The legal implications of the signing of Economic Partnership Agreements by Botswana, Lesotho and Swaziland in view of the SACU Agreement

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Abstract

The introduction and signing of the Economic Partnership Agreements (hereafter EPA's) have been received with mixed feelings legally, politically and economically. African Caribbean and Pacific countries have taken different positions with regards to their signing, ratification and implementation. A lot has been written about the legal effect of EPA's especially in developing countries and their inherent effect on regional integration. The Southern Africa Customs Union (hereafter SACU) has not been spared either. SACU is made up of Botswana, Lesotho, Namibia, South Africa and Swaziland.

Article 31 (3) of the 2002 SACU Agreement prohibits any of the SACU member states to negotiate and enter into new preferential agreements with third parties or amend existing agreements without the consent of other member states. Botswana, Lesotho and Swaziland signed Economic Partnership Agreements with the European Union in direct violation of article 31 (3) of the 2002 SACU Agreement. The actions of these three countries have exposed the vulnerabilities and short-comings of the 2002 Agreement.

The key findings of this study are that Botswana, Lesotho and Swaziland have violated the 2002 Agreement. Namibia and South Africa have openly castigated the actions of Botswana, Lesotho and Swaziland. SACU institutions that are mandated to monitor and implement the 2002 Agreement such as the Council of Ministers, Customs Union Commission, Secretariat, Tariff Board, Technical Liaison Committees and ad hoc Tribunal appear to have not taken sufficient action to penalise the actions of Botswana, Lesotho and Swaziland. This has led some critics to argue that the SACU 2002 Agreement has to be reviewed or suspended or that it has lost its legal force.

Keywords

Economic Partnership Agreements, Southern Africa Customs Union, European Union, Rule of Origin, Most Favoured Nation, Dumping, Reciprocity and Substantially all trade.

Opsomming

Die bekendstelling en ondertekening van die Ekonomiese Venootskapsooreenkomste (EVO'e) [Economic Partnership Agreements – EPAs) is wetlik, polities en ekonomies gesproke met gemengde gevoelens ontvang. Afrika Karibiese en Stille Oseaanlande het verskillende standpunte ingeneem met betrekking tot hulle ondertekening, ratifikasie en implementering. Heelwat is al geskryf oor die wetlike uitwerking van EVO'e, veral in ontwikkelende lande en hul inherente uitwerking op streeksintegrasie. Die Suidelike Afrika In- en Uitvoerunie [Southern African Customs Union – SACU) is ook nie hierin gespaar nie. SACU is uit Botswana, Lesotho, Namibië, Suid-Afrika en Swaziland saamgestel.

Artikel 31 (3) van die 2002 EVO'e verbied enige van die EVO'e-lidstate om nuwe voorkeurooreenkomste met derde partye te onderhandel en daartoe toe te tree of bestaande ooreenkomste te wysig sonder die instemming van ander lidstate. Botswana, Lesotho and Swaziland het in direkte verbreking van artikel 31 (3) van die 2002 SACU 'n Ekonomiese Vennootskapsooreenkoms met die Europese Unie onderteken. Die optrede van hierdie drie lande het die kwesbaarhede en tekortkominge van die 2002-Ooreenkoms blootgelê.

Die sleutelbevindings van hierdie studie is dat Botswana, Lesotho en Swaziland die 2002-Ooreenkoms verbreek het. Namibië en Suid-Afrika het Botswana, Lesotho en Swaziland se optredes openlik getugtig. SACU-instansies wat die mandaat het om die 2002-Ooreenkoms te monitor en te implementeer, soos die Ministersraad, In- en Uitvoerunie Kommissie, Sekretariaat, Tariefraad, Tegniese Skakelingskomitees en ad hoc Tribunaal het blykbaar nie toereikend opgetree om die optredes van Botswana, Lesotho en Swaziland te penaliseer nie. Dit het daartoe gelei dat sommige kritici geredeneer het dat die SACU 2002-Ooreenkoms hersien of opgehef moet word of dat dit sy regsmag verloor het..

List of abbreviations

ACP	African Caribbean and Pacific
BLS	Botswana, Lesotho and Swaziland
CCA	Common Customs Area
CoM	Council of Ministers
COMESA	Common Market for East and Southern Africa
COSATU	Congress of South African Trade Union
CUC	Customs Union Commission
EAC	East African Community
EC	European Commission
EEC	European Economic Community
EPA	Economic Partnership Agreement
EU	European Union
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GSP	General System on Preferences
ITAC	International Trade Administration commission of South Africa
MFN	Most Favoured Nation
PTA	Preferential Trade Agreement
RTA	Regional Trade Agreement
RoO	Rules of Origin
SACU	Southern Africa Customs Union
SADC	Southern Africa Development Community
TB	Tariff Board
TLC	Tender Liaison Committee
TDCA	Trade Development and Cooperation Agreement
WTO	World Trade Organisation

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Chapter 1 Introduction and Problem Statement

1 Introduction

The Southern Africa Customs Union (hereafter SACU) was created mainly with the objective of promoting economic development through regional coordination of trade and the elimination of trade barriers amongst SACU Member States. It is the world's oldest customs union, which was established resulting from the *1910 Agreement*[1]*.* This agreement created a common external tariff on goods imported into the region from third party countries.[2] The *1910 Agreement* enabled the free movement of SACU manufactured products without any duties or quantitative restrictions. It also contained a revenue sharing formula for the distribution of customs and excise revenues collected by SACU.

However, there was disgruntlement amongst SACU Member States over the inequality in revenue distribution that resulted in the *1969 Agreement*.[3] Botswana, Lesotho and Swaziland (hereafter BLS) signed the *1969 Agreement*. It brought about two major changes, which were (i) the inclusion of excise duties in the revenue pool, and (ii) the inclusion of a multiplier in the revenue sharing formula. There was a call to reform the *1969 Agreement,* and this culminated in the signing of the *2002 Agreement*.[4] One of its key objectives was to prohibit the unilateral conclusion of preferential trade agreements by any SACU Member State without the consent of other SACU Member States as per article 31.

1 1910 Southern Africa Customs Agreement (SACU) Union of South Africa – Territories of Basutoland, Swaziland and Bechuanaland Protectorate.

2 Gathii *African Regional Trade Agreements as Legal Regimes* 223.

3 1969 Southern Africa Customs Agreement (SACU) Agreement: Customs Union Agreement between the Government of the Republic of South Africa, The Republic of Botswana, The Kingdom of Lesotho and The Kingdom of Swaziland.

4 2002 Southern Africa Customs Agreement (SACU) Agreement: Customs Union Agreement between the Government of the Republic of Botswana, The Kingdom of Lesotho, The Republic of Namibia, The Republic of South Africa and The Kingdom of Swaziland.

Despite this prohibition, BLS have negotiated and signed Economic Partnership Agreements (hereafter EPA's) outside the legal provisions of the *2002 Agreement*. These EPA's include trade arrangements between African, Caribbean and Pacific (hereafter ACP) countries in partnership with the European Union (hereafter EU) to foster inter alia trade development and liberalisation amongst the ACP and EU countries. The phrase EU will be used interchangeably with the phrase European Commission (EC). This paper will only focus on the SADC EU EPA's signed by BLS that have a direct bearing on SACU.

1.1 Problem Statement and research question

Article 31 of the *2002 Agreement* regulates trade between SACU Member States and third parties. This article provides for three scenarios that have a bearing on the SACU trade relations.

Firstly, article 31 (1)[5] recognises the need for SACU Member States to maintain, if they so wish, any preferential trade arrangements that existed at the time the *2002 Agreement* was established. Secondly, article 31 (2)[6] provides inter alia that when negotiating with third parties on any trade agreement that has a bearing on SACU Member States, such negotiation shall be done collectively. In other words, collective negotiation is one of the main pillars of the *2002 Agreement*. This was seen as a way of safeguarding the economies and opportunities that are accorded exclusively amongst SACU Member States. Thirdly, the *2002 Agreement* reinforced the need for collective negotiation by enacting article 31, (3)[7] which unequivocally prohibits any SACU Member State to enter into new preferential agreements with third parties without the approval of other member states. Furthermore, this article forbids any SACU Member State from re-negotiating and amending existing preferential trade agreements without the consent of

5 Member States may maintain preferential trade and other related arrangements existing at the time of entry into force of this Agreement.

6 Member States shall establish a common negotiating mechanism in accordance with the terms of reference to be determined by the Council in accordance with paragraphs 2 and 7 of Article 8 for the purpose of undertaking negotiations with third parties.

7 No Member State shall negotiate and enter into new preferential trade agreements with third parties or amend existing agreements without the consent of other Member States.

other member states. From the above there is no doubt about the intention of SACU Member States to prohibit any member state from entering into any agreement, which might jeopardise, threaten or weaken SACU.

The signing of the EPA's by BLS is a clear violation of article 31 of the *2002 Agreement.* In addition, it is also a violation of article 9, which advocates for the enforcement of a common external tariff. The actions of BLS also bring into question the competence of the dispute resolution mechanisms under the *2002 Agreement*. Article 13[8] provides for dispute settlement by an ad hoc Tribunal. Almost ten years after the entry into force of the *2002 Agreement,* this tribunal is yet to be appointed.

Namibia and South Africa have openly castigated the actions of BLS. These two countries have also refused to sign the EPA's in their current state. Meanwhile, South Africa has its own agreement with the EU namely, Trade Development and Cooperation Agreement (hereafter TDCA). On the other hand, Namibia exports most of its beef to the EU. The actions of BLS gave rise to other legal questions, including the question concerning the lack of clear Rules of Origin (hereafter RoO) under the *2002 Agreement*.

Will SACU be able to weather this storm and pull through, or will SACU call for another re-negotiation of the *2002 Agreement?* Could this be the beginning of polarisation of SACU, which will eventually lead to its disintegration and integration into the envisaged SADC Customs Union? It is against this background that this dissertation will investigate the legal implications of the signing of the EPA's by BLS as a violation of the *2002 SACU Agreement.* This study thus seeks to answer the following question: What are the legal implications of the signing of EPA's by BLS that is contrary to the provisions of the SACU agreement?

1.2 Outline of the study

8 Any dispute regarding the interpretation or application of this Agreement, or any dispute arising thereunder at the request of the Council, shall be settled by an ad hoc Tribunal.

Chapter two of this dissertation discusses SACU's legal framework with more emphasis on the competence of its institutional framework in dealing the EPA's. In this regard, the functions of the Council of Ministers (hereafter CoM), Customs Union Commission (hereafter CUC), Secretariat, Tariff Board (hereafter TB), Technical Liaison Committees (hereafter TLC) and ad hoc Tribunal (hereafter Tribunal) will be examined. Furthermore, this dissertation investigates the provisions of article 31 of the *2002 Agreement* vis-à-vis other relevant provisions. This is done on their regulation of preferential trade agreements with third parties. Additionally, the dissertation seeks to establish whether the Tribunal could have settled the EPA dispute.

Chapter three dissects the problematic provisions of the EPA's that have a direct bearing on SACU. Five areas that have been identified to have serious legal implications for SACU by virtue of the EPA's are: (i) RoO (ii) Most Favoured Nation (hereafter MFN) (iii) Reciprocity (iv) Dumping and (v) Substantially all trade.

The contributions made by this study, future research opportunities in this field, summary of the findings as well the way forward for SACU are discussed in chapter four.

1.3 Research methodology

This study is based purely on a literature review of the appropriate regional and international agreements, regional and international polices, study of applicable textbooks, law journals, articles and internet sources pertinent to the subject matter.

Chapter 2

The legal position in terms of the SACU Agreement

2 Introduction

In order to fully comprehend the legal relationship between the EPA's and SACU, more particularly the actions of BLS and the resentment of the EPA's by Namibia and South Africa, it is imperative to have an understanding of the general overview of the EPA's and their characteristics. Therefore, before a detailed discussion of the *2002 Agreement* commences, one has to outline the development of the EPA's, beginning with a brief historical background, the *Cotonou Agreement* and the current EPA position. This will be followed by a discussion on the legal position in terms of the *2002 Agreement.*

2.1 Historical development of EPA's

Trade and development agreements between European countries and sub-Saharan Africa can be traced back as far as the *Treaty of Yaoundé* (hereafter *Yaoundé* Treaty).[9] The *Yaoundé Treaty* was signed in 1963 between the then European Economic Community (hereafter EEC) and its former colonies.[10] Of course, not many African countries had gained independence by then. The majority of the signatories came from the Caribbean and Pacific countries. This necessitated a joint negotiation forum between ACP and EEC countries. In short, the *Yaoundé Treaty* earmarked trade negotiations between the ACP countries and European countries represented by the EEC.

