SOUTHERN AFRICA GLOBAL COMPETITIVENESS HUB

Policy Brief

Implication of Existing Bilateral Preferential Trade Agreements of Individual SACU Member States on the Implementation of the 2002 SACU Agreements

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Submitted to:
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Gaborone, Botswana

April 2006

USAID Contract No. 690-M-00-04-00309-00 (GS 10F-0277P)

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Introduction

The 2002 Southern African Customs Union (SACU) Agreement has introduced major changes to provisions governing SACU's trade relations with third parties. Until 2002, individual SACU countries could conclude preferential trade agreements with third parties, provided such agreements were sanctioned by other members of SACU, and their terms and conditions would not in anyway contravene the provisions of the SACU agreement then. However, the 2002 SACU Agreement, which was concluded after years of renegotiating the 1969 Agreement, now restricts individual members from concluding bilateral preferential trade agreements with third parties. Instead, such agreements will be negotiated and concluded by all SACU members as a group.

The provisions governing trade relations with third parties are already being implemented. In the first half of 2005, SACU countries as a group concluded preferential trade agreements with Mercosur and the members of the European Free Trade Area. In addition, negotiations for a Free Trade Agreement between SACU countries and the United States are currently underway.

What is not clear however is the relationship between the existing bilateral trade agreements that predated the 2002 SACU Agreement, and the new policy of harmonizing trade relations with third countries as stipulated in the 2002 agreement.

This policy brief examines these agreements and analyses the implications of their continued existence on the implementation of the 2002 SACU Agreement and the policy questions that have arisen as a result. Specifically, it examines provisions of Article 31 of the 2002 SACU Agreement and, where necessary, draws comparisons with the 1969 Agreement. It also examines and provides a brief summary of each of the preferential trade agreements concluded by individual member states with third parties, including a comparison of those agreements, followed by an assessment of their implications for the new SACU Agreement.

1. SACU Trade relations with third parties

Unlike the 1969 SACU Agreement, where individual countries could conclude preferential bilateral trade agreements with third parties, Article 31 of the current SACU Agreement redefines the terms and conditions governing SACU's trade relations with third parties. It compels SACU members, as a group, to collectively negotiate and conclude such agreements with third parties. Specifically Article 31 makes provision for the following:

- maintenance of existing bilateral preferential trade agreements and arrangements that pre-dated the 2002 Agreement;
- collective negotiation by all SACU countries, as a block, of any new preferential trade arrangements with third parties;
- disallows members to individually conclude any preferential trade agreements with third countries on a bilateral basis;
- requires members to seek concurrence of other members prior to amending existing preferential trade agreements or arrangements; and
- Establishment of a common negotiating mechanism to undertake negotiations for preferential trade agreements with third parties[1].

In addition, goods imported under preferential bilateral trade agreements and exported to territories of other SACU member states will be subject to normal customs duties. However, if the preferential duty paid is less than the normal Most Favored Nation duty, the difference shall be paid into the Common Revenue Pool.

The new approach to trade relations with third parties represents a major departure from the 1969 SACU Agreement. However, it represents a positive milestone for SACU members to coordinate, harmonize and develop common policies as a customs union.

2. Preferential trade arrangements within SACU

The signing of preferential trade agreements by SACU members dates back to the 1956 Customs Agreement between Federation of Rhodesia and Nyasaland and Basutoland, Bechuanaland Protectorate and Swaziland. In subsequent years, especially after gaining their independence, some countries concluded new agreements or amended existing ones to promote bilateral trade relations with other countries or to reflect their status as independent states.

Currently three out of the five members of SACU - Botswana, Namibia and South Africa - have operational preferential trade agreements with other countries. Botswana has bilateral trade agreements with Malawi and Zimbabwe, Namibia has an agreement with Zimbabwe, while South Africa has bilateral agreements with Malawi, Mozambique, Zimbabwe and the EU.

[1] Although SACU is currently engaged in a number of trade negotiations, the negotiating mechanism has not yet been established. Its terms of reference are to be determined by the SACU Council of Ministers. In the mean time, an interim arrangement is currently in place where South Africa plays a lead negotiator's role with respect to ongoing trade negotiations. The SACU Council of Ministers is the highest decision making body in SACU.

3. Preferential Bilateral agreements/ arrangements between individual SACU Countries and third parties

Table 1: Summary of bilateral preferential trade agreements by individual SACU members

	Zimbabwe	Malawi	Mozambique	EU
Botswana	Yes	yes	none	none
Lesotho	none	none	none	none
Namibia	Yes	no	none	none
South Africa	Yes	yes	yes	yes
Swaziland	none	none	none	none

The conclusion of these agreements had been motivated by various factors including economic and political considerations. Economically, countries sought to foster trade and economic relations through removal of tariff and non-tariff barriers to facilitate cross border trade. Agreements were also concluded to promote and contribute towards economic development. In the case of South Africa, the extension of non-reciprocal preferences to Mozambique was both politically and developmentally motivated. It sought to contribute positively to the reconstruction and development of the Mozambican economy after the civil war[2]. On the other hand, when South Africa was facing political and economic isolation because of its apartheid policy, it pursued deliberate policies to overcome such isolation. Offering non-reciprocal market access concessions to Malawi represented one of those options[3].

