Growing the Sugar Industry in South Africa

Document 3: Legislative Environment of the Sugar Industry.

September 2011

The reporting on the outcome of the study consists of a number of reports as listed below. This Report corresponds to the report **Document 3** below:

Management Report: Lessons, Justifications and Challenges – Guidelines for Decision Making.
Document 1: Overview of the Sugar Industry: Contribution to Social and Economic Development and Contentious Issues.
Document 2: Comparative Advantage Analysis of the Sugar Industry.
Document 3: Legislative Environment of the Sugar Industry.
Document 4: Evaluation of the Viability of the Sugar Industry: A Cost Benefit Analysis and Macroeconomic Impact analysis.
Document 5: Investigation and Evaluation of Alternative Uses and Products: A Cost Benefit and Macro-economic Impact Analysis.

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Contents

1. Introduction

1.1 Scope

This chapter provides an analysis of the legislative environment governing the South African sugar sector locally, regionally and internationally for the purpose of delineating the impact of regulatory measures upon the industry in order to guide strategic decision making.

1.2 Sources and methodology

The report is based on a comprehensive review of legislative regimes applicable to the South African sugar industry in the spheres of domestic, regional and international regulation. The predominant focus is on existing legal regimes, while significant historic and proposed future developments are also highlighted. Economic literature was consulted to provide an overview of the trading environment with particular attention being paid to the idiosyncrasies of the sugar production chain and price risk management, which in turn have an impact on the need for and operation of legislative measures.

The report is a compilation of desktop research, supplemented with correspondence and consultation with relevant experts at the South African Department of Trade and Industry ('DTI'), the South African Sugar Association ('SASA') and the South African Agricultural Processors Association ('SAAPA'). Acknowledgement must go to Mr. Zwelibanzi Masilela and Mr. Seth Pule of the DTI, Mr. Lambert Botha of SAAPA, Mr. Johann van der Merwe, Dr. Thomas Funke and Mr. Wolfe Braude of SASA for their input.

The sources in the following sub-sections were those predominantly consulted.

1.2.1 Domestic legislation

- The Competition Act 89 of 1998 ('the CA');
- The Constitution of the Republic of South Africa 108 of 1996 ('the Constitution');
- The Consumer Protection Act 68 of 2008 ('the CPA');
- The International Trade Administration Act 71 of 2002 ('ITA Act');
- The Marketing of Agricultural Products Act 47 of 1996 as amended ('MAPA');

- The Sugar Act 9 of 1978 as amended ('the Sugar Act').

1.2.2 Domestic policy documents

- South African Department of Trade and Industry ('DTI'), (2003), *Discussion document on the review of the Sugar Act*, Pretoria, South Africa;
- The Sugar Industry Agreement ('the agreement/SIA'), (2000);
- International Trade Administration Commission ('ITAC'), (21 July 2009), *Increase in the dollar based reference price of sugar from the existing US$330 per ton to US$358 per ton*, Report 308, Pretoria, South Africa;
- Agro-Processing Industries, Enterprise and Industry Development Division ('EIDD'), DTI, (January 2009), *Revised Strategy for Optimal Development of the Sugar Industry within SACU and SADC* ('sugar strategy') as part of the DTI's National Industrial Policy Framework ('NIPF').

1.2.3 International commitments

- 42nd SADC Trade Negotiating Forum or Trade Negotiating Forum, (July 2011), *Review of Annex VII of the SADC Protocol on Trade,* at pars. 3.4.1 to 5.1.5;
- Annex VII to the Southern African Development Community ('SADC') Protocol on Trade ('Sugar Cooperation Agreement/the Sugar Annex'), (2000);
- The African Growth and Opportunity Act ('AGOA') as part of the United States ('US') Trade and Development Act of 2000;
- The Free Trade Agreement ('FTA') between SACU and European Free Trade Association ('EFTA');
- The General Agreement on Tariffs and Trade ('the GATT'), (1947, 1994);
- The Southern African Customs Union ('SACU') Agreement, (2002);
- The Trade, Cooperation and Development Agreement ('TDCA') between the Republic of South Africa and the European Community ('EU');
- World Trade Organisation ('WTO') SACU Trade Policy Review ('TPR'), (2009).

1.2.4 Publications

- Ahmed, A.K., (2008), *An analysis of regional integration in Southern Africa: a South African perspective*, Stellenbosch: Trade Law Centre of Southern Africa ('TRALAC');

- Botha, L., (20 July 2010), *An overview of the South African sugar industry with reference to its institutional, trade and regulatory environment (adjusted for purposes of release to the NAMC)*, SAAPA, Petoria: South Africa;
- Chinyoka, R., (December 2010), *Analysis of regional integration within SACU*, TRALAC, Stellenbosch: South Africa*;*
- Draper, P. *et al*, (January 2007), *SACU, regional integration and the overlap issues in Southern Africa: from spaghetti to cannelloni?*, Trade Policy Report No. 15, South African Institute of International Affairs ('SAIIA'), Johannesburg: South Africa;
- Greenfield, J., (March 2002), 'International commodity market policies', in *Consultation on agricultural commodity price problems,* Commodities and Trade Division, FAO, Rome: Italy;
- McDonald, S *et al*, (August 2004), *Trade liberalisation, efficiency and South Africa's sugar industry,* Sheffield Economic Research Paper Series: SERP number 2004012, Department of Economics: University of Sheffield, Sheffield: United Kingdom;
- South African Sugar Association ('SASA'), (2010), *South African Sugar Industry Directory,* Durban: South Africa;
- SASA, (2011), *South African Sugar Industry Directory,* Durban: South Africa;
- TRALAC, (November 2010), *Determining the scope and nature of non-tariff measures prevalent in selected international markets*, Stellenbosch: South Africa;
- Vink, N & Sandrey, R., (2009), 'Regional Integration in SACU's agricultural sector', in Bösl, A. et al (eds.), in *Monitoring regional integration in Southern Africa yearbook, Vol 9 2009*, TRALAC, Stellenbosch: South Africa;
- Vink, N & Sandrey, R., (2009), 'Sugar in South Africa and Swaziland', in Bösl, A. et al (eds.), in *Monitoring regional integration in Southern Africa yearbook, Vol 9 2009,* TRALAC, Stellenbosch: South Africa.

2. Trading Environment

2.1 Production and marketing of sugar

Sugar is a basic foodstuff consumed in all countries. Although it cannot be considered a dietary staple, as in the case of rice and maize, raw sugar is nonetheless regarded as an essential food commodity by many governments[1].

The sugar industry has a number of key characteristics that differ notably from those of other agricultural crops[2]. In particular, these relate to its trade structures, production characteristics as well as an array of associated political economy issues[3]. Of these, the following idiosyncrasies may be highlighted[4]:

Firstly, there are severe distortions in global sugar markets as a result of worldwide government policy interventions and preferential trade agreements[5]. While these distortions are widely recognised by the international community, efforts to liberalise remain conservative at best with trade policies displaying a great deal of disparity in the scope of intervention as well as the support mechanisms used[6].

Secondly, the physical characteristics of sugar production have joint production characteristics, meaning that the growth, storage and processing of sugarcane are interdependent activities[7]. Sugar cane must be delivered to the mill for processing within 48 hours of harvesting to ensure viable yields of sugar per ton of cane delivered. The greater the delay in delivering cane to the mill, the lower the sugar yield. For this reason it is not possible to import unprocessed cane, nor can harvested cane be exported for international processing. The result is that farmers and millers are entirely co-dependent in delivering a saleable product to the market. One side cannot survive without the other. This is unlike the bulk of agricultural yields for which the production, storage and

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[1] McDonald, S *et al*, (August 2004), *Trade liberalisation, efficiency and South Africa's sugar industry,* Sheffield Economic Research Paper Series: SERP number 2004012, Department of Economics, University of Sheffield, Sheffield: United Kingdom, at pg. 3.
[2] *Ibid.*
[3] *Ibid.*
[4] United Nations Food and Agriculture Organisation ('FAO'), *Commodities: sugar,* Trade and Markets: Economic and Social Development Department, last visited on 7 August 2011, at http://www.fao.org/es/esc/en/15/106/index.html
[5] Ref.note 1 *supra*
[6] *Ibid*.
[7] *Ibid.*

processing are independent activities, with markets existing for both the processed and unprocessed product[8].

Thirdly, sugar is a political commodity around which numerous political economy issues abound, both between and within countries[9]. If the on-going attempts to liberalise world agricultural trade via the so-called 'Doha Development Agenda' ('DDA') of the WTO prove successful, sugar is among the commodities most likely to experience substantial changes in prices and trade flows, however it is also one of the most contentious products under discussion[10].

2.2 Significance of the South African sugar industry

The South African sugar industry is influential in both its social and economic impacts, making a marked contribution to employment in rural areas, sustainable development and to the country's gross domestic product[11].

According to SASA figures[12], the domestic industry's total average income by 2012 equalled nearly R12 billion per annum. The estimated total average value of sugar cane production reached R5.1 billion with total export earnings accounting for R2.5 billion per annum[13]. The total amount of support granted to the domestic value chain through payment of rebates to domestic manufacturers and value-added exports reached approximately R 300 million per annum[14].

The industry is diverse, combining the agricultural activities of sugarcane cultivation with the manufacturing of raw and refined sugar, syrups, specialised sugars and a range of by-products[15]. The present study (see Document 4 dealing with Macro-economic Impact) calculates that the Sugar Industry's operations sustain in total about 113 009 (direct, indirect and induced) jobs in South Africa, of which 93 990 are direct, 7 356 indirect and 11 663 induced. The 93 990 includes 7 000 mill

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[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] SASA, (2010), *South African Sugar Industry Directory,* Durban: South Africa, at pg. 3 to 4.
[12] SASA, (2012), *Industry overview presentation*.
[13] *Ibid.*
[14] *Ibid.*
[15] Vink, N & Sandrey, R., (2009), 'Sugar in South Africa and Swaziland', in Bösl, A. et al (eds.), in *Monitoring regional integration in Southern Africa yearbook, Vol 9 2009,* TRALAC, Stellenbosch: South Africa, at pg. 185 to 187.

jobs, 1671 industry support jobs, 1 438 large scale farmers, 13871 small scale farmers and 70 010 workers on large scale farms.

About 107 721 of the total are located in KZN and the Mpumalanga Lowveld. Of these, 93 996 are direct, 7 356 indirect and 6 369 induced. This employment impact of 113 009 represents about 0.9% of the total employment in South Africa, about 5,1% of the total employment in the KZN and Mpumalanga Lowveld regions and 18% of the total employment of agriculture in South Africa. The number of dependents on the sugar industry is as important as the workers themselves in the poverty stricken rural areas of KZN and Mpumalanga Lowveld. Figures from the study indicate a dependency of over 5 people per employee which indicates a dependency of nearly 600 000 people.

It is important to note that these percentages are higher than those of GDP mainly because of the relative labour intensity of the sugar industry, compared to other large agricultural crops like maize and wheat production, or in the livestock production sectors, beef and mutton.

According to industry figures[16], the cane-growing sector comprises 26 612[17] registered sugarcane growers, representing a steep decline from some 50 000 registered producers in 2003[18]. Reasons for the decline may be found in steep rises in input prices, anomalous weather patterns which have plunged much of the sugar-growing regions into severe drought, combined with lack of financing opportunities as a result of global recession[19] and lack of additional revenue which would result from access to preferential and renewable market opportunities.

Of this number, approximately 1420 are deemed to be large-scale farmers while the vast majority are small-scale operations based on tribally owned land in the deep rural areas[20]. Operations are predominantly centred in KwaZulu-Natal with significant investments having been made in Mpumalanga and some farming activities also being maintained in the Eastern Cape[21].

On the processing side, sugar is manufactured by six milling companies with fourteen sugar mills operating in these cane-growing regions[22]. The industry on average has produced 2.2 million tons of sugar per season[23]. Commercial farmers and operations on mill-owned land produce around ninety

[16] *Ibid.*
[17] SASA, (2011), *South African Sugar Industry Directory,* Durban: South Africa, at pg. 3
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*

percent of the cane, with the remainder coming from small-scale farmers[24]. Approximately seventy percent of the harvest is marketed in SACU, with the remainder being exported to markets in Africa, Asia and the Middle East[25].

2.3 Market Distortions and Remedies

There is no doubt that sugar is in high demand the world over, yet the world market for sugar is a residual market with fairly thin volumes of trade and changes in supply to this market of only a few percentage points can have swift and significant impacts on price[26]. Profitability is elusive, as world market distortions usually force the price down to unrealistic levels. To promote stability for local industries and protect inefficient production, countries with the financial surpluses to do so offer extensive support to local industries, which, as mentioned above, has led to widespread distortion of the world sugar market – to the extent that the price of both raw and refined sugar is determined by only twenty percent of world production[27].

As a result, the vast majority of sugar-producing countries, South Africa included, apply tariff and/or non-tariff measures to protect local value chains against unfairly priced imports from abroad[28]. Long term average world raw- and refined sugar prices are below the cost of production in many countries around the world, rendering this extremely low price unsuitable as a benchmark for the establishment of tariffs[29]. This has lead to various mechanisms being employed to determine the appropriate levels of protection to be afforded to local industries; those used in South Africa will be discussed in some detail below.

A further consequence of the low world price is that the cost of production – and thereof efficiency – is not a determinant of trade flows[30]. The European Union ('EU'), US and Japan, which produce the bulk of their sugar harvest from beet at an average price of fifty percent above the average cost of

[24] *Ibid.*
[25] *Ibid.*
[26] The sugar strategy, at par. 3.1; Greenfield, J., (March 2002), 'International commodity market policies', in *Consultation on agricultural commodity price problems,* Commodities and Trade Division, FAO, Rome: Italy, last visited on 21 June 2011, at http://www.fao.org/DOCREP/006/Y4344E/y4344e0a.htm.
[27] *Ibid.*
[28] The sugar strategy, at par. 4.4.2.
[29] International Trade Administration Commission, (21 July 2009), *Increase in the dollar based reference price of sugar from the existing US$330 per ton to US$358 per ton*, Report 38, Pretoria, South Africa.
[30] Ref.note 27 *supra.*

producing sugar from cane, also have the highest prohibitive import tariffs on sugar and the most generous farmer support programmes[31].

The need for protection, therefore, is based on the distorted world price which is in essence a residual or 'dumped' price[32] and the volatility thereof[33]. Tariffs are needed to protect local industries from prolonged periods of exposure to an untenably low world price. Remedying this situation is unlikely to occur outside of a comprehensive process of multilateral reforms to government-funded trade and production support measures in all sugar producing countries globally[34].

