

**The protection of Infant Industries in SACU: The Namibian Poultry Industries  
Case**

by

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## **Dedication**

To my Lord and Saviour, Jesus Christ, for your unfailing love. This has only been possible through you. May it be a symbol of my appreciation for who you are to me.

## Abstract

The Southern Africa Customs Union was first established in 1889 between the Cape of Good Hope and the Orange Free State. It has since undergone extensive change resulting in the current 2002 Agreement which includes an institutional framework. SACU's member states comprise of Botswana, Lesotho, Namibia, South Africa and Swaziland. The Agreement thrives on the principle of free trade within the customs union and common external tariffs on goods entering the customs area. However, as an exception to free trade, article 25(1) of the 2002 Agreement recognises the right of a member state to prohibit the importation or exportation of any goods from its area. This may be done for economic, social, cultural or other reasons as may be agreed upon by the Council. However, article 25(3) prohibits the use of article 25(1) as a means to protect infant industries. As a further exception to free trade, article 26 of the 2002 Agreement recognises the right of all other member states, except South Africa, to protect their infant industries. The protection offered in this article is limited, because the definition of infant industry is not clear as to when the inception of such an industry must be. This causes problems with the application of article 26, especially where an industry was established, but only became operational after the expiry of eight years, or has been established for over eight years on a small scale and needs protection in order to enlarge and intensify its operations.

Due to this shortfall, Namibia used its *Import and Export Control Act 30* of 1994 to protect a key industry in Namibia, the poultry industry. However, according to article 25(3), this may be considered a violation, because Namibia has used its national legislation to protect an infant industry. The key finding of this study is that the protection of infant industries in SACU is not sufficient to cater for the economic needs of the member states. To this end, SACU must consider allowing national legislation to supplement and monitor infant industry protection in the member states' areas. In addition, SACU's institutional framework, which is not fully operational at present, must be established to function fully, as this may help address some of the issues in SACU.

## Opsomming

Die Suider-Afrikaanse Doeane-Unie (SADU) is in 1889 tussen die Kaap die Goeie Hoop en die Oranje Vrystaat gesluit. Intussen het dit ekstensiewe veranderings ondergaan, met die mees onlangse die 2002 Ooreenkoms, wat 'n institusionele raamwerk insluit. SADU se lede is Botswana, Lesotho, Namibië, Suid-Afrika en Swaziland. Die Ooreenkoms floreer op die beginsel van vrye handel binne SADU en dieselfde eksterne tariewe op goedere wat die unie binnekom. 'n Uitsondering op die vrye handel beginsel is egter artikel 25(1) van die 2002 Ooreenkoms, wat die reg van 'n lidland erken om die invoer of uitvoer van enige goedere te verbied. Dit mag gedoen word vir ekonomiese, sosiale, kulturele of ander redes soos deur die Raad ooreengekom. Artikel 25(3) verbied egter die gebruik van artikel 25(1) as a manier om jong industrieë te beskerm. As 'n verdere uitsondering op vrye handel, erken artikel 26 van die 2002 Ooreenkoms die reg van alle ander lidlande, behalwe Suid-Afrika, om hul jong industrieë te beskerm. Die beskerming wat in hierdie artikel verteen word is beperk, omdat die definisie van 'n jong industrie nie so duidelik is oor wat die ontstaansdatum van so 'n jong industrie is nie. Dit veroorsaak probleme met die toepassing van artikel 26, veral waar 'n industrie reeds bestaan, maar slegs na die vervaldatum van agt jaar operasioneel geword het, of waar die industrie vir meer as agt jaar al op 'n klein skaal opereer en beskerming benodig om uit te brei.

As gevolg van hierdie tekortkominge, het Namibië die plaaslike *Import and Export Control Act 30* van 1994 gebruik om 'n sleutel industrie in die land te beskerm, naamlik die pluimvee industrie. Na aanleiding van artikel 25(3) van die 2002 Ooreenkoms kan dit egter as 'n oortreding beskou word, omdat Namibië nasionale wetgewing gebruik het om 'n jong industrie te beskerm. Die belangrikste bevinding van hierdie studie is dat die beskerming van jong industrieë in SADU nie voldoende is vir die ekonomiese behoeftes van lidlande nie. Daarom moet SADU dit oorweeg om toe te laat dat nasionale wetgewing die beskerming van jong industrieë in lidlande se gebiede monitor en beskerm. SADU se operasionele raamwerk, wat nog nie ten volle operasioneel is nie, moet ook volledig geïmplementeer word, sodat sekere tekortkoming van SADU aangespreek kan word.

## **Keywords**

Infant industry protection, Southern Africa Customs Union, tariffs and trade, poultry industry, industrialisation

## **Sleutelwoorde**

Jong nywerheid beskerming, Suid Afrika Doene vereniging, tariewe en handel, pluimfee nywerheid, industrialisasie

