



EXPLANATORY MEMORANDUM FOR THE TABLING IN PARLIAMENT OF THE ANNEX ON THE INSTITUTIONALISATION OF THE SOUTHERN AFRICAN CUSTOMS UNION SUMMIT

1. BACKGROUND

SACU was established in 1910 pursuant to a Customs Union Agreement between the then Union of South Africa and the High Commission Territories of Bechuanaland, Basutoland and Swaziland. With the advent of independence for these territories, the agreement was updated on 11 December 1969. SACU was relaunched with the signing of an agreement between the Republic of South Africa, Botswana, Lesotho and Swaziland. The updated union officially entered into force on 1 March 1970. After Namibia's independence from South Africa in 1990, it joined SACU as its fifth member.

Following the formation of the Government of National Unity in South Africa in April 1994, Member States concurred that the present Agreement should be renegotiated to democratise SACU and address the current needs of the SACU Member States more effectively resulting in the 2002 SACU Agreement.

During the implementation of the 2002 Agreement, Member States identified a need for a role of Heads of State and Government to provide strategic direction to SACU. This culminated in the negotiation of an Annex on the Institutionalisation of the SACU Summit of Heads of State and Government. The aim of the Annex is to incorporate the SACU Summit under Article 7 of the SACU Agreement.

2. LEGAL IMPLICATIONS

The Annex on the Institutionalisation of Summit was taken through the legal process in the Republic, through Departments of Justice and Constitutional Development, and of International Relations and Cooperation prior to signing by the Minister as per the requirement. Both departments found that the Annex is not in conflict with any domestic laws and it is also consistent with international law and the country's international obligations. The Office of Chief State Law Adviser at the Department of Justice and Constitutional Development advised that, after signature, the Annex be taken through the ratification process in line with Section 231 (2) of the Constitution.

The President's Minute was obtained and Honourable President Jacob Zuma and the other BLNS Heads of State and Governments signed the Annex on the institutionalisation of the Summit on 12th April 2013 in Gaborone, Botswana.

The Annex has also gone through the International Relations, Communication, Trade and Science and Technology Cluster (ICTS). The legal opinion, notes that the Annex introduces changes to an existing Agreement. However, it also introduces fundamental changes to the structures of SACU as an organisation which require ratification of the Annex in line with the domestic processes of each Member State. In the case of South Africa, the Annex will need to be taken through the Parliamentary process. Cabinet has approved that the Annex be tabled before Parliament.

3. IMPLEMENTATION AND MONITORING

The dti will act as the Competent Authority responsible for overseeing the implementation of the Annex on behalf of the South African Government.

Article 7 of the 2002 SACU Agreement lists the institutions of SACU as Council of Ministers, Customs Union Commission, Secretariat, Tariff Board, Technical Liaison Committees and the ad hoc Tribunal, and it does not have the SACU Summit of Heads of State and Government as a SACU institution. There are issues that necessitated the provision of strategic and political guidance by the Heads of State and Government in the implementation of the 2002 SACU Agreement.

The first SACU Heads of States and Government meeting took place in Namibia on 22 April 2010, to adopt the new SACU vision and mission. This meeting was held on an ad hoc basis as there were no legal bases to convene Summit and the implications were that the decisions made would be uncertain. It was against this background that it was decided to institutionalise the SACU Summit and make it a new and permanent institution of SACU.

4. OBJECTIVE

The objective of the Summit as a SACU institution is to provide a strategic and political guidance in the implementation of the 2002 Agreement. The SACU Council will still be responsible for providing policy direction to SACU and will take administrative, technical and operational decisions relating to the institutions. The Summit will meet once a year to provide strategic direction as requested by the Council of Ministers.



AMENDMENTS TO THE
SOUTHERN AFRICAN CUSTOMS UNION (SACU) AGREEMENT
OF 2002
TO INSTITUTIONALISE THE SACU SUMMIT

1 M.B. J.G.Z. ca
H.O. SL

THE GOVERNMENTS OF THE REPUBLIC OF BOTSWANA, THE KINGDOM OF LESOTHO, THE REPUBLIC OF NAMIBIA, THE REPUBLIC OF SOUTH AFRICA AND THE KINGDOM OF SWAZILAND,

HAVING REGARD to the objectives of the Southern African Customs Union Agreement, 2002;

RECOGNISING the political and economic challenges from the regional and multilateral environment facing the Southern African Customs Union;

BEARING IN MIND the Southern African Customs Union Vision and Mission Statement adopted by the SACU Heads of State or Government in Windhoek, Namibia on 22 April 2010;

BEING AWARE that the implementation of the Southern African Customs Union Agreement will be promoted by strategic guidance through collective leadership from the highest level of Government in the Member States;

BELIEVING that the establishment of the Summit of Heads of State or Government as an institution of the Southern African Customs Union will provide the necessary impetus for its development and contribute to more effective and successful cooperation between the Member States, the consolidation of the Organization, the adoption of common policies and the promotion of the collective interests of the Southern African Customs Union;

HEREBY ADOPT the following amendments to the Southern African Customs Union Agreement, 2002:

ARTICLE 1

AMENDMENT OF ARTICLE 1 OF THE AGREEMENT

Article 1 of the Agreement is amended by inserting the following new definition immediately after the definition of "South Africa":-

"Summit" means the Summit of Heads of State or Government established by Article 7".

ARTICLE 2

AMENDMENT OF ARTICLE 6 OF THE AGREEMENT

- 2.1 Article 6 (2) of the Agreement is amended by deleting the word "Council" and substituting it with the word "Summit".
- 2.2 Article 6 (3) of the Agreement is moved to Article 8 of the Agreement as a function of the Council.

