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Policy making in SACU: From text to textiles

Gerhard Erasmus

1. Why have common policies?

Why does the new SACU Agreement expressly provide for 'Common Policies' and what practical consequences will follow? The very existence of a separate chapter in the Agreement on 'Common Policies'¹ provision for 'common institutions'² as well as the general orientation of the Agreement suggest a dedication to joint action and a deliberate effort to avoid fragmentation in the areas that the Agreement identifies as common policy areas. What does the record show and what common policies have in fact been developed? How are these policies adopted and implemented and how does policy-making relate to regional integration?

Answers to these questions need a context starting with the basic objectives and philosophy underpinning the Agreement, while noting contemporary internal developments and the challenges from the external environment. As the implementation of the Agreement unfolds one would expect additional indications of deliberation on economic integration, the further adoption and refinement of policies and appropriate domestic responses within the Member States. There should actually be a comprehensive vision on the way forward.

This paper discusses the reasons for adopting the new Agreement, some of the legal provisions and certain recent domestic and regional developments against which progress on common action can be measured. It is not an exhaustive analysis of this new phase in the life of this organisation; hopefully it is a contribution to an ongoing debate on the future of SACU. A practical example involving a recent South African decision to limit Chinese textile imports will be discussed in order to shed light on the challenges still to be met before SACU will have effective common policies and a foundation for a proper regional integration agenda.

¹ Part 8 of the Agreement, consisting of Articles 38 to 41, lists the areas for which, at the outset, policies have to be developed. More such policies will become necessary as the process of closer cooperation unfolds, new agreements with third parties are concluded and the SACU institutions become operational.

² Article 7.

This debate is necessary, so it will be argued, in order to develop strategies for the way forward in SACU, the consolidation of the organisation through the further implementation of its Agreement and to attain the objective to have a regional organisation to cater 'for the needs of a customs union in the 21st century'³. An even more urgent reason may be the need to respond to external (regional and multilateral) challenges. SADC has embarked on a road of deeper regional integration and has adopted ambitious decisions in this regard, such as becoming a customs union by 2010. All the SACU States are SADC members too and technically it is not possible to belong to two customs unions simultaneously.⁴ The suspension of the Doha Development Round in July 2006 has brought a new emphasis on regional trade arrangements worldwide and by the end of 2007, when the Cotonou waiver expires, a new, WTO compatible, Economic Partnership Agreement (EPA) with the EU should be in place. The EPA negotiations are running out of time, pose particular technical, political and capacity challenges and will have to resolve difficult issues regarding coverage, dispute resolution and the promotion of regional integration.⁵ The political leaders in SACU cannot ignore these developments and challenges. They will have to respond with strategies about regional integration and SACU's future role within that context.

2. The new Foundation

It may often be easier to establish a regional organisation *de novo*, as opposed to re-inventing an existing one. When the latter is done past patterns of behaviour will not easily change if the very same states are involved and in the absence of major shifts in power relationships. It will require a major diplomatic effort, new political vision and leadership, as well as unequivocal legal and institutional arrangements to bring about fundamental change and new realities. There should actually be a new blueprint for the revamped dispensation, as occurred in Europe after World War Two. Such a fundamental reorientation will presumably be undertaken only with clear reasons why a new organisation is necessary and with firm views on what new outcomes will

³ Preamble, first paragraph.

⁴ Article XXIV, GATT defines a customs union as consisting of a single customs territory with a common external tariff (i.e. a common external trade policy).

⁵ Articles 36 – 38, chapter Two of Part 3 of the Cotonou Agreement list several additional objectives for the EPAs; such as WTO compatibility, integration into the global economy, removal of trade barriers, capacity building, development assistance, etc.

follow. Does SACU have such a new plan and vision and why exactly was it necessary to adopt a new agreement? What new outcomes were planned and can be expected? What new dynamic will be unleashed to generate policies and activities to steer the organisation in a new direction?

