.<sup>17</sup>

The new Agreement, on the other hand, purports to create a typical international organisation, while maintaining – and, in some instances, repeating – provisions in the 1969 Agreement.<sup>18</sup> The Preamble and Article 2 are both new in the sense that they spell out the inadequacies of the former arrangement, especially measured against the need to integrate the member states’ economies into the global economy and in dealing with the different levels of the economic development of the member states. The importance of tariffs as instruments for the implementation of industrial development is emphasised,<sup>19</sup> as is the need now for a –<sup>20</sup>

... dispute settlement mechanism [to] provide a mutually acceptable solution to problems that may rise [sic] between Member States.

Article 2 of the new Agreement deals with the Union’s objectives and emphasises the need for a technically sound customs union and to integrate the national economies into the global economy through enhanced trade and investment. Equitable sharing from the Common Revenue Pool is stressed, and there is a call to develop common policies and strategies. The same provision emphasises “conditions of fair competition in the Common Customs Area”, and the need to –

... create effective, transparent and democratic institutions which will ensure equitable trade benefits to Member States.

This particular aspect is significant: the members wanted to establish a dynamic and properly empowered SACU and to move away from the dominance of South Africa’s national institutions which characterised the functioning of SACU under the 1969 Agreement. They have not really succeeded in this particular endeavour, although they have benefitted substantially from the sharing of customs revenue. As long as the SACU Tariff Board and Tribunal are not established, South Africa will retain control over the administration of SACU’s CET and compliance with obligations will to be tested by an independent judicial forum.

The second part of the 2002 Agreement formalises SACU’s status as one based in the legal personality of the organisation. It provides for a permanent Secretariat to deal with the day-to-day administration of the whole organisation, as well as permanent headquarters in Windhoek, Namibia. Article 7 provides for the establishment of a Council of Ministers,

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17 1969 SACU Agreement, Article 13.

18 The right of members to impose import and export restrictions is, for example, retained in Article 25 of the 2002 Agreement.

19 Preamble, SACU Agreement, para. 4.

20 (ibid.:final para.).

a Customs Union Commission, the Secretariat, a Tariff Board, Technical Liaison Committees, and an ad hoc Tribunal. The member states are represented by the Council of Ministers – still SACU's highest decision-making body – and the Commission, both on ministerial and senior official level. The Technical Liaison Committees will bring together officials from the various member states to deal with agriculture, customs, trade and industry, and transport. Exactly how this will happen will depend on the common policies to be adopted under Part Eight, the interaction with third parties, and agreements concluded with them.

An important development occurred with the decision taken at the SACU centenary celebrations of 2010 to establish a Summit of Heads of State and Government as a new and permanent SACU institution. This will require amendments to the SACU Agreement and a demarcation of powers so that the roles of the Council and Summit are clear. The present indications are that the Summit will provide political guidance to the organisation. Whether this will lead to a new kind of Summit diplomacy in SACU is to be awaited. If it does happen, the BLNS states may start to enjoy fresh scope for foreign and regional policy initiatives. The real test will come when individual member governments have to decide whether they will put vital issues on the Summit agenda and whether Summit decisions will be binding. Will national officials be under an obligation to implement them? Who will monitor implementation and compliance?

SACU has also adopted its own Vision and Mission, which provide as follows:<sup>21</sup>

The Governments of the Republic of Botswana, Kingdom of Lesotho, Republic of Namibia, Republic of South Africa and Kingdom of Swaziland

Acknowledging the positive role which the Southern African Customs Union (SACU) has played in the past one hundred years and the important role it can play in promoting regional integration and the economic development of all its Member States;

Mindful of the different levels of economic development of the SACU Member States and the need for their integration into the regional and global economy;

Recognising the challenges presented by developments at the regional and global level and the need to position SACU to respond to these;

Convinced that SACU can be a vehicle for deeper development integration both within itself and within the Southern African region;

Hereby commit to the following:

**Vision**

An economic community with equitable and sustainable development, dedicated to the welfare of its people for a common future.

**Mission**

To serve as an engine for regional integration and development, industrial and economic diversification, the expansion of intra-regional trade and investment, and global competitiveness.

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21 Available at <http://www.sacu.int/about.php?id=395>; last accessed 12 November 2013.