2 M.B. J. Coetzee
62 D

ARTICLE 3
AMENDMENT OF ARTICLE 7 OF THE AGREEMENT

Article 7 of the Agreement is amended:-

- a) by inserting the following new paragraph (a):
- “(a) Summit of Heads of State or Government”; and
- b) by renumbering the old “paragraphs (a) to (f)” as “paragraphs (b) to (g)” respectively.

ARTICLE 4
INSERTION OF ARTICLE 7A INTO THE AGREEMENT

The Agreement is amended by inserting immediately after Article 7, the following new Article:-

“Article 7A

The Summit

1. The Summit shall consist of the Heads of State or Government from each Member State.
2. The Summit shall provide political and strategic direction to SACU.
3. The Summit shall receive reports on the work of the Council.
4. Subject to Article 42 of the Agreement, the Council may refer legal instruments for the implementation of the provisions of the Agreement to the Summit for adoption.
5. The Summit shall meet once in a year. The Summit may hold extraordinary meetings at the request of any Member State.
6. The Chair of the Summit shall be held in turn by each Member State for a period of twelve months in the same order as that of the Council.
7. The Summit shall determine its own rules of procedure.”

ARTICLE 5
AMENDMENT OF ARTICLE 8 OF THE AGREEMENT

Article 8 of the Agreement is amended:-

- a) in Article 8 (1), by deleting the words “and shall be the supreme decision making authority of SACU matters”;
- b) in Article 8(2) by inserting the words “decision making on” immediately after the words “responsible for”; and
- c) by inserting the old “Article 6(3)” as “Article 8(9)” and renumbering the old “Articles 8 (9) and 8 (10)” as “Articles 8 (10) and 8 (11)”.

ARTICLE 6
AMENDMENT OF ARTICLE 10 OF THE AGREEMENT

Article 10 of the Agreement is amended by inserting in Articles 10 (2) and 10 (9), the word “Summit,” immediately before the word “Council”.

ARTICLE 7
AMENDMENT OF ARTICLE 13 OF THE AGREEMENT

Article 13 of the Agreement is amended:

- a) by inserting the words “Summit or the” immediately before the word “Council” in Article 13 (4);
- b) in Article 13(6), by inserting immediately after the word “Tribunal” the words “through the Council”; and
- c) by inserting a proviso to Article 13(6) which reads as follows: “Provided that the Council may request the Summit to consider such dispute or difference as the Council may deem appropriate, with a view to achieving an amicable settlement”.

M.B.

[Handwritten signature]
J. G. K.
40

[Handwritten mark]

ARTICLE 8
AMENDMENT OF ARTICLE 43 OF THE AGREEMENT

Article 43 of the Agreement is amended:-

- a) by deleting the words "and decision" immediately after the word "consideration"; and
- b) by deleting the word "Council" at the end thereof and substituting it with the word "Summit".

ARTICLE 9
ENTRY INTO FORCE

These Amendments shall enter into force thirty (30) days after the deposit of instruments of ratification by all the Member States.

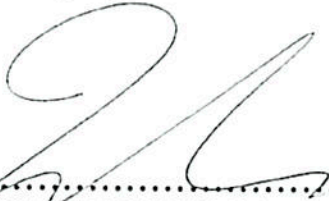
M.B.

12.
16.
14

81

IN WITNESS WHEREOF, we the Heads of State or Government of the SACU Member States have signed these Amendments.

DONE AT Gaborone, Botswana, this ^{12th}.....day of April 2013 in the English Language.



.....

REPUBLIC OF BOTSWANA



.....

KINGDOM OF LESOTHO



.....

REPUBLIC OF NAMIBIA



.....

REPUBLIC OF SOUTH AFRICA



.....

KINGDOM OF SWAZILAND

7



SOUTHERN AFRICAN CUSTOMS UNION AGREEMENT

2002

**BETWEEN THE GOVERNMENTS OF THE REPUBLIC OF
BOTSWANA, THE KINGDOM OF LESOTHO, THE REPUBLIC
OF NAMIBIA, THE REPUBLIC OF SOUTH AFRICA AND THE
KINGDOM OF SWAZILAND**

TABLE OF CONTENTS

PREAMBLE	3
Part One	Definitions and Objectives.....5
Part Two	Establishment and Legal Status..... 8
Part Three	Institutions.....10
Part Four	Meetings..... 17
Part Five	Trade Liberalisation..... 18
Part Six	Common Revenue Pool..... 28
Part Seven	Revenue Sharing.....29
Part Eight	Common Policies.....33
Part Nine	Final Provisions..... 35
SIGNATURES	38
ANNEX 1	Revenue Sharing Formula..... 39

PREAMBLE

THE GOVERNMENTS OF THE REPUBLIC OF BOTSWANA, THE KINGDOM OF LESOTHO, THE REPUBLIC OF NAMIBIA, THE REPUBLIC OF SOUTH AFRICA AND THE KINGDOM OF SWAZILAND

RECOGNISING that the Customs Union Agreement concluded on 11 December 1969 no longer adequately caters for the needs of a customs union in the 21st century and should therefore be aligned with current developments in international trade relations;

BEARING IN MIND the decision of the Ministers responsible for Southern African Customs Union matters of 11 November 1994, mandating the Governments to re-negotiate the 1969 Southern African Customs Union Agreement;

AWARE that the implementation of the 1969 Agreement is hampered by a lack of common policies and common institutions;

RECOGNISING the importance of tariffs as instruments for the implementation of industrial development policy;

BEING desirous of determining and applying the same customs tariffs and trade regulations to goods imported from outside the Common Customs Area;