## TABLE OF CONTENTS

<b>List of abbreviations</b>	<b>x</b>
<b>1 Infant industry protection: Introduction and problem statement</b>	<b>1</b>
<b>1.1 The definition and history of infant industry protection</b>	<b>1</b>
1.1.1 <i>Classical trade and IIP</i>	2
1.1.2 <i>How IIP was to be achieved</i>	3
<b>1.2 Conclusion</b>	<b>4</b>
<b>1.3 The World Trade Organisation and IIP</b>	<b>4</b>
1.3.1 <i>Dumping and IIP under the WTO</i>	6
1.3.2 <i>Conclusion</i>	7
<b>1.4 The Southern African Customs Union and IIP in Namibia</b>	<b>7</b>
1.4.1 <i>Conclusion</i>	9
<b>1.5 The position of IIP in Namibia</b>	<b>9</b>
<b>1.6 Research question</b>	<b>10</b>
<b>1.7 Outline of the study</b>	<b>10</b>
<b>1.8 Research methodology</b>	<b>11</b>
<b>1.9 Objectives of the study</b>	<b>11</b>
<b>2 An analysis of SACU provisions with respect to IIP</b>	<b>12</b>
<b>2.1 Introduction</b>	<b>12</b>
<b>2.2 Customs unions: a general overview</b>	<b>12</b>
2.2.1 <i>The definition of a customs union</i>	13
2.2.2 <i>Historical development of Southern Africa Customs Union</i>	14
2.2.3 <i>The scope of the 2002 Agreement</i>	15
2.2.4 <i>SACU institutions</i>	16
2.2.5 <i>The advantages of the 2002 SACU Agreement</i>	19
2.2.6 <i>The disadvantages of the 2002 SACU Agreement</i>	20
<b>2.3 An analysis of the SACU provisions relating to IIP</b>	<b>21</b>
2.3.1 <i>Free movement of goods</i>	21

2.3.2	<i>Customs duties on goods imported from outside the CCA</i>	22
2.3.3	<i>Customs co-operation and legislation by member states</i>	23
2.3.4	<i>Import and export prohibitions</i>	24
<b>2.4</b>	<b><i>IIP under SACU</i></b>	<b>25</b>
<b>2.5</b>	<b><i>IIP and regional integration in SACU</i></b>	<b>27</b>
<b>2.6</b>	<b><i>Dumping in SACU</i></b>	<b>27</b>
2.6.1	<i>The requirements for SACU and ITAC to initiate investigations into dumping</i>	28
<b>2.7</b>	<b><i>Industrial development in SACU</i></b>	<b>30</b>
<b>2.8</b>	<b><i>Conclusion</i></b>	<b>30</b>
<b>3</b>	<b><i>The position of IIP in Namibia</i></b>	<b>32</b>
<b>3.1</b>	<b><i>Introduction</i></b>	<b>32</b>
<b>3.2</b>	<b><i>Namibia's history</i></b>	<b>32</b>
3.2.1	<i>Political history</i>	32
3.2.2	<i>Economic history</i>	34
3.2.3	<i>The structure of the Namibian economy</i>	34
<b>3.3</b>	<b><i>Namibia's membership in SACU</i></b>	<b>35</b>
<b>3.4</b>	<b><i>Namibia's policy and legislation on IIP</i></b>	<b>36</b>
3.4.1	<i>Pre and post-independence</i>	36
3.4.2	<i>Namibia's policies and IIP</i>	37
3.4.3	<i>The Import and Export Control Act 30 of 1994</i>	38
<b>3.5</b>	<b><i>IIP and the Namibian industry</i></b>	<b>42</b>
<b>3.6</b>	<b><i>The Namib Poultry Industries case – general overview</i></b>	<b>43</b>
3.6.1	<i>The Namib Poultry Industries - case study</i>	44
<b>3.7</b>	<b><i>The application of SACU IIP provisions to the case study</i></b>	<b>46</b>
<b>3.8</b>	<b><i>Conclusion</i></b>	<b>47</b>
<b>4</b>	<b><i>Summary and conclusions</i></b>	<b>49</b>
<b>4.1</b>	<b><i>Introduction</i></b>	<b>49</b>

<b>4.2</b>	<b><i>Recommendations</i></b>	<b>51</b>
<b>4.3</b>	<b><i>Conclusion</i></b>	<b>52</b>
	<b>Bibliography</b>	<b>54</b>

## List of abbreviations

BLNS	Botswana, Lesotho, Namibia, Swaziland and South Africa
BYIL	British Yearbook of International Law
CCA	Common Customs Area
CIA	Central Intelligence Agency
CoM	Council of Ministers
EU	European Union
GATT	General Agreement on Tariffs and Trade
IECA	Import and Export Control Act
IIP	Infant Industry Protection
ITAA	International Trade Administration Act
ITAC	International Trade Administration Commission
MTI	Ministry of Trade and Industry
NEEEF	New Equitable Economic Empowerment Framework
NDP	National Development Plan
NPI	Namib Poultry Industries
SACOB	South African Chamber of Business
SACU	Southern Africa Customs Union
SAPA	South African Poultry Association
SWA	South-West Africa
TB	Tariff Board
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
UNECA	United Nations Economic Commission for Africa
WTO	World Trade Organisation

# 1 Infant industry protection: Introduction and problem statement

## 1.1 The definition and history of infant industry protection

Infant industry protection (hereafter IIP) entails the protection of new industries in a country at the early stages of its economic development.<sup>1</sup> It is submitted<sup>2</sup> that such industries, at their inception,<sup>3</sup> are small and as such cannot produce at the same level of average cost as the established industries. As a result, the larger industries that have a better comparative advantage<sup>4</sup> can sell their products at cheaper prices, causing unfair competition for the smaller industries that are just starting up.