Over the years, some of these agreements have undergone successive reviews and amendments to respond to new challenges and demands for improved market access and product coverage. The scope and extent of coverage of the products traded have also evolved over time, leading to increased numbers of products traded and more diversified sector coverage, especially in the case of South Africa's agreements with Zimbabwe and Malawi. In the case of the former, such reviews have also led to improved tariff concessions for some of the products.

A synoptic summary of preferential trade agreements concluded by each country is provided below. For purpose of this paper, only bilateral preferential trade agreements are considered. The Cotonou Agreement, which benefits Botswana, Lesotho, Namibia and Swaziland (BLNS) as members of the Africa, Caribbean and Pacific (ACP) group, does not form part of this analysis[4]. Non preferential trade agreements concluded with third countries are also not covered. Such agreements are intended to promote trade and economic relation between parties without extending any tariff concessions to products traded between the contracting parties.

[2] Although this was done prior to the democratic process in South Africa, at the time, there was closer consultation with the ANC and therefore this initiative had the full support of the ANC. After democratization process in South Africa, the South African government continued its support to Mozambique in a number of key sectors including trade and economic development.

[3] Malawi was one of the few countries that had maintained ties with the Apartheid South African government at the time.

[4] This is a non preferential trade agreement extending market access for products of ACP origin to the EU.

3.1 Botswana

Botswana has preferential bilateral agreements with Zimbabwe and Malawi. Both Agreements date back to the 1956 Customs Agreement between the Federation of Rhodesia and Nyasaland and Basutoland, Bechuanaland Protectorate and Swaziland. Whereas some of the parties to this agreement have renegotiated and concluded new agreements after their independence, others have maintained and remained parties and signatories to their original agreements. In the case of Botswana, membership of the customs agreement was replaced by individual bilateral agreements with Zimbabwe and Malawi.

Botswana-Zimbabwe Preferential Trade Agreement

In 1988 Botswana and Zimbabwe, as independent states (Article 2), concluded a Preferential Trade Agreement (PTA) to replace the 1956 Customs Agreement. The PTA, though based on the old agreement, sought to address missing elements and deficiencies in the 1956 agreement, especially clearly defined rules of origin. It is a reciprocal agreement that covers all products without any exception. Products traded under the agreement enjoy duty free market access into markets of either party, provided they meet the rules of origin requirements as stipulated in Article 3 of that Agreement. The rules of origin are further elaborated in an Annex to the agreement.

Article 3 of the agreement defines goods that are eligible for duty free market access as:

- Goods grown or wholly produced in the territory of either party or
- Goods manufactured wholly or partly from imported materials, parts or components in the territory of either Contracting Party and traded between the two countries. Products manufactured from partly imported inputs must meet a 25% local content requirement[5].

Article 14 of the agreement relates to institutional arrangements and provides for the establishment of a Joint Ministerial Trade Committee. Its main function is to carry out consultations on matters affecting the agreement.

In 2001, the two governments agreed to amend the 1988 agreement. The amendments sought to modify the rules of origin in order to include the principle of cumulation to the rules of origin provisions and to elaborate and clarify the cost elements considered for the calculation and determination of local content requirements. The amended agreement was signed by both parties but was not ratified and therefore never came into force; by implication, therefore, the 1988 agreement remains in force[6]. Although trade between Botswana and Zimbabwe has declined in recent years, it is not clear whether this is due to the failure to implement

[5] The local content represents the value added percentage to non originating materials used including direct labor performed to manufacture a product in a country. The last process in the manufacture of the product must have taken place in the exporting country. Value added criteria defines the degree of transformation required to meet origin requirements in terms of minimum percentage of value that must come from the originating country or of maximum amount of value that can come from the use of imported parts and materials.

[6] After signing the amendment agreement, differences in the text were discovered and as a result, Botswana did not ratify the agreement.

the amended agreement or more generally to Zimbabwe's economic difficulties. The question arises as to why the amended agreement, has still not been ratified five years later.

Botswana and Malawi PTA

The agreement between Botswana and Malawi stems from the original Customs Agreement of 1956 between the Federation of Rhodesia and Nyasaland and Basutoland, Bechuanaland Protectorate and Swaziland. It provides for duty free market access on all products grown, wholly produced, or manufactured wholly or partly from imported inputs provided they meet a 25 percent local content requirement.

Unlike the Botswana-Zimbabwe agreement, where an amendment agreement was negotiated and concluded, these two countries remained parties to the original 1956 agreement. Despite its continued existence, the agreement has not been utilized over the years. Both parties confirmed that the agreement has not been operational. This is attributed to lack of trade between the two countries. On the other hand, whatever is traded between the two countries currently happens within the framework of the SADC Trade Protocol[7].

3.2 Namibia

Namibia-Zimbabwe PTA

Namibia's reciprocal PTA with Zimbabwe was concluded in 1992. It covers all products without any exclusions or quantitative restrictions. Products traded under this agreement enjoy duty free entry into the market of either contracting party, provided they meet the rules of origin requirements stipulated in the agreement. For products to confer origin, they must be grown, wholly produced or produced from partially imported materials with a 25% local content.

The agreement also provides for the establishment of a Joint Trade Commission (Article XI) whose mandate is to secure full and effective implementation of the agreement and to recommend any measures necessary to improve trade between the two countries. The Joint Trade Commission meets once every six months.