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

TAKING INTO ACCOUNT the results of the Uruguay Round of Multilateral Trade Negotiations on global trade liberalization;

RECOGNISING the obligations of Member States in terms of existing regional trade arrangements and bilateral trade agreements;

BELIEVING that a dispute settlement mechanism will provide a mutually acceptable solution to problems that may arise between Member States;

Hereby agree as follows:

PART ONE
DEFINITIONS AND OBJECTIVES

Article 1
Definitions

In this Agreement, unless the context otherwise requires:

- "additional duties"** means duties imposed in terms of Article 26;
- "Agreement"** means this Agreement, establishing SACU, and includes Annex A and such annexes as referred to in Article 42;
- "Botswana"** means the area of the Republic of Botswana;
- "Commission"** means the Customs Union Commission established by Article 7;
- "Common Customs Area"** means the combined areas of Botswana, Lesotho, Namibia, South Africa and Swaziland;
- "Common Revenue Pool"** means the Pool referred to in Article 32;

"Council"	means the Council of Ministers established by Article 7;
"customs duties"	means customs duties as defined in the customs legislation in force in the respective Member States;
"excise duties"	means excise duties as defined in the excise legislation in force in the respective Member States;
"Financial year"	means a period of 12 months commencing on the 1st of April;
"Lesotho"	means the area of the Kingdom of Lesotho;
"Namibia"	means the area of the Republic of Namibia;
"SACU"	means the Southern African Customs Union established by Article 3;
"Secretariat"	means the Secretariat of SACU established by Article 7;
"South Africa"	means the area of the Republic of South Africa;
"Swaziland"	means the area of the Kingdom of Swaziland;
"Tariff Board"	means the SACU Tariff Board established by Article 7;

"Technical Liaison Committees"	means Committees established by Article 7;
"Tribunal"	means an adhoc Tribunal established by Article 7;
"WTO"	means the World Trade Organisation.

Article 2 Objectives

The objectives of this Agreement are -

- (a) to facilitate the cross-border movement of goods between the territories of the Member States;
- (b) to create effective, transparent and democratic institutions which will ensure equitable trade benefits to Member States;
- (c) to promote conditions of fair competition in the Common Customs Area;
- (d) to substantially increase investment opportunities in the Common Customs Area;
- (e) to enhance the economic development, diversification, industrialization and competitiveness of Member States;
- (f) to promote the integration of Member States into the global economy through enhanced trade and investment;
- (g) to facilitate the equitable sharing of revenue arising from customs, excise and additional duties levied by Member States; and
- (h) to facilitate the development of common policies and strategies.

PART TWO

ESTABLISHMENT AND LEGAL STATUS

Article 3

Establishment of the Customs Union

1. There is established the Southern African Customs Union (hereinafter referred to as "SACU").
2. The Headquarters of SACU shall be in Windhoek in the Republic of Namibia.

Article 4

Legal Status

1. SACU shall be an international organization, and shall have legal personality with capacity and power to enter into contracts, acquire, own or dispose of movable or immovable property, and to sue and be sued.
2. SACU shall be accorded by each of the Member States such privileges and immunities as are necessary for the exercise of its functions.
3. The officials of the SACU Secretariat shall be similarly accorded by each of the Member States such privileges and immunities as are necessary for the independent exercise of their functions.
4. SACU shall conclude a headquarters agreement with the host Member State.

Article 5 Membership

The States mentioned in the Preamble to this Agreement shall, upon signature and ratification of this Agreement, become members of SACU.

Article 6 Admission of New Members

1. Any State not mentioned in the Preamble to this Agreement may become a member of SACU upon being admitted by the existing Member States and acceding to this Agreement.
2. The admission of any such State as a member of SACU shall be approved by a unanimous decision of the Council.
3. The Council shall determine the procedures and criteria for the admission of new members.

PART THREE
INSTITUTIONS

Article 7
Establishment of Institutions

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.

Article 8
Council of Ministers

1. The Council shall consist of at least one Minister from each Member State and shall be the supreme decision making authority of SACU matters.
2. 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.

3. The Council shall appoint an Executive Secretary of SACU.
4. The Council shall appoint the members of the Tariff Board.
5. The Council shall approve the budgets of the Secretariat, the Tariff Board and the Tribunal.
6. The Council shall oversee the implementation of the policies of SACU.
7. The Council shall approve customs tariffs, rebates, refunds or drawbacks and trade related remedies.
8. The Council shall have the authority to create additional technical liaison committees and other additional institutions and to determine and alter their terms of reference.
9. The Council shall meet at least once in each quarter of a financial year, unless agreed otherwise.
10. The Chair of the Council shall be held in turn by each Member State for a period of twelve months in the order to be decided by the Council.

Article 9
Customs Union Commission

1. 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.

2. The Commission shall be responsible to and report to the Council.
3. The Commission shall be responsible for the implementation of this Agreement.
4. The Commission shall ensure the implementation of the decisions of the Council.
5. The Commission shall be responsible for overseeing the management of the Common Revenue Pool in accordance with the policy guidelines decided by the Council.
6. The Commission shall supervise the work of the Secretariat.
7. The Chairperson of the Commission shall be appointed by the Member State chairing the Council.
8. The Commission shall meet at least once in each quarter of a financial year or at the request of a Member State.

Article 10 Secretariat

1. The Secretariat shall be responsible for the day-to-day administration of SACU.
2. The Secretariat shall coordinate and monitor the implementation of all decisions of the Council and the Commission.