The case for IIP was first made by Alexander Hamilton in 1791. In his “Report on Manufacturers”,<sup>5</sup> Hamilton called for the protection of United States’ industries against imports from Great Britain.<sup>6</sup> The report proposed, amongst others, higher import duties on certain final goods, lower import duties on certain raw materials and production subsidies for selected industries.<sup>7</sup>

In a follow-up article by Irwin,<sup>8</sup> it is indicated that, although modest in its initial report on tariff recommendations, Hamilton’s report is heralded as the quintessential American statement against the *laissez faire* doctrine of free trade. This is so because it called for active government interventionist policies, including protectionist tariffs,<sup>9</sup> to promote industrialisation.<sup>10</sup> Hamilton’s tariff recommendations were implemented within five months of delivery.<sup>11</sup>

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1 Grimwade *International Trade* 305.

2 Grimwade *International Trade* 305.

3 Although, in terms of the definition of SACU, it is not clear when such inception is, or should be.

4 Tucker *Economics for Today* 774 defines comparative advantage as the ability to produce a product at a lower opportunity cost than another country.

5 This report was as a result of the need to grow America’s then small, domestic manufacturing industry.

6 Hamilton *Report on Manufacturers* 4 para V.

7 Irwin 2004 *Journal of Economic History* 803.

8 Irwin 2004 *Journal of Economic History* 803.

9 These are tariffs imposed in order to protect a domestic industry from cheaper foreign imports.

10 Northrup *American Economy* 242.

11 Irwin 2004 *Journal of Economic History* 802.

Influenced by Hamilton, Fredrick List,<sup>12</sup> a German political economist, improved the infant industry argument in his book, “*The National System of Political Economy*”. According to List, countries go through five stages during their economic development. These are the savage stage, the pastoral stage, the agricultural and manufacturing stage, and lastly, the manufacturing and commercial services stage.<sup>13</sup> He further stated that this process is not an automatic or easy transition.<sup>14</sup> This is so because all these processes are subject to external factors such as competition from foreign competitors, which at most times, developing countries might not have control of. As a result, infant industry protection becomes necessary. Although List regarded free trade as the ultimate goal, he argued that temporary trade protection was needed to equalise relations among major powers.<sup>15</sup> List<sup>16</sup> also noted that, in the past, no country managed to industrialise without protective barriers. The United Kingdom, for instance, removed controls on trade only after achieving industrial prowess.<sup>17</sup> List’s argument that early industries needed government support was eventually accepted by models of classical trade theorists such as John Stuart Mill.<sup>18</sup>

### 1.1.1 Classical trade and IIP

The classical trade theorists<sup>19</sup> accepted, but pointed out two undesirable results of IIP, the first one being that raising the prices of goods produced by local manufacturers amasses more income for the producer to the detriment of the consumer who pays higher prices. Secondly, they argue that protection reduces the focus on existing comparative advantages.<sup>20</sup> In other words, a country that is probably better at producing one product will not thrive through its comparative advantage because another country will be seeking protection.

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12 Frieden *Global Capitalism* 65.

13 For more details on the stages, see List *National System of Political Economy* 166.

14 List *National System of Political Economy* 166.

15 Irwin 1994 *Journal of Law and Economics* 75-108.

16 Irwin 1994 *Journal of Law and Economics* 75-108.

17 Frieden *Global Capitalism* 65.

18 Frieden *Global Capitalism* 65.

19 For a detailed discussion on classical trade theory, see Golub and Hsieh *Review of International Economics* 221.

20 This is where a nation specialises in a trade which it is best at and which cost less to produce as compared to another nation: Frieden *Global Capitalism* 66.

With regard to the first concern of the classical trade theorists, Namibia, as an example, has tried to rectify this concern. It has done so by requiring that local manufacturers, whose industries have been protected, set prices for their products in consultation with the Ministry of Trade.<sup>21</sup> With respect to the second concern, a possible solution, amongst others,<sup>22</sup> is that IIP is only justified until such a time that the protected industry develops the necessary capacity to compete with similar industries.<sup>23</sup>

### *1.1.2 How IIP was to be achieved*

List and Mill<sup>24</sup> both proposed protection as a temporary measure which should only be confined to the early stages of an industry. Thereafter, it should be removed gradually until the industry has developed to such an extent that it can fairly compete with other similar, but advanced, industries. Of note is that List did not call for protection of all industries during their inception phases, but rather that protection should only be granted to select industries<sup>25</sup> earmarked to address a national or public interest.<sup>26</sup> The rationale for this reasoning is that essentially, industries should be competitive enough and thrive without the government's intervention. Therefore, the government, in an effort to address a national interest, need only intervene at the inception of such industries to protect them from external competition that may compromise its chances of growth. Further, Flatters and Stern<sup>27</sup> state that, where an infant industry is protected for a prolonged period of time, it becomes a permanent infant industry and imposes long term costs on the domestic consumers. Therefore IIP must be temporary to allow the infant industry to mature and become viable without protection.<sup>28</sup>

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21 Steenkamp 2013 *Ministry of Trade Interview: Import and Export Permit Department*.

22 Such as the need to protect an infant industry for industrialisation, economic enhancement and national or food security.

23 Roux 2012 [www.namibian.com](http://www.namibian.com).

24 List *National System of Political Economy* 166.

25 List *National System of Political Economy* 166.

26 Such as economic advancement, industrialisation and national or food security.

27 Flatters and Stern *Trade and Industrial Policy* 11.

28 Melitz 2004 *Journal of International Economics* 178.

## 1.2 Conclusion

Infant industry protection is indeed a vital tool that may be used to address a number of national interests such as economic development, industrialisation and national or food security. However, its application must not be oversimplified to an extent that governments fail to take cognisance of the concerns highlighted above.