These questions are addressed below when the texts of the previous and new agreements are compared and recent practices are discussed. However; the political environment in which the new agreement was negotiated has to be recalled. A major paradigm shift occurred in southern Africa during the 1990s when the destabilisation caused by apartheid came to an end. That development offered far-reaching opportunities and allowed fundamental changes in the pattern of interstate cooperation in southern Africa. One would have expected a strong commitment to a regional peace and development strategy backed up by the necessary institutions, including true regional policies, to tackle the region's severe developmental and stability challenges. It started off with promising ideas and initiatives, including a continental philosophy in the form of NEPAD, a peer review mechanism to promote good governance and the African renaissance. For the southern African region it resulted in South Africa joining the new SADC and, closer at home, the SACU arrangement was revisited.

Part of the reason for adopting a new SACU Agreement relates to these responses to the regional political and economic changes of the 1990s (the demise of apartheid also meant an end to the international isolation of South Africa's economy) as well as independence for Namibia. In the multilateral arena there was the conclusion of the Uruguay Round and the establishment of a rules-based international trade regime to which all the SACU states belong. Other reasons had to do with the very specific conditions in SACU and the structural consequences for the BLNS states flowing from the dominance of the South African economy. The Common Revenue Pool and the transfer of revenue to the BLNS states became an essential *raison d'être* for SACU; it did not grow into a true regional integration mechanism or an instrument for the promotion of trade beyond the exchange of goods.

3. Comparing the two texts

The new SACU Agreement does alter the structure and some of the operational aspects of SACU and now provides for an international organisation with legal personality,⁶ specific institutions, rules on decision making, formal dispute resolution and the development of common policies. In this sense it differs from the previous arrangement. The Agreement of 1969 reflected the *de facto* dominance of the South African economy and emphasised the technical aspects of a customs union by highlighting 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, import and export prohibitions and restrictions, regulating the marketing for agricultural products, as well as several provisions on the 'pool of customs, excise, sales and additional duties'⁷ South Africa was responsible for relationships vis-à-vis third parties and the administration of revenue pool. Differences between the Members had to be resolved through consultations.

The new Agreement purports to create a typical international organisation, while maintaining, and in some instances repeating, provisions in the 1969 agreement. 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 economies of the Member States 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,⁸ as is the need now for a 'dispute settlement mechanism [to] provide a mutually acceptable solution to problems that may rise between Member States'.⁹

Article 2 deals with the objectives of the new SACU and emphasises the need for a technically sound customs union as well as the integration into the global economy through enhanced trade and investment. The equitable sharing from the Revenue Pool is stressed and there is a call for the development of common policies and

⁶ Article 4 of the new Agreement.

⁷ Article 13, 1969 SACU Agreement.

⁸ Preamble, paragraph 4.

⁹ Preamble, final paragraph.

strategies. It now also mentions '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; it implies the absence of these outcomes under the previous Agreement and, in addition, implies that fairness depends on dynamic and properly empowered SACU (not national) institutions.

The Agreement formalises the status of SACU as one based in the international legal personality of the organisation, a permanent Secretariat to deal with the day-do-day administration of the whole organisation and a new permanent headquarters in Windhoek, Namibia. Article 7 provides for the establishment of a Council of Ministers, a Customs Union Commission, Secretariat, Tariff Board, Technical Liaison Committees and an ad hoc Tribunal. The Member States will be represented through the Council of Ministers (still the highest decision-making body) and the Commission, respectively 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 they will do this in future will also depend on the common policies to be adopted under Part 8 and the interaction with third parties, including the agreements concluded with them. The implementation of the recently concluded trade agreement with EFTA will, for example, require specific technical measures and new tariffs. Article 31 has to be mentioned, since it could, once fully operational, make a real contribution to the development of joint trade policies. It provides for a common negotiating mechanism 'for the purpose of undertaking negotiations with third parties'.

The institutional framework contains two particularly important new developments in the form of the Tariff Board and the Tribunal. At the time of writing, these two institutions are not yet operational but important preparatory work has already been undertaken. Their future activities will move SACU to a new level as a rules-based organisation where independent experts will be responsible for all matters regarding customs and customs changes, trade remedies, rebates, refunds or duty drawbacks

in SACU. In the case of the Tribunals an independent court will exercise jurisdiction over 'any dispute regarding the interpretation or application of this Agreement'.¹⁰

Part 8 of the Agreement provides for the development of common policies but those policy areas are limited to industrial development, agricultural policy, competition policy and unfair trade practices. The latter is a bold development in the sense that it refers not to trade remedies vis-à-vis third parties but to the need for developing policies 'and instruments to address unfair trade practices between Member States'. It then goes on to state that these policies and measure 'shall be annexed to this Agreement' in terms of Article 42.