3. The Secretariat shall arrange meetings, disseminate information and keep minutes of meetings of SACU institutions.
4. The Secretariat shall assist in the harmonization of national policies and strategies of Member States in so far as they relate to SACU.
5. The Secretariat shall be headed by an Executive Secretary who shall be a citizen of a Member State.
6. The Secretariat shall have such other staff as may be determined by the Commission from time to time.
7. The Secretariat shall be responsible for keeping a record of all transactions into and out of the Common Revenue Pool.
8. The Secretariat shall coordinate and assist in the negotiation of trade agreements with third parties.
9. The Secretariat shall perform such other duties as may be assigned to it from time to time by the Council and the Commission.
10. The Secretariat shall be the depositary of all records of SACU.

Article 11 Tariff Board

1. The Tariff Board shall consist of experts drawn from Member States. The Tariff Board shall be an independent institution made up of full-time or part-time members or both.

2. The Tariff Board shall make recommendations to the Council on the level and changes of customs, anti-dumping, countervailing and safeguard duties on goods imported from outside the Common Customs Area, rebates, refunds or duty drawbacks based on the directives given to it by the Council as provided for in Article 8.
3. The terms of reference, policy mandates, procedures and regulations of the Tariff Board shall be determined by the Council in accordance with Article 8.

Article 12 Technical Liaison Committees

1. There shall be four Technical Liaison Committees to assist and advise the Commission in its work.

These shall be the following:
 - (a) Agricultural Liaison Committee;
 - (b) Customs Technical Liaison Committee;
 - (c) Trade and Industry Liaison Committee; and
 - (d) Transport Liaison Committee.
2. The Council shall have the authority to determine and alter the terms of reference of the Committees mentioned in paragraph 1.

Article 13 Tribunal

1. 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.
2. The Tribunal shall be composed of three members, except as otherwise determined by the Council.
3. The Tribunal shall decide by majority vote and its decision shall be final and binding.
4. The Tribunal shall, at the request of the Council, consider any issue and furnish the Council with its recommendations.
5. In any matter referred to the Tribunal, the parties to the dispute shall choose the members of the Tribunal from amongst a pool of names, approved by the Council, and kept by the Secretariat.
6. Member States party to any dispute or difference shall attempt to settle such dispute or difference amicably before referring the matter to the Tribunal.
7. The Tribunal shall be assisted by the Secretariat in its work.
8. The Tribunal shall determine its own rules of procedure.

Article 14 National Bodies

1. Member States shall establish specialized, independent and dedicated National Bodies or designate institutions which shall be entrusted with receiving requests for tariff changes and other related SACU issues. The National Bodies will carry out preliminary investigations and recommend any tariff changes necessary to the Tariff Board.
2. The National Bodies will study, investigate and determine the impact of tariffs within respective Member States and periodically propose such changes as may be deemed necessary and make recommendations to the Commission through the Secretariat. The National Bodies shall adhere to similar procedures in all Member States.
3. SACU will assist Member States with the establishment of common procedures and technical capacity to ensure effective, efficient and transparent functioning of National Bodies.

Article 15 General Consultations

Any difference or dispute arising out of this Agreement, which does not directly affect the interests of all Member States, may form the subject of direct consultation between the affected parties with a view to finding a solution thereto. Such affected parties shall report the results of their consultations to the Commission before its next meeting.

PART FOUR
MEETINGS

Article 16
Quorum

Except as otherwise provided in this Agreement, the quorum for all meetings of the institutions of SACU shall be all Member States.

Article 17
Decisions

Except as otherwise provided in this Agreement, decisions of the institutions of SACU shall be made by consensus.

PART FIVE
TRADE LIBERALISATION

Article 18
Free Movement of Domestic Products

1. Goods grown, produced or manufactured in the Common Customs Area, on importation from the area of one Member State to the area of another Member State, shall be free of customs duties and quantitative restrictions, except as provided elsewhere in this Agreement.
2. Notwithstanding the provisions of paragraph 1 above, Member States shall have the right to impose restrictions on imports or exports in accordance with national laws and regulations for the protection of -
 - (a) health of humans, animals or plants;
 - (b) the environment;
 - (c) treasures of artistic, historic or archeological value;
 - (d) public morals;
 - (e) intellectual property rights;
 - (f) national security; and
 - (g) exhaustible natural resources.

Article 19
Goods Imported from outside the
Common Customs Area

Except as otherwise provided in this Agreement, a Member State shall not impose any duties on goods which were imported from outside the Common Customs Area on importation of such goods from the area of any other Member State.

Article 20
Customs Duties on Imported Goods

1. The Council shall, on recommendation of the Tariff Board, approve customs duties to be applied to goods imported into the Common Customs Area from outside that Area.
2. Member States shall apply identical rebates, refunds or drawbacks of customs duty on imported goods.
3. Notwithstanding anything contained in this Article, a Member State may grant a rebate of the customs duties in respect of goods imported into its area where such rebates are -
 - (a) for the relief of the distress of persons in cases of famine and other national disasters;
 - (b) under a technical assistance agreement;
 - (c) in compliance with an obligation under any multilateral agreement to which such a Member State is a party; or

- (d) for such other purposes as may be agreed upon by the Member States.

Article 21

Specific Excise and *ad valorem* Excise Duties and Specific Customs and *ad valorem* Customs Duties on Imported Goods of the Same Class or Kind

1. The Ministers responsible for Finance in all Member States shall meet and agree on the rates of specific excise and *ad valorem* excise duties and specific customs and *ad valorem* customs duties to be applied to goods grown, produced or manufactured in or imported into the Common Customs Area.
2. Member States shall apply identical rebates, refunds or drawbacks of specific excise and *ad valorem* excise duties and of specific customs and *ad valorem* customs duties on imported goods in respect of such goods. Such rebates, refunds or drawbacks of specific excise and *ad valorem* excise duties and specific customs and *ad valorem* customs duties shall be determined by the Ministers responsible for Finance in the Member States through consultation.