## 1.3 The World Trade Organisation and IIP

The World Trade Organisation (hereafter WTO) is an international body, which deals with the global rules of international trade between nations.<sup>29</sup> Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.<sup>30</sup> However, the WTO<sup>31</sup> appreciates that not all countries started from an equal economic and developmental base when the General Agreement on Tariffs and Trade (hereafter GATT) was first put in place in 1947. Some countries, like the United States of America, had a highly developed economy; others, such as West Germany, were destroyed in the war, while others were simply underdeveloped.<sup>32</sup> It is for this reason that GATT has continued to allow the protection of domestic industries through tariff and non-tariff barriers despite its primary goal of trade liberalisation.<sup>33</sup> This is to ensure that developing countries secure a share in the growth of international trade, commensurate with the needs of their economic development.<sup>34</sup>

The WTO under article XIX provides for safeguard measures. Safeguard measures authorise member states to impose temporal import restrictions which would ordinarily be a violation of its WTO obligations under article II.<sup>35</sup> More specifically, article XIX outlines three provisions under which governments may restrict trade. The first is Category A, which allows the use of measures<sup>36</sup> to attain noneconomic objectives such as public health or national security. The second is Category B, which contains

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29 Jones and Whittingham *Understanding the World Trade Organisation* 10.

30 Jones and Whittingham *Understanding the World Trade Organisation* 10.

31 Which was formed as a result of the *General Agreement on Tariffs and Trade* (1947) (hereafter GATT); see the Preamble of GATT, establishing the WTO.

32 Jackson *Restructuring the GATT System* 9.

33 Furtan *Moral Hazard* 4.

34 The Preamble of GATT, establishing the WTO

35 Article II of GATT contains the scope of the Agreement; see also Bown *WTO Safeguards* 4.

36 Such as phyto-sanitary conditions or a ban on imports for certain types of weapons.

articles aimed at ensuring fair competition by use of countervailing<sup>37</sup> and anti-dumping duties,<sup>38</sup> and the third is Category C, which permits intervention in trade for economic reasons such as balance of payments difficulties<sup>39</sup> or infant industry protection. However, the above provisions may only be invoked when there is material injury to the industry concerned.<sup>40</sup> The rationale behind the above provisions is that governments should have the right to step in, only when competition becomes so vigorous as to injure domestic competitors.<sup>41</sup>

In light of the above, the WTO Appellate body in the United States – Definitive Safeguard Measures on Import of Circular welded Carbon Quality Line Pipe from Korea case<sup>42</sup> emphasised that:

Safeguard measures unquestionably, give a WTO Member the possibility, as trade is liberalised, of resorting to an effective remedy in an extraordinary situation that in the judgment of that member, makes it necessary to protect a domestic industry.

### 1.3.1 Dumping and IIP under the WTO

Incidental to IIP is the practice of dumping.<sup>43</sup> Muller<sup>44</sup> traces the history of dumping and dates it to the end of the 19<sup>th</sup> and beginning of the 20<sup>th</sup> century where countries

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37 Elliot *Tariff Procedures* 174 defines countervailing duties as actions against imported products which are subsidised by a foreign government, but cause injury to a domestic industry.

38 Elliot *Tariff Procedures* 171 defines anti-dumping duties as protectionist tariffs that the government may impose on foreign imports that it believes are below fair market value, taking into account factors such as cost of production and foreign market value.

39 Tucker *Economics for Today* 783 defines balance of payments as a bookkeeping record that records all international transactions between a country and other countries during a period of time. This includes the value of a nation's spending inflows and outflows made by individuals, firms, and governments.

40 Krishna *Anti-dumping* 21 states that the basic requirements to determine material injury is that there must be an objective examination of both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products. The authorities must further consider if there has been significant price-undercutting by dumped imports. Krishna further states that, although the list is not exhaustive, the factors to consider where there has been an impact on the domestic industry are the following: actual and potential decline in output, sales, profits, market share, productivity, return on investments, or utilisation of capacity, factors affecting domestic prices, magnitude of margin of dumping, actual and potential negative effects on cash flow, inventories, employment, wages, growth, and the ability to raise capital investments.

41 Hoekman "The WTO" 44; see Buchan "Government Policy" 230-232 for an explanation on the rationale for government intervention.

42 *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* AB-2001-9 WT/DS202/AB/R (15 February 2002).

began to enter into anti-dumping agreements.<sup>45</sup> He states that the introduction of anti-dumping legislation<sup>46</sup> resulted from experience by a number of countries whose industries had suffered damages from foreign competition often selling at prices below the cost of production.<sup>47</sup> The result was that overall productivity and investment strength of the domestic industry was weakened.<sup>48</sup> Moore<sup>49</sup> adds that, in terms of article VI of GATT, dumping is a distortionary practice which must be combated through discriminatory duties that align foreign prices with their normal value.<sup>50</sup> In the same vein, Stegeman<sup>51</sup> states that:

Antidumping is inherently protectionist and should be thought of in the same way as other forms of protection and as just another device for assisting domestic industry against competition from imports.

Therefore, article VI of GATT allows member states to use antidumping duties<sup>52</sup> to balance the margin of dumping, provided material injury to domestic industries is shown.<sup>53</sup> This was re-affirmed by the WTO Director-General Pascal Lamy,<sup>54</sup> who stated that:

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43 The *WTO Anti-dumping Agreement* (1994) in Article 2.1 states that a product is to be considered as being dumped, i.e. when introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

44 Muller, Nicholas and Neumann *EC Anti-dumping Law* 3.

45 According to the WTO 2013 [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm8\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm), these are agreements that focus on how governments can or cannot react to dumping. In other words anti-dumping agreements discipline anti-dumping actions. This means that in order for a government to act against dumping, it must show that there is material injury to the domestic industry.