It is only with respect to unfair trade practices that express mention is made of the embodiment of that future policy in an Annex. The importance of Annexes should not be underestimated because they will then form an integral part of the Agreement. The implication is clear: SACU law can be expanded as these Annexes will form an integral part of the Agreement.¹¹ They too will be justiciable in terms of the jurisdiction of the Tribunal.

There are some inconsistencies in the Agreement and certain provisions do not tally with the fact that the Agreement is rules-based and justiciable. Provision is still made for import and export prohibitions and restrictions¹² exactly as provided for in the 1969 Agreement, which did not provide for adjudication of disputes. One of the challenges facing the Tribunal will be to interpret and apply this Agreement in a manner fully consistent with a rules-based dispensation. Its future jurisprudence may be vital for how the organisation will develop.

The operation of the Common Revenue Pool is still the heart of the new Agreement and a detailed Annex provides for the collection and payment of tariffs into the Revenue Pool as well as for their distribution and the sharing of excise. Trade data disputes are foreseen to be a particular concern¹³ and the management of the Pool is

¹⁰ Article 13(1).

¹¹ The South African "International Trade Administration Act" of 2002, which incorporates the new SACU Agreement, expressly confirms this intention by defining, in section 1 of the Act, the SACU Agreement as also meaning an Annex adopted in terms of Article 42.

¹² Article 25, new Agreement.

¹³ Article 36.

still undertaken by South Africa; although this provision can be revisited in order to come to a new arrangement.¹⁴

Certain technical implications should be noted: the membership of the organisation remained the same but they did not amend the predecessor agreement of 1969, which was found to be incapable of catering for their needs.¹⁵ They in fact set out to 'renegotiate'¹⁶ the SACU Agreement. The 1969 agreement is expressly terminated and can technically not be a source of interpretation for the new one.¹⁷ SACU now has a completely new legal basis and all its provisions (including those taken over from the previous Agreement) should be interpreted and applied in this light.

4. The New Record and the Implementation of Part 8

Under the previous arrangement very little could happen in terms of formalised procedures for developing joint policies, only the technical features of a customs union (a single customs territory and a common external tariff) required de facto practices and the necessary legal arrangements to ensure that Members respected the features of a customs union.

What changed when the new agreement of SACU was negotiated to alter this state of affairs and to provide for common policies and common institutions? The Preamble emphasises the need for a customs union that 'would cater for the needs of the 21st century'. The economies of the five Member States need new framework and a dynamic dispensation which would allow for the active participation of all the member states in policy making with respect to internal development and vis-à-vis a third party. The Preamble speaks of the recognition of the fact that tariffs are important as instruments for the implementation of industrial development policy, that the different levels of the economic development of the member states and the need for integration into the global economy require a mechanism for the development of

¹⁴ Article 33(4).

¹⁵ Preamble, paragraph 1.

¹⁶ Preamble, paragraph 2.

¹⁷ Article 51 states that the 1969 agreement 'shall terminate on entry into force of this Agreement, except as provided for in Article 50'. The latter provides that former institutions shall continue to exist, provided they are not inconsistent with the provisions of the new Agreement.

appropriate and joint policies. It goes on to note that the 'implementation of the 1969 Agreement is hampered by a lack of common policies and common institutions'.

This Agreement has been in force for two and a half years now and this provides an opportunity for some stock taking with respect to the institutional dimension regarding the promises made in the Agreement. To what extent has SACU developed and adopted joint policies and what institutions are now available to give effect to this basic objective in the Agreement? It should also be noted that the new Agreement purports to establish a rules-based dispensation, complete with a tribunal for dispute resolution with respect to disputes regarding the interpretation and implementation of the Agreement. The full implementation of the SACU Agreement would in effect give rise to the establishment of a dynamic where important policy decisions will be taken in the joint institutions and not in Pretoria any longer. What is the record up till now and to what extent have these objectives been implemented?