9 There was also the Rome Convention, which was signed in 1957, that laid the foundation for economic development. However, as most authors agree, it was the Yaoundé Treaty that can be credited with significant trade negotiations.

10 Meyn *Economic Partnership Agreements: A 'historic Step' towards a 'partnership of equals*.' 7.

There were two *Yaoundé Treaties*, namely, the *Yaoundé Convention I* and *Yaoundé Convention* II. Alaro[11] indicates that *Yaoundé I* (1963-69) focussed mainly on non-discriminatory trade and financial aid, whereas, *Yaoundé II* (1969-75), centred largely on increased financial aid development to ACP countries. The demise of the *Yaoundé II Convention* culminated in the launching of the *Lome Conventions I-IV* from 1975 to 2000.

2.1.1 Lome Conventions

The *Lome Conventions* were in place for a combined period of twenty-five years, from 1975-2000, under five *Lome Agreements*, that is, *Lome Conventions I-IV*. The thrust of these conventions is well summarised by the International Federation for Human Rights[12], which states that:

> The *Lome Agreements* established a privileged relationship between ACP and the European Community (EC), with non-reciprocal trade benefits (ACP products benefited from more advantageous customs duties than the products from other regions upon entrance to the European territory, while ACP countries were not committed to give the same advantages to the European products). This non-reciprocity was justified by economic development differential between European and ACP countries.

There were discrepancies that existed in the *Lome Conventions,* particularly on the non-reciprocity and the MFN principles and their non-compliance with objectives of the World Trade Organisation (hereafter WTO). This resulted in the revision of the *Lome Convention IV* in 2000 which culminated in the signing of the *Cotonou Agreement*.[13]

2.1.2 Cotonou Agreement

EPA's were laid out in the *Cotonou Agreement* following objections to the *Lome Conventions,* which were primarily criticised for their discriminatory nature. Hinkle,

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11 Alaro *The EU-ACP Economic Partnership Agreements and their Implications for Ethiopia* 15.

12 International Federation for Human Rights *Economic Partnership Agreements and Human Rights*14.

13 Benin February 29, 2000.

Hoppe and Newfarmer[14] opine that the EPA's are intended to replace EU's present unilateral preferences with the ACP group. Therefore, it can be said that the EPA's are a complete departure from the *Lome Conventions* that seek to bridge the gap between the EU, ACP and other WTO member states as far as trade imbalances are concerned. According to article 37(1)[15] of the *Cotonou Agreement*, the EPA's objectives are (i) poverty reduction (ii) promotion of sustainable development and (iii) facilitation of ACP countries into the global economy through trade.

This sets the platform for a discussion of the signing of the EPA's by BLS under the *2002 Agreement.* This discussion will examine whether this signing will enhance these objectives or whether it is retrogressive to the realisation of these objectives as well as the objectives of SACU.

2.2 Establishment of SACU and Preamble

Article 3(1) of the *2002 Agreement* establishes SACU. It states that:

> There is established the Southern Africa Customs Union.

SACU is clothed with the usual legal status that has become synonymous with international institutions.[16] The *2002 SACU Agreement* brought about remarkable change that sought to revolutionise trade within the SACU Member States[17]*.* At the same time, it was meant to establish SACU as a preferred model to the much talked about Southern Africa Development Community (hereafter SADC) customs union. Whether the anticipated improved trade liberalisation envisaged in the *2002 Agreement*

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14 Hinkle, Hoppe and Newfarmer *Beyond Cotonou Economic Partnership Agreements in Africa* 22.

15 Economic partnership agreements shall be negotiated during the preparatory period which shall end by 31 December 2007 at the latest. Formal negotiations of the new trading arrangements shall start in September 2002 and the new trading arrangements shall enter into force by 1 January 2008, unless earlier dates are agreed between the Parties.

16 Article 4(1) provides inter alia that SACU shall be an international organization, and shall have legal personality with capacity and power to enter into contracts, acquire, own or dispose movable or immovable property, to sue and be sued.

17 Botswana, Lesotho, Namibia, South Africa and Swaziland are also members of the bigger regional bloc SADC.

has achieved its desired goals or whether it will attain its purpose, will be tested by the extent to which the *2002 Agreement* will be able to weather the challenges posed by the EPA's. As it stands, three[18] out of the five countries have signed the interim EPA's. Thus, it is important to ascertain the legal consequences of such signing.

The aim of the *2002 Agreement* is to serve two main purposes, namely (i) free trade in goods and (ii) common external tariff. Mathis[19] defines free trade under SACU to mean the elimination of tariff duties and quantitative restrictions on importation and exportation. The preamble of the *2002 Agreement* expresses the importance of common policies in trade and economic development within each member state. This preamble highlights how the 1969 Agreement failed to propel economic development due to its failure to adequately promote common policies. It was the intention of the parties to enhance trade liberalisation by promoting common policies, meaning, it is an admission by the Member States that unanimity, as an integral part of economic development, can be achieved. Whether this common policy idea was ignored when BLS signed the EPA's without consensus from Namibia and South Africa, will be scrutinised in this paper.

The preamble acknowledges the need for the Member States to apply the same customs tariffs and trade regulations to goods imported from outside the Common Customs Area (hereafter CCA).[20] It is this position that ushers in the need to analyse how SACU Member States had arranged or put mechanisms in place to deal with third party trade agreements such as EPA's. At this point, it is also vital to note that this provision in the preamble compels one to examine how SACU Member States were prepared to deal with the envisaged SADC customs union. Although this paper is not dealing extensively with the anticipated SADC customs union, one cannot resist the temptation of commenting on the SACU/SADC customs union.

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18 Botswana, Lesotho and Swaziland signed EPA's on 4 June 2009 in Brussels. *Economic Partnership Agreements: EU and Southern African countries interim deal* http://europa.eu.

19 Mathis *SACU Framework on Competition Policy and Unfair Trade Practice* 6.

20 UNCTAD Southern Africa Customs Union *Regional Cooperation Framework on Competition Policy* 5.

At the forefront is the question of whether SACU will be subsumed by the SADC customs union or whether SACU will continue to run parallel to SADC customs union. On the other hand, under a fully-fledged SADC customs union and assuming that most SADC Member States[21] have not signed EPA's, the question is how will that affect the customs procedures between SADC EPA Member States (Botswana, Lesotho, Swaziland, Mozambique, Zimbabwe) and SADC non-signing EPA Member States. Issues of RoO, MFN, Reciprocity and many others, including dispute resolution, will become contentious issues. These are the same challenges that SACU is now facing after BLS signed the EPA's. The ability of SACU to deal effectively with these challenges will bring hope to the SADC region when Member States choose to sign other trade pacts that have a bearing on, or that threaten the existence of regional international trade organisations.

It suffices to say that the issues raised above, resonate much with underlying challenges that BLS, by signing the EPA's, have brought to SACU. The preamble of the *2002 Agreement* accepts that Member States are at different levels of economic development and that there is a need for their integration into the global economy. BLS can rely on this provision in justifying their signing of the EPA's. This provision opened the door for signing other trade agreements, whether or not they are EPA's. Botswana's justification of signing the EPA's in the National Trade Policy[22] (hereafter Botswana Trade Policy) is:

> This gives the country duty free-quota free market access to the European market.

This position fits perfectly with the goals of the *2002 Agreement* in promoting trade globalisation. Mmegi[23] opines in this regard that by signing the EPA's, Botswana's exports, including beef, will enjoy permanent duty free market access. If one carefully analyses the spirit of Botswana's Trade Policy, one can derive that Botswana seeks to

21 Sothern Africa Development Community: *Support for SADC Member States*.
22 Ministry of Trade and Industry 2009 http://www.mti.gov.bw.
23 Mmegi 2007 http://palapye.wordpress.com.

improve its market access. In so doing, Botswana's Trade Policy categorically states that:

> Botswana's Trade Policy is also important as it addressed trade issues that are top in government agenda. These include, among others, export diversification covering product and market diversification, export competitiveness, supply-side constraints, employment creation and poverty reduction as well as diversification of the economy in general.[24]

In the same spirit, Lesotho justifies its position of utilising the door of the preamble of the *2002 Agreement* and signing the EPA, stating[25] that:

> This new reciprocal agreement means that both sides will open their markets to the exports of each other, although Lesotho has been given a much longer period of time within which to reduce their import duties for EU products. Lesotho on the other hand will enjoy the immediate scrapping of all import duties for products exported into the EU.

Are these privileges not available under the *2002 Agreement* or is there not much trade between the SACU Member States to promote the desires of the countries? Lesotho, in its Vision 2020[26], states inter alia, that "Lesotho will network and collaborate with other countries in trade, investment and economic advancement in general".

In the same vein, Swaziland's position states that one of its main visions is to create trade opportunities and to enhance export competitiveness.[27] It is clear that BLS appear to be driven by trade advancement to attain increased international market access at reduced tariffs or no tariffs at all. In the process, BLS wants to reap financial benefits from increased trade with the EU. It is against this background that the trade between the SACU members seems not to be addressing the economic thirst of these countries. Whether this state of affairs is true will be shown as the analysis of the *2002 Agreement* continues.

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24 It is this ambition of Botswana that flows from the preamble that saw it sign the EPA's without hesitation in direct conflict with the *2002 Agreement*.

25 Ministry of Trade Lesotho date unknown http://www.trade.gov.ls.

26 Ministry of Trade Lesotho date unknown http://www.trade.gov.ls.

27 Action for Southern Africa Country Profile Swaziland 2009. http://www.actsa.org.

Having said that, South Africa and Namibia are also endeavouring to improve their international market access by increased trade liberalisation. Both countries suffer from high levels of poverty and unemployment, which can be reduced by more duty free access to the EU markets. Yet, despite these seemingly lucrative incentives offered by the EU, these two countries have refused short-term EPA benefits without fully investigating the potential long-term implications these might have on their economies. Chapter three will discuss some of the contentious issues that have been raised by these two countries. Until those issues have been clarified, it appears these two countries seem to prefer the status quo for the time being.

The preamble further states that the Member States should honour existing regional arrangements and bilateral trade agreements. As stated earlier on, BLS signed the EPA's in 2009, yet, the *2002 Agreement* was signed by all SACU Member States in 2002.[28] Therefore, there is no legal justification for BLS to rely on this provision in the preamble. If BLS did not rely on this preamble provision, could it be possible that there are other provisions in the *2002 Agreement* that may validate the position of BLS? This question will be answered in the following in-depth[29] investigation of the key provisions of the *2002 Agreement.* This will be done in an attempt to find the rationale behind the actions of BLS and their consequent legal implications.

2.3 SACU Institutions

2.3.1 Council of Ministers

Article 7[30] of the *2002 Agreement* establishes six distinct institutions. Of particular importance is the role of the CoM and the legal repercussions of its decisions. The CoM is the heartbeat of the organisation and its functions are critical. It is the supreme

28 The *2002 Agreement* was signed on 21 October 2002 in Gaborone, Botswana by all the leaders of SACU members states.

29 Council of Ministers, Customs Union Commission, Secretariat, Tariff Board, Technical Liaison Committees and an Ad hoc Tribunal.

30 The following institutions of SACU are hereby established - (a) Council of Ministers; (b) Customs Union Commission; (c) Secretariat (d) Tariff Board; (e) Technical Liaison Committees; and (f) ad hoc Tribunal.

decision-making body of the organisation, and it has the mandate to oversee the overall policy formulation of SACU. Article 8(1) states that:

> The Council shall consist of at least one minister from each member state and shall be the supreme decision making body of all SACU matters.

This enormous responsibility brings the manner in which the CoM has dealt or is dealing with the signing of the EPA's by BLS into question. To begin with, it appears as if the CoM has failed to deal decisively with the issue of the EPA's. There is no consensus in the way forward from the CoM. This is evident because SACU, through the CoM, has failed to give its official legal position on the EPA's. The infighting over the legal status of the EPA's can be seen in the numerous responses that each minister from the SACU Member States has issued from time to time.

Hage Geingob[31], Namibia's Minister of Trade and Industry, has for instance openly criticised the BLS for signing the EPA's. He has said that "this is not a partnership; by setting an arbitrary deadline the EU is trying to put pressure on us to sign the economic partnership agreement." In the same spirit, Dr Rob Davies, South Africa's Minister of Trade and Industry[32], has on several occasions reiterated South Africa's stance by saying that "the EPA's will establish a series of different and sometimes incompatible trade regimes between the EU and members of SADC."