In 2000 both parties agreed to review and amend the 1992 agreement. The following amendments were introduced:

- Inclusion of the principle of cumulation to the rules of origin provisions in order to allow products sourced from one party to be used as input for production process of a product, or where further processing and value addition would take place before the product is exported to the other party as finished products[8].

[7] The Ministry of Trade and Industry in Malawi and Botswana Customs both confirmed that the agreement is not being implemented.

[8] The final product would be treated as originating from the country where further transformation and the last production process takes place.

- Further elaboration and refinement of costs elements that form part of to the calculations to determine local content ; and
- To change the frequency of meetings for the Joint Trade Commission from every 6 months to every 12 months.

Although both parties had agreed to these amendments, the amended agreement was never signed. As a result, the 1992 agreement remains in force. Again, this raises the question as to why the agreement was not ratified, more than five years later.

3.3 South Africa

South Africa - Malawi Preferential Trade Agreement

The Preferential Trade Agreement between South Africa and Malawi was concluded in 1990. It is a non-reciprocal trade agreement whose main objective is to facilitate duty free market access for Malawian products that meet the rules of origin requirements into the South African market. The 1990 agreement initially provided for preferential rates, rebates and quantitative restrictions on selected goods[9]. However following reviews and amendments over the years including the last amendments in 1999, quantitative restrictions were removed. As a result, goods of Malawian origin now enjoy unlimited and duty free access into South Africa if they are grown, wholly produced or partially produced in Malawi. Products that are partially produced in Malawi from non originating products are subject to 25% local content requirements and the last production process must take place in Malawi before exporting the finished products to South Africa.

The principle of cumulation is also provided for in the rules of origin provisions of this agreement. In essence cumulation allows Malawian producers to use non-originating materials sourced from South Africa without losing the preferential status of the final product[10].

In 1999 an influx of textiles and garments from Malawi into South Africa, considered by the South African authorities to be inconsistent with the country's production capacity, triggered an investigation for alleged cases of transshipment of Asian-originating products. These products had been exported to South Africa from Malawi using the bilateral trade agreement. Another concern expressed by the South African authorities related to Malawi's ability to meet the 25% value added origin requirement for some of its textile exports[11]. Consequently, South Africa invoked Article 12[12] of the agreement and subsequently suspended any import of Malawian

[9] Article 3 of the agreement provided for quantitative restriction on the importation of tobacco(300 000Kg), shelled ground nuts (750 metric tons) , processed ground nuts (100 metric tons) and subject to an import permit issued by the Department of Agriculture in South Africa.

[10] In other words, material originating from South Africa will be considered as originating from Malawi when incorporated in the production of a finished product.

[11] According to the Ministry of Trade in Malawi, there had been differences in interpretation of value added criteria. The Malawian government had sought a legal opinion; however the opinion expressed was not accepted by the South Africa. As a result, differences in interpretation led to the suspension of preferences by South Africa primarily for textiles and garments.

[12] Article 12 (1) allows any party to suspend concessions on the whole or part or to withdraw or modify the concession in case of increased imports under such conditions that threatens local industries.

textiles and garments traded under it. The decision resulted in a reduction of Malawian exports of those products to South Africa. According to the Ministry of Trade and Industry in Malawi, the issue remains unresolved and it is their intention to initiate a dialogue with South Africa on these issues.

Malawian textile and garment exports to South Africa are currently traded under a special arrangement under the SADC Trade Protocol[13]. The arrangement extends preferential market access for specified textiles and clothing products into the SACU market from non-SACU Least Developed Countries in SADC that are party to the Protocol on Trade, namely Mozambique, Malawi, Tanzania and Zambia (commonly referred to as the MMTZ arrangement). Products traded under this arrangement are exempted from customs duties if they meet the rules of origin requirements. This arrangement serves as derogation, for the beneficiaries, from applying the agreed SADC rules of origin on those products. The rules of origin applicable to the MMTZ members requires a single stage transformation production process for textile and garments, as opposed to double stage transformation processes normally required (the latter is the agreed rule of origin applicable to all members under the Trade Protocol). The arrangement is also subject to specified quotas for each country as determined by SACU in consultation with the MMTZ countries.

Currently Malawian exporters of products other than those covered by the MMTZ arrangement have a choice of utilizing either the bilateral agreement or the SADC Trade Protocol to access the South African market for products that are exempted from customs duties. However for those products whose duty levels under the SADC protocol are above zero, the bilateral trade agreement remains the most attractive instrument to trade with South Africa. The rules of origin obtaining under the bilateral trade agreement are also less restrictive for most manufactured products than the rules of origin under the SADC Trade Protocol. Whereas the Trade Protocol provides for the phasing out of duties over time, products traded under the bilateral agreement are fully exempted from duties. The bilateral agreement at this stage, with the exception of textiles and garments, is most favored instrument for trade with South Africa.

South Africa - Zimbabwe Preferential Trade Agreement

The South Africa - Zimbabwe Preferential Trade Agreement was concluded in 1964[14]. It is a reciprocal agreement whose product coverage was limited to a specified list of products when the agreement was concluded.