A regional organisation such as SACU which has the aim to promote its global and regional integration cannot afford to have fragmented approaches to industrial development and all those related aspects dealing with the production and marketing of essential products. Neither can they afford an uncoordinated approach with respect to the use of tariff generally regarding industrial development, trade remedies and the technical aspects such as rebates and duty drawbacks. It is for this reason that the Agreement provides for the establishment of the SACU Tariff Board in Article 11 of the Agreement and for common policies with respect to industrial development, agriculture, competition and unfair trade practices. SACU constitutes a single market and this market has to be regulated in terms of a single set of standards and policies. Part 8 of the Agreement lists the mentioned four areas but does not provide for any essential features or guidelines. The members will have to take deliberate steps to activate a process for developing and adopting the common policies listed in that part of the Agreement.

Common policies require substantive and procedural aspects. There must be agreement on the need for policies for specific areas where the governments of the member states will be prepared not to act as independent sovereign states pursuing unilateral action but will be committed to joint policies and the actual implementation

of such joint policies. The agreement is not entirely clear as to these two aspects, namely the substance and the procedures with respect to implementation. It is true that Part 8 lists industrial development, agriculture, competition and unfair trade practices but the four different provisions do not display a single approach and orientation. On industrial policy 'member states agree to develop common policies and strategies with respect to industrial development'. This formulation suggests that there will be several common policies and strategies with respect to industrial development but at present there is no SACU policy on industrial development or a policy to address the needs flowing from the different levels of development of the five member states.

South Africa has in the meantime embarked on a 'national industrial policy Framework' and the 'accelerated and shared growth initiative (AISGSA) which contain programmes to encourage investment and priority sectors identified as growth drivers.¹⁸ These policies have been in development for quite some time and they aim at the development of 'an overarching strategy to prioritise key interventions in mining and bill beneficiation, agriculture and agro-processing, the white goods sector, creative industries, community and social services and pharmaceuticals.¹⁹ The most important observation to make here is that this is a unilateral South African action and does not reflect a SACU wide orientation or involvement.

The future functioning of the Tariff Board will create additional needs for clarity on industrial policy in and for SACU. This Tariff Board shall make recommendations to the Council on 'the level and changes of customs, anti-dumping, countervailing and safeguard duties on goods imported from outside the Common Customs Area, rebates, refunds and duty drawbacks' based on the directives given to it by the Council as provided for in Article 8.²⁰ There are no directives yet in terms of which the Council will provide guidance to the Tariff Board. The Tariff Board is under construction and draft annexes and guidelines with respect to its composition and functioning as well as that of the National Bodies have been drafted and are apparently well advanced. The potentially important and dynamic development that

¹⁸ For a brief discussion see *The Sunday Times*, February 11, 2007, Business Times, p 4.

¹⁹ *Ibid.*

²⁰ Article 11(2).

can unfold will be when the Tariff Board starts to function and will receive requests with respect to tariffs and trade remedies along the lines provided for in Article 11. It will only be able to make recommendations to the Council, which will decide on the basis of consensus how to take binding decisions. The incomplete framework in SACU will have to be addressed before this important new activity can be launched. There will have to be guidelines; there will have to be a vision on how industrial development will take place in the whole SACU region and the interests and needs of the private sector will bring an additional urgency for clarity and tight time frames. It seems clear that there are still a number of important building blocks absent before industrial policy will be comprehensive and effective for SACU as a whole.

In the area of agricultural policy the commitment is only to 'cooperate on agricultural policies in order to ensure the coordinated development of the agricultural sector within the Common Customs Area.'²¹ The various member states pursue different policies and have different objectives with respect to agricultural development. South Africa is the only member that has deregulated the agricultural sector and in the other member states agriculture is potentially of greater importance for domestic development, employment and export. Countries such as Namibia and Swaziland, for example, have important agricultural export quotas to the EU in terms of the Cotonou Agreement. In this area too, important work has started under the initiative of the SACU Secretariat to bring together the various government officials for the purposes of giving effect of Article 39 of the Agreement. There is no common SACU policy yet and the text of the Agreement seems to suggest that the obligation here is at least to ensure coordination of national policy activities. On the other hand, nothing in the Agreement prevents the member states from developing advanced forms of cooperation and indeed a regional policy. The fact that the obligations and directives contained in the four provisions in Part 8 of the Agreement differ in content and future action suggests that at the time of the drafting of the Agreement it was not possible to develop tighter guidelines and ideas on active integration for these sectors.