Article 22

Legislation Relating to Customs and Excise Duties

Except as otherwise provided in this Agreement Member States shall apply similar legislation with regard to customs and excise duties.

Article 23
Customs Co-operation

1. Member States shall take appropriate measures, including arrangements regarding customs co-operation, to ensure that the provisions of this Agreement are effectively and harmoniously applied.
2. Member States shall take such measures as are necessary to facilitate the simplification and harmonization of trade documentation and procedures.

Article 24
Freedom of Transit

A Member State shall afford freedom of transit without discrimination to goods consigned to and from the areas of other Member States, provided that a Member State may impose such conditions upon such transit as it deems necessary to protect its legitimate interests in respect of goods of a kind of which the importation into its area is prohibited on grounds of public morals, public health or security, or as a precaution against animal or plant diseases, parasites and insects, or in pursuance of the provisions of a multilateral international agreement to which it is a party; and provided further that a Member State shall not be precluded from refusing transit, or from taking any measures deemed necessary by it in connection with such transit, for the purpose of protecting its security interests.

Article 25 Import and Export Prohibitions and Restrictions

1. Member States recognize the right of each Member State to prohibit or restrict the importation into or exportation from its area of any goods for economic, social, cultural or other reasons as may be agreed upon by the Council.
2. Except in so far as may be agreed upon between the Member States from time to time, the provisions of this Agreement shall not be deemed to suspend or supersede the provisions of any law within any part of the Common Customs Area which prohibits or restricts the importation or exportation of goods.
3. The provisions of paragraphs 1 and 2 shall not be so construed as to permit the prohibition or restriction of the importation by any Member State into its area of goods grown, produced or manufactured in other areas of the Common Customs Area for the purpose of protecting its own industries producing such goods.
4. A Member State shall upon request by any other Member State take such steps as may be agreed upon between the Member States concerned (including action to make such steps legally enforceable within its area) to prevent the exportation or unrestricted exportation from its area to the area of such other Member State of such prohibited or restricted goods imported from outside the Common Customs Area or grown, produced or manufactured in its area or to prevent the exportation or unrestricted exportation from its area to a State outside the Common Customs Area of such prohibited or restricted goods imported from the area

of such other Member State. The expression "prohibited or restricted goods" includes second hand goods imported from outside the Common Customs Area.

5. Member States shall co-operate in the application of import restrictions with a view to ensuring that the economic objectives of any import control legislation in any State in the Common Customs Area are attained.

Article 26 **Protection of Infant Industries**

1. The Government of Botswana, Lesotho, Namibia or Swaziland may as a temporary measure levy additional duties on goods imported into its area to enable infant industries in its area to meet competition from other producers or manufacturers in the Common Customs Area, provided that such duties are levied equally on goods grown, produced or manufactured in other parts of the Common Customs Area and like products imported from outside that area, irrespective of whether the latter goods are imported directly or from the area of another Member State and subject to payment of the customs duties applicable to such goods on importation into the Common Customs Area.
2. Infant industry means an industry which has been established in the area of a Member State for not more than eight (8) years.
3. Protection afforded to an infant industry in terms of paragraph 1 shall be for a period of eight (8) years

unless otherwise determined by the Council.

4. The Council may impose such further terms and conditions as it may deem appropriate.

Article 27

Rail and Road Transport

1. Member States undertake that the transit through their areas of goods imported from outside the Common Customs Area to or exported to a State outside the Common Customs Area from the areas of other Member States shall not be subject to transport rate discrimination by public authorities.
2. Each Member State shall ensure that the tariffs applicable within its area to the conveyance of goods by public owned transport to and from other areas of the Common Customs Area shall be no less favourable than the tariffs applicable to the carriage of similar goods within its area.
3. Each Member State undertakes to extend to the motor transport operators registered in the areas of the other Member States treatment no less favourable than that accorded to motor transport operators registered within its own area for the conveyance of goods or passengers for reward or in the course of any trade or business.

Article 28
Technical Barriers to Trade

1. Member States shall apply product standards and technical regulations in accordance with the WTO Agreement on Technical Barriers to Trade.
2. Member States shall strive to harmonize product standards and technical regulations within the Common Customs Area.

Article 29
**Arrangements for Regulating the Marketing
of Agricultural Products**

1. Whenever a regulation for the marketing of an agricultural commodity is in operation in any part of the Common Customs Area, such a regulation shall be applied on a non-discriminatory basis to similar commodities produced in any other part of the Common customs Area and marketed in the area where the marketing regulation is in operation, and the Member States concerned, cognizant of the advantages derived from the effective operation of these regulations, shall co-operate in the application of such regulations on a basis to be mutually agreed upon.
2. Member States agree to consult from time to time on matters affecting the production and consumption of agricultural commodities and the improvement and extension of marketing arrangements for such commodities.

3. Notwithstanding paragraph 1, each Member State may impose marketing regulations for agricultural products within its borders, provided such marketing regulations shall not restrict the free trade of agricultural products between the Member States, except as defined below:
 - (a) emergent agriculture and related agro-industries as agreed upon by Member States; or
 - (b) any other purposes as agreed upon between Member States.
4. Each measure shall be subject to a negotiated sunset clause outlining its conditions and period.
5. Whenever possible, agricultural trade formalities and documents shall be simplified and harmonized, and all Member States shall work towards the harmonization of standards.