The Uruguay Round of multilateral trade negotiations which culminated in the establishment of the WTO in 1995 has had no constraining impact on the supply of subsidised sugar to the world market[35]. With the DDA in its eleventh year, the prospects of multilateral reform remain uncertain[36].

For these reasons, trade in sugar is likely to remain regulated for the foreseeable future.

[31] Ref. note 4 *supra.*
[32] In price-cost dumping, the exporter is subsidised by the local government with duty drawbacks, cash incentives, etc. Dumping is legal under WTO rules unless its injurious effect on the importing country's producers can be established.
[33] Ref. note 27 *supra.*
[34] Ref. note 4 *supra.*
[35] *Ibid;* ref. note 27 *supra.*
[36] *Ibid.*

3. Regulatory environment in South Africa

3.1 Contextualisation

The discussion above provided a broad overview of the general challenges encountered by sugar producers the world over. However, in order to appreciate the need for the measures contained in the South African regulatory environment requires an understanding of the unique challenges faced by the South African industry within the domestic, regional, as well as international trading arenas. For this reason a brief overview follows of the main anticompetitive challenges encountered by the industry in the region as well as beyond.

For the 2010/11 year, the South African industry exported around 35 percent of its production to the world market at prices considerably below local market returns[37]. In order to ensure equitable distribution of exposure to the world market among growers and millers, SASA is charged with effecting a redistribution of proceeds between milling companies[38]. In addition to regulated distribution of proceeds, the industry utilises single desk raw sugar export marketing, which allows participants to coordinate international marketing efforts, obtain freight volume savings and to optimise bulk sugar terminal costs[39].

South Africa is an anomaly among developing sugar producing countries, as it is the only African, Caribbean and Pacific sugar producer to be excluded from preferential market access arrangements with the European Union ('EU'). Furthermore it is excluded from preferential access to the COMESA and SADC markets in Africa[40]. South Africa has been granted no access to the lucrative EU market, in spite of previous trade agreements and ongoing reform in the EU sugar sector[41].

In the last quarter of 2010, SASA publicised that it is actively pursuing talks with the South African government and the EU in hopes of finalising an Economic Partnership Agreement ('EPA') that would grant South Africa right to export a specified quota of sugar duty-free to the EU market[42]. Improving

[37] Ref. notes 11 *supra;* sugar strategy at par. 4.5.1.
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*
[42] The Technical Centre for Agricultural and Rural Cooperation ('CTA'), (26 September 2010), *South Africa seeks duty-free access to EU sugar market*, last visited on 17 August 2011, at http://agritrade.cta.int/en/Archives/Newsletter-Agriculture/2010/Agritrade-News-Update-October-2010

access for South African sugar to the EU market is seen as important for enhancing South African sugar sector revenues and reversing decline in the sector[43]. The importance of economic relations with the EU, as well as other countries and trading blocs, will be discussed in greater detail in the section regarding South Africa's international commitments.

Limited access to export markets is not the only obstacle endured by the industry. As a member of SACU, the South African market allows preferential imports in accordance with three other trading arrangements[44]. These are:

- As a member of SACU, Swaziland, the only other sugar producing country in the customs union, is entitled to preferential access for its products into the markets of other SACU member states, with all of its intra-SACU sugar trade coming to South Africa. Swaziland's access to the South African market has increased by more than 31 percent over the last half of the previous decade, as opposed to a decrease of approximately four percent in South African sales into SACU market over the same period[45]. The access by Swaziland into the South African market costs the South African industry an estimated R 600 million per year by shifting domestic sales, which can be sold at a more favourable price, onto the world market, causing erosion of value and placing severe financial pressure on the South African industry[46].

- The SADC Sugar Annex, effected on 1 April 2001, makes provision for duty-free non-reciprocal quota access into the SACU market by non-SACU SADC net surplus sugar producing countries[47]. Between 2001 and 2005 duty-free quota exports from non-SACU SADC countries exceeded 114 000 tons, carrying an estimated value of R 460 million[48]. The lion's share of this supply is directed toward South Africa, thus again shifting domestic sales onto the less lucrative international market[49]. None of this tonnage goes to Swaziland due to the import control practised by Swaziland.

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[43] *Ibid.*
[44] Sugar strategy at par. 4.5.1.
[45] *Ibid.*
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid.*

- The bilateral agreements effected between Zimbabwe and Namibia, as well as between Zimbabwe and Botswana make provision for duty-free access of sugar imported from Zimbabwe into these countries, thus frustrating the South African industry's participation in these markets, again exacerbating the industry's exposure to the precarious global market[50]. Although such agreements were meant to phased out under the 2002 SACU agreement, this has not occurred.

It is against this background that legislative measures must be implemented in order to compensate for the anticompetitive challenges experienced by the South African sugar sector. In the South African context, the promulgation of the MAPA brought to an end nearly six decades of extensive government intervention in agricultural trade, with sugar being a necessary exception for the reasons delineated above.

Domestically, the sugar sector is governed by the Sugar Act and the SIA as drafted in accordance with section 4(ix) of the act. The sugar industry is the only agricultural value chain administered under the authority of the DTI as opposed to the Department of Agriculture, Forestry and Fisheries ('DAFF').

3.2 The Sugar Act 9 of 1978 as Amended

The Sugar Act lays the legislative foundation for the regulation of the South African sugar industry, with the following key measures being expressly stipulated:

- Incorporation of SASA[51];
- Promulgation of the SIA[52];
- Equality of treatment of individual growers, millers and refiners under the SIA[53];
- Determining the powers of the SASA with regard to prices and surcharges imposed on sugar, including molasses[54]; and
- Penalties for contravention of the act[55].

[50] *Ibid.*
[51] Sugar Act, art. 2.
[52] Sugar Act, art 4.
[53] Sugar Act, art. 5.
[54] Sugar Act, art 6.
[55] Sugar Act, art 7.

Through the application of the SIA, to be discussed in the following section, the Sugar Act administers virtually every aspect of the production, transport, selection, quality assessment, pricing, payment and export of sugar in the South African market. It should be noted that the current Act is in the process of being revised[56]. According to the latest estimates from the DTI, an amended Sugar Bill is due to be published during or about April 2012. Proposed amendments are to be discussed below.

Two important functions of the Sugar Act is that it serves to exempt the South African sugar sector from the scope of the MAPA as well as certain provisions of the CA[57], particularly with regard to allocation of market shares, surplus removal, price determination and revenue sharing. Before 1999 the DTI was the only responsible public authority regulating the sugar industry in terms of the Sugar Act. However, following amendments to article 31 of the CA in 1999, concurrent jurisdiction is now enjoyed by the Competition Commission, as well as by 'other regulatory authorities' with regard to an economic industry or sector in terms of chapter 2 of the CA dealing with prohibited practices and chapter 3 covering merger control.

The revision of the Sugar Act is a direct result of this change in regulatory jurisdiction with published commentary on the revision process stating that the 'review of the Sugar Act aims to optimise the level of competition that can be generated within the policy restrictions imposed by a severely distorted global market for sugar'[58].

Soaring food prices, locally as well as abroad, combined with widely publicised allegations of collusive conduct by large firms in staple foods value chains such as bread, milling, dairy and poultry, has sparked suspicions regarding possible collusion, abuse of dominance and other anticompetitive behaviour across many of South Africa's agricultural industries[59]. This has incurred scrutiny as well as increased calls for greater levels of intervention by the government and competition authorities to ensure that market forces are not contravened illegally[60]. The Competition Commission has

[56] DTI, (2003), *Discussion document on the review of the Sugar Act*, Pretoria, South Africa, at pg. 1.
[57] Competition Act, arts. 3(1)(d) and 4(1)(b).
[58] Ref. note 58 *supra,* at pg. 10.
[59] The Competition Commission of South Africa (Competition Commission), (2006), *The South African agricultural industry in context,* Research Report, Pretoria: South Africa, at pgs. 1 to 2.
[60] *Ibid.*

identified food and agro-processing as a priority area of interest and is paying particular attention to staple foodstuffs[61].

The Competition Commission's need to prioritise sectors is based on two paramount considerations. These are[62]:

- Firstly, the Commission is obliged to make efficient use of its resources while exercising its mandate[63]. While resource constraints are a reality for many institutions, the challenge is heightened in the Commission's case due to the sheer breadth of its directive. As it is responsible for investigating all complaints of anticompetitive activity across the entire South African economy, it receives vast numbers of complaints of varying forms of anticompetitive conduct in relation to all markets and sectors[64]. Some markets and sectors are far more significant to consumers and the economy than others[65]. For these reasons, the allocation of resources must be directed to those sectors where the Commission is able to make the widest impact[66].

- Secondly, the Commission must act strategically and constantly seek to hone its effectiveness[67]. If the Commission is to make a significant contribution in promoting competition in the face of inherited uncompetitive structures and related anticompetitive practices, a transfer of resources toward dealing with anticompetitive conduct in areas where it is likely to yield the most direct results, is a basic requirement. This means that the Commission has to exercise discretion with regard to the sectors it proactively chooses to investigate[68].

As mentioned above, while sugar is not considered a dietary staple, it is still regarded as an important part of any country's food security strategy, is a key input into many processed foods and is used in pharmaceutical and other products. It plays a significant role in generating employment and rural development in some of the Republic's poorest areas. The debate regarding the pros and

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[61] *Ibid.*
[62] Competition Commission, *Priority sectors*, last visisted on 28 July 2011, at http://www.compcom.co.za/priority-sectors/
[63] *Ibid.*
[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.*

cons of agricultural liberalisation rages on and while opponents of the current sugar regime abound, it is important for policy makers and industry stakeholders to take cognisance of the idiosyncrasies of the sugar sector nationally and globally, both with regard to production and market conditions. Furthermore, it is necessary to ensure that substance takes precedence over form as far as either regulation or liberalisation are concerned, i.e. to take steps based on sound economic considerations as opposed to international policy trend setting or broad, positivistic application of measures.

The question posed by Pierre Pagesse, chairperson of the Paris-based think tank, Momagri, eloquently summarises the approach to be followed if efficiency is to trump rhetoric: 'We are all for free trade. The basic issue is the following one: how must we organise free trade to make it fair and sustainable?'[69]

3.3 The Sugar Industry Agreement, 2000

As stated above, the SIA is a function of article 4 of the Sugar Act. It can be regarded as the most influential provision of the Act as the measures contained in the agreement effectively set the sugar industry apart from agricultural sectors subject to the MAPA as well as certain provisions of the Competition Act in allowing for the creation of a differentiated market for sugar in the domestic sphere[70], thus allowing producers to sell at last part of their product at a more realistic price than what can be procured in the international trading arena.

Article 4(1) of the Sugar Act authorises the Minister of Trade and Industry to determine the provisions of the SIA following consultation with SASA. The most recent version of the agreement became operational in 2000 and is binding on every grower, miller and refiner of sugar operating within the Republic[71].

The Sugar Act stipulates that the agreement shall include provisions dealing with the regulation and control as well as the prohibition of the production, marketing and exportation of sugar industry products[72] and to provide a formula for determining the price to be paid by millers to growers for sugar cane, which may include any factor related to the sale or other disposal of any sugar industry

[69] Pagesse, P., (2011), *Momagri: about us*, last visited on 21 August 2011, at http://www.momagri.org/UK/momagri-about-us.html
[70] SIA, chapters 5 and 6.
[71] SIA, chapter 5.
[72] Sugar Act, art. 4(2)(b).

product[73]. In addition, the agreement determines the functions to be performed by SASA[74] in its execution thereof as well as the establishment and constitution of a Board to implement the terms of the agreement[75]. It further regulates the imposition of levies upon growers, millers and refiners[76] and regulates and controls the transportation of sugar cane from growers to millers[77].

An important provision of the agreement deals with equitable export obligations in light of the distorted world market price and the difficulty endured by unfair import competition in the local market[78]. As stated previously, the South African industry, like other efficient producers in the developing world, finds it difficult to export profitably to the world market as the international sugar price is severely depressed by subsidy-induced overproduction and hence oversupply[79]. Consequently, any export onto the world market is done at depressed prices[80].

This, to reiterate, is in essence what gives rise to the need for regulatory intervention to create a differential pricing regime between the domestic and export market and to ensure an equitable exposure amongst producers to the world market[81].

The volume of sugar for local market requirements is currently regulated under Chapter 7 of the SIA. It is determined by the sugar industry on the basis of consumer demand, with the resultant balance of production being exported to the world market[82]. The ability of the industry to remove surplus production from the domestic market is one of the cornerstones on which all other regulatory measures are based. Should this provision be abandoned, the industry will no longer be able to maintain a differential pricing policy for its domestic and export markets leading to a massive over supply of sugar on the domestic market, driving prices down to export parity[83], thus negating the tariff protection afforded to the domestic industry as determined by the SACU tariff, and triggering massive job losses and closures of mills due to the artificially depressed nature of world market prices. The tariff regime will be discussed below, with the operation of SACU and the sugar trade in particular being attended in the section regarding South Africa's international obligations.

[73] Sugar Act, art. 4(2)(d).
[74] Sugar Act, art. 4(2)(e).
[75] Sugar Act, art. 4(2)(f).
[76] Sugar Act, art. 4(2)(g).
[77] Sugar Act, art. 4(2)(h).
[78] Sugar strategy, at par. 6.3.6.
[79] *Ibid.*
[80] *Ibid.*
[81] *Ibid.*
[82] Ref. note 58 *supra,* at pgs. 7 to 10.
[83] I.e. prices sans transport and delivery expenditure.

Other key provisions of the agreement include:

- The establishment of a Sugar Industry Administration Board, an Appeals Tribunal and Mill Group Boards[84];

- Provisions dealing with the production of cane, including but not limited to the grower's right to deliver cane to any mill willing to accept their product for crushing; pest and disease control measures; and matters related to the selection and planting of approved varieties of cane[85];

- The supply of cane to the mill, including provisions dealing with cane delivery estimates, cane supply agreements, the provision of information to the local Mill Group Board by each mill and grower contracted to a mill as well as the powers of the Local Grower Council to deal with matters on behalf of growers contracted to deliver cane to a mill[86];

- Provisions dealing with the payment for cane, including the testing and analysing of cane for purposes of determining the Recoverable Value content[87] ('RV') of cane delivered to the mill as well as payment of the RV[88];

- Provisions dealing with the determination and distribution of proceeds between growers and millers as well as matter related to cane prices, including the price for the RV-value of cane[89]; and

- Provisions dealing with crop disposal and export of surplus sugar, including provisions dealing with the determination of the local and export market[90].

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[84] SIA, chapter 2.
[85] SIA, chapter 3.
[86] SIA, chapter 4.
[87] Historically the measure of quality for cane payment purposes in the South African sugar industry has been the sucrose content of the cane, but as of 1 April 2000, the start of the new sugar season, payment for sugar cane is on basis of its Recoverable Value (RV) content. The recoverable value is a measure of the value of the sugar and molasses that will be recovered from the sugar cane delivered by the individual grower.
[88] SIA, chapter 5.
[89] SIA, chapter 6.
[90] SIA, chapter 7.