²¹ Article 31(2).

With respect to competition, Article 40 requires that the member states 'shall cooperate with each other with respect to the enforcement of competition laws and regulation'. This seems to suggest that each member state will adopt its own laws and establish its own institutions with respect to the regulation of competition matters and that they will thereafter cooperate with each other as independent national entities. South Africa has a well-developed legal and institutional infrastructure for competition and Namibia is well advanced but has not yet established operational competition authorities. A lot is still to be done before a common competition policy will be in place.

Article 41 deals with unfair trade practices and here the obligation is different and quite clear; there shall be policies and instruments 'to address unfair trade practices between member states. These policies and measure shall be annexed to this Agreement'. Annexes are provided for in Article 42 and once they are adopted they form an integral part of formal SACU law. It is only with respect to unfair trade practices between the member states that Part 8 foresees this advanced form of cooperation, although Article 41 speaks of policies and instruments in the majority. The Secretariat has embarked on a process of developing such an annex and one of the most important challenges is to distinguish between three areas: namely unfair competition, unfair trade practices between the members (that is intra-SACU unfair trade practices) and unfair trade practices with respect to third parties. As far as the latter is concerned the Tariff Board will have jurisdiction in cooperation with the National Bodies such as ITAC in South Africa. The challenge will be to find the correct lines of demarcation between Articles 40 and 41 and to distinguish competition and intra-SACU unfair trade practices. Once these policies and annexes are in place and institutions will start to give effect to them, one would presumably see dynamic developments and also new challenges on how national and SACU authorities will interact and cooperate and how private entities and traders will be protected and will enjoy standing before the Tariff Board, the Tribunal and other institutions that may be established.

5. The institutional dimension: The Tariff Board and the Tribunal

Joint policies require mechanisms for their development, adoption and subsequent implementation. This need is partially recognised and for the first time now SACU has common institutions and some of them will be responsible for joint policies. However, the SACU Agreement is also a framework agreement and future action will depend on the initiatives taken by the Members. The functioning of SACU as a customs union is not interrupted and provision is made for the necessary transitional arrangements.²²

Article 7 of the Agreement lists the main institutions and they are the Council of Ministers, Customs Union Commission, Secretariat, Tariff Board, Technical Liaison Committees and the ad hoc Tribunal. All these institutions have formally been 'established' in terms of the wording of Article 7 but not all of them are operational. It is expected that the Tariff Board will become operational in early 2007. Work on the Tribunal has started and it will apparently start functioning in 2008.

Some of the institutions are 'political' in nature, such as the Council of Ministers and the Customs Union Commission. The Council consists of one Minister from each Member State and is the supreme decision making authority for SACU.²³ It is responsible for the overall direction and functioning of SACU institutions, including the formulation of policy mandates, procedures and guidelines for the SACU institutions.²⁴ Some of these have still to be adopted, such as for the Tariff Board and the appointment of members of the Tribunal.

The Customs Union Commission consists of senior officials at the level of Permanent Secretaries, Directors-General, Principle Secretaries or other officials of equivalent rank.²⁵ The Commission reports to the Council and is generally responsible for the implementation of the Agreement. The Commission takes decisions on all types of practical issues and makes recommendations for adoption by the Council. The

²² Article 50 provides for the continuation of those institutions which existed before, provided they are not inconsistent with the provisions of the new Agreement.

²³ Article 8(1).

²⁴ Article 8(2).

²⁵ Article 9(1).

meetings of the Council and the Commission take place on consecutive days and are preceded by meetings of the four Technical Liaison Committees. This part of the Agreement is still very much in line with the practice followed under the previous 1969 Agreement.