On the contrary, Neo Moroka, Botswana's Minister of Trade and Industry[33], said that "the signing of the interim EPA marks a significant milestone in our trade negotiations." In the same vein, Lesao Lehohla[34], the then Lesotho's Deputy Prime Minister, said that "we are particularly delighted and indeed, grateful that our country is ranking among those targeted for showcasing of investment opportunities." However, article 8(2) obliges the CoM to steer the customs union in the direction of increased economic

31 *The Namibian* 2.
32 Ministry of Trade and Industry *A South African Trade Policy and Strategy Framework* May 2010.
33 Europa Press *Economic Partnership Agreements: EU and South Africa* 1.
34 Ministry of Trade and Industry, Cooperatives and Marketing (MTICM) Newsletter 2.

growth by providing policies that are in line with the *2002 Agreement*. This article notes that:

> The Council shall be responsible for the overall policy direction and functioning of SACU Institutions, including the formulation of policy mandates, procedures and guidelines for the SACU institutions.

At the 25th Council Meeting in December 2011,[35] the CoM stated that an impact assessment on the proposed COMESA/EAC/SADC Free Trade Agreement was already underway, and SACU senior trade officials were expected to consider the recommendations early in 2012. This stance by the CoM shows that the CoM is a very capable body. If the CoM could embark on such a study, they should have done the same for the EPA's. Therefore, there is a legal duty on the CoM to give the SACU members a clear lawful position regarding the signing of EPA's.[36]

The continued side-line bickering by the CoM is not helpful, if anything, it adds to the confusion that seems to already exist regarding the EPA's. The CoM owes it to its constituency to come up with a clear legal position, because stakeholders, especially in international trade, operate more on legal certainty than uncertainty. With this in mind, has the CoM failed in its legal mandate of being the supreme decision[37] making body of SACU? A clear lack of cohesion in the CoM is evident from this. This has left SACU vulnerable to the extent that some critics have already seen the demise of SACU. On the other hand, those that are optimistic still believe there is a possibility to salvage the situation and that SACU will come up with a unified position. Whichever way one looks at it, the CoM needs to come up with a "working legal position".

The idea behind the suggested "working legal position" is that the CoM has to issue an official communiqué that will allow BLS to map the way forward. This will also allow Namibia and South Africa to weigh their options. It will send a signal of unity to the outside world, and it will indicate the commitment of all SACU Member States to move

35 *SACU Newsletter 1*.
36 Rule 3 of *SACU rules of procedure* Council of Ministers 3.
37 SACU *Foreign Trade Barriers Southern African Customs Union (SACU)* 443.

forward. Additionally, the CoM has a mandate to issue policy guidelines and procedures for the SACU institutions.[38] In this regard, one would have expected the CoM to issue interim guidelines and procedures on how to deal with goods imported via the EPA's. This should be done without compromising one of the main purposes of SACU, namely to establish a common external tariff to goods imported from outside SACU Member States. These guidelines and procedures were not issued by the CoM, and it appears as if it has been left to individual Member States to deal with this issue, disregarding the effect on Namibia and South Africa.

However, since 2009, when BLS signed the EPA's, goods from the EU have been entering into markets of Namibia and South Africa with no interim legal position on how to levy the relevant duties or tariffs. In other words, these goods were treated and had the same status as if the goods were originally from SACU Member States. The result is that the revenue that is meant to be collected from the EU goods, imported under the EPA's, has been lost by Namibia and South Africa. The CoM were supposed to provide measures, guidelines and procedures, even on an interim basis, on how to levy the customs duty on these goods, whilst SACU is still trying to work out a plan.

One may argue that once SACU issues interim guidelines and procedures dealing with goods imported via the EPA's, Namibia and South Africa will admit that there is a need to legitimise the trade in such goods and thereby tacitly agree to the EPA's. Whilst this argument appears to hold water, the idea is not necessarily to legitimise trade in goods from the EU. The thrust of the argument is that the CoM must be proactive in policy formulation, thereby fulfilling its legal mandate. If SACU leaves the trade of goods from the EU unregulated, it is a failure of the overall expectation of the values and aspirations that founded the *2002 Agreement*. The CoM must attend to this matter, using the legal powers invested in them.

The current situation has left SACU polarised and compromised to the extent that even labour organisations in South Africa have condemned BLS for signing the EPA's. The

38 Ruppel 2010 *Namibian Law Journal* 122-165.

Congress of South African Trade Unions (hereafter COSATU) has viciously attacked BLS on numerous occasions for signing the EPA's.[39] There was even talk of South Africa pulling out of SACU if BLS continues to be part of the EPA pact.[40] These threats cannot be taken lightly, seeing the political relationship between the South African government and COSATU, especially on issues that they agree on.

Since South Africa is the largest contributor to the SACU revenue,[41] it is in the best interest of BLS to find common ground on the EPA's or to state SACU's legal position as soon as possible. The longer the situation goes unabated, the greater the chances that SACU will be weakened. Thus, one can say that the CoM has failed in its legal mandate as far as article 8(2) is concerned.

2.3.2 Customs Union Commission

Article 7[42] establishes the Customs Union Commission (hereafter CUC). The purpose of the CUC is to implement the *2002 Agreement* as per article 9(4)[43] and to implement the decisions of the CoM as per article 9(5).[44] The CUC thus have an executive function within the confines of the *2002 Agreement*.[45] However, the failure by the CoM to give directions as to the manner in which goods traded by BLS under the auspices of the EPA, causes the CUC to be a limping organisation lacking the zeal or persuasion of the CoM to legislate trade that already exists within the BLS and the EU.

Because of CoM's failure to give policy directions as far the EU goods are concerned, the CUC does not have much power to influence the CoM. Be that as it may, CUC has taken a lacklustre approach in this matter. If cognisance is to be given to its executive

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39 Hlangani 2007 http://numsa.org.za.
40 Craven 2009 http://www.polity.org.za.
41 In 2008/90 South Africa contributed R45 billion to the common revenue pool which represented 98% of SACU transfers 1.
42 The following institutions of SACU are hereby established - (b) Customs Union Commission.
43 The Commission shall ensure the implementation of the decisions of the Council.
44 The Commission shall be responsible for overseeing the management of the Common Revenue Pool in accordance with the policy guidelines decided by the Council.
45 UNCTAD 2005 http://www.unctad.org.

functions, then one can say that CUC has not fully flexed its muscles. It is common cause that the actions of BLS have complicated the operations of the CUC. Interestingly, the decisions of the *2002 Agreement* must be made by consensus as provided for in article 31(3), which states inter alia that:

> No member state shall negotiate and enter into new preferential trade agreements with third parties or amend existing agreements without consent of other *Member States*.

Did the CUC hold BLS accountable when they signed the EPA's? Did the CUC even attempt to block the signing of the EPA's by BLS by compelling them to abide by the agreed legal position postulated in article 31(3)? Does the silence of CUC on this aspect amount to condoning of the violation of the *2002 Agreement*? What does this mean for the future violation of the *2002 Agreement* by any other member of SACU?

The CUC has not begun any action to force BLS to first withdraw or even to suspend their interim EPA's to enable BLS to comply with article 31(3).[46] The CUC has no official position in this regard, which leads to a lot of speculation on the competence of the CUC. Can it be said that the CUC is in agreement with the CoM by not fully disapproving of the open violation of the *2002 Agreement.* If the CUC fails to protect the very essence or principles of the organisation, then surely the CUC cannot continue to operate devoid of criticism without bringing the organisation into disrepute.

Thus, it can be said that the approach of the CUC is dismal, particularly in its failure to force adherence to the *2002 Agreement,* or to at least speak out against the actions of BLS. Article 31(3) clearly advocates consensus by all Member States for any preferential trade agreement signed after 2002. There was no such consensus when BLS signed the EPA's. On what legal basis did the CUC then base its current position of silence on such a crucial principle threatening the very existence of SACU?

46 SACU Quarterly Review January-March 2008 *SACU's participation in the EPA's* 3.

Other authors[47] have said that South Africa is actually losing billions in revenue by being a member of SACU, since it is the largest contributor of revenue to SACU. The CUC has kept quiet on the concerns raised by Namibia and South Africa. On the other hand, one can probably say that the composition of the CUC, including representatives of each *Member State*, might be compromising the operations of the CUC. It is obvious that each representative of each Member State will support the position of his or her country at the expense of the well-articulated international trade norms.

At the end of the day the CUC becomes more partisan to bolster the economic aspirations of the Member States without giving due regard to the principles envisaged in the *2002 Agreement*. One may also argue that decisions on preferential trade agreements, or any other such agreement that a member state wants to conclude, should be done by a majority vote. Therefore, the view of the majority will prevail, which will inevitably become the legal position of SACU.

However, the current legal position is that any decision, particularly that of concluding preferential trade agreements after 2002 by any member state, is by consensus as provided for in article 31(3). This was not done by BLS. The CUC did not fulfil their task as imposed on it by the 2002 Agreement in terms of article 9.[48] The CUC may argue that the CoM did not make a decision as far as the EPA's are concerned, therefore the CUC had no decision to react to, thus such criticism is unwarranted. However, this argument is a fallacy as article 9(3)[49] makes it mandatory for the CUC to implement the *2002 Agreement*.

2.3.3 Secretariat

47 Langton *United States-Southern African Customs Union (SACU) Free Trade Agreement Negotiations*.Sandrey R and Jensen HG *Implications of South African/SACU Free Trade Agreements*.

48 The Commission shall consist of senior officials at the level of Permanent Secretaries, Directors-General, Principal Secretaries or other officials of equivalent rank, from each Member State.

49 The Commission shall be responsible for the implementation of this Agreement.

Article 7[50] establishes the Secretariat. The Secretariat must perform the day-to-day administration of SACU as provided for in article 10(3).[51] Furthermore, it has the duty to coordinate and monitor the implementation of all decisions of the CoM and the CUC as per article 10(4).[52] It is worth noting that the Secretariat is absolved from the actions of BLS. That might be because the CoM did not make a decision on the EPA's and the CUC did the same, therefore, the Secretariat was left with no choice but to follow its "leaders".

Although this might seem right, a proper analysis of the aims and objectives of the *2002 Agreement* mandates the Secretariat to uphold the principles of the *2002 Agreement,* in particular decisions through the consensus principle.[53] Nothing in the entire *2002 Agreement* justifies the failure by BLS to comply with article 31(3), which would in turn validate the actions of the Secretariat. Article 9(4)[54] also obligates the Secretariat to ensure harmonisation of national policies and strategies of Member States in their relation to SACU. It can be argued that BLS, by engaging in the EPA's, sought to exercise and broaden their economic strategies. Consequently, the Secretariat should have and can still exercise the powers vested in it by article 10(3), of ensuring harmonisation in both national policies and international strategies.

If three out of five SACU Member States signed the EPA's, is there harmonisation in SACU?[55] It appears as if the answer to that question is in the negative. This was and still is a perfect platform for the Secretariat not to be part of the problem, but to be part of the solution or to at least set a stage for negotiations by all Member States. Article 10(8) provides that:

50 The following institutions of SACU are hereby established - (c) Secretariat.
51 The Secretariat shall arrange meetings, disseminate information
52 The Secretariat shall assist in the harmonization of national policies and strategies of Member States in so far as they relate to SACU.
53 SACU *Developments in SACU – 5 years into the implementation of the 2002 SACU Agreement* 3.
54 The Commission shall ensure the implementation of the decisions of the Council.
55 Department of Agriculture, *SADC Agreement and SACU Protocol on Trade* 1.

> The Secretariat shall coordinate and assist in the negotiation of trade agreements with third parties.

Why did BLS not involve the Secretariat in negotiating the EPA's? Why did the Secretariat not demand representation in the negations between BLS and the EU in compliance with this provision? The negotiations between BLS and the EU were an open secret until the point of conclusion.[56] During that whole process of negotiation the Secretariat did not officially raise any objections. For that reason, the Secretariat still has a pivotal role to play in trying to resolve the EPA dispute. The Secretariat should not rest on its laurels, but rather it should push the Member States to expedite, reaching a workable legal position (even an interim one) that is in the best interests of SACU. To date the Secretariat has not stated its preferred position. This situation is deplorable, taking into account the importance of the Secretariat in SACU.

2.3.4 Tariff Board

Article 7[57] establishes the Tariff Board (hereafter TB). The main purpose of the TB is stated in article 11(2), which is to inter alia:

> Make the 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 or duty drawbacks based on the directives given to it by the Council as provided for in article 8.

The TB occupies a special role within the structures of SACU.[58] It has one of the most crucial duties in that it has to be hands-on in doing research on and identifying the importation of goods into the CCA. From the above provision, one would have expected the TB to make the necessary recommendations on how to deal with goods imported into the CCA in violation of the *2002 Agreement*.[59] As explained earlier on, goods from the EU are being imported into the CCA and SACU has no legal mechanism that

56 Meyn *The end of Botswana beef exports to the European Union?* 1-4.
57 The following institutions of SACU are hereby established - (d) Tariff Board.
58 Van Dijk "Agricultural Trade Negotiations in Parliamentary Committee for Agriculture" 11-18.
59 Hartzenberg *Towards and Economic Community – Critical Issues to be addressed* 3.

determines whether these goods qualify to be levied under the anti dumping or countervailing regimes.