46 The WTO 2013 [www.wto.org](http://www.wto.org) defines anti-dumping legislation as the national anti-dumping laws that a country puts in place to address dumping.

47 Nyaungwa 2013 [www.economist.com](http://www.economist.com).na (2) reported that the President of the Namibia Chamber of Commerce and Industry noted the following: "You can go to any South African retailer in South Africa and you will see that the prices you get there are the same prices that we get here in Namibia. Clearly you cannot sell the same chicken at the same price that you are selling at source. You can't sell at the same price that you sell in Namibia because you have transport costs to add into Namibia. Clearly they don't want Namibian chicken to take off."

48 Booyens *International Trade Law* 84.

49 Moore *Economics of the Doha Round* 5.

50 Being the price actually paid or payable for the imported goods (WTO Date Unknown [www.wto.org](http://www.wto.org))

51 Stegeman *Efficiency Rationale* 35.

52 Anti-dumping duties are penalties imposed on suspiciously low-priced imports, to increase their price in the importing country, thereby protecting local industry from unfair competition (Business Dictionary Date Unknown [www.businessdictionary.com](http://www.businessdictionary.com)).

53 See Krishna *Anti-dumping*.

54 In launching the World Trade Report 2009 in Singapore on 22 July 2009 (WTO 2009 [www.wto.org](http://www.wto.org)).

well-balanced trade contingency measures such as antidumping duties or other safeguards act as safety valves to help WTO members deal with various unanticipated markets situations, although they need to be used with care...especially so in times of crisis.

### 1.3.2 Conclusion

The above exposition reveals that, even though protection of infant industries is not a primary goal of the WTO, it is indeed encompassed in the organisation. It therefore means that member states to the WTO have the right and should take measures to protect infant industries that would otherwise be seriously affected by imports. This can be addressed in a number of ways, among them, the imposition of countervailing or antidumping duties.

## 1.4 *The Southern African Customs Union and IIP in Namibia*

The Southern Africa Customs Union (hereafter SACU) was created to promote economic development by means of regional coordination of trade and the elimination of trade barriers amongst SACU member states.<sup>55</sup> The Agreement created a common external tariff on goods imported into the region from third party countries.<sup>56</sup> In particular, the 1910 Agreement permitted free movement of SACU manufactured goods without imposing duties or quantitative restrictions within SACU.<sup>57</sup> The 1910 Agreement was, however, done away with due to the inequality in the revenue-sharing<sup>58</sup> and the dominance of South Africa in setting the duties imposed.<sup>59</sup> The 1910 Agreement was revised and resulted in the establishment of the 1969 Agreement,<sup>60</sup> which was later reviewed and became known as the 2002 SACU Agreement (hereafter the 2002 Agreement).

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55 *Southern Africa Customs Union Agreement (1910)*: Union of South Africa, Territories of Basutoland and Swaziland, and Bechuanaland Protectorate.

56 Gathii *African Regional Trade Agreements* 223.

57 Blumenfeld *Economic Interdependence* 35.

58 This is the formula used to calculate the percentage of the common revenue each member state is entitled to.

59 McCarthy *Southern African Customs Union* 26.

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

As an exception to free trade, article 25 of the 2002 Agreement recognises the right of each member state to prohibit or restrict the importation or exportation of any goods for economic, social, cultural or other reasons agreed upon by the Council of Ministers (hereafter CoM).<sup>61</sup> Article 25(5) of the 2002 Agreement also requires that member states co-operate in the application of import restrictions within the Common Customs Area (hereafter CCA). As a further exception to free trade, article 26 of the 2002 Agreement<sup>62</sup> recognises a member state's right<sup>63</sup> to protect its infant industry<sup>64</sup> by imposing temporary additional duties on goods imported into its area. In addition, article 26 states that such protection is to enable the infant industry to compete fairly with other producers or manufacturers in the CCA. The proviso to this right, as according to article 26, is that such duties must be levied equally on goods grown, produced or manufactured in other parts of the CCA or outside. This is regardless of whether or not the goods imported from outside the CCA are subject to customs duties applicable upon importation into the CCA.

Further, with regard to dumping, the Tariff Board (hereafter TB)<sup>65</sup> under article 11 may make recommendations to the CoM on customs, anti-dumping, countervailing and safeguard duties on goods imported from outside the CCA. It must, however, be noted that because SACU and its member states are also parties to the WTO, they must have regard to WTO regulations on anti-dumping measures.

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61 The CoM as per Article 8 of the 2002 Agreement consists of at least one minister from each member state and is tasked with the responsibility of overseeing policy direction and the functioning of SACU institutions. Its duty includes approving customs tariffs, rebates, refunds or drawbacks and other trade related matters.

62 To be discussed in detail in chapter two.

63 This right is only extended to Botswana, Namibia, Lesotho and Swaziland.

64 Article 26 of the 2002 Agreement further defines an infant industry as one that has been established in the area of a member state for not more than eight years and may be protected, similarly, for not more than eight years.

65 The Tariff Board as established in Articles 7 and 11 of the 2002 Agreement is an independent institution made up of experts drawn from each member state. It is tasked with the responsibility of making recommendations to the CoM on the level and changes of customs, anti-dumping, countervailing and safeguard duties on goods imported from outside the CCA, although, at present, this function is performed by the International Trade Administration Commission until such a time that SACU's institutional framework is running. This is to be discussed in detail in chapter two.