To build economic policy coherence, harmonization and convergence to meet the development needs of the region.

To promote sustainable economic growth and development for employment creation and poverty reduction.

To serve as a building block of an ever closer community among the peoples of Southern Africa.

To develop common policies and strategies for areas such as trade facilitation; effective customs controls; and competition.

To develop effective, transparent and democratic institutions and processes.

SACU's new institutional framework provides for a Tariff Board and ad hoc Tribunal. They are in fact 'established' since they are expressly provided for in the text of the Agreement. However, they cannot become operational unless specific decisions are taken and additional legal instruments are adopted. This has not happened and present indications are that SACU may in fact never have these two institutions. If established and properly empowered, they could move SACU to a new level of rules-based trade and governance. The organisation will then enjoy effective powers and will decide over customs matters, trade remedies, rebates, refunds, and duty drawbacks. The ad hoc Tribunal will be an independent court and will exercise jurisdiction over "any dispute regarding the interpretation or application of this Agreement".<sup>22</sup> This will allow for remedies when legal obligations are not complied with, a rather essential feature in a trade arrangement based on predictability and certainty of rights – including the rights of private parties, traders and investors. SACU lacks this important dimension.

Part Eight of the Agreement provides for the development of common policies over industrial development, agriculture, competition, and unfair trade practices. A regional organisation which has the aim of integrating the national economies of its members into the global economy cannot afford fragmented national approaches in these important areas. The use of tariffs with respect to industrial development, trade remedies and related customs matters should, for example, be coordinated in a real and effective manner. The SACU Tariff Board will eventually play an important role in this regard – if it is established. SACU constitutes a single market which requires regulation in terms of the same standards and policies in several commercial areas and in respect of trade-related policies.

Part Eight of the Agreement lists industrial development, agriculture, competition, and unfair trade practices as areas of future cooperation, but does not provide for any essential guidelines. The members will have to take deliberate steps to activate a process for developing and adopting the common policies listed in Part Eight.

These challenges remain on the SACU agenda. Part of the reason why no new policies have been adopted has to do with the vague language in the Agreement. The four areas – industrial development, agriculture, competition, and unfair trade practices – aim at

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22 SACU Agreement, Article 13(1).

outcomes which require specific negotiations and outcomes for each area. In the case of industrial policy “member states agree to develop common policies and strategies with respect to industrial development”,<sup>23</sup> but nothing is said about the content or enforcement of such common policies. In the case of agriculture, the Agreement requires only that member states must “cooperate on agricultural policies in order to ensure the coordinated development of the agricultural sector within the common customs area”.<sup>24</sup> The five member states often follow different domestic approaches with regard to agriculture. In the case of South Africa, agriculture is a deregulated sector – while the opposite is true in the other member states.<sup>25</sup> With respect to competition policy, the members “shall cooperate with each other with respect to the enforcement of competition laws and regulations”.<sup>26</sup> This seems to suggest that each and every country will have its own competition laws and institutions: national authorities will only cooperate with respect to the enforcement of their domestic competition-related decisions. This will not be sufficient to deal with the extraterritorial challenges of uncompetitive commercial practices.

On unfair trade practices, Article 41 provides that the Council –

... shall, on the advice of the Commission, develop policies and instruments to address unfair trade practices between member states. These policies shall be annexed to this Agreement.

This provision differs from the other three in Part Eight, and goes further in terms of enforceability, implementation and adoption. The ultimate SACU policy on unfair trade practices will have to be adopted by the Council, after which it will become an annex to the SACU Agreement. Annexes to the Agreement are binding and, in terms of Article 42, an integral part of the Agreement. The adoption of annexes will presumably expand the legal obligations of members and may provide for additional mechanisms.

It is not entirely clear how competition policy, unfair trade practices and trade remedies will be coordinated. SACU’s Competition Policy will be a loose arrangement about national powers and national laws, while in the case of unfair practices there should ideally be a single legal instrument – in the form of an annex. The Tariff Board should have jurisdiction over trade remedies, while the national bodies will initially vet applications for trade remedies, tariff changes, duty drawbacks or rebates.<sup>27</sup>

The operations of the Tariff Board will require a new institutional framework consisting of a detailed arrangement: national bodies in the member states, the Tariff Board as a SACU institution, and the SACU Council. Up till now, South Africa’s International Trade Administration Commission has been responsible for all decisions with respect

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23 SACU Agreement, Article 38(2).