The Tariff Board and the Tribunal are new institutions. The former is an independent expert body responsible for recommendations to the Council regarding all changes to customs, trade remedies regarding exports from third parties, refunds, rebates or duty drawbacks.²⁶ It will work together with the National Bodies in Member states, where the initial requests for customs changes and trade remedies will first be heard. The future activities of this very important new institution will focus quite directly on the need for joint policies on industrial development. The Agreement recognises the 'importance of tariffs as instruments for the implementation of industrial development policy'.²⁷ The Tribunal still needs additional development, apparently via a clear Annex and procedures on many substantive issues before it will be able to become the effective adjudicating body foreseen by the Agreement. Its jurisdiction and standing provisions (who will be able to bring claims and for what?) are not clear.

Article 31 foresees in the creation of a different kind of institution and is an example of how closer cooperation and joint policies require tailor-made mechanisms. It deals with trade relationships with third parties and foresees in the establishment of a common negotiating mechanism. This has not yet been established.

Part 8 of the Agreement provides for common policies with respect to four different areas but that is not an exhaustive list. As SACU grows and becomes more integrated into the global economy, inter alia through the formal conclusion of trade agreements with third parties, it will have to deal with the realities and implementation (through similar domestic measures) of such new relationships. The SACU Agreement at present only covers trade in goods, with some related provisions on transport and agriculture. There are no provisions on trade in services, investment, the movement of people and all the contemporary trade related issues. SACU faces the demands of international trade and commerce and the development and

²⁶ Article 11(2).

²⁷ Preamble, paragraph 4.

implementation of suitable joint policies for the single customs territory will be an inevitable consequence. The very nature of its existence as a customs union, complying with Article XXIV GATT, must bring about important changes with respect to the political dynamics, the institutional dimension and the functioning of the Customs Union vis-à-vis third parties. Its responsibility to promote the interests of all the Members States and integration into the global economy will eventually include a dynamic policy-making and policy-implementation aspect. Our argument is that serious tensions will develop within SACU as it inevitably integrates into the global economy and adopts trade arrangements and agreements with third parties that have to develop policies with respect to such parties.

The present negotiations with the European Community on the Economic Partnership Agreements are a case in point. The EU wants to promote regional integration through the conclusion of the EPAs and aims at binding agreements not only on trade in goods but a whole range of trade related matters. It will not be possible for SACU to form the nucleus of such an EPA unless it develops the necessary intra-SACU policies. The basic framework does exist but the policy, institutional dimension and implementation will have to be added.

Are the new institutions sufficiently empowered and are all the structures in place in order to cope with the challenges of common policies and coordinated implementation? The SACU institutional dimension has been improved but certain areas remain uncertain. The Agreement does not e.g. explain how the 'final and binding' decisions of the Tribunal will be given effect to and how the disciplines of the WTO on trade remedies will be complied with once the Tariff Board takes over the functions of Article 11.

It would be a serious mistake to ignore the domestic aspect of policy implementation. One of the consequences of the previous modus operandi in SACU has been the neglect of domestic structures in most of the BLNS States. South Africa took responsibility for most of these needs, but that has to change now. The Tariff Board will only be activated via national procedures and subsequent implementation of its findings, as well as of trade arrangements with third parties, and will increasingly

require domestic implementation machinery. Such domestic measures will, in addition, have to be sufficiently coordinated in substance and effect.

The relationship between the various institutions of SACU and the nature of their functions will become clearer as the new arrangement is implemented. A distinction will have to be drawn between policy decisions (of the Council) and other areas where other institutions can take binding decisions, such as the Tribunal. There is also no organ to speak on behalf of SACU or to protect its interest as a separate legal person.

Decision making may be hampered by the consensus requirement in Article 17. It cannot mean that a veto automatically applies to all substantive areas. The practice in other international organisations with the same decision-making approach shows the need for an active search for consensus, not the blunt application of a veto to silence other Members. If that would be the case it would, for example, be impossible to refer certain disputes to the SACU Tribunal. The rules and procedures for the various institutions can clarify some of these matters.