The latest version of the agreement, replacing that of 1994, has led to greater liberalisation of the sugar industry, though not the extent experienced by other agricultural value chains with the advent of the MAPA. Deregulation that occurred was limited to the following areas[91]:

- Fixed domestic and export quotas allocated to milling groups were replaced by flexible market shares in terms of which milling companies are entitled to sell more sugar on the domestic market than their pro-rata share of total production. Should a milling company however 'oversell' on the local market, the company pays over to SASA an amount calculated as the volume of sugar sold on the domestic market in excess of its domestic market entitlement (calculated pro-rata to its production) multiplied by the weighted average notional price, less a manufacturing allowance, and less export realisation, for redistribution to under performing milling companies. The redistribution of proceeds takes place on a quarterly basis.

- The pricing of sugar was adjusted from a free-on-rail Durban basis to an ex-mill basis. This allows for competition based on geographical location, as sugar is now sold on an ex-mill basis and the transportation of sugar has become a normal commercial transaction between the milling company and the buyer of the sugar.

- The gazetted maximum price for sugar that was used as the basis for proceeds sharing in the industry was replaced with a notional price. Under the previous dispensation, the maximum price for sugar was also the *de facto* price charged by all sugar producers for sales, in bulk, on the domestic market according to domestic market quotas. The notional price, like the maximum price also determined by SASA, is used in the calculation of the division of industry proceeds between millers and growers in order to determine the RV price payable by millers to growers. It also provides the basis for redistribution of proceeds amongst millers in order that there is an equitable exposure to world markets. Although domestic market sales are no longer limited to production shares, domestic sales in excess of production shares are subject to redistribution payments in favour of the under-selling miller, i.e. over-performing millers have to pay the difference between the notional price, less a manufacturing allowance, and SASA's export realisation over to under-performing millers. This provision is limiting the level of domestic competition that can be generated between millers or refiners firstly, because of the fact that it is an artificially price set by SASA and, secondly, due to the

[91] Ref. note 58 *supra* at pgs. 7 to 9.

fact that the notional price is also used as the basis for proceeds sharing between millers and growers. In terms of the proceeds sharing formula, 63.0316 percent of the notional price is distributed between growers based on the RV pricing system whilst the milling companies retain the remaining 36.9684 percent, minus any discounts that the milling companies might have given as their share of the proceeds.

- The cane payment system is no longer based on the sucrose content of cane but rather on the RV price. This contributes towards greater efficiencies within the industry as growers are paid based on the quality of the cane and not just the sucrose content. Better quality cane increases production efficiencies and overall sugar recovery.

- In terms of the 1994 agreement, SASA was responsible for the exportation of all sugar except in refined packed sizes of 25kg and less. The 2000 agreement allows milling companies to export refined sugar and direct consumption raw sugar ('DCRs'). SASA is thus only responsible for the exportation of indirect consumption raw sugar.

3.4 Approved areas of intervention in accordance with industrial policy

In 1999, prior to the promulgation of the latest version of the SIA, the DTI in cooperation with the SASA and industry stakeholders completed a strategy document entitled the Strategy for the Optimal Development of the Sugar Industry in SADC and SACU Context, updated in 2009 as part of the NIPF[92]. While not legislative in nature, the sugar strategy is an important tool in the shaping of the regulatory environment.

The sugar strategy takes cognisance of the distorted nature of the world sugar market, as detailed above, and the impact of producer support measures on international price determination, as well as the status of SADC, and South Africa in particular, as a low cost net exporting sugar producer[93]. Based on these considerations the sugar strategy covers intervention in the following three areas, for as long as the world sugar market remains significantly distorted[94]:

- Tariff protection against disruptively low world sugar prices;

[92] Ref. note 58 *supra.*
[93] *Ibid.*
[94] *Ibid.*

- Provisions for the establishment of equitable export obligations for millers and growers alike as discussed above[95]; and

- The implementation of the SADC Sugar Annex.

While not strictly within the ambit of South Africa's domestic jurisdiction, these measures will be considered below with regard to their impact on national regulation and policy making. Greater detail about the respective regional measures and trading blocs will be provided in the section dedicated to South Africa's international commitments.

3.4.1 Tariff protection against abnormally priced imports

All the members of SACU, i.e. Botswana, Lesotho, Namibia, South Africa and Swaziland, share a common external tariff with respect to imports on products, including sugar under heading 1701 of the Harmonised Customs Tariff book[96]. Irrespective whether sugar enters the customs area via Walvis Bay or Durban, the same tariff structure will apply[97].

The tariff dispensation for SACU, including that for sugar, is administered under the authority of ITAC, based in Pretoria, South Africa [98]. While governed under SACU, and thus not within the ambit of the Sugar Act, the tariff dispensation for sugar is nonetheless an important part of the domestic regulatory environment wherein the sugar industry operates, especially as it pertains to national prices and thus external price competition.

SACU uses a variable tariff formula (as opposed to a fixed tariff employed by most other countries) to determine the level of protection afforded from time to time to the local industries within the customs union. Because only South Africa and Swaziland produce sugar, the tariff is effectively providing protection to the industries in these two countries[99]. The tariff is determined using a US Dollar ('US$') based reference price ('DBRP') system which is calculated by using a long term average world price for sugar adjusted for distortions and only grants protection for as long as the world

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[95] Administered under the SIA.
[96] Botha, L., (20 July 2010), *An overview of the South African sugar industry with reference to its institutional, trade and regulatory environment – adjusted for purposes of release to the NAMC*, SAAPA, Petoria: South Africa, at pg. 18.
[97] Ibid.
[98] Ref. note 58 supra at pg. 2.
[99] Sugar strategy, at par 4.4.1; Ref. note 146 *supra*, at pgs. 190 to 192.

price remains below this level[100]. Recent industry data, as supplied by SASA, reveal that over the course of the past five years, the tariff has only been triggered for short intervals, meaning that the industry enjoyed no tariff protection for the bulk of the period.

Pressure on the industry was further exacerbated by recent economic stresses such as massive increases in input costs, particularly energy and fuel, coupled with high interest rates throughout the previous decade[101]. This mix of distorted world market imports, higher input costs, and an unfavourable interest rate locally has also demonstrated a severely negative impact on small-scale growers due to their higher debt burdens and smaller economies of scale[102].

The variable tariff formula operates on the basis of a price-trigger mechanism according to the following principles[103]:

As mentioned above, the trigger price mechanism uses a US$ based domestic reference price. In 2009, ITAC recommended that the DBRP be increased from US$330 per ton to US$358[104]. The recommendation was subsequently approved by the Minister of Trade and Industry on 7 August of the same year, however, as mentioned above, tariff protection for the industry remains limited.

The reference price is calculated by taking the ten-year London No.5 price for sugar of US$256 per ton, plus an adjustment for the distortion factor experienced in the international sugar market calculated at US$148 per ton, from which an average transport cost of sugar of US$46 per ton is then subtracted.[105] The reference price is used to calculate the level of tariff protection. This UD$-based duty structure aims to align domestic prices with a normalised world price for sugar[106].

In its report on the proposed increase of the DBRP, ITAC explains the principles by which adjustments to the level of protection will be calculated:

> *Adjustments to the level of protection will be based on quantum movements in the world reference price as follows: the difference between the twenty trading day moving average of the London No.5*

[100] *Ibid.*
[101] *Ibid.*
[102] *Ibid.*
[103] Ref. note 98 *supra,* at pg. 18.
[104] ITAC, (21 July 2009), *Increase in the dollar based reference price of sugar from the existing US$330 per ton to US$358 per ton*, Report 38, Pretoria, South Africa, at pg. 17.
[105] *Ibid*.
[106] Ref. note 58 *supra,* at pg. 2.

settlement world reference price and the established domestic reference price for sugar will be calculated daily. If the twenty trading day moving average of the No. 5 settlement world reference price shows a variance of more than US$20 per ton from the previous trigger level of twenty consecutive trading days, a new duty will be calculated. The resulting dollar duty will be converted to Rand according to the Rand per Dollar exchange rate prevailing on the day that the adjustment is triggered.

For the purposes of illustration, the following example may be considered[107]:

Assume the base price, i.e. that price which previously triggered the tariff, is US$190. Assuming further that the moving average of the London No. 5 settlement world reference price over a period of twenty trading days is calculated to be higher (or lower) than the base price of US$190 by more than US$20, e.g. the moving average was US$212. The level of tariff protection will be determined by subtracting the twenty consecutive trading day moving average of US$212 (which then automatically becomes the new 'base price') from the South African DBRPof US$358. The balance of US$146 per ton then becomes the new level of tariff protection for the domestic sugar industry. To convert the level of the tariff from US$ to South African Rand ('R'), the exchange rate that is used to convert the US$ amount will be the $ to R exchange rate on the day the adjustment was triggered. In other words, the twentieth consecutive trading day. This level of tariff protection will then apply until the next adjustment is made using the new base price of US$212 per ton of sugar. The sugar industry has expressed concerns with regard to the length of the trigger period, as in some cases the duty calculation process is aborted if the world price recovers within the window period, thus undermining the effectiveness and consistency of the tariff.

Imports in general into the SACU market have risen dramatically over recent years as importers appear to have realised that the SACU market is not as rigidly protected as many other sugar producing and consuming markets[108]. Duty paid imports from abroad act as direct displacers of locally produced sugar, i.e. these imports further reduce the 'post-Swazi, SADC and Zimbabwe imports' SACU market share that the South African industry would otherwise have gained[109].

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[107] Ref. note 98 *supra,* at pg. 19.
[108] Sugar strategy, at par. 4.4.2.
[109] *Ibid.*

The negative impact of imports is increased due to the nature of the industry, in that a sugar mill is reliant on the surrounding sugarcane growers for a consistent supply of cane for its survival and *vice versa*[110]. As a result, a loss of market share is felt across the industry as a whole and not relegated to individual actors in the value chain[111].

3.4.2 Equitable export obligations

As explained above, the creation of differentiated local and export markets is at the core of the South African sugar regime as administer by the Sugar Act and the SIA. The pricing mechanism for sugar, discussed in greater detail below, is administered via chapter 5 and 6 of the SIA.

In appreciating the need for intervention into the distribution of exports and proceeds, it is important to be aware of the competition faced by local producers from abroad and within the region. As mentioned above, Swaziland's access to the South African market has increased by more than 31 percent over the last half of the previous decade, as opposed to a decrease of approximately four percent in South African sales into SACU market over the same period. At the commencement of the Sugar Act review, the 1997 to 2003 figures revealed that Swaziland's access to the South African market had at that time increased by more than 850 percent, as opposed to an increase of approximately twenty percent in South African sales into the SACU market over the same period[112]. This increased access by Swaziland into the SA market has cost the local industry nearly R600 million per annum due to the shift of production onto the international market[113]. This erosion of value for domestic producers has placed severe financial stress on the South African industry to the direct benefit of its Swazi counterpart[114].

With regard to the determination of the domestic sugar price and the proposed revision of the Sugar Act, it is important to note that with the promulgation of the Consumer Protection Act ('CPA') on 1 April 2011, a new era of consumer protection, particularly with regard to pricing, has been ushered in. While this does not directly invalidate any of the current provisions in the Sugar Act or SIA regarding the domestic price dispensation for sugar, it is likely that the aims as contained in the CPA will be considered during the amendment process. The impact thereof on the sugar industry remains to be seen.

[110] *Ibid.*
[111] *Ibid.*
[112] Ref.note 58 *supra*, at pg. 3.
[113] *Ibid.*
[114] *Ibid.*

3.4.3 SADC Sugar Cooperation Agreement, Protocol on Trade, Annex VII

Annex VII to the SADC Protocol on Trade, also known as the SADC Sugar Annex or the Sugar Cooperation Agreement, states the following as its main objectives with regard to Southern African trade in sugar:

- To promote, within the region, production and consumption of sugar and sugar-containing products according to fair trading conditions and an orderly regional market in sugar for the survival of the sugar industries in all sugar producing member states, in anticipation of freer global trade;

- To create a stable climate for investment, leading to growth and development of sugar industries in the member states;

- To improve the competitiveness of the sugar producing member states in the world market;

- To facilitate the sharing of information, research and training with a view to improving the efficiency of growers, millers and refiners of sugar in Member Sates;

- To facilitate the development of small and medium sugar enterprises; and

- To create stable market conditions in the member states so as to encourage the rehabilitation and development of all sugar industries with a view of facilitating direct foreign investment and the creation of employment opportunities.

The SADC Sugar Agreement consists of two components, namely market access and areas of cooperation. The market access component allows non-SACU SADC surplus sugar producing countries exposed to depressed world market prices the opportunity to share in growth in the SACU market, while the cooperation component enables cooperation in the areas of research, training, small holder development, infrastructure[115], customs administration and developments in the rest of

[115] Including export facilities.

the world, with the ultimate objective of creating an integrated and internationally competitive SADC sugar industry[116].

The annex states further that the end goal is full reciprocal liberalisation of SADC sugar trade after 2012[117], yet article 3 stipulates that 'liberalisation will be dependent on a positive review of conditions prevailing in the world sugar market'. In addition, any liberalisation beyond 2012 is contingent on 'sufficient normalisation of the international sugar market'. The justification for this protection is that the world sugar market is highly distorted, and that this, combined with cognisance of the fact that the world price for sugar is a 'dumped or subsidised price', results in the continuing need for most sugar producing countries to impose tariff and non-tariff barriers against the free importation of sugar in order to protect their domestic industries[118]. Thus, recognising that for as long as the world sugar market remains highly distorted, sugar will be a product requiring special dispensation within the framework of the Protocol on Trade so that no sugar industry within SADC will suffer injury[119].

It is clear that full liberalisation in SADC, as elsewhere in the world, is contingent upon a sufficient normalisation of the international sugar market, with this determined by a 'positive review' by SADC with 'sufficient normalisation' not defined[120]. The implication is that the continuation of the current SADC sugar regime is likely to remain in the foreseeable future[121]. A recent meeting of SADC Trade Officials noted that a review was conducted in 2007 which found that the world market was indeed still distorted. It was agreed that another review would be deferred due to uncertainties such as the EU's CAP reform, the current review of the US Farm bill, the status of sugar under any Doha Development Round agreement and Brazil's policies around the channelling of cane between sugar and ethanol. This was again confirmed by SADC Trade Ministers in 2012, when they deferred a review and established a set of procedures for assessing the world market conditions as the precursor to any future review.