24 (ibid.:Article 39(2)).

25 See McCarthy (2006:10).

26 SACU Agreement, Article 40(2).

27 SACU Agreement, Article 11.

to trade remedies, rebates, refunds or duty drawbacks. It functions in terms of the South African Trade Administration Act,<sup>28</sup> which provides for the necessary powers and procedures. The Act also incorporates the respective WTO disciplines on trade remedies as part of South Africa's domestic legislation, and implements decisions with respect to the common customs territory.

The BLNS states do not decide over or implement trade remedies. They are nevertheless duty-bound to give effect to International Trade Administration Commission decisions and to protect the existence of the CET. Article 22 of the Agreement provides that "member states shall apply similar legislation with regard to customs and excise duties". Article 23 stipulates that member states –

... shall take appropriate measures, including arrangements regarding customs cooperation, to ensure that provisions of this Agreement are effectively and harmoniously applied.

These outstanding building blocks in the SACU architecture have a number of implications. One is that the original plan adopted as part of the 2002 Agreement remains incomplete. As long as this state of affairs prevails SACU will, in many important aspects, not function as a common mechanism. South Africa will retain essential powers which will impact on the operations and policies of the customs union and, by implication, on all the member states.

There are several inconsistencies in the 2002 Agreement, such as that it still allows individual members to impose import and export prohibitions and restrictions,<sup>29</sup> exactly as the 1969 SACU Agreement did. As long as this remains possible, fragmented outcomes will follow. A SACU Tribunal could deal with some of the complications by developing a binding jurisprudence, but it does not exist. One of the challenges for the Tribunal will be to interpret the SACU Agreement in a coherent manner and ensure that a rules-based regime comes about.

## Revenue-sharing

The operation of the Common Revenue Pool is at the heart of the 2002 Agreement, as it was under the 1969 Agreement. A detailed annex provides for the collection and payment of tariffs into this Pool and for the distribution and sharing of customs and excise revenue.

The GATT rules do not determine how customs revenue in a customs union should be divided among member states: they are free to decide whether to link tariff revenue to the state of final destination of imported goods, or follow another type of arrangement.

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28 No. 71 of 2002.

29 SACU Agreement, Article 25.

In SACU a special revenue-sharing formula applies. Members' shares are calculated from a customs component, an excise component and a development component.<sup>30</sup> Each member state's share of the excise component is calculated from its value of the gross domestic product (GDP) in a specific year as a percentage of total SACU GDP in such year.<sup>31</sup> The customs component consists of the gross amount of customs duties and other specific and ad valorem duties levied on imports from outside the union. A member's share of the customs component is calculated on the basis of an unrelated consideration: the value of goods imported from all other SACU member states, on which no customs duties are levied. The destination of goods imported from outside the union is not taken into account for the purpose of this calculation.

For the 2011/12 tax year, the SACU revenue pool total contributions amounted to R61,437 million, of which South Africa contributed R60,135 million (97.9%). This figure includes revenue collections by South Africa on behalf of the BLNS countries. Namibia contributed R571 million – excluding revenues on Namibian imports collected by South Africa.<sup>32</sup> Namibia received N\$7,137 in 2011/12 (11.6% of the total revenue pool). This amounted to 26.6% of total Namibian revenue in 2011/12 and 7.7% of GDP in that year.<sup>33</sup> For Swaziland and Lesotho this figure was more than 60%.

It is generally known that South Africa is unhappy with the present revenue-sharing arrangement. Some officials have complained that South African imports generate revenue which 'subsidises' the BLNS countries. The BLNS countries, on the other hand, point out the high costs for them which result from South Africa's domestic industrial and tariff policies.

There has always been a unique arrangement in terms of which customs administration has been undertaken according to the approach adopted in the applicable South African legislation. South Africa administers the CET and its International Trade Administration Commission is responsible for matters such as trade remedies and tariff changes.

Trade data disputes will be decided by the Council,<sup>34</sup> and the management of the Pool is still undertaken by South Africa, although this provision can be revisited in order to come

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30 (ibid.:Article 34).

31 (ibid.:Article 34(4)).