Article 30
Sanitary and Phyto-Sanitary (SPS) Measures

1. Subject to the provisions of Article 18, Member States recognize the importance of measures prescribing zoo-sanitary and phyto-sanitary requirements aimed at the prevention of the spread of animal and plant diseases, parasites and insects and agree to consult from time to time to achieve such aim in the Common Customs Area with due regard to the need to facilitate the flow of trade in products affected by such measures.

2. Member States reserve the right to apply SPS measures in accordance with their national SPS laws and international standards.

Article 31
Trade Relations with Third Parties

1. Member States may maintain preferential trade and other related arrangements existing at the time of entry into force of this Agreement.
2. 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.
3. 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.
4. When goods imported by a Member State from outside the Common Customs Area under a preferential agreement are exported to another Member State, the normal import duty applicable to such goods when imported into the rest of the Common Customs Area will be charged. Any difference between the normal duty and the duty originally charged on these goods shall be paid into the Common Revenue Pool.

PART SIX
COMMON REVENUE POOL

Article 32
Pool of Customs, Excise and Additional Duties

All customs, excise and additional duties collected in the Common Customs Area shall be paid into the Common Revenue Pool in accordance with Article 33 within three (3) months of the end of the quarter of a financial year.

Article 33
Management of the Common Revenue Pool

1. A Member State or SACU institution may be appointed by the Council to manage the Common Revenue Pool.
2. The appointed Member State or SACU institution shall specify the accounts into which all SACU customs, excise and additional duties shall be paid and from which all SACU payments shall be made.
3. All transactions into and out of the Common Revenue Pool shall be reported to the Secretariat, and shall be subjected to regular audits.
4. South Africa shall manage the Common Revenue Pool for a transitional period of two years from the entry into force of this Agreement.

PART SEVEN
REVENUE SHARING

Article 34
Revenue Sharing Formula

1. Member States agree that in determining their respective shares of the total customs, excise and additional duties collected in the Common Customs Area during any financial year, the share accruing to each Member State will be calculated from three distinct components as set out in the paragraphs below.
2. Member States agree that the budgeted cost of financing the Secretariat, the Tariff Board and the Tribunal for the related financial year will first be deducted proportionately from the gross amounts of customs, excise and additional duties collected, before distribution to Member States from the three components mentioned hereunder.

The Customs Component

3. (a) The customs component shall consist of the gross amount of customs duties and specific and ad valorem customs duties leviable and collected on goods imported into the Common Customs Area, and other duties collected on imported goods, less the deduction as provided for in paragraph 2, but shall not include any duties rebated or refunded under the provisions of any law relating to customs duties.

- (b) Each Member State's share of the customs component shall be calculated from the value of goods imported from all other Member States in a specific year as a percentage of total intra-SACU imports in such year.
- (c) The exact method and procedures for the calculation of each Member State's share of the customs component are specified in Annex A.

The Excise Component

- 4. (a) The excise component shall consist of the gross amount of excise duties, less the deduction as provided for in paragraph 2, leviable and collected on goods produced in the Common Customs Area, less the amount set aside to fund the development component, but shall not include any duties rebated or refunded under the provisions of any law relating to excise duties.
- (b) Each Member State's share of the excise component shall be calculated from the value of its Gross Domestic Product (GDP) in a specific year as a percentage of total SACU GDP in such year.
- (c) The exact method and procedures for the calculation of each Member State's share of the excise component are specified in Annex A.

The Development Component

- 5. (a) A development component shall be established

and shall be funded from a fixed percentage of the excise component, less the deduction as provided for in paragraph 2.

- (b) Each Member State shall receive a share of the development component and the distribution of this component shall be weighted in favour of the less developed Member States.
- (c) The exact method and procedures for the calculation of each Member State's share of the development component are specified in Annex A.

Article 35 Revenue Forecasting

Each Member State shall annually submit its forecast for customs and excise revenue to the Secretariat for use in the calculation of revenue shares.

Article 36 Trade Data Disputes

Any dispute arising out of differences relating to trade data shall first be referred to customs and excise authorities of Member States for resolution. Should the customs authorities fail to resolve such a dispute or difference within thirty (30) days or such longer period as the Member States may agree then any Member State to the dispute shall refer the matter to the Council.

Article 37
Timing of Payments

Payments shall be made on the first day of each quarter of a financial year to all Member States from the Common Revenue Pool in accordance with Articles 33 and 34.

**PART EIGHT
COMMON POLICIES**

**Article 38
Industrial Development Policy**

1. Member States recognise the importance of balanced industrial development of the Common Customs Area as an important objective for economic development.
2. Pursuant to paragraph 1, Member States agree to develop common policies and strategies with respect to industrial development.

**Article 39
Agricultural Policy**

1. Member States recognize the importance of the agricultural sector to their economies.
2. Member States agree to co-operate on agricultural policies in order to ensure the co-ordinated development of the agricultural sector within the Common Customs Area.

**Article 40
Competition Policy**

1. Member States agree that there shall be competition policies in each Member State.
2. Member States shall co-operate with each other with respect to the enforcement of competition laws and regulations.

Article 41
Unfair Trade Practices

The Council shall, on the advice of the Commission, develop policies and instruments to address unfair trade practices between Member States. These policies and measures shall be annexed to this Agreement.

PART NINE
FINAL PROVISIONS

Article 42
Annexes

1. The Council may develop such annexes as may be necessary to facilitate the implementation of this Agreement.
2. All such annexes shall form an integral part of this Agreement.