The above provisions will be discussed in chapter three, in light of the *Import and Export Control Act*<sup>66</sup> of Namibia. This Act empowers the Minister of Trade and Industry to prohibit imports and exports into Namibia in the interest of the nation.

#### 1.4.1 Conclusion

From the above it is clear that the 2002 Agreement provides for infant industry protection. The effectiveness of the protection however, is another matter. This paper thus aims to discuss the effectiveness of the protection offered and the methods of the protection itself. This is done with a view of critiquing the efficiency and utility of the SACU Agreement.

### 1.5 The position of IIP in Namibia

Namibia, being a member state, is a key player within SACU. It is therefore bound by the 2002 Agreement and must conduct its economic affairs in line with the objectives of the 2002 Agreement. However, Namibia also has its own legislation, in particular the *Import and Export Control Act* 30 of 1994.<sup>67</sup> This Act gives the Minister of Trade and Industry (hereafter MTI) the right to prohibit imports and exports, in the interest of the public.<sup>68</sup> The MTI may do so by the use of permits which should state, *inter alia*, the quantity that a manufacturer may import or export into or out of Namibia.

Currently, Namibia faces a problem as a result of South African and European Union poultry<sup>69</sup> products that are flooding the Namibian market.<sup>70</sup> It has been quoted that the company concerned, Namib Poultry Industries, (hereafter NPI) has lost millions of its \$600 million investment due to previously unregulated poultry imports.<sup>71</sup> To this

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66 *Import and Export Control Act* 30 of 1994 (hereafter the IECA).

67 To be discussed in detail in chapter three.

68 Section 2(l) of the IECA. The Minister may, whenever it is necessary or expedient in the public interest, by notice in the *Gazette* prohibit - (a) the import into or the export from Namibia; or (b) the import into or the export from Namibia, except under the authority of and in accordance with the conditions stated in a permit issued by the Minister or by a person authorised by him or her, of any goods of a class or kind specified in such notice or of any goods other than goods of a class or kind specified in such notice.

69 For the purposes of this paper, poultry products shall mean frozen chicken parts, in whole or in pieces.

70 To be discussed in detail in chapter three.

71 Nyaungwa 2013 [www.economist.com.na](http://www.economist.com.na) (1).

end, NPI made an application through the MTI to grant it protection under article 26 of the 2002 Agreement.<sup>72</sup> This attempt did not yield any immediate results. As a result, NPI once again approached the MTI with the initial request that importation of poultry products into Namibia be prohibited. This brought some measure of success for NPI, as the MTI has since, using the IECA, established a permit system to limit imports of poultry products to 600 metric tons. The rest of the Namibian market will be supplied by NPI. Clearly, NPI needs protection to enable it to build skills, modern expertise and, in the process, a good capital base. This will allow them to create employment and compete with established poultry producers.<sup>73</sup> There is a need therefore, for SACU member states to examine the extent to which infant industry and the poultry industry in particular, are being protected under SACU.

### **1.6 Research question**

This paper seeks to answer the following question: to what extent does the 2002 Agreement and the IECA sufficiently protect and monitor the process of IIP and dumping in Namibia, with respect to the Namib Poultry Industries case?

### **1.7 Outline of the study**

Chapter two traces the history of SACU and its customs agreements. It also discusses the effectiveness of provisions in the 2002 Agreement, pertaining to IIP. The discussion includes the duties of the institutional framework in so far as infant industry protection is concerned. Dumping will also be discussed due to the fact that it is also a threat to IIP.

Chapter three discusses Namibia's IECA in light of Namibia's obligations under SACU.

Chapter four is a summary of the findings and possible recommendations.

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72 Nyaungwa 2013 [www.economist.com.na](http://www.economist.com.na) (1).

73 Nyaungwa 2013 [www.economist.com.na](http://www.economist.com.na) (1).

## **1.8 Research Methodology**

This study is based on literature reviews of relevant legislation, agreements/treaties, articles and journals. As this subject is very topical, most of the current happenings in this field are posted onto the internet and so internet sources will also be used to highlight the current state of affairs. This will be in order to achieve a proper and relevant application of the law and subsequently, the recommendations.

## **1.9 Objectives of the study**

The objective of this study is to understand the legal position of IIP and dumping in SACU. Therefore, this paper will discuss the implications of SACU provisions regarding IIP and dumping, with particular emphasis on Namibia's poultry industry. The discussion will therefore include a comparison of the provisions of the 2002 Agreement and the Namibian IECA. This will be done in order to make possible recommendations on how best this industry may be protected in light of the instruments stated above.

Ancillary to the above, this study discusses the legal relationship between SACU and its member states, particularly Namibia, with regard to national and regional interests. This study will, for example, look at the 2002 Agreement and its possible shortcomings. It will look at whether Namibia can use the IECA for IIP and should it do so, would it be in violation of its objectives under SACU?

## 2 An analysis of the SACU provisions with respect to IIP

### 2.1 Introduction

This chapter discusses the concept of custom unions by tracing their history and foundational principles. Particular reference will be made to SACU. The discussion will highlight, with respect to the 2002 Agreement, the ways in which SACU tries to protect infant industries. Therefore, dumping will also be discussed as it poses a threat to IIP.