3.5 Proposed revision of the regulatory environment in South Africa

[116] Ref. note 58 *supra*, at pgs. 2 to 4.
[117] Ref. note 146 *supra* at pg. 194.
[118] *Ibid.*
[119] *Ibid.*
[120] *Ibid.*
[121] *Ibid.*

The main objective of the current review of the Sugar Act, as proposed by the DTI, is to establish a regulatory framework for sugar production and marketing that will promote optimal competition and participation in the domestic sugar industry, whilst still recognising that a degree of formal intervention is needed to allow the industry to maintain its participation in the global sugar market[122]. Greater regional integration, to be discussed in the section on preferential trade, is also anticipated to form a key consideration for amendments to South Africa's sugar regime as negotiations for the proposed Tripartite Agreement, to be concluded between the East African Community ('EAC'), the Common Market for Eastern and Southern Africa ('COMESA') and SADC, gain momentum.

According to the DTI, the review of the Sugar Act aims to optimise the level of competition that can be generated within the policy restrictions imposed by a severely distorted global market for sugar[123]. Specific elements to be subjected to government intervention have been accepted as necessary[124] in terms of the South African sugar strategy as well as in accordance with the SADC Sugar Annex as discussed above. Therefore the implementation of these measures hinges on the presence of significant distortions in the world market which would curb the development potential of the domestic industry in the absence of such regulation[125].

The goal of the DTI in reviewing the current Sugar Act, is to establish a positive legal position providing for approved elements of government intervention as opposed to supporting an 'enabling position' that sanctions regulatory intervention by the industry[126] as is currently done under the SIA[127].

3.5.1 Key considerations under review[128]

The key considerations under review are listed below. The review is still to be concluded. It is expected that the review may possibly be concluded in 2013. Due to the sensitivity of the discussions both within the industry and between industry and government, it was not

[122] Ref. note 58 *supra*, at pg 10.
[123] *Ibid.*
[124] *Ibid.*
[125] *Ibid.*
[126] Subject to approval by the minister.
[127] Ref. note 58 *supra*, at pg. 10.
[128] Ref. note 58 *supra*, at pg. 11 to 17.

possible to include any detail of the discussions in this study. The considerations themselves may be subject to change. A broad list includes:

a. ***Equitable exposure to the world market***

b. ***Domestic market competition***

c. ***Fixed proceeds sharing between millers and growers***

d. ***Value addition***

4. International Commitments

4.1 Contextualisation: International

According to the Most Favoured Nation ('MFN')[129] clause of the WTO, favourable treatment afforded to products traded with one WTO member must be extended to all like goods traded with other members. However, exceptions to this rule exist in the form of preferential or regional trade agreements ('RTAs') whereby, subject to stipulations[130], WTO members may negotiate bilateral arrangements offering favourable trade conditions to parties to the agreement without being required to automatically extend the same treatment to third countries.

By mid- 2011, some 297[131] RTAs were in force worldwide, with free trade areas (FTAs)[132] and partial scope agreements, such as EPAs, accounting for ninety percent thereof, while customs unions[133],

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[129] GATT, art. I.
[130] GATT, art. XXIV; enabling clause for developing countries; art. V, General Agreement on Trade in Services ('GATS').
[131] WTO, *WTO trade topics: regional trade agreements*, last visited on 4 June 2011, at http://www.wto.org/english/tratop_e/region_e/region_e.htm
[132] A free trade area is a grouping of countries within which tariffs and non-tariff trade barriers between the members are generally abolished but with no common trade policy toward non-members. It can be considered the second stage of economic integration. Economic partnership agreements (EPAs) are generally regarded as a precursor to an FTA. Ref. OECD website, 'Definition: Free Trade Area', *OECD Glossary of Statistical Terms*, last visited on 4 June 2011, at http://stats.oecd.org/glossary/detail.asp?ID=3128

which represent the deepest level of economic integration, accounted for ten percent.[134] While these statistics appear to reveal a trend in favour of FTAs, it is necessary to have regard to the typical number of trading partners involved in the different types of agreements.[135] When this is done, it becomes clear that the true split between FTAs and customs unions is less significant than the percentages indicate due to the fact that the largest RTA to date, i.e. the EU, is in fact a customs union.[136]

At present, there are three main RTAs or 'trading blocs' in Southern Africa, i.e. COMESA, SADC and SACU. Most Southern African countries hold membership of at least two of these[137], with South Africa belonging to both SADC and SACU. This overlapping membership constitutes a 'spaghetti bowl' of political commitments and institutional requirements, adding significantly to the costs of conducting intra-regional business[138]. Therefore, rather than facilitating trade, in many sectors, RTAs serve to divert market access away from efficient producers to the detriment of consumers and firms alike[139].

In an effort to curb this fragmentation, an overarching FTA, known as the Tripartite Agreement, or Tripartite FTA between SADC, COMESA and the EAC is currently under negotiation. Leaders of member countries are engaged in talks regarding the harmonisation of policies and programmes in the areas of trade, customs and infrastructure development among the three existing trade areas. If successful, the new FTA will open markets quite literally from the Cape in South Africa to Cairo in Egypt, spanning 26 countries with a combined gross domestic product ('GDP') of US$ 624 billion and a total population of 527 million people[140].

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[133] A customs union is a free trade area that also establishes a common tariff and other trade policies with non-member countries. A customs union is intended to create a common 'trade bloc' without differentiation in external policy between members, representing the third and deepest stage of economic integration. Ref. OECD website, 'Definition: Customs Union', *OECD Glossary of Statistical* Terms, last visited on 4 June 2011, at http://stats.oecd.org/glossary/detail.asp?ID=3130

[134] *Ibid.*

[135] Freund, C. & Ornelas, E., (May 2010), 'Regional trade agreements', *The World Bank Policy Research Group: Trade & Integration Team,* Working Paper 5314, at pg. 3.

[136] *Ibid.*

[137] Chinyoka, R., (December 2010), 'Analysis of regional integration within SACU', *TRALAC,* at pg. 3.

[138] Draper, P. *et al*, (January 2007), 'SACU, regional integration and the overlap issues in Southern Africa: from spaghetti to cannelloni?', *Trade Policy Report No. 15*, SAIIA, at pg. 7.

[139] *Ibid.*

[140] 'African leaders launch grand FTA negotiations', Kenya Broadcasting Corporation: KBC News, 12 June 2011, last visited on 8 August 2011, at http://www.kbc.co.ke/news.asp?nid=70722

SACU and SADC will be discussed below in the section on regional blocs, with particular attention paid to measures affecting the South African sugar sector. The proposed Tripartite FTA will be covered on in the section regarding seminal developments in the cross-border trading arena.

In addition to the regional blocs mentioned above, South Africa is also a party to a number of bilateral trade agreements, both in its own sovereign capacity and as a member of SACU. The most notable of these agreements as far as trade in sugar is concerned, are the TDCA between South Africa and the EC, the SADC-EC IEPA and the FTAs between SACU and EFTA and SACU and MERCOSUR (still in the process of being ratified).

While the anomaly of a member of a customs union concluding trade agreements in its individual capacity has been criticised for its incongruence with WTO provisions, it has been held that the discrepancies between the South African economy and the so-called BLNS countries, consisting of Botswana, Lesotho, Namibia and Swaziland, justify this exception as it allows for the opening of markets that would have remained largely inaccessible otherwise. Nevertheless, with the call for regional integration sounding louder than ever in the wake of a slew of international crises regarding finance, energy supply, climate change, food security and political stability within Africa and beyond, the move toward harmonisation in the region and in SACU in particular is gaining momentum, with the latest version of the SACU agreement clearly endeavouring to limit bilateral arrangements between SACU members and third parties.

In addition to the specific agreements mentioned above, South African products are eligible for non-reciprocal preferences, including lower tariffs or preferential tariff quotas under, *inter alia*, the US African Growth and Opportunity Act ('AGOA'), and the General System of Preferences of the EC, as well as of Canada, Japan, Norway, Switzerland, and that of the USA.

Each of these agreements will be discussed below with regard to their significance for the South African sugar sector.

The next section provides a summary of the mechanisms by which South Africa participates in and concludes FTA negotiations, with special attention being paid to the role of the legislature as custodian of the South African regulatory dispensation.

4.2 Contextualisation: Domestic

The South African Constitution[141] requires the national assembly to establish mechanisms to:

> *(a) Ensure that all executive organs of state in the national sphere of government are accountable to it; and*
>
> *(b) To maintain oversight of—*
>
> *i. The exercise of national executive authority, including the implementation of legislation; and*
>
> *ii. Any organ of state.*

The Doctrine of Separation of Powers[142] is an integral part of the South African democracy and a key feature of the relationship between the different branches of government. The Doctrine is based on a system of 'checks and balances'[143] to monitor and control the exercise of authority by the three spheres of government: the executive[144], the legislature[145] and the judiciary[146]. Of particular relevance to the topic at hand, is the power of the executive to enter into preferential trade arrangements with other nations or trading blocs.

In terms of the Constitution, the executive is charged with negotiating and signing all international treaties, which of course include RTAs[147]. As such, the negotiation and signature of international agreements are regarded as executive acts, realised through Presidential Minute[148]. Nevertheless, to actually bind the South African Republic[149], international treaties must be accepted by a resolution of both parliamentary houses, save where the agreement is 'technical, administrative or executive'[150] in nature, or in circumstances where neither ratification nor accession are required[151].

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[141] The Constitution, art.55(2).

[142] Mabandla, M., (8 November 2006), 'Separation of Powers in Sub-Saharan Africa', *presented at Konrad Adenauer Foundation's Rule of Law Conference held at Somerset West, South Africa*, last visited on 5 June 2011, at http://www.justice.gov.za/m_speeches/sp2006/2006%2011%2008_sp_MIN_KAF.pdf

[143] Cronjé, J.B., (13 April 2011), 'The role of parliament in trade negotiations and policy', *TRALAC Newsletter April 2011*, Stellenbosch: South Africa, last visited on 12 May 2011, at http://mail.google.com/mail/?hl=en&tab=wm#search/label%3Apublikasies-publikasies---tralac/12f4ebb9f27ba463

[144] I.e. the presidency, the cabinet and organs of state.

[145] I.e. parliament.

[146] I.e. the national courts.

[147] The Constitution, art. 231(1).

[148] Ref. note 146 *supra.*

[149] I.e. in its capacity as a subject of international law.

[150] Art. 231(3), the Constitution.

[151] *Ibid.*

Although parliament does not actively participate in treaty negotiations, all international agreements unaffected by the aforementioned exceptions[152] must endure full parliamentary debate during separate sessions of both parliamentary houses prior to being effected[153]. In this regard, it is essential to note whether ratification or accession is required, or whether signature by a duly authorised state representative will suffice.

As highlighted above, technical, administrative or executive agreements concluded by the executive do not require the approval of the legislature to become binding on the Republic, although such agreements must be tabled before the National Assembly and National Council of Provinces 'within a reasonable time'[154]. The Constitution contains no exact criteria by which a treaty may be categorised as technical, administrative or executive, but the general understanding is that these terms refer to department-specific agreements, agreements without serious political importance or agreements which do not have extra-budgetary financial or legislative consequences[155].

In order to become part of the South African legal system[156], an international agreement must be enacted as national legislation, save in the event that a self-executing provision was incorporated into the treaty text as approved by parliament[157]. One advantage of this exception is that administrative delays are lessened, thus enabling nationals to take immediate advantage of opportunities arising from RTAs. On the other hand, this requires a high degree of cooperation between negotiators and parliament as bypassing the legislative process means that the legislature in effect must preside over what is generally thought to be the exclusive domain of the executive[158].

The practice in this regard is for parliament to establish committees to monitor government action as well as to interact with the public. In order to fulfil this supervisory function, it is imperative for committee members to understand and appreciate the dynamics of the global trading system, the trade issues at hand and the implications thereof for economic, political and social policy space. As democratically elected representatives, parliamentarians too are duty-bound to be well-informed with regard to international trade issues affecting their constituency and to participate in the

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[152]Ref. Note 153 *supra*.
[153]*Ibid.*
[154] *Ibid.*
[155] Ref. note 146 *supra*.
[156] I.e. to bind not only the state in its capacity as a subject of international law, but also individuals and entities in the domestic jurisdiction.
[157] The Constitution, art. 231(4).
[158] Ref. note 146 *supra.*

moulding of government policy and negotiating positions[159]. Members of parliament must be aware of the scope of their influence over the direction and outcomes of trade talks. They should take particular cognisance of the nuances during the pre-negotiation phase, the description of the negotiating mandate, the progress of talks, as well as the implementation and dispute settlement processes[160]. Where a ministry initiates consultations pertaining to a specific agreement, prudence requires that parliament solicit feedback from non-government organisations ('NGOs') and other interest groups to ensure that all implications are duly considered[161].

In summary, parliament is charged with the ratification of RTAs, the implement of their provisions by enacting appropriate legislation, making the necessary budget allocations as well as oversight of their overall implementation[162]. Important to note, is that the portfolio committees are authorised to stipulate reservations to the agreements under their consideration or to refer them back to the executive for amendment[163].

To be worthwhile, trade agreements must provide the greatest good for the greatest number, however, the fact that some firms and labour sectors will be unfavourably impacted is largely inevitable[164]. This requires government to formulate and implement strategies to assist those who bear the brunt of adjustment in order to reap opportunities created elsewhere[165]. To ensure an equitable distribution of benefits derived from RTAs, parliament must play a pivotal role throughout the negotiation and implementation process to help harmonise potentially adversarial needs of national self-interest, of domestic constituencies and of civil society[166].

The next section considers the operations of SACU with particular attention to the role of South Africa in the customs union as well as the impact on the Republic's sugar sector.

4.3 Regional Trading Blocs

4.3.1 SACU

[159] *Ibid.*
[160] *Ibid.*
[161] *Ibid.*
[162] *Ibid.*
[163] *Ibid.*
[164] *Ibid.*
[165] *Ibid.*
[166] *Ibid.*

a. Structure and operations

Originally established in 1910, SACU is the oldest customs union in the world[167]. SACU has historically been administered by South Africa via the operation of the original 1910 agreement and its revised 1969 successor[168]. Despite its status as a customs union, SACU's external trade relations were directed largely by individual members' bilateral and regional alliances for the greater part of its history. Acknowledgement of the weaknesses of the 1969 agreement finally led to its renegotiation, coinciding with the advent of popular democracy in South Africa in 1994[169]. The latest version of the agreement was signed on 21 October 2002, entering into force on 15 July 2004. This agreement is referred to as the 2002 SACU agreement.