Products eligible for preferential market access under the agreement are subjected to various preferential market access conditions. These range from preferential tariff rates, rebates, quotas to tariff rate quotas accompanied by varying duty rates. The initial agreement started off with narrow product coverage, limited to agricultural products (fruits, vegetables and grains, poultry and dairy products) and a much

[13] South African Department of Trade and Industry is in favor of rationalizing bilateral trade agreements concluded with SADC members in favor of the SADC Trade Protocol.

[14] The contracting parties to the agreement then were the Republic of South Africa (including the territory of South West Africa) and the Government of Southern Rhodesia. However following Namibia's independence in 1990, Namibia and Zimbabwe signed a bilateral trade agreement in 1992.

broader coverage for textiles and clothing. In 1986, 1990, 1996 and 1999 the agreement had undergone several reviews to improve its terms and conditions, scope, product coverage and levels of tariff concessions. These successive reviews and amendments resulted in improved coverage of agricultural products, expansion of manufactured products, improved tariff concessions and quota levels[15]. By 1999 the duty structure had been simplified resulting in specific rates of duties replacing specified rebates on certain textile and clothing products originating from Zimbabwe.[16]

Rules of origin criteria for products traded under this agreement include:

- products grown or wholly produced in the country of origin;
- 25% local content for some of the manufactured products made from non originating materials;
- 75% local content for some textile products

The principle of cumulation applies to allow contracting parties to add value to non originating products sourced from either contracting party and subsequently exported as finished products under the agreement without loosing preferential status.

Trade of some of the products especially agriculture, textiles and clothing products requires import permits and other accompanying licenses besides the normal documentation such as certificate of origin that typically accompany goods traded under preferential trade the agreements.

Preferential Trade Arrangement for Mozambique

South Africa extends non-reciprocal preferential market access for a limited number of products of Mozambican origin into its market. However, the two parties have not concluded a formal agreement to regulate this arrangement. Instead South Africa created a special rebate item 412.25 under schedule no. 4 of its Customs and Excise Act to facilitate implementation of this arrangement.[17] The arrangement entered in force in 1990. Products eligible for preferential market access include fish products, prawns, cashew nuts, citrus fruits, wooden furniture, coconut oil, new tyres, handicrafts, textiles and clothing. Some of the products, especially agriculture and fisheries products are subject to quotas and import permits. Eligible manufactured products are required to meet 35% local content to qualify for preferences. Duty concessions for eligible products take the form of full rebate of import surcharges as well as rebates of customs duties to the level of 3 % of ad valorem duty. In other words customs duties are levied at 3% or less. The Mozambican Ministry of Commerce is responsible for administering the quotas.

[15] Amendments to the agreement in 1990 saw an expansion of the product coverage for the agriculture sector and an inclusion of manufacture products, minerals, and chemicals in addition to textiles and clothing which had constituted the bulk of manufactured products traded under the initial agreement.

[16] Most products were still subject to tariff rate quotas.

[17] It is a unilateral preferential arrangement similar to arrangements such as the Generalized System of Preferences, GSP, which are non reciprocal arrangements.

South Africa EU Trade Agreement

The South Africa - European Union Trade and Development Cooperation Agreement (TDCA) was signed in 1999 and entered into force on the 1st January 2000. This is a comprehensive agreement covering trade, development cooperation, finance, technical cooperation and political dialogue. Its trade component seeks to establish a Free Trade Area over a period of twelve years in accordance with WTO rules. The parties have agreed to an asymmetrical process of liberalizing 90% of trade between them. This would entail removal of tariff and non-tariff barriers by South Africa on 86% of imports from the EU, whereas the EU would liberalize 95% of its imports from South Africa over a ten to twelve year transitional period. This implies that 10% of trade between the two parties is not covered by the agreement.

A protocol on rules of origin elaborates conditions that are required for products to qualify for preferences. Products can only qualify for preferences if they are grown or wholly produced in either of the territories or are manufactured from wholly or partially originating material. In the case of manufactured products, qualifying products are subject to product-specific rules of origin that elaborate the working processes required for a product to confer origin. This may involve Change of Tariff Heading (CTH) or percentage value added requirement. The principle of cumulation is also provided for under this agreement. Unlike all the other agreements reviewed in this paper, this agreement, apart from trade in goods, also covers other trade related areas such as government procurement, intellectual property, standards, competition policy and trade in services.

A Joint Cooperation Council is established to oversee implementation of the agreement and to deal with issues related to the agreement including periodic review of the agreement.

South Africa has had to seek concurrence of the BLNS for the implementation of the TDCA in accordance with article 19 of the 1969 SACU Agreement. Among the BLNS members, Namibia has not granted concurrence. However, the agreement is being implemented.

4. Comparing the agreements

The agreements summarized above were concluded primarily to promote and enhance trade relations between contacting parties through tariff liberalization and the removal of non tariff barriers in accordance with agreed terms and conditions, rules of origin and administrative procedures stipulated in the agreements. Conditions for conferring origin are the same for products grown and wholly originating but vary to some degree, with respect to value added and local content requirements. In the case of the Botswana-Zimbabwe, Namibia-Zimbabwe and the South Africa-Malawi agreement, the local content requirement is set at 25%. In the case of Mozambique the local content requirement is 35% and for some of the textile products covered by the South Africa-Zimbabwe trade agreement, local content is as high as 75%. The SA-EU trade agreement rules of origin for manufactured products provides for product-specific rules of origin which are expressed either as value added percentage or in terms of specified production processes of individual products.