32 See South African National Treasury/South African Revenue Service 2012 tax statistics, pp 7–8; available at <http://www.treasury.gov.za/publications/tax%20statistics/2012/2012%20Tax%20Statistics.pdf>, last accessed 21 August 2013. The 2009 WTO Trade Policy Review for SACU (WTO 2009) mentions South Africa contributing approximately 80% of the customs component (for 1998/99) and that this proportion was likely to remain relatively stable over the coming years.

33 See SACU (2012:41).

34 SACU Agreement, Article 36.

to a new arrangement.<sup>35</sup> It has not yet happened. At the time of writing there were some serious deliberations afoot to change the existing revenue-sharing arrangement. A special study called for in 2010 proposed far-reaching changes, including the establishment of a regional development fund, with conditionalities. The BLNS countries are strongly opposed to these proposals. This matter remains unresolved.

## Assessing the promises of the 2002 SACU Agreement

Where does the new Agreement leave SACU with respect to the new philosophy of the 2002 Agreement, the commitment to common policies, and future regional integration? The message is a mixed one. The most optimistic reading suggests that the new Agreement – through the express provision for common policies and new annexes, and by mentioning independent institutions such as the Tariff Board and the Tribunal – contains a promise to bring about a truly new dispensation and to adopt joint policies. SACU's future depends on a common commitment and the quality of its political leadership.

That brings one to an important institutional deficit in the organisation: SACU lacks a collective voice. The Council of Ministers, which is the highest decision-making body (decisions are taken on the basis of consensus), is essentially a platform for the articulation of national interests. The Secretariat could become a more proactive body in promoting joint policymaking. This could happen via joint projects. However, it is not permitted to undertake its own policy initiatives: Article 10(4) of the Agreement limits its policy role to assistance regarding “the harmonization of national policies and strategies of member states in so far as they relate to SACU”. It remains, as a result, an institution responsible for the day-to-day administration of SACU and the related activities of its members.

Article 31 of the SACU Agreement is important since it provides for the establishment of –

... a common negotiating mechanism ... for the purpose of undertaking negotiations with third parties.

Once in place, this common arrangement can make a real contribution to the development of joint trade and related policies. This will also provide scope for the development of foreign policy strategies by SACU members and their translation into joint agreements.

The fact that this common mechanism does not exist results in a serious lacuna. It means that trade negotiations with third parties, such as the Economic Partnership Agreement (EPA) negotiations with the European Union,<sup>36</sup> will inevitably be influenced by South

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35 (ibid.:Article 33(4)).

36 See the chapter by Raúl Fuentes Milani in this volume.

African preferences and its complicated tariff regime. A few trade agreements with third parties have been concluded,<sup>37</sup> and they will also require specific technical measures and new tariffs. More needs to be done in this area.

Trade diplomacy is a very important foreign policy dimension for members of a customs union and needs to be channelled through joint structures with the necessary powers. The absence of a common negotiating mechanism leaves the BLNS countries without such an instrumentality.

## SACU and Namibia's foreign policy

Namibia's membership of SACU brings foreign policy constraints as well as benefits. It is between these diverging tendencies that Namibia has to steer its foreign policy boat – at least with respect to trade issues and matters covered by the SACU Agreement. The other major consideration is Namibia's bilateral relationship with South Africa. Relations with South Africa, its biggest trading partner<sup>38</sup> and a SACU member, are a priority concern for Namibia. This is not a relationship which permits unfettered unilateral action: for a substantial part it has to be conducted via the structures of SACU and in terms of the limited policy space permitted under that arrangement. It is also a difficult relationship, given the differences in economic and political power.

Namibia's foreign policy is historically and geographically determined to focus quite directly on southern Africa, and on South Africa in particular. The fact that Namibia was administered as an integral part of South Africa for seven decades<sup>39</sup> had lasting effects on the nature of its national economy, which is intrinsically linked to that of South Africa. After Independence in 1990, the Namibian Government continued to recognise and promote these ties. It also benefitted from SACU arrangements such as the revenue accruing from the Common Revenue Pool.

When the present chapter looks at the role of SACU in the shaping of Namibia's foreign policy, it requires an assessment of SACU's practices – in addition to specific Namibian initiatives. What does the SACU record tell us about common policies and strategies undertaken as joint commitments of the SACU member states? What policy space do

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37 For example, with the European Free Trade Association (EFTA) and Mercado Común del Sur (MERCOSUR, the Southern Common Market).