The economic structure of the customs union links the member states by a single tariff and, theoretically at least, no customs duties between them[170]. The members form a single customs territory in which tariffs and other barriers are eliminated on substantially all the trade between the member states for products originating within their borders[171]. A common external tariff is applied to imports from non-members[172]. The customs union collects duties on local production and customs duties on members' imports from outside SACU, with the resulting revenue being paid into South Africa' national Revenue Fund and then allocated to member countries in quarterly instalments using a pre-existing revenue-sharing formula[173]. Only the BLNS member states' shares are calculated; South Africa receives the residual[174]. SACU revenue constitutes a substantial share of the state revenue of the BLNS countries[175]. As per agreement between the members, the revenue share accruing to each member is calculated from three basic components[176]. These are:

- A share of the customs pool;
- A share of the excise pool; and

[167] SACU, 'What is SACU', last visited on 30 June 2011, at http://www.sacu.int/main.php?include=about/what_is.html&menu=menus/leftmenu.html
[168] *Ibid.*
[169] WTO TPR (2009), WTO Secretariat, at pg. 5.
[170] *Ibid.*
[171] *Ibid.*
[172] *Ibid.*
[173] Ref. note 170 *supra.*
[174] South African Department of International Relations and Cooperation, 'The Southern African Customs Union', *Multilateral Agreements: Africa,* last visited on 30 June 2011, at http://www.dfa.gov.za/foreign/Multilateral/africa/sacu.htm
[175] *Ibid.*
[176] *Ibid.*

- A share of a development component.

It was further agreed that these three different components would be distributed as follows: the customs component should be allocated according to each country's share of total intra-SACU trade, including re-exports[177]. The excise component, net of the development component, should be allocated on the basis of GDP[178]. The development component should be fixed at fifteen percent of the total excise pool and distributed to all SACU members according to the inverse of each country's GDP *per capita*[179].

In addition to regulating the operations of the customs union, SACU 2002 provides for the establishment of six institutions deemed necessary for the proper functioning of the customs union[180]. These are:

- the Council of Ministers;
- the Customs Union Commission;
- the Secretariat;
- the Tariff Board;
- the Technical Liaison Committees; and
- the Tribunal.

Of the institutional organs provided for by SACU 2002, the Council of Ministers, the SACU Commission, the Technical Liaison Committees and the Secretariat are currently functional. SACU members have agreed that, in the meantime, ITAC will undertake the functions of the Tariff Board[181].

The Council of Ministers is the final decision-making authority on all matters pertaining to the customs union[182]. It is 'responsible for the overall policy direction and functioning of SACU institutions, including the formulation of policy mandates, procedures and guidelines for the SACU

177 *Ibid.*
178 *Ibid.*
179 *Ibid.*
180 SACU 2002, art. 7.
181 Ref. note 172 *supra* at pg. 7.
182 Ref. note 172 *supra* at pg. 6.

institutions'[183]. The Council consists of at least one Minister from each member state and is chaired in turn by each member state for a period of one year[184].

The Customs Union Commission is responsible for implementation of the agreement, overseeing the management of the common revenue pool in accordance with the policy guidelines decided by the Council and supervising the work of the Secretariat[185].

The Secretariat is responsible for the daily administration of the union. It is headed by an Executive Secretary, who must be a national of a member state[186]. In general, it is responsible for implementing the policies of the Council and of the Commission, as well as for providing technical support for all SACU initiatives[187].

SACU 2002 also establishes four Technical Liaison Committees for agriculture, customs, trade and industry, as well as transport. In addition, the SACU Council created the Finance Technical Liaison Committee in 2008[188]. These committees advise and assist the Customs Union Commission in its work.

Although SACU 2002 has made *de jure* provision for the establishment of all the SACU institutions described above, the agreement does not address the detailed substantive and procedural aspects of the work of the Tariff Board, the Tribunal or the national bodies. In an effort to remedy this *lacuna,* the SACU Secretariat, in consultations with the member states, have made proposals on Annexes to the SACU agreement. Negotiation of the Annexes, as well as their adoption by member states is taking a considerable amount of time, yet progress has been made in recent years[189].

The table below, as provided by the DTI, outlines the timeframe for the implementation of SACU 2002 as from 6 May 2011.

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183 SACU 2002, art. 8(2); ref. WTO TPR (2003) at pg. 8 re: details on the responsibilities of the Council of Ministers.

184 Ref. note 172 *supra* at pg. 6.

185 Ref. WTO TPR (2003) at pgs. 8 to 9 re: details on the composition and operational procedures of the Customs Union Commission.

186 The Secretariat is based in Windhoek, Namibia.

187 WTO TPR (2003) at pg. 9 re: details on the duties and responsibilities of the SACU Secretariat.

188 This was done in accordance with art. 8(8) of SACU 2002, which provides a mandate for the Council to create additional technical liaison committees. The objective was to alleviate the work of the Customs Technical Liaison Committee by splitting finance and customs matters.

189 The Secretariat drafted a SACU Model Law on National Bodies, which members are currently in the process of adopting.

ROADMAP TABLE

No.	Milestones	Target Date	Activities	Responsible
1.	Establishment of the National Bodies 1.1 Enactment of the national laws 1.2 Setting up of the institutions	December 2012	1 Needs assessment and provision of technical assistance 2 Drafting of the Bills 3 Information exchange with other Member States	Member States
			1 Needs assessment and provision of technical assistance 2 The national process for establishing the institutions	Secretariat/ITAC
2.	Development of National Bodies' Capacity	July 2012	Needs assessment for Member States	Secretariat
			Technical support to Member States • workshops for national stakeholders • Exchange visits • Providing resource experts	Secretariat
3.	Development of model regulations for the National Bodies	April 2012	Develop and circulate the draft model regulations on tariff investigations, anti-dumping, countervailing and safeguard to Member States for comment	Secretariat
			Submit comments to Secretariat	Member States
			Consideration of the draft model regulations	Task Team/legal experts
			Consideration of the draft model regulations	Commission
			Approval of the draft model regulations	Council
			gazetting of model regulations in Member States	Member States
4.	Appointment of the Chief Liaison Officer	December 2012	Propose to Council the appointment of the CLO	Secretariat
			Conducting of the recruitment process of the CLO position	Secretariat

			Appointment of the Chief Liaison Officer	Council
5.	Appointment of the Tariff Board Members	June/July 2013	Conduct research on criteria and process of identifying, nominating and appointing the Tariff Board members	Secretariat
			Requesting for nomination of the Tariff Board members	Secretariat
			Submit names of nominees to the Secretariat	Member States
			Consideration and appointment of Tariff Board by Commission and Council	Commission/Council
6.	Transitional arrangement defined (leading towards the end of ITAC mandate and takeover of responsibility by the Tariff Board)[190]	December 2011	Develop and circulate the proposal to Member States for national consultations	Secretariat/ITAC
			Submit comments to the Secretariat for incorporation/revision	Member States
			Consider and adopt the transitional arrangement	Commission/Council
7.	Common principles for regional industrial development, trade and tariff adopted	To be determined	Subject to a separate process	Secretariat/Commission/Council
8.	The Tribunal established and operational to adjudicate on economic operators' disputes with the Tariff Board	To be determined	Subject to a separate process	Secretariat/Commission/Council

[190] The detailed programme for the transitional arrangement will be developed in consultation with ITAC at a later stage.

9.	Tariff Board operational	To be determined		

Source: DTI, South Africa (May 2011)

The Tariff Board, once established, will be responsible, *inter alia*, for making recommendations to the Council on the level of and changes to customs, anti-dumping, countervailing, and safeguard duties on goods imported from outside the common customs area, as well as on rebates, refunds or duty drawbacks on the basis of directives by the Council as provided for in article 8 of the agreement. SACU 2002 affords clear independence to the Tariff Board, consisting of experts drawn from member states. Pursuant to article 14 of the agreement, SACU members are to establish national bodies or designate institutions, entrusted with receiving requests for tariff changes, carrying out preliminary investigations, and making appropriate recommendations to the Tariff Board. The national bodies may also periodically make recommendations to the Commission via the Secretariat on the basis of studies or investigations on the impact of the tariff[191].

The Tribunal, once established, will adjudicate over any disputes arsing between member states regarding interpretation of the SACU agreement or any matter brought to it by the SACU Council. It will also fulfil an advisory role. Until this body is in place, current disputes in SACU are settled either via bilateral negotiation on an *ad hoc* basis, i.e. where the matter involves two member states, or via consensus in the Council, i.e. where more that two members are involved or where any of the disputing parties decide to table the matter before the Council. It is envisaged that the establishment of the Tribunal will coincide with that of the the SACU Tariff Board.

The ongoing lack of a structured dispute resolution mechanism and therefore lack of recourse for any aggrieved parties, is one of the major shortcomings of the customs union. Despite calls for integration since the coming into force of SACU 2002, members have continued to pursue protectionist measures in support of significant sectors, and particularly with regard to sensitive agricultural products. While arguments exist both for and against the legitimacy of such policies, the fact remains that persistent protectionism within the ambit of the customs union threatens not only relations between members of the trading bloc itself, but also negotiations with non-members, and by extension SACU's very recognition in the WTO. It can also be argued that such policies violate the spirit of the agreement, if not perhaps the letter of the law. In the absence of an authoritative

191 Ref. note 172 *supra* at pg. 7.

judicial organ such as the agreed SACU Tribunal, however, precedent is virtually impossible to establish.

While the Council and Secretariat propagate negotiation and consultation between members when disputes arise, often the only *de facto* remedy in the event of breach by one member is retaliation by the adversely affected members. Under the current regime, resolution is thrust into the political sphere of member states, resulting in conflicts of sovereignty, and thus rendering alleged breaches of the agreement politically sensitive to pursue and difficult to prove, with no penalties for transgressions having ever been enforced.

This *status quo* has contributed to the lack of policy integration and harmonisation over various sectors, particularly as far as agricultural products are concerned.

Another major issues SACU 2002 hopes to address, is trade arrangements with third parties[192]. Article 31 of the agreement stipulates that no member state can negotiate or enter into new preferential trade agreements with non-members or amend existing agreements without the prior consent of other member states[193]. In order to harmonise trade policy within SACU, the Council of Ministers has directed that the customs union will negotiate any new preferential trade agreements with third parties as a bloc and not as individual countries[194]. SACU 2002 also provides for the establishment of a common negotiating mechanism for any new negotiations with outside parties.

Despite this, article 31 allows member states to maintain pre-existing preferential trade and related agreements. Consequently, some SACU members are still signatories to other trade arrangements, such COMESA, of which only Swaziland is a member[195], and also the TDCA between South Africa and the EC as mentioned above[196]. In addition, South Africa has bilateral trade agreements in place with Malawi and Zimbabwe[197]. Botswana has bilateral trade agreements with Malawi and Zimbabwe[198],

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[192] Ref. note 172 *supra.*
[193] *Ibid.*
[194] *Ibid.*
[195] WTO TPR (2009) Annex 5. Lesotho withdrew from COMESA in 1997, followed by Namibia on 31 May 2004.
[196] WTO TPR (2009) Annex 4.
[197] South Africa also grants preferential tariff treatment to a list of products from Mozambique, which are admitted duty-free, within annual quota limits. Ref. WTO TPR (1998).
[198] WTO TPR (2009) Annex 1.

while Namibia has a bilateral trade agreement with Zimbabwe[199]. Lesotho and Swaziland are not party to any external bilateral trade agreements[200].

As mentioned previously, SACU members, including South Africa, are eligible for non-reciprocal preferential treatment under, *inter alia*, the European GSP as well as the American AGOA initiative. No SACU member is a signatory to the agreement on the Global System of Trade Preferences among Developing Countries ('GSTP')[201].

All the SACU members are members of SADC in their individual sovereign capacities, but have undertaken single tariff phase-down commitments in terms of the SADC Protocol on Trade.

b. ***Sugar***

The underlying philosophy of the SACU agreement is that of 'free movement of domestic products'[202]. Goods grown, produced or manufactured in the common customs area are meant to be free of customs duties and quantitative restrictions[203]. Article 39 of SACU 2002, regarding agricultural policy, has been deemed a 'central pillar'[204] of the customs union and reads as follows:

> 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.*

This is closely linked with article 31 of the agreement as mentioned above, which calls for the establishment of a common mechanism for undertaking negotiations with non-SACU trading partners.

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199 WTO TPR (2009) Annex 3.
200 *Ibid.*
201 Ref. note 172 *supra.*
202 Ref. note 15 *supra* at pg 190.
203 SACU 2002, art.18.
204 Vink, N & Sandrey, R., (2009), 'Regional Integration in SACU's agricultural sector', in Bösl, A. *et al* (eds.), *Monitoring regional integration in Southern Africa yearbook*, Vol 9 2009, TRALAC, Stellenbosch: South Africa, at pg. 166.

South Africa and Swaziland are the only sugar cane producers in the customs union, with Swaziland's share doubling from less than eight percent over the period between 1961 to 1965 to around seventeen percent from 2000 to 2004[205]. South Africa's total production has doubled since the early 1960s, while production in Swaziland increased more than fivefold[206]. The increase in both countries is largely due to increased acreage since average yields have been declining[207].

Following extreme draught in KwaZulu-Natal, South Africa's sugar crop yields declined to a low not experienced since 1992, resulting in a higher price per ton produced. South African sugar production fell from 564 000 tons to 445 000 tons, representing a decline of over twenty percent[208]. South Africa's neighbours, however, enjoyed a bumper crop, thus filling the shortfalls created in the South Africa market, further exacerbating the loss in profits of local producers.

In evaluating agricultural policy harmonisation within SACU, the following aspects are relevant, first of all, for areas where elements of policy harmonisation and coordination exist in some form [209]:

- Common external tariff;
- Single export channel for raw sugar exports;
- Coordinated inputs on trade negotiations with third countries;
- and
- Preferential access to the US market. In the case of South Africa, the benefits derived goes to small-scale growers as a form of subsidisation.

And secondly, those areas where harmonisation is lacking[210]:

- Preferential access only for Swaziland to the EU under the EPA and to COMESA;
- Restructuring funds received by Swaziland from the EU;
- Swaziland applies import and export controls by way of a permit system;

[205] Ref. note 207 *supra* at pg. 169.
[206] *Ibid.*
[207] *Ibid*.
[208] Tongaat-Hulett website, 'Tongaat-Hulett and its strategic platform', last visited on 21 July, at http://www.tongaat.co.za/au/introduction.asp
[209] Ref. note 15 *supra* at pgs. 191 to 192.
[210] *Ibid.*

- The Swaziland Sugar Association ('SSA') has monopoly marketing of both raw and refined sugar, other than that packaged in small quantities;
- Swaziland's sugar marketing arrangements are not subject to competition laws;
- Swaziland has non-reciprocal access into SACU's sugar market; and
- South Africa provides for equitable exposure to the world market for millers and growers
- South Africa actively applies a Black Economic Empowerment ('BEE') policy and legal framework in its sugar sector.