One would have expected the TB to embark on an initiative that regulates the manner in which the goods from the EU, imported under the EPA instrument, will be dealt with.[60] However, the omission by the TB, whether deliberate or not, to recommend to the CoM the need to have an interim regulation is worrisome. During the SACU Factual review by the World Trade Organisation (hereafter WTO),[61] the chair of SACU at that time, Lesotho, admitted that:

> The main objective of SACU being to enhance trade amongst its Member States by facilitating the free movement of goods, whilst deepening integration through cooperation in the development of mutually beneficial economic and trade policies.

The irony of it is that Lesotho is one of the countries that signed the EPA's, and the signing of the EPA does not "enhance trade amongst Member States." If anything, the signing threatens that anticipated trade in Namibia and South Africa. It is important to note that Lesotho was presenting a common position that was shared by all SACU Member States, yet, on the side lines Lesotho, Botswana and Swaziland were negotiating the EPA's outside the SACU legal framework. The TB was directly involved in the WTO consultations and presented a unified position on the various queries that were raised by other WTO Member States.

Why is it that the TB has not taken a unified position or at least recommended the need to have a unified position as far as the EPA's are concerned to the CoM in order to continue and safe guard the trade amongst Member States? Could this be traced back to the legal composition of the TB since it is comprised of experts from Member States? One may infer again from this that it appears as if each representative of each Member State seem to be rallying behind the position of their respective countries without paying due regard to the spirit and tenor of the *2002 Agreement*. As with CoM, CUC and the

60 McCarthy Developing *Common Policies: An Industrial Policy for SACU* 1-10.
61 World Trade Organisation *SACU Factual Review by the World Trade Organisation, (WTO)*.

Secretariat, TB seems to have been compromised by its legal composition and its affiliation to each Member State. If the position of the TB is viewed under the spectacle of article 11(1), which provides inter alia that:

> The Tariff Board shall be an independent institution made up of full-time or part-time members or both.

One can say that it is debatable whether the TB is really an independent institution. It seems as if the independence of the TB has been compromised. The representatives of each Member State give the impression that they are pay allegiance to their individual Member States at the expense of SACU.

2.3.5 Technical Liaison Committees

Article 7[62] establishes the Technical Liaison Committees (hereafter TLC) in the designated areas stated in article 12, namely agriculture, customs, and transport as well as trade and industry. The purpose of the TLC is to assist and advise the Commission in its work.[63] Unfortunately, there is not much the TLC can do under the current situation as far as the signing of EPA's are concerned. However, on a preponderance of probability, the TLC can lobby the CoM by clearly stating that if the status quo continues and there is increased trade between the EU and BLS, the long term effect of the EPA's will definitely affect the operations of the TLC. It is against this background that the TLC can start the process, though its chances of success are slim. Nevertheless, it still has a legal chance of forcing the Member States to resolve the outstanding issues regarding the EPA's.

2.3.6 The Tribunal

62 The following institutions of SACU are hereby established - (e) Technical Liaison Committees.

63 World Trade Organisation Trade *Policy report by the Secretariat Review SACU* 1-68.

Article 7[64] establishes the Tribunal. The composition and jurisdiction of the Tribunal is outlined in article 13. Since the establishment of SACU under the *2002 Agreement,* the Tribunal has not heard any dispute from the Member States. It appears that the few disputes that have risen within SACU, have been dealt with by the existing mechanisms of SACU and not the Tribunal. Therefore, the current dispute of the EPA's has brought the function of the so-called Tribunal into perspective. One of the most contentious issues regarding the Tribunal is its competence to deal with serious disputes arising out of the *2002 Agreement*.[65] This is mainly because, from its inception the *2002 Agreement* favours cooperation and consensus in the decision making process. It seems as if the Member States have deliberately avoided using the Tribunal, lest it can be viewed as a weakness of the Member States to resolve their disputes amicably as provided in article 13(6):

> Member States party to any dispute or difference shall attempt to settle any dispute or difference amicable before referring the matter to the Tribunal.

Why is it that Member States have not opted for this route, but have rather chosen to confront each other using the various modes of communication, which has only worked in favour of proponents of the EPA's? It would have been more acceptable for this dispute either to be resolved amicably as provided for in article 13(6), or to be referred to the Tribunal. There is no reason why the Member States cannot submit to the dispute resolution mechanisms that they have put in place. This contempt destroys the confidence of the other stakeholders or would be parties to the organisation. It is unfortunate that Member States have not displayed the willingness to respect their own dispute resolution process.[66] Therefore, the first inquest is to find out if the Tribunal is clothed with the legal mandate to deal with the EPA's dispute. Article 13(1) states that:

> Any dispute regarding the interpretation and application of this Agreement, or any dispute arising there under at the request of the Council, shall be settled by an ad hoc Tribunal.

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64 The following institutions of SACU are hereby established - (f) ad hoc Tribunal.
65 Brink Regional *dispute settlement mechanisms in Africa* 270.
66 Erasmus *New SACU Institutions: Prospects for Regional Integration* 20.

Because of the fact that Namibia and South Africa have refused to honour the signing of the EPA's by BLS, one would have thought that such a dispute qualifies to be referred to the Tribunal. To make it worse, BLS insisted on and defended their signing of the EPA's in complete disregard of their obligations under the *2002 Agreement*. Article 31(3) prohibits the entering into any preferential trade agreement by any Member State without the consent of other Member States, which is exactly what BLS have done.

Therefore, the Tribunal is vested with the powers to hear the EPA dispute.[67] Is there any justification to explain why the dispute has not been referred to the Tribunal? It is already three years after the interim EPA's have been entered into, the dispute is still unresolved and there is no indication that the dispute will be resolved anytime soon. As if that is not enough, the CoM has the power to refer any dispute (including the EPA dispute) to the Tribunal.[68] Why is it that the CoM has not referred the EPA dispute to the Tribunal? The CoM is the supreme arm of SACU, and it has the legal capacity to deal with any matter, including speedy dispute resolution of the EPA dispute.

If Namibia and South Africa are really serious about resolving the EPA dispute, why have they not referred this matter to the Tribunal? If Namibia and South Africa continue to sing choruses of disapproval of the EPA's, it appears to attract sympathy and paint the EPA's as evil, they should rather take the matter to the Tribunal.[69] This would bring credibility to the institution, enhance the position of SACU and establish legal certainty.

The current situation leaves SACU extremely susceptible in a world that is seeking to capitalise any preferential trade arrangement with little or no consequences. It appears as if the West and its allies are exploiting such weaknesses in dispute resolution as displayed by SACU. This resonates with Africa's RTA's such as SADC, EAC, and ECOWAS to mention just a few. A number of African countries have entered into multiple trade arrangements without fully realising their legal implications in the long-term. Some of these trade arrangements do not have adequate dispute resolution

67 SACU Annual Report October 2010 61.
68 SACU Annual Report 2008/2009 35.
69 Mavuso *Presentation to the University of Namibia Economic Students* 6.

mechanisms, and even if they do, most African countries do not have the willingness to abide by a ruling that goes against them.

In the present case, it is not surprising that BLS have not brought the matter before the Tribunal. In all fairness, BLS is well aware that the Tribunal is likely to rule against them. This position is justified through the wording of article 31(3) and the objectives of SACU as stated in article 2(b):

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

Ruppel and Bangamwabo[70] state that the Tribunal is an independent body. The Tribunal is meant to be inter alia effective and democratic. This presupposes that the CoM, CUC, Secretariat, TB and the Tribunal must work together effectively. The dispute of the EPA's as of now is working against the provisions of article 2(b). The Tribunal should be independent, transparent and effective in its dealings. The independence, transparency and effectiveness of the Tribunal have not yet been tested, and the EPA dispute offers an ideal chance for the Tribunal to exhibit what they are capable of. Why should the Tribunal be denied this opportunity by all SACU Member States? Namibia and South Africa have argued that the EPA's do no ensure equitable benefits to Member States in their current state. This remark is supported by article 2(b) and if it is not addressed by the Tribunal, then what institution will address it?

Article 2(d) read in conjunction with article 2(f) which seeks:

> To promote the integration of Member States into the global economy through enhanced trade and investment.

If SACU is to be taken seriously, the Tribunal should fulfil its tasks and SACU should support the functions of the Tribunal.

70 Ruppel and Bangamwabo *The SADC Tribunal* 33.

One can deduce that the respect for the SACU Tribunal and its findings can be equated to the respect of rule of law at municipal level. Suzor[71] says that the rule of law requires that governance operate within the limiting framework of the law. Warren[72] states that laws must be adapted and enforced through established procedures and in compliance with internationally recognised standards. Therefore, it seems as if SACU has failed to observe its own rule of law. Just like at municipal level a country that struggles to respect its own laws or a country that begins to show signs of lack of respect for the rule of law such a country will find it extremely difficult if not impossible to attract any foreign direct investments.

In addition to this, article 2(h) states that another objective of the *2002 Agreement* is:

> To facilitate the development of common policies and strategies.

The EPA disagreement has so far reflected that SACU Member States have failed to develop a common policy and a common strategy. It may be argued that it is too harsh to conclude that SACU has failed to deal with the EPA disparity. This may be a noble proposition and it can be accepted if the Tribunal is given an opportunity to intervene in the EPA difference. As long as the Tribunal is denied the opportunity to pronounce itself on the EPA dispute, SACU has failed in this aspect. Development of common policies and strategies comes with respecting the SACU institutions, in particular the Tribunal. Even if this dispute is submitted to the Tribunal, it is very unlikely that the Tribunal will resolve this matter timeously seeing the complications that the EPA's are likely to unravel.

2.4 Conclusion

The signing of the EPA's by BLS seems to have exposed the inadequacies of SACU. BLS have openly violated the *2002 Agreement,* more specifically article 31 requiring consensus by all Member States*,* should any Member State desire to sign any

71 Suzor *Digital Constitutionalism and the role of the rule of law* 76.
72 Warren *Rule of Law 1*.

preferential trade agreement outside the *2002 Agreement*. Critical institutions of SACU like the CoM, CUC, TB, TLC, Secretariat and the Tribunal have all contributed to the current sorry state of the *2002 Agreement*. These institutions continued to disregard the highlighted legal implications of the EPA's on SACU. Chapter three discusses the legal implications of five specific aspects that the EPA's have on SACU and these are RoO, MFN, dumping, reciprocity and the substantially all trade principle.

Chapter 3

Legal implications of EPA's on SACU

3 Introduction

The GATT/WTO Agreement has laid the general foundation upon which different trade aspect such the RoO, MFN, dumping, reciprocity and substantially all trade should be based. Lowenfeld[73] states that one of the objectives of GATT/WTO was to create a harmonised system of objective, understandable and predictable rules of origin. As far as dumping is concerned article VI (1) of the GATT remains the guiding provision of the GATT/WTO. The Uruguay Round Anti-Dumping Code sets out the procedures of determining dumping. Furthermore, one of the major principles of GATT/WTO is that trade should be conducted on the basis of non-discrimination. The effect of this is that the GATT/WTO seeks to eliminate the MFN principle.

The issue of reciprocity dominated trade negotiations as far back as 1947. Under the GATT/WTO it continued to take centre stage as it was viewed as a trade barrier. This debate appears not to be over as will be shown below. One of the objectives of GATT/WTO is to eliminate trade barriers so as to allow free movement of goods amongst member states. In other words it seeks to reduce trade barriers "substantially in all trade." However, the GATT/WTO does not give guidance as to what amounts to substantially all trade. As such, this has been of the most contended principles in international trade as discussed below.

The previous chapter revealed a glaring disregard of the *2002 Agreement*, not only by BLS when they signed the EPA's, but also by Namibia and South Africa that failed to refer the dispute to the Tribunal as provided for in article 13. The legal implications of such violation affect key elements of trade amongst the SACU Member States. The discussion of this chapter is centred on the following five areas RoO, MFN, dumping,

73 Lowenfeld *International Economic Law* 74.

reciprocity and the ambit of substantially all trade. This chapter will focus only on these essential aspects against the backdrop of the relevant provisions in the *2002 Agreement* beginning with the RoO.

3.1 Definition of rules of origin

It is not easy to find a universal definition of RoO. Most authors prefer to describe RoO rather than define them. Naumann[74] states that:

> Rule of Origin describe the local processing requirement necessary for a good to be considered being of local origin and hence qualify for preferential market access under a given preferential trade agreement.