38 Imports from South Africa amount to about 73% of Namibia's total imports, while exports to South Africa account for about 22% of the total. The United Kingdom is its second most important export destination, at 16%. See Namibia's Aid for Trade Framework and Strategy, adopted in 2011 and prepared by the Namibian Ministry for Trade and Industry and the United Nations Development Programme in Namibia.

39 This happened under the mandate system of the League of Nations and then, controversially, also when the United Nations took over the international supervision of the mandated territories after 1945. Namibia became independent in 1990.

individual SACU members enjoy which will allow them to steer SACU policies in a particular direction in order to promote individual national interests?

Intra-SACU business is not plain sailing. The BLNS countries often complain that South Africa acts without due regard to the impact on the smaller SACU member states when adopting changes to the CET. They maintain that these changes mainly address South African industrial and commercial concerns, while they are locked into a position where they inevitably have to bear many of the import costs resulting from such decisions. The other side of the coin concerns South Africa's own developmental needs at home, where it faces major unemployment and poverty alleviation challenges. South Africa is the dominant economy in Southern Africa, but is not a typical first world country which happens to have developing countries or least developed states as neighbours.

When Namibia joined SACU in 1990 as an independent state, the 1969 Agreement was still in place. The new South African Government, elected in 1994, soon announced its intention to renegotiate the Agreement and to adopt a new framework for interaction with its neighbours. South Africa was also then invited to join the Southern African Development Community (SADC). The negotiations to adopt a new SACU Agreement took much longer than initially expected, and the new Agreement was only signed, in Gaborone, Botswana, on 21 October 2002. It entered into force in July 2004.<sup>40</sup> This is SACU's present legal foundation, and it contains the principles and structures in terms of which the members have agreed to promote their trade and related interests and to adopt policies with respect to third parties. This had to take place in a spirit of 'democratisation'.

Under the 2002 Agreement, SACU had to provide a forum for practising a different style of decision-making, while generating common policies and functioning through new SACU institutions. The achievement of these goals and the implementation of Article 2 of the Agreement (listing the objectives of SACU) have not been easy. The member states have to manage a complicated regional relationship where one specific member, South Africa, plays a dominant role. Regional integration is never easy when the needs of a single hegemon often deviate from those of the smaller members. It may turn out that the former often dictates matters.

At times, Namibia has demonstrated a resolve to voice its concerns when unilateral South African actions have impacted on SACU affairs. When the European Union and South Africa in 2002 concluded their bilateral Trade, Development and Cooperation Agreement (the TDCA), which covers trade relations, development cooperation, economic cooperation and numerous other fields such as socio-cultural cooperation and political dialogue, Namibia withheld its concurrence. The 1969 SACU Agreement did not contain any provision on a common negotiating mechanism. When trade agreements

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40 Article 46 of the SACU Agreement provides that entry into force of the new text would happen 30 days after the deposit of the instruments of ratification by all the member states.

with third parties were concluded, the concurrence of the other member states had to be obtained. The TDCA is a Free Trade Agreement (FTA) in its own right and has had direct implications for SACU's CET.<sup>41</sup> The correct approach would have been to involve the BLNS countries in those negotiations. Namibia's refusal to grant concurrence subsequently demonstrated its unhappiness with the approach adopted by South Africa. This decision did not, however, result in the derailing of the implementation of the TDCA. Namibia learned to live with those consequences.

A customs union has a CET and this factor precludes members from pursuing unilateral trade policies vis-à-vis third parties. It means that joint tariff offers have to be developed when new trade agreements – such as the Tripartite Free Trade Agreement<sup>42</sup> – are negotiated. This often requires compromises. Most of the time, the BLNS states have to live with the realities and implications flowing from the South African tariff policy, which is anchored on the use of the import tariff as a strategic instrument for promoting its national industrial development.

As an organisation, SACU is a mixture of both the old and the new. It has not fully moved away from the 1969 model. It is still primarily an organisation which focuses on trade in goods and a unique customs revenue arrangement. Some commentators believe that this particular aspect – the emphasis on customs revenue as a source of public revenue – contributes to the lack of forward movement and deeper integration. There is no real incentive to alter the present *modus operandi* or to enlarge SACU.