The South African industry argues that the lack of harmonisation in the sugar policies between South Africa and Swaziland discriminates against South African sugar millers and cane growers as well as having an adverse affect on BEE initiatives being pursued in the interest of sustainable land reform[211].

According to the SSA, on the other hand, the main obstacles to policy harmonisation are the structuring of competition between the two industries in the SACU market, where market sharing arrangements had to be discarded following the promulgation of the CA, as well as delays in effecting desired amendments due to the requisite consultation with respective government authorities which make for a lengthy and convoluted process[212].

4.3.2 SADC

a. Structure and operations

Consisting of fifteen member states, SADC operates in pursuit of development and economic growth objectives within the Southern African region[213]. The treaty establishing SADC ('SADC Treaty') was originally signed in 1992 and amended in 2001 for the purpose of creating a development community that would achieve economic integration in the whole of Southern Africa, including through increased intra-regional trade.[214]

[211] *Ibid.*
[212] *Ibid.*
[213] Ahmed, A.K., (2008), *An analysis of regional integration in Southern Africa: a South African perspective*, Stellenbosch: TRALAC, at pgs. 11 to 12.
[214] SADC replaced the Southern African Development Coordination Conference ('SADCC'). SADC membership comprises the five SACU countries and nine other countries from the sub-region, i.e. Angola, Democratic Republic of the Congo, Malawi, Mauritius, Madagascar, Mozambique, Tanzania, Zambia, and Zimbabwe.

The SADC mandate is quite ambitious, seeking to provide balanced economic growth and development, political stability, and security for all its member states through increased regional cooperation and integration[215]. The specific milestones set in pursuit of these aims are delineated in a variety of sources. These include the community's founding treaty, a number protocols in specific areas such as trade, finance, industry, education, agriculture, transport, and investment[216], development and cooperation plans[217] as well as declarations[218] issued by the Summit of Heads of States and Governments ('SADC Summit'). Some disharmony still exists between older directives and those concluded since the revision of the SADC Treaty at the turn of the century.

The community is administered by eight governing bodies. These are:

- The SADC Summit, comprising heads of state or heads of government;
- The Organ on Politics, Defence and Security ('OPDS');
- The Council of Ministers;
- The Tribunal;
- The SADC National Committees ('SNCs'); and
- The SADC Secretariat.

In some areas, such as foreign policy, cooperation is aimed merely at superficial coordination of national activities and policies. In others, such as trade and economic integration, more intensive coordination efforts are in progress, with the ultimate goal of establishing a common market with uniform regulatory institutions. In this regard, the SADC Protocol on Trade is of particular relevance.

All five SACU members are signatories to the SADC Protocol on Trade, which entered into force on 25 January 2000 following ratification by eleven SADC members[219]. The protocol aims to further liberalise intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial trade arrangements[220]. A SADC FTA was notified to the WTO under article XXIV of the

[215] Ref. note 217 *supra.*
[216] Such as the trade protocol, the corruption protocol, the firearms protocol, the OPDS protocol, the health protocol and the education protocol.
[217] such as the Regional Indicative Strategic Development Plan ('RISDP') and the Strategic Indicative Plan of the Organ ('SIPO').
[218] Such as those on HIV and AIDS and food security.
[219] Ref. note 217 *supra.*
[220] *Ibid.*

GATT[221] in 2005 and was considered by the Committee on Regional Trade Agreements ('CRTA') on 15 and 16 May 2007[222]. The FTA was launched in August 2008, however progress toward integration remains gradual, with trade in those products deemed sensitive by members requiring liberalisation between 2005 and 2012[223]. In developing of a fully-fledged FTA, intra-regional trade and investment is expected to grow significantly as the issues of market access, rules of origin, and non-tariff barriers are resolved[224].

Through the 2003 Regional Indicative Strategic Development Plan ('RISDP'), SADC hopes to make yet further strides towards broader regional integration. The aims include the establishment of a customs union which was originally envisaged to be operational by 2010, a common market by 2015, and a monetary union by 2016[225]. SACU members have committed themselves to these milestones[226], however commentators have highlighted that these timeframes might be overly ambitious with the 2010 deadline for establishment of a customs union having already lapsed[227].

Despite these setbacks, SADC remains the most prominent regional body in sub-Saharan Africa, and is the only regional body in which all Southern African countries have membership[228]. While this lends relevance to SADC's position as far as regional representivity is concerned, divergent views exist as to whether SADC is apt to facilitate economic integration. According to a report by the Institute for Research on Rural Development ('IRRD')[229], SADC remains the most appropriate regional body to drive economic cooperation with its commitment toward convergence and cooperation well reflected in the community's protocols. The signing and ratification of protocols oblige member states to 'operate, coordinate, harmonise and integrate policies and strategies in one or more sectors'[230]. As of 2009, nine of the twenty signed protocols were ratified by member states[231].

Several commentators assert, however, that SACU, rather than SADC, should be the primary vehicle for economic integration in the region, given its long history and institutional capacity[232].

[221] WTO documents WT/REG176/N1/Rev.1, 27 August 2004; WT/REG176/1, 8 October 2004; and WT/REG176/Rev.1, 19 November 2004.
[222] WTO document WT/REG176/M/1, 12 June 2007.
[223] *Ibid.*
[224] Ref. note 217 *supra.*
[225] Ref. note 172 *supra* at pg. 12.
[226] *Ibid*.
[227] Ref. note 217 *supra.*
[228] *Ibid.*
[229] *Ibid.*
[230] *Ibid.*
[231] *Ibid.*
[232] *Ibid.*

b. *Sugar*

Sugar and sugar policies are a key component of agriculture in both SACU and SADC. Therefore the implications of changes to the sugar policy and trade regimes in the region are important when considering imminent structural changes such as the proposed Tripartite FTA[233].

As discussed previously, the sugar trade between SACU and SADC is administered by Annex VII of the SADC Protocol on Trade. SACU market access for sugar is granted on a non-reciprocal quota basis[234], i.e. sugar originating in SADC enters SACU under preferential terms, but the same does not hold true for sugar which originates in SACU and is then exported to other SADC members[235]. This is not the long term objective contemplated by the Sugar Annex, but, as detailed above, will be sustained until such time as a 'positive SADC review' finds that the world sugar market has normalised sufficiently to allow for reciprocity[236].

During the 42nd SADC Trade Negotiations Forum, held on 29 and 30 July 2011, amendments to the Sugar Annex as tabled by the Technical Committee on Sugar ('TCS') were accepted and were incorporated into the regulation of the SADC sugar regime. The section below provides an overview of the measures governing SADC trade in sugar currently and makes note of the 2011 amendments.

The initial quota regime was structured as follows:

- *Imports from all SADC countries into the SACU market*

Based on the annual growth in the SACU market for sugar, each SADC net surplus producer, i.e. a sugar producing SADC member state with a net surplus production[237], will be allocated a share of the SACU market according to each producer's relative net surplus production[238]. Each net surplus producer's share will be calculated by using the total SADC net surplus production as denominator[239].

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[233] Vink, N. *et al,* (March 2011), *Sugar: the implications of trade liberalisation for Eastern and Southern Africa,* TRALAC Working Paper No. DIIWP05/2011, Stellebbosch: South Africa, at pg. 1.
[234] Sugar Annex, art. 3(2).
[235] Ref. note 98 *supra* at pg. 22.
[236] Sugar Annex, art. 3(1).
[237] Sugar Annex, art. 1.
[238] Sugar Annex, art. 4(1).
[239] Sugar Annex, art. 4(2).

A producer's net surplus was calculated by taking the total local production in any marketing year[240] and subtracting total domestic consumption and all exports under preferential market access concessions granted by non-members, such as the EC and the US, to such producers[241]. The net surplus production then represented that producer's 'exposure to the world market'[242]. The total net surplus production for SADC was then calculated[243]. Each net surplus producer's share of the total SADC net surplus production was then determined by dividing the former by the latter[244]. This then represented that producer's relative net surplus production[245].

The higher the relative net surplus of a producer, i.e. the greater the exposure to the distorted world market a producer experienced, the larger its portion of the SACU sugar market was based on the annual growth of the SACU sugar market[246]. The annual growth in the SACU sugar market was set at 138 000 tons[247].

Due to the fact that South Africa does not share in the preferential market access into third markets granted to other SADC sugar producing countries, its exposure to the world market was most significant[248]. As a result, South Africa's share into the SACU market was the largest of all SADC sugar producing countries.

With the duty-free-quota free market access granted to SADC sugar producing countries under the IEPA, South Africa's share in the SACU market could have theoretically increase to 100 percent, based on this formula[249].

- *Imports from non-SACU SADC countries into the SACU market*

Apparently due to some concerns raised by other SADC sugar producing countries about SACU's own share in its market as a result of the application of article 4 of the Sugar Annex, provision was made

[240] A marketing year is defined as a period of twelve months commencing on 1 April and ending on 31 March; ref. Sugar Annex, art. 1.
[241] Ref. note 98 *supra* at pg. 23.
[242] *Ibid.*
[243] *Ibid.*
[244] *Ibid.*
[245] *Ibid.*
[246] *Ibid.*
[247] Sugar Annex, art. 4(3).
[248] Ref. note 98 *supra* at pg. 23.
[249] *Ibid.*

for an additional duty-free sugar quota open only to non-SACU SADC sugar producing countries[250]. These non-SACU SADC sugar producing countries shared in a 20 000 tons duty-free quota according to the relative net surplus production of each such country as a fraction of the total non-SACU SADC net surplus production.[251] If the net non-SACU SADC surplus production was less than 20 000 tons, then the duty-free access to the SACU market is limited to the actual net surplus production of those countries take together[252].

The preferential market access provisions provided for under articles 4 and 5 of the Sugar Annex become immaterial under circumstances where no duty is imposed on imported sugar into SACU[253]. Also, under the preferential market access provided for under the IEPA the level of world market exposure suffered by the non-SACU producers fell dramatically.

Fixed access by non-SACU producer's to the SACU market[254]

In 2004 the Agreement was included in the mid-term review of the SADC Trade Protocol. During this review, the main pillars of the Agreement were reaffirmed. The review focused on administrative and technical issues that would enhance the smooth implementation of the Agreement. One of these improvements related to the definition of 'preferential access'. The intention was to bring it in line with internationally accepted norms of defining preferential access.

At its meeting of 14 March 2008, the TCS discussed a proposed definition and noted that this, while technically correct, would have negative effects on the market access for non-SACU SADC sugar-producing countries. This was mainly because sales to the COMESA market, in particular, were to be deemed part of preferential sales. In addition, because of the termination of the EU Sugar Protocol, and the subsequent granting of duty-free quota-free access to the EU market for sugar from African, Pacific and Caribbean states, most of the non-SACU SADC producers would find their access to SACU eliminated.

TCS members agreed to explore mechanisms through which the application of the new definition would not be detrimental to the supply interests of non-SACU SADC net surplus producers. While

[250] Ref. note 98 *supra* at pg. 24.
[251] Sugar Annex, art. 5.
[252] Sugar Annex, art. 5(3).
[253] Ref. note 98 *supra* at pg. 24.
[254] 42nd SADC Trade Negotiating Forum or Trade Negotiating Forum, (July 2011), *Review of Annex VII of the SADC Protocol on Trade,* at pars. 3.4.1 to 5.1.5.

the revised definition was theoretically correct, and in line with the original premise of the Agreement, it would have resulted result in a possible reduction of the tangible value of the Agreement for non-SACU SADC sugar producers. Agreement was reached in July 2009 on principles for a revised quota arrangement for preferential market access for non-SACU SADC sugar producers to the SACU market. The final basis for such fixed access was approved by SADC Trade Ministers in February 2011, as set out below.

- *Non-Reciprocal Access To The SACU Market*

Duty free quota access to the SACU sugar market will be allocated to all non-SACU SADC sugar producing members. Access will be established through duty-free quotas allocated to each such member. The quotas will be allocated as follows:

  - The base market access quotas are hereby established as the average of the annual quotas allocated to each non-SACU SADC sugar-producing country over the period 2001/2002 to 2007/08. These quotas would apply from the first year in which this quota system became effective. These base quotas are indicated in Appendix 1.

  - An annual growth factor will be applied from the second year of implementing the new quota system. The annual percentage growth in the quota will be equal to the actual growth percentage in the SACU sugar market in the preceding year, and will only be applied to quota tonnage in excess of 20,000 tons A minimum annual total quota increase of 500 tons will be applicable. This total quota increase shall be distributed among the quota beneficiaries on the basis of their relative base quota allocations. The relative shares in the base quota allocations are indicated in Appendix 1.

  - The annual percentage growth in the SACU sugar market is computed as the growth in the combined SACU sales of the South African and Swaziland sugar industries plus imports into SACU.

  - From the total annual base quota, an initial annual quota of 1,500 tons will be allocated to each non-SACU SADC sugar producing country. The balance of the quota will then be allocated to each beneficiary country in accordance to with that country's calculated relative share of the average annual quota allocated to non-SACU SADC countries over the period 2001/2002 to 2007/08.

- The determined quota allocations are not transferable between countries. The principle of ‘use it or lose it’ will apply.
- Any new sugar producer in SADC will be accommodated within the total quota determined in this Annex.
- The modalities for the utilisation or distribution of the quota of a country would be determined by the competent sugar quota allocating authority in that country.
- This provision for non-reciprocal access for non-SACU SADC sugar producers will be reviewed in accordance to scheduled and/or agreed revisions of the SADC Trade Protocol.

Country	**Base Quota**	**Relative Share**
Malawi	7,646	2.8%
Mauritius	2,342	20.6%
Mozambique	7,623	20.7%
Tanzania	1,500	0.0%
Zambia	14,444	43.6%
Zimbabwe	5,125	12.2%
TOTAL	**38,681**	**100.0%**

Source: Appendix 1, Meeting Record: 42nd session of the SADC Trade Negotiating Forum

- *Zimbabwe’s Free Trade Agreements with Botswana and Namibia*

Botswana and Namibia, both members of SACU, concluded free trade agreements with Zimbabwe allowing for sugar to enter those markets on a duty-free basis[255].