Letterman[75] says that RoO "determine when a good is or is not deemed to be a product of the free trade area". According to the WTO[76], RoO "are the criteria needed to determine a national source of a product". The importance of determining the origin of a product enables a country to assess tariffs properly. Jones and Martin[77] subscribe to this notion when they say that RoO allow a country or a trade area to properly "enforce trade remedies (such as anti-dumping and countervailing duties or quantitative restrictions (tariff quotas)". It is against this background that an enquiry as to whether the *2002 Agreement* has adequate legal mechanisms to deal with goods traded under the EPA's, is necessary.

3.1.1 Rules of Origin under the EPA's

The RoO under the EPA's cannot be applied to other bodies. Each body, for example, the SADC-EPA, EAC and the ACP are negotiating separate RoO with the EU. The provisional agreement between the EAC-EU Economic Partnership Agreement

74 Naumann *Rules of Origin and EPA's: What has been agreed?* 2.
75 Letterman *Basics of the Internal Systems of Customs and Tariffs* 5.
76 WTO 2012 http://www.wto.org.
77 Jones and Martin *International Trade Rules of Origin* 2.

provides, inter alia in Protocol 1 article 2[78], wide ranging criteria that defines goods that can be classified as originating from the community. This article states inter alia that the following products shall be considered as originating in the community:

> Products obtained in the Community incorporating materials which have not been wholly obtained there, provided that such materials have undergone sufficient working or processing in the Community.

This definition is similar to the one found in the SADC EPA-EC IEPA.[79] In 2003, the European Commission published a Green Paper on RoO.[80] The paper was not exclusively on RoO, but contained other areas that have to do with international trade. These guidelines have gone through a chain of metamorphosis that resulted in new changes that were implemented on 1 January 2011. The EU uses a Generalised System of Preferences (hereafter GSP) as its basis to determine the RoO. The European Commission[81] says that the GSP was determined at the UNCTAD conference and "it is a facility granted to developing countries (beneficiary countries) by certain developed countries (donor countries), it is not negotiated with them: the preferential treatment is non-reciprocal". According to Naumann[82]

> The GSP is a non-reciprocal trade programme that has been adopted by a number of developed countries to provide trade preferences to developing and least-developed countries.

This is the general position of most EU countries. It is obvious that in the EPA negotiation process on the RoO, the GSP will be the backbone of EU countries. In this context SACU, let alone BLS, do not have a legal position as far as EPA's RoO are concerned. Thus far, there is no legal mechanism by SACU on how to incorporate the RoO when the EPA's are fully operational. The EC has stated RoO that will be used in full EPA are still being negotiated.[83] SACU and BLS have not taken a legal position. There is a suggestion that SACU should in the meantime engage in the EPA's

78 Tralac Date Unknown http://www.tralac.org.
79 Consilium Europa Date Unknown http://register.consilium.europa.eu.
80 European Commission 2003 http://ec.europa.eu.
81 European Commission Date Unknown http://ec.europa.eu.
82 Naumann *The EU GSP Rules of Origin: An overview of recent reforms* 1.
83 Europa 2010 http://ec.europa.eu.

negotiation not as individual countries, but as a body. This will bring unanimity as envisaged in article 31 of the *2002 Agreement*. Not only that, it will also bring about the harmonisation that the *2002 Agreement* seeks to achieve.

On the other hand, SACU has chosen not to negotiate its own RoO. It appears as if the conflict in SACU, as far as the EPA's are concerned, has resulted in SACU choosing to "ignore" negotiation of RoO with the EU. This stance does not augur well for the development of SACU. It is better for SACU to negotiate its own RoO with the EU, whilst it waits to resolve its own in-house disputes. The RoO under the EPA's are being negotiated and it is not wise for SACU to act indifferently. After all, three of its members have already signed the interim EPA's, and it is very unlikely that BLS will reverse their commitment to the EPA's.

3.1.2 Legal implications of the EPA's RoO for SACU

Article 18(1) provides that:

> Goods grown, produces or manufactured in the Common Customs Area, on importation from the area of one Member State, shall be free of customs duties and quantitative restrictions, except as provided elsewhere in this Agreement.

This is the key provision that deals with origin of goods within the SACU Member States. Daya[84] submits that this provision allows for the free movement of goods within the organisation. In an ideal situation, where inputs are from purely SACU parties, there would be little need to examine the legal implications of RoO in SACU vis-à-vis the EPA's and BLS. However, the reality is that in today's world, countries produce goods made of different components that are imported from all over the world. If RTA's do not deal effectively with the origin of goods, then countries will lose the revenue that is supposed to be realised from such goods.

84 Daya *Development of online harmonized customs and excise tariff database and reference tool* 1.

In order to give impetus to further the free movement of goods, article 19 prohibits any Member State to levy an import duty on any goods imported outside the CCA. The rationale behind this is to allow harmonisation of customs duties within the CCA. In addition, the *2002 Agreement* permits the TB to recommend the tariff duties to be imposed on goods outside the CCA to the Council.[85] Furthermore, article 21 calls for the uniform application of specific excise and *ad volerem* duties, as well as specific customs and *ad volerem* custom duties on goods of the same kind imported from outside CCA.

Moreover, article 22 compels Member States to apply similar legislation concerning customs and excise duties. Article 23 read in conjunction with article 24 calls for co-operation and free movement of goods without discrimination. All these efforts appear to be threatened by the signing of the EPA's by BLS. From the above, it can be safely concluded that as far as SACU is concerned, Member States do not have RoO amongst themselves. As Daya[86] observes:

> Once a good enters the Customs Union it does not need a Rule of Origin Certificate to move across borders inside the Customs Union. Rules of Origin are only applicable to goods coming into the Customs Union from third parties and also forms an integral part of the common customs regime in SACU.

The position was favourable before the signing of the EPA's. It will be shown that the signing of the EPA's by BLS affected the manner in which RoO under SACU will affect the EPA's. This is mainly because the RoO under the EPA's take a different form and seek to achieve different goals as those envisaged under SACU. Parties to the *2002 Agreement* sought to control trade with third parties by implementing a Common External Tariff. The conflict between the RoO and the Common External Tariff that the EPA's pose, were exposed by South Africa when Davies[87] said that:

> At least there is some understanding that we (SACU) need to sort out the tariff and rules of origin issues and to try and have a common basis for that.

85 Article 20.
86 Daya *Development of online harmonized customs* 1.
87 *The Namibian* 1.

Two years after this statement was made, no progress has been made as far as renegotiating the Common External Tariff as well as RoO. With these outstanding issues, Gibb[88] has suggested the renegotiation of the *2002 Agreement*. SACU's Executive Secretary[89] admitted the challenges posed by RoO when she said that the time had come to move away from just trade liberalisation, to also deal with critical issues at the core of trade liberalisation such as RoO.

The sentiments by Gibb were also shared by SACU's Executive Secretary[90] when she said that "SACU is considering the review of the *2002 Agreement* to take into account, inter alia, the broadened scope of preferential trade agreement". One of the consequences of signing the EPA's by BLS, contrary to the SACU Agreement, has been the manner in which SACU has to treat the application of the MFN principle. What follows is a legal analysis of the relationship between SACU and the MFN principle.

3.2 Most Favoured Nation

It has been observed that negotiations of the EPA's have raised a number of controversies concerning the MFN principle. The inclusion or exclusion of the MFN has created a lot of debate and some countries have argued that unless this area is clarified, or unless a mutual compromise on the MFN is reached, they will not be part of the EPA's. Where does this leave SACU, taking into account that BLS have already committed to the EPA's?

3.2.1 Definition of MFN

According to the International Law Commission[91] (hereafter ILC):

88 Gibb *Should Zimbabwe join the Southern Africa Customs Union?* 11.
89 SACU *Statement of Tswelopele C. Moremi Launch of the WTO Report* 1-7.
90 SACU *Statement of Tswelopele C. Moremi Launch of the WTO Report* 1-7.
91 International Law Commission 2007 http://untreaty.un.org.

> An MFN clause is a provision in a treaty under which a State agrees to accord to the other contracting partner treatment that is no less favourable than that which it accords to other or third States.

An MFN status means that a country enjoys all the lowered tariffs and reduction of trade barriers. It is conferred between two or more countries that have a trade agreement. This state of affairs prevailed for a very long time and it is still prevailing. A number of preferential trade agreements have tried to tacitly include the MFN principle. The rationale behind the MFN was that it was meant to improve the economies of developing countries. MFN lowers the cost of their exports and makes them more competitive, with the intention of boosting a country's economic growth. The controversy of the MFN and the EPA's was challenged in the negotiations of the WTO.

3.2.2 MFN and the EPA's

The controversies surrounding the inclusion of the MFN in the EPA's were raised and summarised by Brazil. They have the same challenges in which the MFN clause is likely to be problematic for SACU, and these are:[92]

> (i) The EPA MFN clause obliges "ACP countries to extend to the EC on line by line basis, any treatment they might negotiate with third parties".
>
> (ii) The EPA MFN clause severely undermines the Enabling Clause because the MFN clause provides disincentives for ACP's to negotiate agreements with other developing countries that may contain more favourable market access conditions than those enjoyed by the EC under the EPA's with ACP countries.
>
> (iii) The MFN clause will "prevent" third world countries from negotiating FTA's with EPA parties and constrain South-South Trade.

Chase[93] submits that opposition to the MFN provision is based primarily on paragraph 2(c) of the Enabling Clause that recognises the right of developing countries to receive

92 Caribbean Regional Negotiating Machinery EPA Brief T http://www,slideshare,net.

differential and more favourable treatment in "regional or global arrangements entered into among less developed contracting parties for the mutual reduction or elimination of tariffs". This is exactly what the signing of the EPA's by BLS without the consent of Namibia and South Africa is likely to cause in SACU.

In the same light, Ochieng[94] opines that the inclusion of the MFN in the EPA's is "both legally and developmentally problematic". This author is of the opinion that the inclusion of the MFN clause is neither necessary under GATT Article XXIV, predicting the EPA's, nor under GATS Article V. This paper is not discussing the MFN clause in detail, but it is necessary for the sake of completion to discuss some aspects of the MFN within the context of the GATT. Article 1 of the GATT 1994 states that:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all members.

The principal purpose of the MFN treatment obligation of article 1 of the GATT 1994 is to ensure equality of opportunity to import from, or to export to all WTO Members. However, it is almost impossible to apply equal opportunity of goods to all WTO Member States, let alone services. It is difficult to conceptualise this "equal opportunity", especially with the background of the developing countries. The developing countries have been given plenty "mechanisms" tailored to enhance economic activity in their countries with the aim of bringing the developing countries into world economy.

Despite these economic incentives, most developing countries have struggled to access the EU market. The EPA's however seem to reverse the little gains that the developing

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93 Chase *Legal Issues of Economic Integration* 4.
94 Ochieng *Legal and Systematic issues in the Interim EPA's: Which Way Now?* 12.

countries have managed to generate. Mbatha and Charalambides[95] lament the effect of the MFN vis-à-vis Botswana's beef exports to the EU. The authors state that:

> It is inconceivable that Botswana could export any beef to the EU under the MFN conditions.

3.2.3 Legal implications of the EPA's MFN for SACU

SACU appears not to have an official position in dealing with the MFN under the EPA's. The legal relationship between the MFN and the *2002 Agreement* is a mammoth task if one attempts to decipher the various statements made by the different stakeholders of SACU. At the meeting of the SACU Task Team[96], it was stated that EPA's, of which MFN is a critical component, undermine the objectives of the SACU Agreement as a tool for promoting regional integration in SACU. The Task Team[97] stated that EPA's have:

> Implications on the maintenance of the integrity of the CET and severely limits SACU's trade policy space through the MFN provision.

These observations by the Task Team should have been taken seriously by SACU. In other words, what the Task Team was saying was that the MFN has legal implications on the free trade movement of goods, because there may be a need to introduce internal customs control procedures. This may affect the free flow of goods amongst SACU Member States. With all these evident legal challenges, why then should SACU allow the signing of the EPA's that contain the retrogressive MFN principle since this is affecting the very objectives of SACU?

It should be borne in mind that Free Trade Areas (hereafter FTA's) and Customs Unions such as SACU are permissible in terms of the WTO.[98] In other words, SACU is an

95 Mbatha and Charalambides *What is really in the economic partnership agreements* 422.
96 SACU 2008 http://sacu.int.
97 SACU 2008 http://sacu.int.
98 Tralac 2011 http://www.tralac.org.

exception to the MFN clause and other non-discriminative trade arrangements. It is against this background that the silence of SACU on the inclusion of the MFN in the EPA's appears to be a disgrace to the organisation. SACU's position of avoiding the EPA negotiations is detrimental to the future of SACU. The EU is very determined to include the MFN principle in all the EPA's. For instance in the already concluded CARIFOUM-EPA it has been observed that the EU successfully negotiated the implementation of the MFN principle. The Council of the European Union[99] said in a statement that "EPA's are WTO-compatible agreements aimed at overall effort to eradicate poverty in the ACP countries".