Article 43
Amendments

Any Member State desirous of amending this Agreement shall put forward its proposal for such amendment, together with its submissions in motivation of the proposed amendment, to the Council for consideration and decision. An amendment of this Agreement shall be adopted by a decision of the Council.

Article 44
Signature

This Agreement shall be signed by all the States mentioned in the Preamble.

**Article 45
Ratification**

This Agreement shall be ratified by the signatory States in accordance with their respective constitutional procedures.

**Article 46
Entry Into Force**

This Agreement shall enter into force thirty (30) days after the deposit of the instruments of ratification by all the Member States.

**Article 47
Accession**

This Agreement shall, subject to Article 6, remain open for accession by any other State.

**Article 48
Depositary**

This Agreement and all instruments of ratification or accession shall be deposited with the Executive Secretary, who shall transmit certified copies thereof to all Member States.

Article 49
Withdrawal

If a Member State wishes to withdraw from this Agreement that Member State shall give notice thereof to all the other Member States. If after consultation the Member States fail to agree on the date and conditions of the withdrawal, this Agreement shall remain in force until twelve (12) months from the date of such notice and shall then cease to apply to the withdrawing Member State.

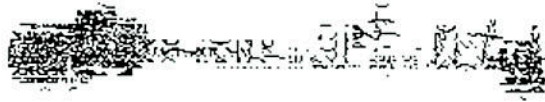
Article 50
Transitional Provisions


A commission, technical liaison committee or any other institution, obligation or arrangement of SACU which exists immediately before the entry into force of this Agreement shall, to the extent that it is not inconsistent with the provisions of this Agreement, continue to subsist, operate or bind Member States of SACU as if it were established or undertaken under this Agreement, until the Council determines otherwise. The Council of Ministers shall determine, on the basis of updated figures, how payments of adjustments under the 1969 SACU Agreement revenue sharing formula will be made.

Article 51
Termination of the 1969 SACU Agreement

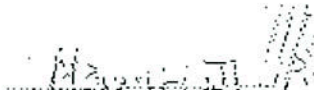
The Customs Union Agreement between the Governments of Botswana, Lesotho, South Africa and Swaziland concluded on 11 December 1969, and acceded to by Namibia, shall terminate on entry into force of this Agreement, except as provided for in Article 50.

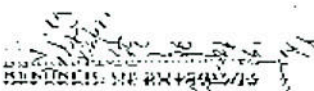
IN WITNESS WHEREOF, WE, the Heads of State or Government or duly authorized representatives of Member States have signed this Agreement.

 in the English


DEPARTMENT OF STATE


DEPARTMENT OF STATE


DEPARTMENT OF STATE


DEPARTMENT OF STATE


DEPARTMENT OF STATE

Signatures

ANNEX 1

REVENUE SHARING FORMULA

1. The Customs Component

- (a) Each Member State's share of the customs component shall be calculated from the Cost-Insurance-Freight (CIF) value at border posts of goods imported from all other Member States into the area of each state as a percentage of the total CIF value of intra-SACU imports.
- (b) Each Member State shall submit the actual data of intra-SACU imports and intra-SACU exports, for the most recent financial year for which such data are available for all Member States, to the Secretariat at least six months prior to the beginning of any financial year. No future adjustments will be made for errors in or improvements to the trade data provided.
- (c) All import and export data provided for the calculation of these shares shall exclude the re-exports of goods imported from within or outside of the Common Customs Area.
- (d) All data will be converted to South African Rand value, using the average daily exchange rate for the financial year to which the data relate.
- (e) Where Member States are unable to provide actual CIF data, then the value of any enhancement factor used to calculate CIF values of imports from Free-on-Board (FOB)

values of imports must be provided to the Secretariat and agreed by all other Member States.

- (f) If any Member State is unable to provide intra-SACU import data for the calculation of these shares, then the intra-SACU export data of other Member States shall be used to calculate its share. In such circumstances Member States will agree on an enhancement factor to calculate CIF import data from FOB export data.
- (g) Where revenue forecasts for year (t) are used to calculate the size of the customs component to be distributed over the course of year (t), adjustments will be made in years (t+1) and (t+2) to account for differences between the forecast and actual revenue collected.

2. The Excise Component

- (a) Each Member State's share of the excise component shall be calculated from the value of its GDP in a specific calendar year as a percentage of total SACU GDP in such year.
- (b) Each Member State shall submit actual GDP data, for the most recent calendar year for which such data are available for all Member States, to the Secretariat at least six months prior to the beginning of any financial year. No future adjustments will be made for errors or improvements to the GDP data provided.
- (c) All data will be converted to South African Rand value, using the average daily exchange rate

for the calendar year to which the data relate.

- (d) Where revenue forecasts for year (t) are used to calculate the size of the excise component to be distributed over the course of year (t), adjustments will be made in years (t+1) and (t+2) to account for differences between the forecast and actual revenue collected.