[255] *Ibid.*

4.4 International Agreements

4.4.1 Relations with the European Communities

a. *Background*

Preferential market access agreements between the EU and the African, Caribbean and Pacific ('ACP') bloc of countries have been operational for nearly forty years[256]. These agreements have been subject to repeated revision and renewal, with the initial Lomé Agreements being superseded by the Cotonou Agreement[257]. The Cotonou Agreement, like its predecessors, allowed for the export of products from ACP countries into the EU market duty-free or at preferential rates of duty and like the Lomé Agreements was non-reciprocal, i.e. the ACP countries were not obliged to grant the EU comparable market access in return[258]. A waiver from the MFN treatment obligations under article I(1) of the GATT for the Cotonou Agreement was granted by WTO Members for the period up to 31 December 2007, and has since expired.[259]

The BLNS countries were signatories to the Cotonou Agreement, however, while South Africa became a party to Lomé IV in 1994, following normalisation of the trade relations with the EU, it was excluded from the provisions for non-reciprocal preferential market access to the EC and, as a result, was excluded from the trade provisions of the Cotonou Agreement[260]. This exclusion was contended to be necessary as providing access for South Africa would have impacted negatively on the quota provisions for other less developed ACP countries[261]. As indicated previously, it was agreed that the trade arrangements between the EU and South Africa should be governed under a separate bilateral TDCA, concluded in 1999 to make provision for an FTA covering trade in goods[262].

[256] Van der Merwe, J., (15 September 2010), *Preferential access for South African Sugar to the EU,* SASA, Durban: South Africa, at pg. 1.
[257] The Cotonou Agreement was signed on 23 June 2000. The fourth Lomé Convention expired at the end of February 2000.
[258] Ref. note 172 *supra* at pg. 12.
[259] WTO document WT/MIN(01)/15, 14 November 2001. The full text of the Cotonou Agreement has been communicated to WTO Members in WTO document G/C/W/187/Add.3 of 14 April 2000.
[260] Ref. note 172 *supra* at pg. 12.
[261]Ref. note 262 *supra.*
[262] Ref. note 172 *supra* at pg. 12.

ACP-EC negotiations began in September 2002, and are aimed at establishing EPAs on a bilateral basis or between the EC and regional groupings[263]. The EPAs take the form of reciprocal FTAs between the EU and six ACP geographical regions, one of which covers Southern Africa, and is referred to as the SADC-EU EPA[264], with negotiations for the SADC region launched in July 2004. SACU, including South Africa, is negotiating the EPAs with the EC as part of the SADC configuration – known as the SADC EPA Group comprising only seven of the fourteen SADC members, i.e. SACU plus Angola and Mozambique[265]. The rest of the SADC countries are negotiating the EPAs under the Eastern and Southern Africa ('ESA') Group with the exception of Tanzania, which is negotiating as part of the EAC[266].

In July 2005, SADC Ministers of Trade decided to commission a working group to look at harmonising trade relations between Southern African countries and the EC[267]. A Strategic Framework Document ('SFD') was developed and approved by the SADC trade ministers at their meeting in Luanda, Angola, in February 2006[268].

The EPAs were expected to have been in force from 1 January 2008, however this has not come to fruition[269]. The SADC-EC EPA negotiations reached an initial agreement culminating in an Interim EPA ('IEPA'), dealing with trade goods only, at the end of 2007[270]. Botswana, Lesotho, and Swaziland, together with Mozambique, signed the Interim EPA on 4 June 2009[271].

b. *Sugar*

Both the Lomé and Cotonou Agreements made provision for duty-free entry of ACP sugar into the EC, subject to quota restrictions, from which South Africa was excluded[272]. At the time of the EC-South Africa TDCA's entry into force, sugar was disqualified from trade liberalisation by both sides, partly due to the interests of the ACP countries in the EU market[273]. There was, however, an expectation that South Africa as a preferential trading partner to the EU, would be allowed to

[263] Ref. note 172 *supra* at pg. 12.
[264] Ref. note 262 *supra.*
[265] Ref. note 172 *supra* at pg. 12.
[266] *Ibid.*
[267] *Ibid.*
[268] *Ibid.*
[269] *Ibid.*
[270] *Ibid.*
[271] *Ibid.*
[272] *Ibid.*
[273] Ref. note 262 *supra* at pg. 2.

participate in any new market opportunities that may arise in the EU sugar market, either as a consequence of the EC's enlargement programme or through adjustments to its common market policies, where such access would not be detrimental to the preferential access arrangements for ACP and LDC countries[274].

The EPAs and related reforms to the EU sugar regime have therefore reopened the floor for negotiations regarding the South African sugar sector's access to the EU market[275]. Yet, at the time of this writing, South Africa remains the sole developing country sugar producer with a preferential trade arrangement with the EU from which sugar is excluded[276].

Within the current *status quo*, sugar under tariff heading 1701 appears under Annex IV List 7 of the EC's Agricultural Products' Lists as well as under Annex VI List 4 of South Africa's Agricultural Products' Lists, designating sugar a sensitive product in both jurisdictions. No market access concessions have ever been granted between the EC and South Africa[277]. Sugar from the EC will therefore enter the Republic subject to the applicable import duty calculated to apply from time to time using the variable SACU tariff formula as delineated above[278].

As mentioned above, preferential access to the EC market for ACP sugar, which includes sugar originating in the BLNS states, was formerly administered under Protocol 3 of the Cotonou Agreement ('the Sugar Protocol'). Effective from 1 October 2009, the Sugar Protocol was substituted by the provisions of the IEPA, although Namibia abstained from signing. More important for purposes of the topic at hand is the fact that Swaziland now exports its sugar in terms of IEPA provisions[279].

Effective from 1 October 2009, no import duty is charged on Swazi sugar exported to the EC. This arrangement is however subject to certain quantitative restrictions[280], i.e. if in any marketing year[281] falling within the period between 1 October 2009 and 30 September 2015 imports under tariff heading 1701, expressed as 'white sugar equivalent', from members of the ACP countries signatory

[274] *Ibid.*
[275] *Ibid.*
[276] *Ibid.*
[277] Ref. note 98 *supra* at pgs. 20 to 21.
[278] *Ibid.*
[279] *Ibid.*
[280] In addition, imports from ACP countries signatories to the Cotonou Agreement shall also be subject to safeguard measures provided for under art. 34 of the IEPA.
[281] 'Marketing year' means the period between 1 October and 30 September.

to the Cotonou Agreement exceed 3.5 million tonnes, imports exceeding this quota shall attract the applied MFN or 'general' duty[282]. Any volume of sugar beyond the quota shall be regarded as causal to a disturbance in the EC sugar market[283]. The quota is further qualified by the following *de minimis* provision: if imports under heading 1701 originating in the ACP region, but not recognised by the United Nations ('UN') as least developed countries ('LDCs'), exceed 1.38 million tonnes for the 2009/2010 marketing year, 1.45 million tonnes for the 2010/2011 marketing year and 1.6 million tonnes for each of the 2011/2012, 2012/2013, 2013/2014 and 2014/2015 marketing years, all imports from the SADC EPA states, including Swaziland, beyond these levels for each respective marketing year shall attract the applied MFN duty[284]. Once again, any volume of sugar beyond these quotas shall be deemed to cause a disturbance in the EC sugar market[285].

In this regard, the following points must be noted[286]:

- Irrespective of whether the volumes imported under heading 1701 from LDC's are taken into account for determining the quota-fill, even once the quota levels have been exceeded no LDC will be subject to paying the applied MFN duty. Exports from LDCs will continue to enter the EC duty-free.

- the MFN duty will only apply until the end of the marketing year during which it was introduced[287].

- For purposes of imposing the bilateral safeguard mechanism pursuant to article 34 of the IEPA, effective from 1 October 2015, disturbances in the sugar market of the EC will be regarded as to arise where the EC white sugar market price depreciates during 'two consecutive months below 80 percent of the European market price for white sugar prevailing during the previous marketing year'[288].

- For the period between 1 October 2009 and 30 September 2012 no preferential import license shall be granted for imports under heading 1701 'unless the importer undertakes to

[282] Ref. note 98 *supra* at pgs. 20 to 21.
[283] IEPA Annex 2 'Customs Duties on Products Originating in SADC EPA States', at par. 5.
[284] Ref. note 98 *supra* at pgs. 20 to 21.
[285] *Ibid.*
[286] *Ibid.*
[287] *Ibid*.
[288] IEPA Annex 2 'Customs Duties on Products Originating in SADC EPA States', at par. 6.

purchase such products at a price not lower than 90 percent of the reference price set by the EC party for the relevant marketing year'[289].

For all practical purposes however, it can be assumed that exports of sugar from Swaziland, as a non-LDC, to the EC market will be on the basis of duty-free quota free market access[290]. Imports into the BLNS of EC products listed under heading 1701 are scheduled in Table 1, List 4 of Annex 3, which implies that no tariff concessions were made for the benefit of such imports. Tariff heading 1701 is excluded from any tariff-phase down commitments made under Annex 3[291].

With regard to South Africa's position, the TDCA is currently undergoing a scheduled review, which has galvanised efforts to have sugar included in the agreement[292]. The Review Clause of the TDCA states that market access for products initially excluded from access arrangements will be revisited[293]. A delegation from the South African sugar industry, supported by the DTI, met with EC officials as well as members of the European Parliament in July 2010 to reignite the issue[294].

Following discussion with the South African government regarding the outcome of the sugar sector's EU visit, it was agreed that the industry should consider a quota arrangement[295]. In this context it was noted that a quota equal to Swaziland's access to the SACU market as detailed above will contribute towards addressing some of market and investment inequities created within SACU and SADC by the current market access arrangements[296]. The potential for preference erosion among less developed ACP sugar producing countries has been considered as well, and, to minimise the risk to these nations, it was contended that that preferential market access for South Africa should be granted outside of the EU's current arrangement, i.e. in the form of a quota[297].

4.4.3 Free-Trade Agreement between SACU and EFTA

a. Background

[289] IEPA Annex 2 'Customs Duties on Products Originating in SADC EPA States', at par. 8.
[290] Ref. note 98 *supra* at pgs. 20 to 21.
[291] IEPA Annex 3, at par. 8.
[292] Ref. note 262 *supra* at pg. 2 to 3.
[293] *Ibid.*
[294] *Ibid.*
[295] *Ibid.*
[296] *Ibid.*
[297] *Ibid.*

In June 2006, SACU members jointly entered into negotiations with EFTA, consisting of Iceland, Liechtenstein, Norway and Switzerland[298]. An FTA agreement was concluded on 1 May 2008 and notified to the WTO's CRTA on 29 October 2008 under article XXIV of GATT 1994[299]. A factual review thereof took place on 19 and 20 November 2009[300].

The scope of agreement covers trade in industrial products, including fish and other marine products, and processed agricultural goods[301]. The principal objective of the agreement is to achieve liberalisation of trade in goods in conformity with the relevant WTO provisions, i.e. the EFTA members will grant the SACU countries duty-free entry for all industrial goods from the entry into force of the agreement, while the SACU members undertake to dismantle their tariffs progressively over a period not exceeding nine years[302].

The agreement also includes trade-related disciplines as well as an article on special treatment for Botswana, Lesotho, Namibia, and Swaziland[303]. Moreover, the agreement contains provisions on the protection of intellectual property rights, as well as cooperation regarding investment, services, and government procurement, as well as chapters on economic cooperation and technical assistance, and on institutional and procedural provisions[304]. A Joint Committee supervises the application of the agreement[305].

b. ***Sugar***

In addition to the principal agreement, the individual EFTA members and SACU concluded bilateral agreements on basic agricultural products, which form part of the instruments creating the FTA. Three separate agricultural trade agreements have been signed, i.e. between SACU and Iceland, SACU and Norway as well as between SACU and Switzerland, which is also applicable to the Principality of Liechtenstein.

- <u>*SACU-Iceland Agricultural Trade Agreement ('ATA')*</u>

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[298] Ref. note 172 *supra* at pg. 14.
[299] *Ibid.*
[300] *Ibid.*
[301] *Ibid.*
[302] *Ibid.*
[303] *Ibid.*
[304] *Ibid.*
[305] *Ibid.*

Iceland allows sugar originating from SACU to enter Iceland free of tariff duty. No reciprocal concession has been made by SACU[306].

- *SACU-Norway ATA*

SACU sugar, other than sugar used for feed purposes, enters Norway free of any tariff duty. No reciprocal concession was made by SACU[307].

- *SACU-Switzerland Agricultural Trade Agreement*

Switzerland has granted sugar imported from SACU preferential market access to the extent of CHF22 per 100 kg gross below the applied MFN or 'general' duty in force at the time of importation. No reciprocal concession was made by SACU[308].

4.4.4 Preferential-trade agreement between SACU and MERCOSUR

During 2008, SACU and MERCOSUR, consisting of Argentina, Brazil, Paraguay and Uruguay, concluded negotiations on a preferential trade agreement ('PTA')[309]. The agreement was signed by the MERCOSUR members on 15 December 2008, and by SACU member states on 4 April 2009[310]. The agreement replaces the one signed in December 2004, based on the Understanding between SACU and MERCOSUR on the Conclusion of their PTA, which mandated further negotiations aimed at resolving outstanding issues[311]. The PTA has not yet been notified to the WTO, although both parties have indicated their intention to do so in future[312].

The agreement is aimed at promoting trade between the two parties on a select number of products[313]. In addition, it contains provisions on rules of origin and methods of administrative cooperation, trade remedies, technical barriers to trade ('TBTs'), sanitary and phytosanitary measures ('SPS'), further market access, settlement of disputes, mutual administrative assistance

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306 Ref. note 98 *supra* at pgs. 21 to 22.
307 *Ibid.*
308 *Ibid.*
309 Ref. note 172 *supra* at pgs. 14 to 15.
310 *Ibid.*
311 *Ibid.*
312 *Ibid.*
313 *Ibid.*

between customs authorities, as well as legal and institutional provisions[314]. The agreement established a Joint Administrative Committee ('JAC'), which supervises the administration and application thereof[315].

MERCOSUR has not granted any preferential market access to SACU in terms of the SACU-MERCOSUR PTA. Similarly no concessions have been made on sugar by SACU in favour of MERCOSUR. The agreement awaits ratification by all Parties before it can enter into force.

4.4.5 Relations with the US

AGOA, contained in the US Trade and Development Act of 2000 offers duty-free access to some manufactured products originating in 37 designated sub-Saharan African countries[316]. The Act originally covered the eight year period from October 2000 to September 2008, but amendments in July 2004 extended the AGOA to 2015[317]. At the same time, a special dispensation relating to apparel was extended to 2007, but has since expired[318].

Duty-free access to the US market under the combined AGOA-GSP programme now covers approximately 7 000 product tariff lines, including some 1 800 product tariff lines that were added to the GSP by the AGOA[319]. These include items such as apparel and footwear, wine, certain motor-vehicle components, a variety of agricultural products, chemicals, and steel[320].