6. The recent Chinese textile saga

Tariffs have implications for industrial and development policies for the whole region, and for national considerations on the use of trade remedies. In the latter part of 2006, the South African Government decided to impose quotas on textiles imported from China.²⁸ This has been a unilateral South African measure and aimed at the sale of the textiles in South Africa, but can only be fully implemented with the active cooperation of the other Member States. The scheme requires certificates on the origin of imported textiles.

The notice in the *South African Government Gazette* provides that goods listed in an attached schedule shall not be imported into the Republic of South Africa except by virtue of a special import certificate. The Regulations have been issued in terms of

²⁸ See the Government Notice Number 1056 of 20 October 2006, *Government Gazette* No 29316 of 20 October 2006.

Section 6 of the International Trade Administration Act 2002²⁹ and purport to implement a prior memorandum of understanding concluded with the People's Republic of China. This restriction can only be implemented if the other SACU Members actively cooperate. However, it is not clear at all whether they have been consulted; the indications are that this has not happened, at least not as part of the preceding deliberations. At present the SACU Agreement does not expressly require that form of cooperation - the Tariff Board is not in place yet.

What does the South African measure imply with respect to the common policies supposedly underpinning the new SACU Agreement? The common external tariff and the existence of the single customs territory are essential features of all customs unions. Article 18 of the SACU Agreement provides as follows: 'Goods grown, produced or manufactured in the Common Customs Area, on importation from the area of one Member State to the area of another Member State, shall be free of customs duties and quantitative restrictions, except as provided elsewhere in the Agreement'. This provision ensures the practical implementation and existence of a single customs territory for goods produced within SACU. When goods are imported from outside SACU and thereafter re-exported to another SACU member, Article 19 applies. It reads: 'Except as otherwise provided in this Agreement, a Member State shall not impose any duties on goods which were imported from outside the Common Customs Area on importation of from the area of any other Member State'. In the present matter, the restriction involves quotas, not additional duties, but the intention to ensure free movement of goods is clear.

Article 22 of the Agreement provides that members shall apply similar legislation with regard to customs and excise duties. In terms of Article 23 the members 'shall take appropriate measures, including arrangements regarding customs cooperation, to ensure that the provisions to this Agreement are effectively and harmoniously applied'.

²⁹ Which, however, appears in a chapter in the Act expressly dealing with 'Implementation of the SACU Agreement'.

The Council has to give permission before a member state may impose any restrictions on imports and exports.³⁰ In the present instance, there is no indication that permission of the Council has been obtained and the regulations that have been passed by the South African authorities make no reference to SACU; they simply refer to imports into South Africa.

The implications of the South African regulations on Chinese textile quotas are the following:

- Proposed regulations are not directed at importation into SACU; only importation into South Africa is targeted. This seems to be a serious oversight.
- These regulations have territorial application only. It means that South African customs officials have to ensure compliance with the permits at all border posts. They can only rely on the assistance of their counterparts in the BLNS States, ideally, if these regulations become a SACU measure.
- If Chinese textiles would be imported into another SACU Member and then re-exported to South Africa, the enforcement of the proposed regulation will require new and additional measurements at the borders involved, affecting the very nature of the Customs Union.
- South Africa apparently did not seek the prior cooperation of the other SACU Members. This is in principle the violation of Article 25(1).
- These South African import restrictions on Chinese textiles can only apply on imports for **sale** in South Africa. If South African retailers want to supply their shops in the BLNS states with such products it will be lawful to import them first via South Africa ports of entry. They will then need to re-export such goods to the BLNS resulting in further red tape and potential delays.
- The implications of the South African measures for the Common Revenue Pool are not clear. Neither is it clear what the position will be with respect to individual remedies. At present, in the absence of the Tariff Board, ITAC administers all applications with respect to tariff changes and trade remedies.

³⁰ Article 25.

This particular example demonstrates the consequences of the absence of mechanisms and practices in SACU on common policies. It also sheds light on the distance still to be travelled in order to alter previous patterns of behaviour and what effective common policies will need in terms of deliberation, decision making and domestic implementation.