Cooperation amongst customs authority is essential for the successful implementation of these agreements. Therefore provision is made in these agreements for closer cooperation between customs authorities of the respective countries to ensure smooth implementation of such agreements including sharing and exchanging relevant information.

Generally, customs authorities in each country take responsibility for the verification of proof of origin for goods exported from their countries under the bilateral agreements. This process entails registration of exporters. Upon receipt of the exporter's application, customs carries out physical verification of material and input used for production, including their origin. Such verifications also enable customs authorities to establish if indeed the production processes meet the rules of origin requirements as stipulated in the agreement. Once customs approval is granted the exporter is then registered and issued with a registration code or number which will serve as their means of identification. Such information is also shared between customs authorities of the parties to the trade agreement.

Only registered companies are issued with certificates of origin and can therefore trade and take advantage of the duty preferences granted under the bilateral agreements.

Botswana and Namibia's bilateral agreements with Zimbabwe, and the SA-EU agreement, make provision for institutional mechanisms to monitor and oversee implementation of those agreements.

Except the EU-SA agreement all agreements reviewed only cover trade in goods.

A summary table of these agreements is attached as Annex 1 to this paper.

5. Implications for the 2002 SACU Agreement

Existing bilateral PTAs affect the SACU Agreement in two broad areas:

(i) Implementation of the 2000 SACU Agreement especially the movement of goods traded under the preferential bilateral trade agreements within the Common Customs Area Market including the impact on customs revenue; and

(ii) Policy implications especially trade relations with third parties.

(a) *Implications for the implementations for the 2002 Agreement*

The conditions pertaining to the movement of goods within SACU Common Customs Area, CCA, and those traded under bilateral trade agreements with third parties are stipulated primarily in Articles, 18, 19, 20 and 31 respectively.

- Article 18 provides for free movement of goods produced within, the CCA and subsequently traded between member states.
- According to Article 19, SACU member states are restricted from imposing duties on goods imported from outside the CCA, when such goods are

imported from the area of any other member of SACU. In other words once a product is imported from outside into the CCA, such a product should move freely within the CCA, without attracting any duties.

- Article 20(2) requires SACU member states to apply identical duties on imported goods into the CCA[18].
- Article 31(1) allows member states to maintain bilateral preferential trade agreements that pre-date the 2002 SACU Agreement and to seek concurrence of other members when amending such agreements.
- Normal customs duties apply to products traded under such preferential bilateral agreements once exported to other members of SACU that are not party to those preferential trade agreements, article 31(4)[19].
- SACU members are restricted from entering into any preferential bilateral trade agreements with third parties. According to Article 31(3), such agreements can only be concluded by all member states collectively.

In the short to medium term, the rationale for continued existence of the pre-2002 bilateral preferential agreement is justified. Most of the agreements seem to have proven their relevance in relation to their stated objectives and have in turn benefited the contracting parties. However, indefinite existence of such agreements within the current customs union setting could create serious contradictions with article 18 and 20(2) of the SACU agreement, regarding free movement of goods within the CCA. In addition, administering multiple individual trade agreements within a customs union and having to control movement of goods within CCA increases transaction costs and promotes inefficiencies. Such inefficiencies impact directly on the human and institutional capacities, especially when some of these countries face capacity constraints in relation to their day to day operations. This requires of countries to put in place additional measures in order to ensure effective application and compliance with the relevant provisions and to monitor and control the movement of goods traded under the bilateral agreements within the CCA. Clearly some measures are required to bring past practices of individual bilateral agreements in harmony with the current agreement in order to improve efficiency and to reduce transaction costs.

For smaller countries like Namibia and Botswana the number of products traded under bilateral trade agreements is fairly small and details of registered exporters and importers that utilize the agreements are well documented. As a result, customs authorities are familiar with companies that trade under the agreement, have sufficient knowledge to ensure that only goods that confer origin are traded under the agreement and therefore exempted from duties. Such information contributes to effective monitoring and overall management of those agreements. However the same may not be applicable to others that are not party to those agreement. They may not necessarily have the same level of information and knowledge of goods traded as outsiders to those agreements. As such they would not be in the position to identify products traded under bilateral agreements and sold into their markets. Nor would they be able to levy duties on such goods when exported to their markets, thus running the risk of contravening Article 31(4).

[18] There are exceptions for members to grant rebates of customs duties in respect of relief of distress of persons, under technical assistance, compliance of multilateral agreements etc. (Article 20(3)).

[19] For products that enjoy duty free entry, normal duties will apply where as the difference between normal duties and preferential rate will apply to those products that attract reduced duties under the bilateral agreements.

In the case of South Africa, the size of its economy, its diversified manufacturing sector and, in some cases, the similarity between imported and locally produced products, presents a challenge for the BLNS to distinguish between products imported through the bilateral trade agreement and those manufactured in South Africa. As a result, goods originating from the EU, and subsequently exported to the BLNS are treated as South African originating and no duty, full or partial, (depending on the level of preferential duties,) is charged. Consequently, customs duties that should otherwise be collected and paid into the pool is not levied and collected, thereby resulting in revenue losses. However, earlier studies have shown that the cost of collecting such duties would far exceed the benefit, hence the decision by the BLNS to allow duty free flow of EU originating products traded under the EU-SA FTA into their markets[20].