To be eligible for AGOA benefits, a number of conditions are laid out, including proven progress in establishing a market-based economy, commitment and action in developing political pluralism and the rule of law, eliminating discriminatory barriers to US trade and investment; adequate protection of intellectual property, combating corruption, protecting human rights, e.g. those specifically

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[314] *Ibid.*
[315] *Ibid.*
[316] African countries eligible for preferential treatment under the AGOA receive GSP treatment, exempt from the 'competitive needs' limitations of the general GSP treatment by the US, in the US market until the expiry of the AGOA (in contrast to general GSP treatment, which is renewed on an annual basis in the US), and will qualify for an expanded list of GSP products beyond that available to other countries. All eligible African countries are entitled to duty-free and quota-free access to the U.S. market for apparel made from US fabric, yarn or thread. The legislation provides for an upper limit by volume on such imports, rising from 1.5percent of 'aggregate square metre equivalent' of all US apparel imports to 3.5 percent, over an eight year period.
[317] Ref. note 172 *supra* at pgs. 13 to 14.
[318] *Ibid.*
[319] *Ibid.*
[320] *Ibid.*

related to labour, particularly the abolition of certain child labour practices.[321] The five SACU members were declared eligible for tariff preferences under the AGOA on 31 December 2001[322].

The US Trade Act of 2002 ('AGOA II') expanded preferential access for imports from beneficiary sub-Saharan African countries by modifying certain provisions of the AGOA[323]. On 16 July 2008, SACU and the US signed a Trade, Investment, and Development Agreement ('TIDCA')[324]. This is a cooperation agreement aimed at promoting investment and expanding and diversifying trade between SACU and the US[325].

The TIDCA aims to promote increased contact between the private sectors of both sides, as well as to promote trade and investment between SACU members and the US by, *inter alia*, looking at the possibility of concluding trade- and investment-enhancing agreements between the two sides, monitoring trade and investment relations between them, identifying and removing barriers to trade and investment, and dealing with trade-capacity-building assistance or cooperation[326].

The agreement further provides for a consultative process to deal with any matter relating to trade and investment between the two sides. It also provides for cooperation and the possibility of concluding further agreements in the areas of SPS, TBT, customs cooperation, and trade facilitation[327].

4.4.6 African Union ('AU') and African Economic Community ('AEC')

The five SACU countries are members of the AU, which succeeded the Organisation of African Unity (OAU) in July 2002. The AU aims to become, in the longer run, an economic and political union, and is being structured largely on the model of the EU. Its organs comprise the Assembly, composed of Heads of State and Government, the Council of Ministers, the Pan-African Parliament, the Commission, including eight commissioners, each responsible for a portfolio, and the Peace and Security Council ('PSC'). The AU will also comprise an African central bank, an African monetary

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[321] African Growth and Opportunity Act online information, last visited on 23 July 2011, at www.agoa.gov/index.html
[322] Ref. note 172 *supra* at pgs. 13 to 14.

[323] *Ibid.*
[324] *Ibid.*
[325] *Ibid.*
[326] *Ibid.*
[327] *Ibid.*

fund, an African investment bank, a Court of Justice, an Economic, Social and Cultural Council ('ESCC') and specialized technical committees[328].

In June 1991, the OAU founded the African Economic Community ('AEC'). Under the AU, the AEC is to become a customs and monetary union in six stages, over a 34 year period[329]. The AEC is encountering several difficulties, however, including conflicts, institutional and budgetary insufficiencies, and weak commitment by its members[330]. At the last AU Summit, held in Addis-Ababa in February 2008, the concept of a United States of Africa was revived, which may re-ignite the continent-wide economic integration[331].

One of the main initiatives under the AU is the New Partnership for African Development ('NEPAD'), which has its own Secretariat, based in South Africa. It resulted from the fusion of two other plans proposed for Africa, i.e. the Omega Plan and the Millennium Africa Plan[332]. The goals of NEPAD are to halt the marginalization of Africa in the globalization process, to eradicate poverty, and to promote accelerated growth and sustainable development[333]. It places the private sector and investment promotion at the centre of its project, and aims at trade integration and improved access to the developed countries markets[334].

To respond to the objectives defined by the AU and the NEPAD, an EC-Africa partnership to develop trans-African connections was launched in 2006[335]. A total of €5.6 billion from the tenth European Development Fund ('EDF 2008-13') will support regional development in the priority areas of transport, energy, water, information technology, and telecommunication networks.[336]

4.4.7 Generalized System of Preferences (GSP)

SACU members also benefit, in their individual capacities, from non-reciprocal preferential treatment from many developed and some developing countries under the GSP[337].

[328] Ref. note 172 *supra* at pgs. 11 to 12.
[329] *Ibid.*
[330] *Ibid.*
[331] *Ibid.*
[332] *Ibid.*
[333] *Ibid.*
[334] *Ibid.*
[335] *Ibid.*
[336] *Ibid.*
[337] SACU countries are not signatories to the Agreement on the Global System of Trade Preferences ('GSTP') among Developing Countries.

5. Seminal Developments

5.1 Tripartite Free Trade Agreement

In June 2011 negotiations were launched toward the formation of the Tripartite FTA, as mentioned above[338]. The final agreement is proposed to be concluded on a tariff-free, quota-free, exemption-free basis, and is set to combine the existing FTAs of COMESA, EAC and SADC into a single trading bloc[339]. By 2012, all three regional economic communities ('RECs') should have eliminated any exemptions or sensitive lists in their respective trading regimes[340]. The Tripartite FTA is expected to achieve a number of key objectives envisioned to facilitate economic development across the African continent. These are[341]:

- To cushion and control internal and external trading shocks;
- To enlarge markets for goods and services for members;
- To increase the critical mass of trading facilities;
- To eliminate the problem of multiple memberships;
- To promote inter-REC and intra-African trade; and
- To enhance the economic and social wellbeing of the people in the region.

The Tripartite FTA is further expected to stimulate the formation of other FTAs in other regions of Africa and thus fast track the establishment of a so-called 'Grand Africa FTA' in accordance with the recommendation of the sixth Ordinary Session of the AU Council of Ministers, which was held in Kigali from 29 October to 2 November 2010[342].

At the summit held in South Africa in June, heads of state adopted a developmental approach to the integration process that anchors on three pillars namely:

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[338]Fundira, T,. (10 August 2011), 'The Tripartite FTA from a development perspective', *TRALAC Newsletter August 2011*, Stellenbosch: South Africa, last visited on 12 Auguts 2011, at http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=108238&cat_id=1030

[339] United Nations Economic Commission for Africa, (2 May 2011), *Final report: study on the establishment of inter-REC's free trade areas in Africa drawing lessons from the COMESA-SADC-EAC FTA experience,* Addis Ababa: Ethiopia, at pg. 1.

[340] *Ibid.*

[341] *Ibid.*

[342] *Ibid.*

- Market integration;
- Infrastructure development; and
- Industrial development.

It is anticipated that by positioning half of Africa as one large common market, the establishment of the FTA will allow the region to benefit far more from global trade flows, and to attract greater investment and large-scale production[343]. Furthermore, this FTA will allow for increased intra-African trade which is currently very limited[344]. There is therefore need for the FTA to also promote and increase Africa's share of global trade, which despite experiencing exceptional growth in the past decade, remains low and is heavily concentrated in natural resources[345].

Looking at the envisaged tripartite FTA, this should be viewed as more than just tariff liberalisation[346]. There is a need for ensuring that supply-side constraints that have perpetually plagued African trade are eliminated[347]. There is need for strong linkages in the supply chain and a movement away from the production and trade of similar primary resource-based goods which have very little value addition[348]. Focus should be more on the diversification of the export base through the production of high value-added goods and the promotion of intra-regional trade[349].

On this notion, the 2011 Africa Competitiveness Report notes that African countries have much to gain by diversifying exports and by further opening up regional trade[350]. There is need for African countries to be integrated into the world economy and have a strong, sophisticated, and well-diversified export sector in order to maintain and achieve sustained growth[351]. The report further notes that there is need to create an enabling environment to attract foreign direct investment ('FDI') into high-growth potential sectors, beyond mining as this will help Africa to improve competitiveness of its economies and raise productivity in order to achieve robust, sustained, and shared growth. This in the long run will ensure that Africa becomes resilient to external shocks[352].

343 Ref. note 344 *supra.*
344 *Ibid.*
345 *Ibid.*
346 *Ibid.*
347 *Ibid.*
348 *Ibid.*
349 *Ibid.*
350 *Ibid.*
351 *Ibid.*
352 *Ibid.*

As far as the sugar industry is concerned, regulation is part of what has allowed it to survive in the context of the heavy distortions existing within world market. With reference to the Tripartite FTA, and due to the fact that both SACU and SADC are net-sugar exporting regions, negotiations should ensure that sugar producers within SACU benefit from the establishment of the Tripartite FTA, whilst at the same time taking into account the absence of policy harmonisation in the wider region and preventing destructive competition from manipulated world sugar prices through subsidising of production, and import quotas by other countries. Consequently, SADC industries have requested that the trade in sugar under the new FTA be treated under a separate dispensation, for the same reasons as those requiring the addition of Annex VII to the SADC Trade Protocol.

5.2 World Organisation for Agriculture

The Group of Twenty ('G20'), currently chaired by the French head of state, Mr. Nicholas Sarkozy, has marked agricultural trade, and price volatile in particular, as a top priority. While visiting French farmland areas on 25 November 2010, Pres. Sarkozy listed the three key issues that are at the heart of the G20's operations in 2011[353]:

- Firstly, to make progress on regulating agricultural commodity markets through the control of commodity derivative products to restrict the speculative trends observed in 2007 and 2008;

- Secondly, to promote agricultural market transparency. According to Mr. Sarkozy, 'not a single international entity is currently able to assess the reserves of agricultural products in the world, in particular regarding grain'. He further indicated that this lack of transparency is one of the cause of speculation and volatility of agricultural commodity prices; and

- Thirdly, to address the viability of establishing a world organisation for agriculture ('WOA'), whose objective it would be, *inter alia*, to take stock of production prospects in the various regions of the world.

[353] Momagri, (May 2011), *Proposal for the establishment of a World Organisation for Agriculture,* last visited on 18 August 2011, at http://www.momagri.org/UK/press-reports/The-proposal-for-a-World-Organization-for-Agriculture-backed-by-momagri-will-be-presented-at-the-upcoming-G8-Summit-by-President-Abdoulaye-Wade-_912.html

The Dakar Declaration ('the Declaration'), issued following the Dakar Agricole Forum held on 18 and 19 April 2011, directed a call to the G20 to:

> *Establish a World Organisation of Agriculture and Food Security which would be a watch over agency of anticipation and management of agricultural crises, directly attached to the G20 or to the United Nations, and working in synergy with relevant international organizations.*

Taking into account the difficulties encountered with regard to agricultural reform in the ongoing DDA of the WTO, the encompassing mandate of the proposed WOA would be the development of a new global governance system for trade in agricultural commodities. In pursuing this objective, the proposed WOA would stave to[354]:

- Consider agriculture and food as global public goods. Agriculture is a strategic sector for the future of mankind and agricultural price hyper-volatility threatens food security and world peace;

- Set indicative equilibrium prices per agricultural product and per large homogenous economic zone, as producers require visibility to achieve sustainable production. That is to say product prices that match fair compensation levels instead of generalised dumping;

- Determine regulation-free fluctuation ranges around these equilibrium prices and a compulsory negotiation process beyond these ranges;

- Build up intervention reserves to be managed at the global level;

- Initiate a deduction-restitution system per homogenous economic zone. Trade between economic zones would be carried out by applying withdrawals or restitutions between zones when market prices would be outside the fluctuation-free price ranges;

- Encourage investment into poorer countries. In such countries, the reference to equilibrium prices and the definition of fluctuation ranges will make allowances for economic development goals to advance investment;

[354] Dakar Declaration, at pg. 5.

- Implement monitoring and cooperation committees per product, by pooling producing countries and a panel of consumer nations.

- Create a Global Food Security Council. A permanent entity would bring together about twenty nations from the five continents and make all regulation decisions;

- Use steering and decision-making assistance tools, such as the Momagri model;

- Instigating negotiations to reduce financial aid and subsidies based on new foundations.

It is advocated that the implementation of these principles will lead to a cut in export subsidies and national financial aid more effectively than the WTO negotiations, since risks related to market excesses will be curtailed[355].

While the establishment of of said WAO is still in the proposal stages, the clear sentiment is that unrestrained free trade is no longer at the heart of international agricultural policy direction. As stated previously, it is of crucial importance for the South African agricultural sector, including sugar, to be strategic in its pursuit of liberalisation with food security and competitiveness at the core of the decision-making process.

[355] Ref.note 359 *supra.*

6. Conclusion

The South African sugar industry is operating within a distorted global market environment. Being a price taker on the world market and a net surplus producer of sugar will force the industry to sell sugar on the domestic market at export parity pricing. Without sufficient tariff protection and a mechanism providing for surplus removal, it is the view from industry that it will not be able to sustain viable levels of production within such distorted global market. The Sugar Act, read in conjunction with the SIA provides these safeguards to the industry.

Downstream users of sugar in South Africa need to be competitive, against both imported processed products containing subsides sugar as well as the export market where, again, South African products are competing on an uneven playing field. The market for sugar is an abnormal market, justifying intervention as far as protection against abnormally low priced import competition and intervention in support of the industry's access to the world market is concerned, provided that domestic efficiencies are maintained and where possible improved.

Tariff protection afforded to the industry against subsidy-induced abnormally low priced world market prices isolates the industry from such international competition. It is inevitable that the approved elements of government intervention in the market for sugar will impact on the level of competition that could be generated in the marketplace. It is, however, of the utmost importance that an environment is created that will promote optimal domestic market competition based on competitive advantages and efficiencies within the confines of the need for regulatory intervention in the first instance.

It is recognised that measures introduced since the revision of the SIA in 1994 and in 2000 have added to the competitive environment in which the industry operates. Although not intended to influence the pricing of sugar by millers, the notional price without doubt negatively impacts on the pricing of sugar by millers and the level of price competition generated on the domestic market. Increased competition on the local market will drive prices closer to export parity levels and as such nullifies the level of and protection afforded by the tariff. Care should, however, be taken that the approved pillars of support are not eroded.

With regard to South Africa's international commitments, two issues must be regarded as priority concerns, i.e. policy harmonisation within SACU and the negotiation of preferential access to the EU market. The uneven extension of preferential access to sugar producers in the common SACU customs area and also amongst SADC FTA members is not only jeopardising the integrity of the customs union, but is also undermining the efforts of the regional sugar industries to develop a common development policy for the sugar sector, as investment in the regional sugar sector is increasingly bypassing SA in favour of those countries with preferential access to the EU market.

Given the far-reaching effect of RTAs and the exponential expansion thereof, it is of crucial importance that the discrepancies within the SACU sugar sector be addressed, lest they be perpetuated into ever-expanding regional blocs with ever greater consequences for the South African market.