### 2.2 Customs unions: a general overview

A customs union is an area composed of a free trade agreement between two or more countries, and the application of similar external duties on goods entering the CCA.<sup>74</sup> This means that, as soon as countries sign such an agreement, they become bound by the provisions thereof.<sup>75</sup> The implication of signing a customs union agreement is that it limits the member state's ability to freely decide on all matters pertaining to fiscal policies and import and export duties.<sup>76</sup> In addition, *pacta sunt servanda*, a fundamental rule in international law of treaties and the *Vienna Convention*,<sup>77</sup> states that every treaty is binding upon the parties and must be performed in good faith.<sup>78</sup> The duty to act in good faith requires that signatories to an Agreement refrain from acts which defeat the objectives of the Agreement. It further requires the signatories to take appropriate steps to eliminate incompatibilities with the Agreement.<sup>79</sup> Therefore, member states must adhere to the provisions of the Agreement, even though they may at times have some reservations concerning the Agreement.

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74 World Economy Encyclopaedia 2011 [www.world-economics.org](http://www.world-economics.org).

75 Widdows 1979 *BYIL* 118-119.

76 Odada and Godana 2002 "Sources of Growth in Africa" 29; See also African Economic Outlook 2012 [www.afdb.org](http://www.afdb.org).

77 Article 1 of the *Vienna Convention on the Law of Treaties* (1969) states that it (the *Vienna Convention*) applies to treaties between states. For the purposes of this Convention, Article 2 states that a treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation may be.

78 Article 26 of the *Vienna Convention*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." See also Fitzmaurice "Some Problems" 153.

79 UNECA Date Unknown [www.uneca.org](http://www.uneca.org) 1.

### 2.2.1 *The definition of a customs union*

Historically, GATT<sup>80</sup>, concluded in 1947 by 23 countries, defined a customs union as follows:

A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that all tariffs and other restrictive regulations of commerce as between the territories of members of the union are substantially eliminated and substantially the same tariffs and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.

The original definition of the Geneva Agreement<sup>81</sup> which was replaced by the Havana Protocol in 1948 defined a customs union as:

The substitution of a single customs territory for two or more customs territories so that duties and other restrictive regulations of commerce are eliminated with respect to all trade between the territories of the union. With respect to territories not included in the union, the same duties and other regulations of commerce must be applied by each of the members.

Kruger<sup>82</sup> submits that a customs union must have three main criteria. The first one is a uniform external tariff for imports into the CCA. The second one is the removal of customs duties on domestic products traded within the CCA, and the third, the division of customs and excise revenues amongst the members.<sup>83</sup> Similarly, El-Agraa and Jones<sup>84</sup> submit that a customs union entails the abolishing of all trade impediments among members and the application of common external tariffs on imports from non-member states. Therefore, the objective of a customs union is to promote free trade within the CCA.

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80 Paragraph 4, Article XXIV of GATT.

81 Paragraph 8, Article XXIV of GATT.

82 Kruger *Customs Union* 33.

83 This paper does not focus on revenue sharing, although it may be mentioned during the discussion.

84 El-Agraa and Jones *Theory of Custom Unions* 1.

### 2.2.2 Historical development of Southern Africa Customs Union

In the nineteenth and twentieth centuries, customs unions began to play an important role in the regulation of commercial relations between countries.<sup>85</sup> Examples of such unions are the German Zollverein which was the precursor of the political union of German states, the customs union between France and Monaco, and the customs union between Belgium, Luxemburg and the Netherlands concluded in 1944.<sup>86</sup>

Similarly, South Africa had several customs unions. The first one was the customs union between the Cape Colony and the Republic of the Orange Free State in 1889. The second customs union was concluded in 1906 and comprised of the Union of South Africa, Basutoland, Swaziland, the Bechuanaland Protectorate and Northern and Southern Rhodesia.<sup>87</sup> This customs union was partly as a result of the political union<sup>88</sup> achieved between the Cape of Good Hope, Transvaal, Natal and the Orange Free State.<sup>89</sup> In 1910, a new agreement was put in place. The effect of the 1910 Agreement was that no customs duties would apply to goods traded within the union. In addition, the union was to apply the same rate of duty on goods entering the customs union from outside the CCA.<sup>90</sup>

Although each member could theoretically initiate a change in duties, in practice South Africa set the duty.<sup>91</sup> This position was the main reason behind the failure of the 1910 Agreement. The independence of the British High Commissioner's Territories also necessitated the negotiation of a new customs union. To this end, the 1969 Agreement was introduced.<sup>92</sup> The main changes in this Agreement was that South Africa was now to give other contracting parties adequate opportunity for consultation before imposing, amending or abrogating any customs duties.<sup>93</sup>

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85 Kruger *Customs Unions* 1; see also Gibb *Regional Integration* 67-86.

86 Kruger *Customs Unions* 1; see also Gibb *Regional Integration* 67-86.

87 Kruger *Customs Unions* 1; see also Blumenfeld *Economic Interdependence* 35.

88 The union government made arrangements with the local territories and the Rhodesias so that, although they were not included in the political union, they remained in the customs union.