In this context, the EU owes the ACP countries an explanation if not a blue print on how it seeks to promote economic growth and global economic integration of developing countries. At the same time, it seeks to enact measures that curtail opportunities or tools, such as the insistency on MFN and an utter disregard of the Enabling Clause.

The persistence by the EU on the MFN clause fits in well the objectives of the EU trade policy. The unyielding position of the EU on inclusion of the MFN in the EPA's appears to be suspicious, given that the EU has remained inflexible on this aspect.

One of the challenges created by the MFN clause under the EPA's is the definition of a "major trading economy". It is generally accepted that is defined as any country, accounting for more than 1% of the world merchandise exports. South Africa automatically qualifies as a "major trading economy" and it is expected to honour certain obligations that will not necessarily be expected of BLS and Namibia. Makombe[100] states that:

> The MFN clause is problematic for all ACP [BLS included] countries because it limits their leverage to make deals with countries especially in the emerging economies where ACP exports are growing fast.

99 European Union *Council of the European Union Council Conclusions on EPA's* 1.
100 Makombe *Economic Partnership Agreement and SADC: The controversy continues* 1.

Makombe's statement is echoed by the critics of the inclusion of the MFN clause in the EPA's, since South Africa is not willing to extend the benefits it has with BRICS to the EU.[101] From the above it can be said that the MFN clause will serve to constrain the flexibility of SACU (including Namibia and South Africa) in negotiating FTA's with other developing countries. The EPA's signed by BLS will create some legal implications that the inclusion of the MFN principle has for SACU.

3.3 Dumping

Dumping is one the most problematic areas in international trade. Its controversy emanates from the various types of dumping as well as the different ways in which it manifests itself.[102] In the negotiation process of the EPA's, developing countries have tried to resist the pressure to adopt trade practices with an in-built bias to favour developed countries.[103] Bekker[104] submits that:

> Dumping is unfair because the exporter is perceived to have an artificial rather than a genuine comparative advantage over its competitors in the importing market.

3.3.1 Definition of Dumping

The WTO[105] defines dumping by stating inter alia that generally it is a situation of price discrimination, where the price of a product when sold in the importing country is less than the price of the product in the market of the exporting country. The above definition is over-simplified, because price determination for the sake of investigating dumping is a complex one. The reaction to the threat of dumping resulted in what is generally known as the Anti-Dumping Agreement in Article VI of GATT 1994. According to the WTO[106]

101 Makombe *Economic Partnership Agreement and SADC: The controversy continues* 1.
102 Levich http://people.stern.nyu.edu.
103 Sen *International Trade Theory and Policy: A Review of the Literature* 18.
104 Bekker *The determination of dumping and the use of anti-dumping measures in international trade* 49.
105 WTO Technical Information on anti-dumping http;//www.wto.org [date of use 31 July 2012]
106 WTO Technical Information on anti-dumping http;//www.wto.org [date of use 31 July 2012]

> This provision explicitly authorizes the imposition of a specific anti-dumping duty on imports from a particular source, in excess of bound rates, in cases where dumping causes or threatens injury to a domestic industry, or materially retards the establishment of a domestic industry.

On the contrary, the WTO has submitted that there is a need to balance the Anti-Dumping Agreement with the principles of non-discrimination. This is because some countries may discriminate hiding behind anti-dumping.[107]

3.3.2 Dumping under the EPA's

The legal position adopted by the EU, as far as dumping is concerned, can be found in the SADC EPA Agreement[108] under the heading Trade Defence Instruments. Article 32 of the Agreement states that:

> The rights and obligations of the EC or SADC EPA States in respect of the application of antidumping or countervailing measures shall be governed by the relevant WTO Agreements. Any disputes related to these measures can only be settled under WTO Dispute Settlement.

This is the only article that refers directly to the goods that will be subject of dumping under the EPA's. This is what SACU is confronted with when dealing with the goods dumped into SACU via the EPA's. To make it worse, the dispute will be resolved according to the WTO Dispute Settlement mechanism. Yet, SACU has its own dispute resolution mechanisms as provided for by article 13 of the *2002 Agreement*. The *2002 Agreement* does not provide for a mechanism when Member States are party to another free trade pact that has its own dispute resolution mechanism. This is different from what is provided for in the *2002 Agreement*. On the contrary, the anti-dumping provision in the EC/EAC EPA Agreement[109] is more elaborate and it states in article 19(1) inter alia that:

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107 WTO Technical Information on anti-dumping http;//www.wto.org [date of use 31 July 2012]
108 Asil Date Uknown . http://www.asil.org.
109 European Union Date Unknown http://www.europa.edu.

> Subject to the provisions of this Article, nothing in this Agreement shall prevent the EC Party or the EAC Partner States, whether individually or collectively, from adopting anti-dumping or countervailing measures in accordance with the relevant WTO agreements. For, the purpose of the Article, origin shall be determined in accordance with non-preferential rules of the origin of the Parties.

What BLS has initialled, is not clear in giving guidance on how to deal with dumping in comparison with the EC/EAC Agreement. It seems as if BLS rushed to sign EPA's, without paying due regard to the legal implications of the intrinsic details on dumping. SACU's position appears not to be good, because the BLS/EPA has only one article that attempts to highlight the challenges of dumping. However, the EC/EAC Agreement, in addition to article 19(1), has six more articles that emphasise the need to deal effectively with the problems of dumping.

With this in mind, if the EC is genuinely committed to improving economic conditions in BLS, it should have advised the SADC-EPA that negotiated the EPA's on behalf of BLS to have a more detailed anti-dumping provision. Most developing countries do not have the technical competencies in negotiations at international level. Therefore, one can say that the EC seems to have taken advantage of the lack of knowledge on the legal implications of dumping in the SADC-EPA negotiators. The EC/EAC dumping provisions are similar to the dumping provisions in CARIFORUM/EPA. They are detailed to such an extent that article 19(2) of the EC/EAC states that, before imposing definitive anti-dumping or countervailing duties with regard to products, the parties shall consider constructive remedies as provided for in the relevant WTO agreements.

Therefore, it is very unlikely that any Member State of the EAC will be able to dump its goods into the EC. The EC has strong regulations as far as dumping is concerned. Thus, under the EPA's there is a very high chance that the EC that will dump most of its goods into developing countries, including BLS. There is an outcry from a number of local investors that China is dumping its goods in developing countries.[110] By so doing,

110 Raslan *Antidumping a developing country perspective* 87.

China is increasing its economic dominance in developing countries. Thus, one may argue that the fact the dumping provisions are so weak, particularly in the BLS EPA, will favour the EC.

This is so because the EC has been trying to reduce the dominance of China in the developing countries, particularly in Africa. If China is willing to export goods to SACU, the EC will be tempted to follow suite in an attempt to compete with China. Therefore, BLS should have advocated for a stronger anti-dumping provision. The disputes with regard to dumping should not be settled in line with the principles of constructive remedies, as provided for in the WTO Agreement. This is because the WTO dispute resolution process is cumbersome and it involves a lot of intrinsic investigation. This is detrimental to BLS.

It would have been more acceptable if the dumping provision had allowed dumping disputes with SACU parties to be resolved in accordance with the *2002 Agreement*. Such an approach allows Namibia and South Africa with an opportunity to be part of the EPA process. In essence, goods dumped in BLS by the EC via the EPA's will eventually find their way either to Namibia or South Africa. If the dumping dispute resolution process is not in accordance with the SACU Agreement, it creates a legal problem for SACU. The reason for this is SACU's parallel dispute resolution process. There is no way under the current situation that Namibia and South Africa will submit to a process in which they have not endorsed. There have been accusations of dumping by the EU into SACU. South Africa's trade officials have raised concerns with regard to dumping concerning the EPA's:

> SA's trade officials argued that decision would open up the customs union as a dumping ground for cheap products, with disastrous consequences for the manufacturing industry in the region.[111]

It is clear that the issues of dumping are critical in SACU. The legal implications of dumping outweigh any possible remedies that may be available. The reason for this is

111 Langeni 2010 http://www.businessday.co.za.

that dumping threatens the existing industries in SACU and dumping has adverse effects on the infant industry in SACU. With this in mind, one may be tempted to think that the EU is planning to dump its goods in SACU. This is not the case. However, if dumping does occur in BLS, and the goods circulate in SACU, does SACU have the regulatory mechanisms to effectively deal with dumping?

3.3.3 Legal implications of the EPA's Dumping for SACU

ITAC administers SACU's anti-dumping and countervailing duty measures.[112] There have been accusations of dumping amongst the SACU Member States themselves. South Africa has been accused of dumping products in some SACU Member States. In this regard, Brink[113] indicates that:

> South Africa has had occasion to deal with a number of regional disputes, having been accused of dumping products in SACU Member States e.g. beer in Namibia and flour in Botswana.

If South Africa can violate its own obligations under SACU, how much more will third parties be willing to manipulate the polarisation in SACU? South Africa is the leading Member State in SACU. What message does the actions of South Africa send to the administrative institutions of SACU? It is submitted that South Africa should lead by example and respect the regulations established in SACU. The author further points out that the dumping dispute highlighted above was:

> Settled at political level, as the SACU Agreement makes no provision for taking anti-dumping measures against fellow customs union members.[114]

If SACU does not have anti-dumping measures against another SACU *Member State*, how will it then regulate dumping by the EU into BLS and eventually Namibia and South Africa? It appears as if the threats of dumping in SACU by the EU via the EPA's may

112 US Trade Government Date Unknown http://www.ustr.gov.
113 Brink *Regional dispute settlement mechanisms in Africa* 270.
114 Brink *Regional dispute settlement mechanisms in Africa* 270.

result in the review of the *2002 Agreement* in order to curb dumping amongst Member States.

In addition to that, the dumping of beer by South Africa in Namibia and flour in Botswana was settled at a political level. The involvement of political leadership in dispute resolutions of SACU should be discouraged. SACU has made provision for the SACU Tribunal that has the mandate of resolving trade disputes amongst Member States. Such a dispute should be referred to the Tribunal so that SACU can develop its own jurisprudence. Political interference in running the affairs of SACU should be limited.

ITAC[115] has imposed anti-dumping duties on countries that have been accused of dumping products in South Africa. These goods will eventually find their way into SACU. China[116] and Sweden[117] have been accused of dumping their products in SACU Member States. In the same vein, Brazil[118] has been accused of dumping its chickens in the South African market.[119]

South Africa dominates the retail sector in SACU countries through its chain of big corporations such as Shoprite, Pick n Pay and Checkers. These corporations are controlled in South Africa and they distribute their imported products (chickens, door locks, etc) to SACU countries via these corporations. If dumping can occur this easily in South Africa, it can occur even to a greater extent in BLS.

The legal complications of dumping in SACU are too ghastly to contemplate. Of course, SACU can argue that it can impose anti-dumping duties as a measure to regulate

115 ITAC Date Unknown http://www.info.gov.za

116 Welded link steel rate of anti-dumping duty2.4%-52.9% imposed on 9 May 2008 and expires on 8 May 2013. Door locks and door handles rate of anti-dumping duty 1196c/kg imposed on 22 August 2008 and expires on 21 August 2013.

117 Tall Oil fatty Acid rate of anti-dumping duty 19.1%-27% imposed on 12 December 2008 and expires on 11 December 2013.

118 ITAC imposed anti-dumping duties on frozen chickens and chicken meat imported from Brazil after investigating suspected dumping in 2008-2010. In 2010 Brazil accounted for 94.2% of South Africa's chicken products.

119 Gedye *Mail and Guardian* 1.

dumping. However, the revenue that is collected through the anti-dumping duties will not be easily distributed to boost the industries affected by the dumping. Usually the anti-dumping revenue is directed at other needy causes within the affected country, such as civil servants salaries. The affected industry is likely to suffer in the long run.

3.4 Reciprocity

Trade practices have seen tremendous development over the years. The principle of reciprocity as well as the principle of special and differentiated treatment introduced by the GATT can be traced back as far as the 1970's. Under this principle developing countries in multilateral and bilateral commitments, are not required to open up their markets to the same extent as developed countries. The issue of reciprocity has come under immense scrutiny in the negotiations of the EPA's. The misconceptions of the application of the principle of reciprocity, the advantages that non-reciprocity was meant to give to the developing countries, seem to be threatened by the suggested removal of non-reciprocity. It is imperative to understand the ambit of the principle of reciprocity in the EPA's and its legal effect on SACU.

3.4.1 Definition of reciprocity

The Agreement establishing the WTO states a number of objectives that are centred on real income growth and expansion of trade in goods and services. In order to achieve these goals, the WTO established the principle of reciprocity. Yanai[120] defines reciprocity as a:

> Fundamental rule by which plural parties maintain the balance of treatment of granting the same or equivalent rights and benefits and/or undertaking obligations to each other.