3. The Development Component

- (a) The development component shall initially be set at 15% of the excise component, but shall be reviewed from time to time and will be adjusted if agreed to by all Member States.
- (b) Each Member State shall submit actual GDP per capita data, for the most recent calendar year for which such data are available for all Member States, to the Secretariat at least six months prior to the beginning of any financial year. No future adjustments will be made for errors or improvements to the GDP per capita data provided.
- (c) All data will be converted to a South African Rand value, using the average daily exchange rate for the calendar year for which the data are provided.
- (d) Each Member State's share of the development component, as a percentage of the total development component, shall be calculated by the following formula:

- (i) Calculate the relative difference of the Member State's GDP per capita (A) from that of the mean GDP per capita of all Member States (B), where the relative difference equals $(A)/(B) - 1$;
 - (ii) Deflate the relative difference by a factor of 10;
 - (iii) Subtract from 1;
 - (vi) Multiply by 20.
- (e) Where revenue forecasts for year (t) are used to calculate the size of the excise and development components to be distributed over the course of year (t), adjustments will be made in years (t+1) and (t+2) to account for differences between the forecast and actual revenue collected.



international relations & cooperation

Department:
International Relations and Cooperation
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER (INTERNATIONAL LAW)
Private Bag x 152, PRETORIA, 0001 Tel: +27 12 351 0857 Fax: +27 12 329 1721

14gcz0111110a
10/16/5/1
RO 380/2014

For Attention: H. Roodt
Directorate: SADC
Route: NAB 008

DRAFT AMENDMENT TO THE SOUTHERN AFRICAN CUSTOMS UNION (SACU) AGREEMENT OF 2002 TO INSTITUTIONALISE THE SACU SUMMIT

1. Your request for legal advice received on 10 November 2014 regarding the abovementioned matter refers.
4. We have had an opportunity to study this Draft Amendment to the SACU Agreement of 2002 to institutionalise the SACU Summit and we also have noted the comments by the Department of Justice and Constitutional Development. As result we are of the view that the Draft Amendment to the SACU Agreement of 2002 to institutionalise the SACU Summit is consistent with international law and South Africa's international obligations.
5. This Draft Amendment to the SACU Agreement of 2002 to institutionalise the SACU Summit constitutes an international agreement that falls under the purview of section 231 (2) of the Republic of South Africa Constitution, 1996. These are agreements which require both Executive and Parliamentary approval before binding South Africa. Section 231(2) of the Constitution provides that all international agreements shall bind the Republic only after they have been approved by resolution of both Houses of Parliament.
6. To facilitate the process for President approval, the line function department will be required to provide this Office with the following documents in order for us to certify the Agreement-
 - Two copies of the finally agreed text of the Draft Amendment to the SACU Agreement of 2002 to institutionalise the SACU Summit;
 - Two copies of the President's Minute;
 - Two copies of the Full powers;
 - Two copies of the Explanatory Memorandum setting out the purpose of the Draft Amendment to the SACU Agreement of 2002 to institutionalise the SACU Summit (as well as the expected date of signature);
 - A copy of the legal opinion from the State Law advisers of the Department of Justice and Constitutional Development relating to the Amendment;
 - A copy of this legal opinion;

- All documents must be in a z137 folder; and
- The certification checklist.

7. Please do not hesitate to contact our Office for further details concerning this matter.

8. Kind regards

MR. MICHAEL KABAI
STATE LAW ADVISER (IL)

10 NOVEMBER 2014
PRETORIA

CONFIDENTIALITY NOTE:

This legal opinion might contain information that is privileged and confidential. If the reader is not the intended recipient, or the employee or agent responsible for delivering the opinion to the intended recipient you are hereby notified that any dissemination, distribution, or copying the documentation is strictly prohibited. If you have received this communication in error, please notify the Office of the Chief State Law Adviser (IL) immediately by telephone, and return the original message to the Office of the Chief State Law Adviser (IL).



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER

Private Bag X81, PRETORIA, 0001, Tel (012) 315 1130, Fax (012) 315 1743, Momentum Centre East Tower 12th Floor, Pretorius Street, E-mail: OCSLA@justice.gov.za

Ref: 397/2014
Enq: Adv K Zwarts
Tel: (012) 315 1413
E-mail: kzwarts@justice.gov.za
Website: <http://www.doj.gov.za>

Date: 14 November 2014

Mr Lionel October
The Director-General
Department of Trade and
Industry
Private Bag X84
PRETORIA
0001

Dear Mr L October

Attention: Mr G Mokolane

DRAFT SOUTHERN AFRICAN CUSTOMS UNION (SACU) AMENDMENT AGREEMENT OF 2002 TO INSTITUTIONALISE THE SACU SUMMIT: YOUR UNNUMBERED E-MAIL DATED 11 NOVEMBER 2014

1. We have scrutinised the draft "Southern African Customs Union (SACU) Amendment Agreement of 2002 to Institutionalise the SACU Summit" in terms of *paragraph 5.20(a) of the Manual on the Executive Acts of the President of the Republic of South Africa* read together with Chapter 5 of the *Constitutional Handbook for Members of the Executive*, the Constitution of the Republic of South Africa, 1996 ("the Constitution"), and other relevant legislation.

2. We have carefully gone through all the proposed amendments to the existing SACU Agreement (2002) and we are satisfied that they all appear to be in harmony with our domestic law.

Ad Article 9

3. This Article deals with the entry into force of the Amendment Agreement. The Department needs to take cognisance of the provisions of section 231 of the Constitution, which provide as follows:

“231. (1) The negotiation and signing of all agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.”

4. The proposed amendments are merely changing some parts of the existing Agreement. The existing Agreement has already been classified sometime in the past when it was ratified. Therefore, that aspect is not in contention at this point. Considering the nature of the proposed changes, we are of the view that even though they appear mainly to be of technical in nature, these amendments are introducing some fundamental changes to the structures of SACU as an organisation. It is against that background that each member

state be afforded an ample opportunity to consider the proposed amendments thoroughly and the implications thereof, and then ratify them according to the legal processes applicable in their respective states. This would warrant that the whole gamut of the parliamentary, ratification procedures be followed. It is against that background that we would regard section 231(2) procedure, as being the most appropriate one in this regard.

Yours sincerely,



**CJS ZWARTS/ KA SELOKELA/ SM MASAPU
FOR THE CHIEF STATE LAW ADVISER**