7. Conclusion

The Southern African Customs Union (SACU) claims to be the world's oldest customs union³¹ but it is only since the adoption of its new Agreement in 2002³² that common policies and common institutions are mentioned as part of the official framework and of the legal arrangement among the same Members.³³ The nature and functioning of the new common institutions, their areas of competence, decision-making procedures and the fact that SACU is a legal persona in its own right³⁴ introduce important new features. Under the predecessor Agreement of 1969, SACU's institutions were rather elementary and they functioned in a manner which reflected the dominant position of the South African economy.

The new SACU Agreement has established an organisation which is a mixture of both old and new. It has not moved away from the emphasis on trade in goods and the benefits flowing from the Common Revenue Pool; it is essentially still an organisation about trade in goods and sharing tariff revenue. The achievement of the new objectives depends on how the institutional and policy-making potential will be unlocked. There is no reference to services, investment and other trade related issues. Their inclusion could only happen once focused policies are developed and deliberate steps are taken to expand SACU's coverage; to do what the Preamble suggests, namely to have an organisation that will cater for the needs of the 21st

³¹ It was established in 1910. Certain common arrangements existed even before that date under British colonial administration over what is now the independent Member States of SACU.

³² It entered into force in July 2004.

³³ Namibia became a Member in its own right after its independence in 1990. Before that it was administered as an integral part of South Africa, an arrangement going back to the mandate granted by the League of Nations after World War I when Germany lost its colonies.

³⁴ Article 4 declares SACU to be 'an international organization, and shall have legal personality with capacity and power to enter into contracts, acquire, own or dispose of movable or immovable property, and to sue and be sued'.

century. This promise may still be unfulfilled, but it depends on the Members how they define their needs and how they will use the SACU institutions.

The promises imbedded in the initiative to reform SACU are still largely unfulfilled and new challenges are in fact confronting SACU members and the wider region. The latter relate to the implosion of Zimbabwe and the potential destabilisation of the whole region, the negotiations of the EPAs with the EU, still the major trading partner of these states. South Africa has concluded a bilateral trade agreement with the EU (the TDCA) which operates outside the disciplines of the SACU Agreement³⁵. The People's Republic of China has launched its own initiatives to secure access to Africa's raw materials; by offering its own trade deals and various forms of support to national governments without the ties Western governments would often add with respect to the protection of human rights and a commitment to transparency. The Doha Development Round petered out and a potential global commitment to address Africa's needs seems to have run out of momentum. The full impact of South Africa's own poverty, health and unemployment crises also became clearer and brought new types of constraints. These factors introduce new realities and are part of the explanation for the limited extent of the regional reform that has been promised. The reform agenda is not dead; but it has to be redefined against the background of several new structural and political challenges.

The new regional developments and new conditions offered an opportunity to change the legacy in SACU and to adopt a new regional vision. Certain changes and some degree of innovation did follow, but essential features (such as the strong focus on tariff revenue sharing) of the previous regime remain dominant. There is still no blueprint for the active and express promotion of regional integration. Certain building blocks (such as the new institutions) are being put in place and when they become fully operational there may be a new impetus and an incremental process towards increased cooperation and integration. The next part will mention some of the formal changes adopted through the new Agreement.

³⁵ This is technically possible in terms of Article 31(1) of the Agreement. The amendment of the TDCA is, however, a joint matter; see article 31(3).

What then is the conclusion with respect to joint action and future regional integration? The message is a mixed one and the most optimistic reading suggests that the new Agreement contains, through the express provision for common policies, new Annexes, and by establishing independent institutions such as the Tariff Board and the Tribunal, the potential for the Members to come up with specific new policies and a new direction. The verdict is still out and it will depend on the needs, political leadership and vision of participating governments as to what will happen to SACU. In this sense it is a member-driven arrangement and the Agreement is in many ways an enabling framework. Future developments will also be determined by how the organisation is utilised vis-à-vis third parties and developments in the SADC region, including the EPA negotiations. This is potentially a more focused and technically sophisticated institution that offers (and in certain areas obligates) opportunities to the Member States to foster integration and to meet contemporary challenges. Once this potential is fulfilled there will presumably also be a fundamentally different approach to the perceived threats and injury to all the economies in SACU resulting from the unregulated importation of Chinese textiles.