Putting in place measures to manage movement of goods traded under preferential trade agreements provides little benefit to member states and the cost would most probably outweigh the benefits. The fact that no duty is levied on such products shows that there is little benefit, both for revenue purposes and from the perspective of protecting domestic production. On the contrary, such measures, if implemented, would undermine free movement of goods within the customs union. In addition, they would contribute to transaction costs related to compliance both from the perspective of the responsible authority and the private sector.

Although continued existence of these bilateral agreements is provided for in the agreement, SACU and its members states should consider streamlining and in some cases rationalizing these agreements. This would bring about conformity with article 31(1) and 20(2) as far as preferential trade relations with third parties are concerned, and the application of the identical duties on imports by all members respectively.

(b) Policy implications

The SACU agreement is silent about the linkages, in the long-term, between Article 19[21], on the one hand and Articles 31(1) and 31(4)[22] on the other. Though directly linked to article 31(1), article 31(4) is a clear contradiction to article 19. In the long run, indefinite existence of preferential bilateral agreements would undermine the principle of applying uniform tariff policy and harmonizing trade relations with third parties. Therefore, a policy decision is required to address this anomaly in the long run. As a start there would be a need to establish a transitional mechanism that provides for phasing out of individually concluded preferential agreements in favor of agreements concluded by all SACU members collectively.

[20] For the BLNS to effectively identify such products they would need to put systems in place that would enable them to identify and capture those products. These have cost implications and may just result in some form of non tariff measures that would impede movement of goods within the common customs area.

[21] Dealing with application of customs duties on goods imported from outside the customs area when imported from an area of another member.

[22] Articles 31(1) and 31(4) provide for continued existence of preferential bilateral trade agreements of individual members and application of duties to goods traded under such agreements, when traded within the CCA.

SACU members can draw lessons of a similar nature from their own experience as SADC members with respect to the SADC Trade Protocol. The Protocol makes provision for continued existence of bilateral agreements until such time that the protocol becomes more beneficial. Once that is achieved, bilateral agreements are to be phased out in favor of the SADC FTA. These provisions are limited to bilateral agreements between members of SADC that are also signatories to the SADC Trade Protocol. Therefore, SACU members and their partners have an obligation to phase out existing preferential agreements with other SADC members in favor of the SADC Trade Protocol once market access conditions under the Trade Protocol become more favorable than the bilateral trade agreements[23].

Two options may be considered: 1) to phase out those agreements in line with the provisions of the Trade Protocol or 2) phasing out bilateral agreements within the framework of the SACU Agreement. The first option is already in place and is legally binding on all members of SADC, including individual SACU members with preferential bilateral trade agreements. It would be easier to enforce given that these countries have ratified and are already implementing the Trade Protocol. The second option would only be limited to individual SACU members who are signatories to those agreements and cannot be extended to Mozambique, Malawi and Zimbabwe. There would be no legal basis to apply and enforce such provisions in relation to the three non SACU countries. Meanwhile, SACU members would first have to introduce measures or provisions that would guide the process of phasing out of those agreements. Such provisions do not exist under the current SACU Agreement. Given the above, it would be easier and faster to consider and phase out existing bilateral agreements between countries that are party to the SADC Trade Protocol using the provisions of the Trade Protocol.

Which ever option is adopted should be accompanied by a clearly defined and time bound transitional arrangement that would lead to the transformation of individually concluded bilateral preferential trade agreements into common trade arrangements between all SACU members and third parties[24]. Two different approaches need to be considered. For that purpose:

- Rationalizing the existing bilateral agreements with Malawi, Mozambique and Zimbabwe in line with the SADC Trade Protocol and
- Harmonizing trade relations between SACU and the EU.

As regards rationalization of the existing bilateral agreements concluded with other members of SADC, SACU has already made a start within the context of SADC. As members of SADC, SACU members have collectively offered the same concessions and schedule of tariff liberalization for the establishment of a SADC Free Trade Agreement through the SADC Trade Protocol. In other words, SACU's trade relation with members of SADC, who are party to the Trade Protocol, is based on a common approach. As a result, goods traded under the protocol face identical preferential concessions and products traded under the protocol move freely within the common customs area once they enter SACU. This is different from the treatment of goods

23 In this case, countries affected are Namibia, Botswana, South Africa and Malawi, Mozambique and Zimbabwe.

24 This process may also involve negotiations with Malawi, Mozambique, Zimbabwe and the EU respectively.

traded under the bilateral preferential trade agreements. Those are subject to customs duties when exported to the area of another SACU member.

The approach adopted by SACU under the SADC Trade Protocol provides a good basis to redefine SACU's trade relations with Malawi, Mozambique, and Zimbabwe. However there is need to work out detailed modalities for the phasing out or the integration of the bilateral agreements into the Trade Protocol.

Currently countries that are party to these preferential agreements can choose to trade either under the bilateral trade agreement or the SADC Trade Protocol.

Liberalization of trade under the SADC Trade Protocol is reaching a stage where a substantial number of products traded enjoy the same levels of preferences, i.e. duty free, as those available under bilateral trade agreements. This is mainly true for products exported to the SACU markets by countries that have bilateral agreements with individual SACU member states. Since the beginning of January 2006, about 80% of products from other SADC members into the SACU markets enjoy duty free entry if they meet the rules of origin requirement. On the other hand, market access for SACU products into individual non-SACU SADC members will still be subject to higher levels of duties. This is because of the asymmetrical tariff reduction commitments made by member states[25]. Most of the non-SACU SADC members, especially LDCs, have back-loaded their tariff liberalization commitments towards South Africa[26].