This does not mean that the organisation cannot become a more effective vehicle in the pursuit of deeper integration. However, the SACU members still act as independent nations, not as a common structure. In this regard, the new SACU did not change state behaviour in a fundamental way and it has not succeeded in generating supranational institutions.

The explanation for this state of affairs lies, to some extent, in SACU's limited mandate. For example, the SACU Agreement contains no provisions on trade in services or taxation. Common competition, agricultural and industrial policies have to be developed through new negotiations, but no additional commitments have been adopted. The list of formal objectives mentioned in Article 2 of the SACU Agreement does not mention the deeper integration of SACU expressly. This aspect may be implied in, for example, the

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41 Goods imported into South Africa under the TDCA will circulate freely within the SACU customs territory. There will also be a loss of customs revenue.

42 The member states of SADC, the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC) decided, at a summit in Kampala in 2008, to form one joint free trade area between the 26 members. These negotiations are under way and have proved to be quite complicated. See also Erasmus (2013).



reference to the “development of common policies and strategies”. The recently adopted SACU Mission Statement recognises that the organisation has to –

... serve as an engine for regional integration and development, industrial and economic diversification, the expansion of intra-regional trade and investment, and global competitiveness.

It remains to be seen whether this statement will result in tangible outcomes.

The adoption of the Mission Statement does seem to indicate that SACU members will not pursue unilateral initiatives which will undermine their SACU agenda. It remains to be seen whether South Africa in particular will consider this to be a binding commitment. It has in the meantime become a member of BRICS, a loose arrangement between Brazil, Russia, India, China and – for the past two years – South Africa. Membership of this configuration suggests a special and higher status and a unique role in international affairs. The inaugural meeting of the BRICS Business Council took place in Johannesburg on 19 and 20 August 2013. It focused on identifying areas of potential cooperation, including the promotion of public–private partnerships, information exchange, and harmonisation of technical standards. These are matters which should also be canvassed at SACU meetings.

It might be argued that deeper integration efforts can be pursued through the initiatives adopted in SADC, to which all the SACU members belong. However, SADC’s integration record is rather unimpressive. Its Regional Indicative Strategic Development Plan (RISDP) is many years behind schedule, while several members have not implemented their Free Trade Area obligations. The suspension of the SADC Tribunal in 2011 was a retrogressive step which will seriously undermine efforts to transform SADC into a rules-based arrangement. SADC does not offer an exciting prospect for deeper regional integration. SACU is a smaller community of states: its members will be better served by adopting their own plans of action to deepen integration and then to endeavour to initiate larger regional initiatives.

The achievement of the new SACU objectives depends, for a major part, on how the organisation’s institutional and policymaking potential will be unlocked in order to bring about effective common governance. This will only happen once focused policies are developed, and deliberate steps are taken to do what the Preamble and the new Mission Statement require, namely to have an organisation that will cater for the needs of the 21st Century. Strengthening of the collective institutional voice is vital. Successful implementation will depend on firm commitments and effective monitoring of compliance. The SACU Tribunal will be a critical element in the achievement of a rules-based arrangement. This promise is yet to be fulfilled. This task falls squarely on the shoulders of the political leadership, but there are few indications that the member states want a properly empowered SACU with an effective collective voice. Would Namibia be prepared to champion these causes?

Regional integration in southern Africa and on the African continent could be undergoing important changes with the new Tripartite Free Trade Area being negotiated.<sup>43</sup> SACU has entered these negotiations by developing a joint tariff offer. The aim is for this integration initiative to evolve into a continent-wide free trade arrangement. For this to come about, a more serious commitment to legal certainty, predictability and effective regional institutions will be required. SACU should get its own house in order and actively support the correct efforts.

All African regional economic communities have, on paper, embarked on the road towards deeper integration. Attaining this objective has proven rather difficult and holds serious implications for traditional notions about *state sovereignty*. Most African governments have demonstrated little preparedness to grant regional institutions effective and independent powers or to accept the jurisdiction of regional courts. They claim that they will lose their sovereign policy space. This approach to sovereignty is problematical. The conclusion of most international agreements flows from the fact that they are necessary in order to protect and promote national interests: states cannot prosper in isolation. It is an act of sovereignty to conclude such agreements and to found regional and multilateral trade arrangements. These agreements cannot bind particular states unless ratification or accession has occurred. Compliance with international obligations freely entered into cannot subsequently be denied by invoking national sovereignty or domestic constitutions or laws. If that were possible, no international agreements would be implemented.