120 Yana *Reciprocity in Trade Liberalization* 1.

According to Parisi and Ghei[121] reciprocity "involves like behaviour with like, that is, tit-for-tat strategy." Under the GATT/WTO, the principle of reciprocity has been described as based on reciprocal negotiations (over market access) that occur on a voluntary basis between pairs of countries or among a small number of countries.[122] Further, according to Ossa[123], reciprocity under the GATT/WTO is not binding in the legal sense, because governments are required to seek a balance of concessions during trade liberalisation negotiations by cutting tariffs reciprocally.

Another view that enjoys legal status under GATT/WTO, is the entitlement of governments to withdraw substantially equivalent concessions if a trading partner increases previously bound tariffs.[124] These two submissions appear to be confusing. This is what the application and the interpretation of the principle of reciprocity, which is encoded in the EPA's signed by the BLS, is likely to introduce into SACU. For a deeper analysis of the principle of reciprocity and its legal implications in SACU, one has to examine the current status of this principle in the already concluded EPA's.

3.4.2 The principle of Reciprocity in the EPA's

Before the conclusions of the EPA's, developing countries enjoyed the benefits of non-reciprocal trade arrangements with the developed countries. The legal position on the principle of reciprocity as adopted by SACU *Member States* finds its acceptance as far back as the GATT 1947. Three main arguments were advanced particularly by developed countries and it was agreed by all parties that: (i) protection should rest on tariffs and elimination of non-tariff barriers; (ii) periodic negotiations should be aimed at a gradual reduction of existing tariff levels; and (iii) there should be equal MFN treatment of all GATT members.[125]

121 Parisi and Ghei Date Unknown http://www.law.gmu.edu.
122 Staiger 2006 http://www.ssc.wisc.edu.
123 Ossa 2009 http:// www.wto.org.
124 Ossa 2009 http:// www.wto.org.
125 Osakwe 2011 *Minnesota Journal of Int'l Law* 365-436.

Developing countries sought exceptions from these onerous trade obligations that resulted in a "special status" for the developing countries. The developing countries pursued these exceptions even in the *WTO Agreement*. The *Cotonou Agreement* makes provision for maintaining the non-reciprocity preferences only during the so-called "preparatory period" (2000-2007), as expressed in Article 36.[126] The EPA negotiations have not been completed as contemplated, therefore BLS should push for the extension of the application of the non-reciprocity. This should happen until Namibia and South Africa are parties to the EPA's. However, in the midst of uncertainty, the EU is advocating for the implementation of reciprocity in the EPA's. Bernal[127] who favours the EU's position has argued that:

> Cotonou Agreement of 2000 (Article 36 of Title II of the revised text), in setting the stage for the negotiations of EPA's, explicitly recognised the need for arrangements that would be compatible with the rules of the World Trade Organisation (WTO), and that there would be a progressive removal of barriers to trade among the parties.

On the other hand, proponents for the maintaining of non-reciprocal principles, that is, the position before the EPA's, such as Thomas[128] have argued that:

> The first contentions plank of the EPA is its emphasis on reciprocity and trade liberalisation between regions of vastly unequal development levels and capacities and arriving at an agreement on many unresolved issues at the WTO, with the Doha Round of negotiations still incomplete. This reverses the operating principle of non-reciprocity embodied in the Lome Conventions and Cotonou.

The argument by Thomas seems to be more practical and it exposes the double standards of the EU. There is no justification to rush the implementation of the EPA's that contain the retrogressive application of the reciprocity principle. SACU will be adversely affected by the reciprocity principle, because goods from the EU will flood its markets. The EU already has the capacity to produce as many goods as possible and at

126 CRNM Date Unknown http://crnm.org/epa.
127 Bernal RL Date Unknown http://www.crnm.org..
128 Thomas *Sunday Stabroek News* 3.

the moment they are seeking to increase their market base. Developing countries, such as SACU Member States, are their prime target.

There is no way that SACU Member States will have the capacity to produce goods that will be openly accepted in the EU without satisfying stringent production requirements. The objectives of the non-reciprocity principle should be upheld by all SACU Member States. Trade liberalisation through the principle of reciprocity should be frowned upon by all SACU Member States. Supporting this, Thomas[129] states that:

> The *potential gains* (my emphasis) from trade cannot be casually linked to further claim that liberalising trade, in all circumstances and under all conditions, (including those between regions with vastly unequal development level) will invariantly realise these potential benefits.

The above discussion has exposed the bias of the principle of reciprocity in the EPA's. What remains to be seen is whether SACU has the legal capacity of implementing this principle. In other words, to what is extent is SACU prepared to further open its market under the guise of reciprocity, in an attempt to enhance the gains trade liberalisation propounded in the EPA's, and simultaneously protect its markets?

3.4.3 Legal implications of the EPA's Reciprocity for SACU

According to SACU[130], a commitment was made to conclude EPA's aimed at developing a trade relationship based on reciprocity in accordance with WTO obligations. Furthermore, SACU states that as part of these EPA negotiations, through the built-in agenda of the *Cotonou Agreement*, SADC tabled a proposal framework. This contains the vision of a SADC-EU EPA that addresses inter alia:

> Non-reciprocity for non-SACU LDC's (Angola, Mozambique and Tanzania.

129 Thomas *Sunday Stabroek News* 3.
130 SACU Date Unknown http://www.sacu.int.

If SADC could push for an EPA that caters for the specific needs of Angola, Mozambique and Tanzania, then surely SACU can or should proceed to the conclusion of EPA's that are in favour of non-reciprocity. Therefore, the reciprocity provision in the EPA's is not cast in stone. All SACU Member States are suffering from shockingly high unemployment rates, poverty, and unequal access to resources. These are the same challenges that made Angola, Mozambique and Tanzania qualify as LDC, consequently, benefiting from the non-reciprocal arrangement.[131]

Surprisingly, the EC took note of the non-reciprocity suggested by SADC and the EC. This "started an internal consultative process aimed at providing a new mandate to its negotiators that would address SADC's proposal".[132] Before the enactment of the EPA's, SACU Member States enjoyed the benefits of non-reciprocity that enabled them to protect their markets from the EU through various mechanisms. These benefits will soon be gone if SACU fails to take a legal position that favours the position of non-reciprocity. Draper, Halleson and Alves[133] submit that:

> The threat to Botswana, Namibia and Swaziland is that they may forego the market access they currently enjoy under the Cotonou Agreement owing to the fact that the EU requires reciprocity-which they are not in a position to give to without South Africa's concurrence.

This is a true legal position that Draper, Halleson and Alves point out. This is premised on the notion that all SACU Member States adhere to article 31 of the *2002 Agreement*. This agreement requires consensus. However, this legal position has been altered and BLS has shown that with or without South Africa's consent, they are willing to violate the *2002 Agreement*. Whether Namibia and South Africa like it or not, BLS have agreed to further liberalise their trade with the EU without paying due regard to its implications in SACU. The impact of this trade liberalisation has increased trade in goods form the EU into BLS. Whether South Africa and Namibia will seek legal recourse using SACU

131 Angola, Mozambique and Tanzania qualify for non-reciprocity not by virtue of EPA's but under Everything But Arms (EBA) Arrangement.
132 European Union Date Unknown http://www.europa.edu.
133 Draper , Halleson, and Alves *SACU, Regional Integration* 38.

institutions such as the Tribunal, or whether they shall use other means like a political settlement is point in moot.

The retention of the reciprocity principle advocated in the EPA's, which BLS are a party to, ignores the unequal economic realities among trading nations, especially between SACU Member States and the EU. The EPA's seek to erode the trade gains that were created by the non-reciprocal trade arrangements. It is obvious that the WTO Agreement allows RTA's such as SACU. In practice, there is a need to protect the markets of developing countries, like SACU markets, from the developed countries. There is no reason why the EC should insist on reinstating the reciprocity principle in the EPA's. As Onguglo[134] observes, "the non-reciprocal schemes offer preferential market access in the form of duty free (zero tariff) or substantially lower tariff."

3.5 Substantially all trade

Concomitant to the issue of reciprocity is the contentious predicament of the scope of "substantially all trade". According to Bilal and Stevens[135]:

> In order for the new EPA's to be compatible with WTO rules, the key requirement was a need to comply with Article XXIV of GATT, which stipulates inter alia that regional trade agreement must eliminate duties on "substantially all trade" within a reasonable length of time.

This is the basis for the application of the principle of reciprocity. There has been a huge debate on the correct interpretation of this provision. In addition to this, there are issues relating to goods that are not supposed to enjoy the benefits of trade liberalisation. Thus developing countries, particularly those from ACP countries, have been battling to have a schedule that defines goods that are supposed to be an exception to the "substantially all trade" provision. Another concern has been the magnitude of "substantially all trade". Does it imply 100% trade liberalisation? The fact that BLS signed the EPA's without fully

134 Onguglo *Developing countries and unilateral trade preferences* 2.
135 Bilal and Stevens *The Interim Economic Partnership Agreements* 63.

appreciating the extent of "substantially all trade" will definitely expose SACU to excessive goods from the EU. To understand the enormity of the legal complications that the "substantially all trade" debacle will cause SACU, it is vital to examine some of the suggestions that have been made in attempt to interpret the scope and application of "substantially all trade."

3.5.1 Definition of "Substantially all trade"

Article XXIV of GATT did not define "substantially all trade", therefore this provision has been left open to a lot of speculative and at times unreasonable interpretations. According to the EU, a PTA is WTO compatible if 90% of bilateral trade is fully liberalised.[136] In the case of SACU, there is no official legal position to define "substantially all trade". Ochieng[137] states that there have been disagreements between the EU and the ACP countries in the EPA negotiations on the quantum of "substantially all trade." According to Ochieng the ambit of "substantially all trade" ranges from 80 to 90 percent of trade between the parties or 90 to 95 percent of the combined tariff lines of parties.[138] According to the EU's legal position, the EPA's will have fulfilled the requirements of "substantially all trade" when at least 90% of trade has been liberalised.

3.5.2 Substantially all trade in the EPA's

The EU has decided that 90% of liberalised trade is "substantially all trade". Scollay[139] has taken the issue further by suggesting two proposals. The suggested approaches are:

> (a) A quantitative approach, using some kind of "statistical benchmark, such as a certain percentage of trade between

136 Fontage , Mitaritonna and Laborde *An impact study of the EU-ACP EPA's* 4.
137 Ochieng *Legal and Systematic issues in the Interim EPA's: Which Way Now?* 7.
138 Ochieng *Legal and Systematic issues in the Interim EPA's: Which Way Now?* 7.
139 Scolly *"Substantially all trade": Which definitions are fulfilled in practice*? 1.

> parties". Percentages commonly suggested in this context are 90%, 85% and 80%.[140]
>
> (b) A qualitative approach, according to which the "substantially all trade" requirement means that no sector (or at least no major sector) was to be kept out of intra-RTA trade liberalization. This approach attempts to overcome the objection to the quantitative approach outlined above.[141]

Scollay's models suggest either a quantitative or a qualitative approach. These approaches allow BLS or rather ACP countries more leverage in determining which goods are covered in the proposed 90% in terms of quantity or quality. With these approaches, BLS or even SACU Member States might have an opportunity to have a greater say in the manner in which the goods are traded. These two approaches give a more practical solution in that BLS or SACU Member States can protect their infant industries. The influx of 90% liberalised goods is catastrophic for SACU Member States, since most of the goods from the EU that are manufactured are subsidised by their states. In light of the above, Sukati[142] states that:

> There has also been uncertainties on whether EPA's will promote regional integration of ACP countries as claimed by the EU or subject ACP countries to unfair competition from subsided EU exports.

SACU Member States have struggled to access the EU over the years. The EU has only been interested in those imports from SACU Member States that are of benefit to them, for instance beef and clothing. Even these goods have to meet strict requirements to be allowed into the EU. On the contrary, goods from the EU have almost free access into SACU Member States. The goods from the EU also enjoy relatively less stringent measures into SACU markets and this has resulted in increased competition for the local producers. Before the EPA's, exports from the EU did not amount to 90%, but

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140 A key objection to this approach is that it would preclude the exclusion of entire sectors in cases where trade in that sector had hitherto been prevented by prohibitive trade barriers.

116 One obvious difficulty is that the definition of "sector" might also be subject of debate. It might also be questioned whether the inclusion of a very minor component of a major sector would be deemed to satisfy this definition.

142 Sukati *The Economic Partnership Agreements (EPA's) and SACU* 2.

represented a certain fraction. That fraction already caused arguments of unfair competition, despite the application of the non-reciprocity principle.