For an exporter, the choice of which agreement to utilize is determined by the extent and level of tariff concession and applicable rules of origin requirement. For manufactured products, the 25% local content rules of origin requirement under bilateral trade agreements remains attractive to those countries whose ability to reach higher levels of local content remains limited. Therefore such countries would prefer to retain and trade under the bilateral preferential trade arrangement. If faced with a choice of a 25% or 40% local content requirement, exporters that do not meet the 40% requirement will naturally opt for less restrictive rules of origin under the bilateral agreement. Similarly, the level of tariff concessions will also inform the exporters' choice of agreement. Tariff concessions under the SADC Trade Protocol are based on an asymmetrical and gradual tariff reduction approach, whereas some bilateral agreements grant duty free access to all products traded or fairly low levels of duty like in the case of the South Africa – Mozambique agreement where most duties are 3%.

In the short to medium term, it will be important to identify those products that enjoy better market access from bilateral trade agreements compared to the SADC Trade Protocol, with a view to improve their market access conditions under SADC.

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[25] Under the Trade Protocol, each of the non- SACU SADC members have committed two different schedules for tariff reduction: one towards all other member states including the BLNS and a "Differentiated offer" towards South Africa only. In addition, the pace of tariff liberalization differs among countries to take account of the levels of development.

[26] Meaning that tariff liberalization does not start from year one but rather deferred towards the end of the time frame set for tariff liberalization. In most cases, liberalization starts from year three and four with the real impact becoming effective towards the end of the phasing out period which is set for the year 2008 for most products and 2012 for sensitive products.

Facilitation of free movement of goods within the common customs area requires adoption of a uniform approach towards trade with third parties. The following possible options may be considered:

- renegotiating existing agreements and opening them up for accession by all members of SACU[27],
- Adoption of existing terms and condition of existing agreements by all SACU members. In the case of non-reciprocal arrangements applicable to Malawi and Mozambique, existing concessions will be adopted and applied by all SACU members and not only South Africa as it is currently the case.
- Terminate all bilateral agreements and extend preferential market access concessions through the SADC Trade Protocol only[28]
- Incorporate tariff concessions for products enjoying better preferences under the bilateral trade agreements into the SADC Trade Protocol through revision of SACU and other partner's schedules of tariff concessions applicable such products. This would remove differences in tariff concessions for specific products that enjoy duty free preferences under the bilateral agreements while fetching higher tariffs under the trade protocol. However, changes made to the tariff concessions would have to be applicable to all parties to the trade protocol.

None of these options can be implemented immediately. However, as a start, SACU requires a policy decision to guide treatment of existing bilateral preferential trade agreements going forward. This will most certainly require improvement or revision of schedules for tariff reductions under SADC to secure the same benefits provided under bilateral agreements. If achieved it will be an added advantage and would and boost the effectiveness of the Trade Protocol, resulting in a win-win situation for all affected parties. The options above are applicable to trade relations affecting SADC members and may not necessarily apply to agreement between the EU and South Africa.

In the case of the SA-EU trade agreement, SACU would need to harmonize its trade relations with the EU. Because of the SACU common external tariff, de facto, the BLNS are extending preference to the EU even though legally they are not party to that bilateral agreement[29]. As a result, goods traded under that agreement are not charged any customs duties when entering markets of other members from South Africa. Application by the BLNS of preferential duties towards EU imports without any legal basis is a serious anomaly and impacts on the operation of the customs union agreement[30]. The factors highlighted above favor harmonization of SACU Trade

[27] This will be applicable more in the case of Zimbabwe that has agreements with 3 members of SACU

[28] This option will not benefit the BLNS immediately because of the asymmetrical nature of tariff concessions under the SADC Trade Protocol. For the BLNS such benefits would only accrue at a later stage.

[29] Alternatively the BLNS would have to charge duties on EU goods entering their markets from South Africa if such goods are accorded preferential market access through the bilateral agreement. However the cost of doing so outweighs the benefits.

[30] This is largely attributed to the differences in trade policy relations obtaining between BLNS and South Africa towards the EU. Trade between the BLNS and the EU, which is non reciprocal, is governed by the Cotonou Agreement whereas South Africa has the bilateral trade agreement with the EU. Meanwhile because of the SACU common external tariff, the BLNS apply the same tariffs as South Africa, to goods imported from the EU

relations with the EU. [31]. Harmonization in this case requires of SACU to put in place a mechanisms that would allow the BLNS to legally apply identical duties towards EU imports. In addition, an identical regime will address the trade diversion effect on the BLNS arising from TDCA, especially given that the EU is also a significant trading partner for the BLNS. Concerns related to sensitive products may not arise for the BLNS as those had already been safeguarded in South Africa's schedule of tariff concessions towards the EU by treating them as sensitive products; this means products such as sugar or beef would either be excluded from liberalization, or tariff liberalization of such products is back-loaded. BLNS industries are already facing competition from the EU, particularly within South Africa, though the impact may be felt much later when the levels of tariff are reduced by larger margins.