What are the direct implications of SACU membership for Namibia's foreign policy? The most immediate concern is the future of the revenue-sharing arrangement and the management of the Common Revenue Pool. Namibia, together with the other BLNS states, will have to steer discussions about possible changes to the present formula in a direction which will account for the broader regional implications. Namibia and Botswana are not as dependent on SACU revenue as Swaziland and Lesotho are. However, the more than 20% of public revenue annually flowing into the fiscus in Windhoek is a vital contribution. Serious political instability could follow if abrupt changes to SACU's revenue-sharing arrangement are introduced and the smaller SACU members, which have become dependent on the revenue from the Pool, are left stranded. SACU has generated regional realities and a degree of stability which cannot be altered in an abrupt manner. Regional instability will not be to South Africa's advantage. A well-informed and joint BLNS strategy about this matter is called for. Namibia could be a champion of such efforts.

Another important concern involves the conclusion of the SADC EPA with the European Union. SACU is not the official counterpart of the European Commission in these

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43 The member states of SADC, the Common Market of Eastern and Southern Africa (COMESA), and the East African Community (EAC) are involved in these negotiations.

negotiations,<sup>44</sup> but the negotiations are, for all practical purposes, conducted with SACU. Pretoria has become the major player on behalf of SACU and this has complicated matters. South Africa wants, via the SADC EPA, an improvement of the market access conditions provided for South African goods under its bilateral free trade agreement, the TDCA, with the European Union. Namibia has specific needs with regard to quota-free and duty-free European Union access for its beef and table grapes. It stands to lose these important trade preferences if an agreement is not concluded in time. The European Commission has indicated that quota-free and duty-free access will be discontinued by the end of 2014 in those instances where EPAs have not been finalised. Windhoek's policy choices are difficult ones and require a balancing of regional solidarity concerns against real economic and trade benefits. It should, however, push for the successful conclusion of these negotiations. The whole SACU region stands to benefit from a sound and balanced deal.

Namibia is the host of the SACU Secretariat, which may allow it to develop a special relationship with this SACU institution. This will require a clear strategy in favour of the membership as a whole, especially since the chair of the Council of Ministers rotates every six months. The need for enhancing the Secretariat's technical capacity is rather obvious: the organisation needs a well-functioning Secretariat while the smaller members can benefit from Secretarial support with regard to customs procedures, the implementation of trade obligations, and complying with international standards, and in order to avoid duplication of institutions.

SACU's institutional strengthening will benefit Namibia and the other BLNS members in particular. The establishment of the SACU Tribunal and Tariff Board should be a priority concern and Namibia could play a constructive role in ensuring that the necessary is done as a matter of urgency. Without these institutions the SACU structures will remain seriously deficient, while operations will be fragmented and without a proper rules-based component.

Not all of Namibia's developmental needs can be addressed via SACU. Windhoek needs strong regional and multilateral ties in order to accelerate its infrastructural development and trade facilitation programmes. These priorities are recognised, but they can only be implemented as part of sound regional integration initiatives. Namibia stands to benefit quite directly by deliberately working for the improvement of regional governance and deeper integration. Apart from South Africa, Namibia is the only SACU member with its own ports. Walvis Bay is linked to many other African states within the SADC region via a good transportation and corridor network, which is a vital aspect of trade in goods and services. The Namibian Government is pursuing the benefits to be gained from deeper

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44 Angola and Mozambique are also involved, but will probably opt for a future trade relationship with Brussels based on the 'Everything but Arms' arrangement in favour of least developed countries.

integration and from using the existing transportation network optimally. Transportation and trade facilitation are SACU and SADC concerns too, and a higher level of integration and commitment is needed.

Is there a particular principle which could guide these Namibian policy decisions? The pursuit of sound regional governance is an obvious candidate. Namibia's domestic governance is anchored in a constitution which proclaims these values and the rule of law. This constitution has been respected. As a smaller nation it will benefit from regional relationships which will reflect the same approach. This will also lead to the strengthening of SACU in a much-needed manner.

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