3.5.3 Legal implications of the EPA's "substantially all trade" for SACU

Now with the proposed 90% of open trade between the EU and BLS, without quantitative and qualitative guidelines, where will that leave local producers from BLS or all the SACU Member States? Is SACU ready for such competition when currently its manufacturers and producers are under threat from Chinese products? If SACU has failed to regulate unfair competition from one country (China), what will happen with 27 EU[143] member countries?

The EU is growing and a number of countries are working on joining the EU. As of August 2012, six countries had applied to join the EU.[144] The inference is that as the EU is increasing in numbers, the new countries will enjoy the same benefits that the EPA's offer to the current EU countries. This is what BLS is failing to realise. SACU Member States are not increasing, if anything the very existence of SACU is threatened by its own inability to put its house in order. The EU knows that the more member states it takes, the more competition there will be in the EU, and in order for the EU to remain competitive, it has to increase its options in terms of market access. The EPA's are one such instrument that the EU is using to expand its market.

The EU appears to have made its calculations very well and it has adopted an inflexible negotiating attitude as far as the EPA's are concerned. Unfortunately, BLS and SACU seem to be oblivious of these facts. There is no way that the SACU Member States will be able to cope with the exports from the EU. The SACU Member States have chosen to ignore or have adopted a lacklustre approach to the legal implications of "substantially all trade". This is the biggest threat to the existence of SACU. BLS have put SACU in a very precarious position and SACU needs legal measures to protect itself from this potentially disastrous situation as a matter of urgency.

143 European Union Countries http://europa.eu.
144 Croatia, Former Yugoslav Republic of Macedonia, Iceland, Montenegro, Serbia and Turkey.

3.5.3.1 Reasonable time and substantially all trade

The period of implementation of "substantially all trade" has been another controversial subject. The Understanding on the Interpretation of Article XXIV of GATT 1994 provides that a reasonable length of time should exceed 10 years only in "exceptional cases".[145] What amounts to exceptional cases is not a given, in other words, the term exceptional cases is open-ended. Reliance and guidance on the interpretation of reasonable time is found in article 37 of the *Cotonou Agreement*. It states inter alia that the EPA negotiations would be as flexible as possible in establishing the duration of a sufficient transitional period. The EU interpreted the reasonable time as not exceeding 15 years. The ACP countries, on the other hand, suggested a period between 18 and 25 years.[146] However, in the already concluded CARIFORUM/EPA, the EU concluded that substantially all trade means 90% and reasonable time was defined to mean a period not exceeding 15 years.

SADC-EPA (of which BLS is a party) has agreed on 100% trade liberalisation.[147] The legal implication of this is that there is going to be what Lui and Bilal[148] calls "tariff dismantling". The effect of tariff dismantling will result in revenue loss and governments will have to establish alternative sources of fiscal revenue.[149] BLS and Namibia receive a greater portion of their revenue from SACU. Therefore, BLS, by signing the EPA's, have encroached on the revenue sharing with the result that there is going to be a massive reduction in revenue for BLS and Namibia.

South Africa's revenue is not heavily reliant on SACU, but South Africa's revenue also includes revenue collected from corporates operating in other SACU Member States. So whichever way one looks at it, South Africa will be affected by the suggested 100% trade liberalisation. Thus, once SACU Member States fail to benefit from SACU

145 www.sice.oas.org.
146 Ochieng *Legal and Systematic issues in the Interim EPA's: Which Way Now?* 7.
147 Ochieng *Legal and Systematic issues in the Interim EPA's: Which Way Now?* 7.
148 Lui and Bilal *Contentious issues in the interim EPA's* 4.
149 Lui and Bilal *Contentious issues in the interim EPA's* 4.

revenue, these Member States will eventually pull out of SACU because it will be counter-productive to keep the institution running.

Due to the above, the issue of "substantially all trade" and the "reasonable time" clause in the EPA's signed by BLS should follow the approach provided for in article V of GATT. This article recognises the need for differentiated treatment of the gap in the market between developed and developing countries.[150] It seems as if BLS blindly signed the EPA's, without regarding all the consequences. However, it is possible for BLS to put its EPA's in neutral, in order to give SACU a chance to iron out these challenges. In other words, BLS should freeze the application of certain provisions of the EPA's, particularly the "substantially all trade" provision. If 100% or even 90% of the trade is liberalised without properly defined interpretations, BLS and all SACU Member States are likely to lose out. A win-win approach that protects the infant industry of SACU Member States, as well as shielding its market from unfair competition from subsidised exports from the EU, should be pursued.

150 Office for Promotion of Parliamentary Democracy *EPA's Facts and Key Issues* 31.

Chapter 4

4 Summary and Conclusions

4.1 Introduction

The signing of the EPA's by BLS has been hailed as a remarkable achievement by the 27 EU Member countries. It has been viewed by the EU as a way to achieve the much needed increased trade between the EU and SACU. On the contrary, Namibia and South Africa have criticised (justifiably so) the signing the EPA's by BLS, since it is a direct violation of the *2002 Agreement*. BLS has argued that the signing of the EPA's is justified if one looks at the developmental needs of the SACU Member Countries. BLS has persistently said that they need more market access for their goods and the EPA's offer such an opportunity. South Africa should not complain, since it has its own TDCA and South Africa's goods are enjoying preferential market access at reduced tariffs in the EU. This access is denied to the rest of the SACU Member States. Therefore, South Africa should not be selfish, but rather it should support the signing of the EPA's by BLS.

However, SACU has a clear procedure provided in article 31of the *2002 Agreement* that calls for consensus in negotiating any PTA's with third parties. The signing of the EPA's by BLS was done outside the *2002 Agreement*, therefore it is a clear violation of the objectives of SACU. The EU has honoured and even congratulated BLS on signing the EPA's. The EU, by so doing, has shown its double standards by failing to persuade BLS to first honour its *SACU Agreement* before concluding the EPA's. It appears that so long as it is beneficial to the EU, the rights of Namibia and South Africa under SACU must be trampled upon.

The EPA's concluded by BLS call for 100% trade liberalisation within the next ten years. SACU Member States are already failing to deal with goods from China that increased competition in the local markets. SACU does not have the capacity to deal with an influx

of subsidised goods from EU Member States. Most local manufacturers and producers will be threatened by extinction. Infant industries will definitely collapse and industrialisation will be a thing of the past in SACU. The ripple effect is too ghastly to contemplate. Job losses will be inevitable, which will result in high unemployment as well as catastrophic poverty. SACU has no sound legal framework to deal with the challenges of the RoO, MFN, dumping, reciprocity and substantially all trade principles envisaged in the EPA's signed by BLS.

This study has revealed the fragmentation of SACU's institutions. One of the objectives of the *2002 Agreement* was to make SACU a competent body with sound institutions. The purpose of these institutions was to steer SACU forward by using the existing legal framework and by recommendations for improved regional economic development. Nonetheless, this study has shown that SACU's institutions such as the CoM have failed to provide the desired leadership when it mattered most. This is especially true in the negotiations and implementation of the EPA's. The CoM is responsible for the overall policy direction and functioning of SACU. It is also tasked with SACU's policy formulations. Nevertheless, the CoM has not made any official policies or even interim ones that deal with the signing of the EPA's by BLS. Three years have passed since BLS signed the EPA's and SACU has no legal position on how to deal with the EPA's. The blame is put squarely on the CoM.

Article 31(3) of the *2002 Agreement* makes it mandatory that no Member State shall negotiate and enter into preferential trade arrangements with third parties without the consent of other Member States. The Secretariat should have objected to the signing of the EPA's by BLS by virtue of the powers vested in it by article 10. BLS openly violated article 31(3) and the Secretariat remained quiet on the notorious actions of BLS. This has compromised the Secretariat's competence on running the affairs of SACU. The silence of the Secretariat makes it difficult for the Secretariat to call other Member States to order, should they violate the *2002 Agreement*. In the same context, other SACU institutions comprising of the CUC, TB and TLC have followed suit by not

challenging the signing of the EPA's. These institutions have built-in mechanisms that they can use on a technical basis to challenge the signing of the EPA's by BLS

It has been shown that the ad hoc SACU Tribunal has been dormant for a long time. Trade disputes that have arisen between the SACU Member States, especially the allegations of South Africa dumping beer into Namibia and flour into Botswana, have been settled at political level instead of using the Tribunal. Apart from that, the EPA dispute should have been referred to the Tribunal for speedy resolution.

The technical aspects of trade such as RoO, MFN, reciprocity, dumping and the ambit of substantially all trade, as far as the EPA's are concerned, are not adequately regulated under SACU. The TB and the CUC are assigned with this mandate, but have chosen to remain quiet over these matters. They have not made any proposals on how goods imported via the EPA's should be levied in order for them to be SACU compliant.

SACU is in great danger of being the "dumping ground" of subsidised goods from the EU. The basis of this observation indicates that the EU is of the view that China's "cheap" products are enjoying tremendous access in ACP countries. One of the ways to curtail that dominance is for the EU to have unlimited access into ACP countries (including Botswana, Lesotho, Swaziland, South Africa and Namibia) using the EPA's as a vehicle.

4.2 Recommendations

- The CoM needs to urgently reconvene and practically map a way forward to deal effectively with the signing of the EPA's.

- BLS should be encouraged to pull out of the EPA's so that they negotiate their own EPA's under the auspices of SACU in order to give impetus to the objectives of SACU.

- South Africa's TDCA should be transformed into the SACU-EU EPA, by so doing it will be possible to incorporate South Africa as a party to the EPA. The rationale for this recommendation is that there is no going back on the EPA's and the TDCA will be a platform to find common ground.

- BLS should be encouraged to suspend the application of the EPA's until the issues regarding RoO, MFN, reciprocity, dumping and the scope of the substantially all trade are finalised.

- In the event that the 100% trade liberalisation is applied, SACU should insist on a much longer period before its implementation, for example, 30 to 50 years. This should be done to cushion SACU from unfair competition and at the same time to allow SACU to put proper legal mechanisms in place on the handling of the EPA's. Specific sectors should be liberalised and this liberalisation should be done gradually.

- SACU should come up with a detailed schedule that prohibits certain goods from the EU from being exported into SACU, in order to boost local productions and promote national industries.

- SACU needs a consolidated negotiating mechanism that takes into account all interests of Member States. This should be done in the spirit of harmonisation in line with the objectives of SACU.

- SACU should show its commitment to its dispute resolution process and allow the SACU Tribunal to develop its jurisprudence.

- SACU needs to establish a competent and comprehensive technical negotiating team. Such a team would have been able to negotiate SACU's preferences in the EPA's. The EU has a strong competent technical legal negotiating team drawn up from its 27 Member countries, vying for one common cause on behalf of the

EU. Unfortunately, SACU does not have such a strong team to push for an agreement that fosters the objectives of SACU.

4.3 Conclusion

The purpose of Chapter two was to legally examine the extent to which the *2002 Agreement* is able to deal with the challenges of the EPA's signed by BLS in 2009. This chapter has revealed that the signing of the EPA's by BLS has created complicated legal problems for SACU. One of the objectives of the *2002 Agreement* was to establish an institution that operates on shared responsibilities and decision-making processes. Article 31(3) of the *2002 Agreement* prohibits any SACU Member State from negotiating any PTA without the consent of the other Member States. BLS have signed the EPA's in direct contravention of the *2002 Agreement*. No action has been taken by SACU to redress that problem since 2009.

The relevant SACU institutions, especially the CoM, have failed to order BLS to comply with the *2002 Agreement*. In addition, SACU institutions have not openly objected to the signing of the EPA's by BLS. SACU Member States will thus be subjected to goods from 27 EU states that will find their way into SACU through the implementation of the EPA's. On a positive note, SACU has the necessary institutions to, when properly supported by all Member States, deliver the aspirations of the SACU Member States.

The aim of chapter three was to investigate the nature of the EPA's signed by BLS and their legal implications on SACU. This chapter revealed that the EPA's in their current form are not beneficial in the long-term. The controversial issue of the RoO is unsustainable for SACU. Further, the removal of the MFN principle in EPA's is economically retrogressive for SACU. It is impossible for SACU to extend its trade preferences to all WTO Member States. Such a scenario will leave SACU extremely vulnerable to unfair competition, especially seeing that most goods from the EU will be subsidised.

Additionally, chapter three revealed that it is premature for SACU to implement the principle of reciprocity. It is more beneficial for SACU Member States to shelve the reciprocity provision in the EPA's. Added to this, SACU does not have adequate mechanisms to deal with dumping. The current anti-dumping measures in SACU are not suitable to curtail dumping by the EU. SACU needs to revise its dumping duties and enact an anti-dumping fund, which will be used to support business affected by dumping. In the same vein, chapter three revealed that SACU is not ready for 100% trade liberalisation as provided in the SADC-EU EPA signed by BLS. The ambit of "substantially all trade" if it goes unabated will threaten the very existence of SACU.

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