The Economic Partnership Agreement currently being negotiated between SADC and the EU presents an opportunity for SACU members to collectively address the anomaly related to trade relations between SACU members and the EU. As a customs union it makes sense for SACU members to extend the same preferences to the EU. This is consistent with harmonization of trade relations with third parties and application of common policies within SACU. In addition it promotes efficiency in the operation of the customs union. On the other hand market access concession granted to SACU member's export into the EU could vary, to take account of the different levels of development among them[32].

6. Conclusions

The continued existence of bilateral preferential trade agreements that predated the SACU Agreement of 2002 and the treatment of products traded under those agreements are both provided for in the SACU Agreement. Therefore, these agreements do not in any way contravene the SACU Agreement. However, in the long run, the new agreement aims to achieve policy harmonization in a number of areas one of which is trade relations with third parties. In that respect, rationalization and harmonization of some of the existing bilateral preferential trade agreements that were in force prior to 2002 would be a necessary step towards harmonizing trade relations with third parties. In that process, the linkage of these agreements to existing regional arrangements such as the SADC Trade Protocol and the EPA negotiations should also be considered.

At the time that some of these bilateral agreements were concluded, there were no regional arrangements such as the SADC Trade Protocol. As such, bilateral agreements were the most effective instruments in fostering bilateral trade relations. However with the Trade Protocol in force, and countries having committed to the creation of a regional Free Trade Area, the relevance of bilateral trade arrangements become somewhat minimal. This is however only true when implementation of the

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under the SA-EU trade agreement into the CCA. This is a clear demonstration of why a common policy is necessary within the customs union – it allows uniformity in the application of trade policy.

[31] This process should not be seen in isolation from the EPA negotiations at all. This is only one element. Broadly it involves negotiating an agreement that involves all SACU members and therefore calls for an urgent need to review the trade aspects of the TDCA for only. For purpose of this paper, the discussion is only limited to harmonization of external trade relations.

[32] Provided such concessions take full account of the common market and thus would not undermine the ability of countries to source from other members to meet the rules of origin requirement especially in relation to cumulation.

Trade Protocol becomes effective and more beneficial and as deep and widespread tariff reductions take place; otherwise bilateral agreements remain more relevant and attractive to their beneficiaries.

Achieving the requisite harmonization would require rethinking of current measures governing those agreements with a view to achieving the uniform application of preferential trade with those partners with whom individual SACU members have concluded bilateral trade agreements. For a start a policy decision is required to overcome what would be, in the long run, a contradiction between free trade within the CCA, and continued existence and management of these existing bilateral preferential trade agreements.

Where as these agreements have managed to safeguard the interest individual of SACU members that are party to them, in the long run it makes more sense to consider long-term objectives of building an effective and functioning Customs Union in the interest of all its members.

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Summary table of Preferential Bilateral Trade Agreements concluded by individual SACU members with third countries

	Botswana / Malawi	**Botswana/ Zimbabwe**	**Namibia/ Zimbabwe**	**South Africa/ Malawi**	**South Africa/ Mozambique**	**South Africa/ Zimbabwe**	**South Africa EU**
Date of Signature	1956	1956	1992	1990	1989	1964	1996
Amendments	1988 and 2001	1988 and 2001	2000 But not ratified			1986,1990,1999,	
Type of agreement	Reciprocal, FTA	Reciprocal, FTA	Reciprocal, FTA	Non Reciprocal, Preferential Tariff Arrangement	Non reciprocal Preferential Market access arrangement	Reciprocal, Preferential Trade Agreement	Reciprocal Free Trade Agreement
Product coverage	All products	All products	All products	All products except Textile and clothing (covered by the SADC Trade Protocol, MMTZ arrangement	Limited list of products	Limited product specific list	Substantially all trade : 86% RSA and 94% EU of trade
Nature of tariff concessions	Duty free subject to Rules of Origin	Duty free subject to Rules of Origin	Duty free subject to Rules of Origin	Duty free subject to Rules of Origin	Rebates of customs duty at 3% ad valorem	Preferential duties, rebates, tariff rate quotas,	Tariff Phase down schedule over 12 years
Rules of Origin requirements	Wholly originating or value added criteria	Wholly originating or value added criteria	Wholly originating or value added criteria	Wholly originating or value added criteria	Wholly originating or value added criteria	Wholly originating or value added criteria	Wholly originating or value added criteria or

Origin requirements for non originating products	25 % Local content required	25 % Local content required	25 % Local content required	25 % Local content required	25 % Local content required	25 % Local content required	Product specific rules
Cumulation principle	Applicable	Applicable	Applicable	Applicable	Applicable	Applicable	Applicable
Exclusions	none	none	Based on product list	Textile and clothing as of 1999 covered by the SADC MMTZ arrangement	Yes, preferences only limited to a list of products	Yes ; preferences only limited a list of products	Yes ; 10% of trade excluded
Institutional set up	None	Joint Ministerial trade Committee	Joint Trade Commission	Not specified in the agreement	Not specified		Trade and Developme nt Cooperation Council
Documentation s requires	Origin Certificates	Origin Certificates	Origin Certificates	Origin Certificates	Origin Certificates, Import and Export Licenses	Origin Certificates	Origin Certificates
Issuing Authority for origin Certificates	Customs	Customs	Customs	Customs	Customs	Customs	Customs