89 Kruger *Customs Unions* 1; see also Blumenfeld *Economic Interdependence* 35.

90 Kruger *Customs Unions* 1; see also Blumenfeld *Economic Interdependence* 35.

91 McCarthy *Southern African Customs Union* 14.

92 Consisting of Bechuanaland, Lesotho, South-West Africa, South Africa and Swaziland.

93 McCarthy *Southern African Customs Union* 15.

Noteworthy in the 1969 Agreement was the recognition of the unequal size and development of the members.<sup>94</sup> As a result, there was now an intention to encourage the industrialisation of the smaller member states. In order to achieve this, the 1969 Agreement provided for an exception to the single tariff and free flow of goods among member states. It did so by allowing smaller member states to protect infant industries<sup>95</sup> or those of special interest to the smaller economies.<sup>96</sup> However, the consent of other member states was not required when interim measures to protect an industry were implemented.<sup>97</sup> This Agreement, it is safe to say, did not change much about the involvement of other member states in decision making; South Africa could still unilaterally change tariffs. In addition to this, the problem of revenue sharing and the dominance of South Africa on most pertinent decisions again saw the failure of the 1969 Agreement, leading to the negotiation of the 2002 Agreement.<sup>98</sup>

One of the objectives of the 2002 Agreement is to promote the development, diversification and industrialisation of the economies of the four less advanced members and to equitably share in the benefits of trade.<sup>99</sup>

### 2.2.3 *The scope of the 2002 Agreement*

The signing of the 2002 Agreement by the SACU Heads of State was done mindful of the autonomy they were each forfeiting, as well as the benefits they each hoped to achieve.<sup>100</sup> SACU was no longer dominated by South Africa, but was now an autonomous union which regulated trade and guided socio-economic relations in the region.<sup>101</sup> The 2002 Agreement also demonstrated a consolidated effort towards simplifying tariff regulations, opening decision making and developing a better

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94 Blumenfeld *Economic Interdependence* 35.

95 Article 6 of the 1969 Agreement.

96 Article 7 of the 1969 Agreement.

97 McCarthy *Southern African Customs Union* 15.

98 Davies and O'Meara "Total Strategy in Southern Africa" 128. See also Lundahl *Dependent Economy* 128.

99 Article 2 of the 2002 Agreement.

100 See Kiala *Politics of Trade* 90 for a detailed discussion.

101 Kiala *Politics of Trade* 90.

revenue sharing formula.<sup>102</sup> The scope of the 2002 Agreement is wide, including, *inter alia*, the establishment of the institutional framework<sup>103</sup> tasked with overseeing the application and interpretation of the Agreement.<sup>104</sup> The 2002 Agreement also centres on issues of trade liberalisation and common external tariffs. The removal of trade barriers within the CCA is a means of promoting trade and investment within the CCA.<sup>105</sup> The free movement of domestic products within SACU applies to goods grown, produced or manufactured in SACU.<sup>106</sup> However, member states retain the right to impose trade restrictions in accordance with their national laws and regulations in order to protect the health of humans, animals or plants, the environment, public morals, national security, intellectual property rights, exhaustible natural resources and treasure of artistic, historic or archaeological value.<sup>107</sup> It also includes Infant Industry Protection<sup>108</sup> which will be discussed later in this chapter. This means that there is a degree of protectionist measures that are allowed for certain purposes, specific to a member state. However, whether this protection can be extended to the Namibian poultry industry will be investigated in chapter three.

#### 2.2.4 SACU institutions<sup>109</sup>

##### 2.2.4.1 The CoM

Article 7 of the 2002 Agreement establishes six institutions.<sup>110</sup> Article 8 provides for the roles and functions of the CoM.<sup>111</sup> The CoM is the supreme decision making

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102 Hentz 2005 *Journal of Modern African Studies* 25.

103 Article 7 of the 2002 Agreement provides that the governing structure of SACU will consist of the following six institutions: the Council of Ministers, the Customs Commission, the Secretariat, the Tariff Board, the Technical Liason Committee and the Ad Hoc Tribunal.

104 Kiala *Politics of Trade* 90.

105 Khamfula and Tesyayohannes 2004 *South African Journal of Economics* 38.

106 Article 18 of the 2002 Agreement.

107 Article 18 of the 2002 Agreement.

108 In Article 26 of the 2002 Agreement.

109 This part will not discuss all SACU institutional bodies, but only those institutions pertinent to this paper.

110 Article 7 of the 2002 Agreement provides that the governing structure of SACU will consist of the following six institutions: the Council of Ministers, the Customs Commission, the Secretariat, the Tariff Board, the Technical Liason Committee and the Ad Hoc Tribunal.

111 Article 8 of the 2002 Agreement provides that the CoM is the supreme decision making authority of SACU and will comprise of at least one minister from each member state. Its responsibilities are the following: a) appoint an Executive Secretary of SACU; b) appoint the members of the Tariff Board; c) approve the budgets of the Secretariat, the Tariff Board and the Tribunal; d)

body of SACU and consists of one Minister of Trade from each member state. Its mandate is to oversee overall policy formulation in SACU and approve customs tariffs, rebates, refunds or drawbacks and other trade related remedies. The CoM approves the tariffs mentioned above upon recommendation by the Tariff Board (hereafter TB), taking into account each member state's interests.<sup>112</sup> Unless otherwise agreed, the CoM sits at least once in each quarter of a financial year<sup>113</sup> and makes decisions, *inter alia*, on tariffs and trade within SACU.<sup>114</sup> These decisions must be made by consensus,<sup>115</sup> but due to the divergent interests of member states, it is not as easy and it takes time to make decisions.<sup>116</sup> One can envision a situation where a member state wishes to protect one of its industries from imports from another member state. This can potentially affect the decision making that requires consensus.

#### 2.2.4.2 The Tariff Board

Article 7 of the 2002 Agreement establishes the TB whereas article 11 outlines the functions of the TB.<sup>117</sup> The TB's main function is to:

make recommendations to the CoM regarding customs, anti-dumping, countervailing and safeguard duties, rebates, refunds or duty drawbacks.

The TB has a special role within the structures of SACU.<sup>118</sup> This is so because it has to continuously stay abreast in monitoring the trends on import and export into the CCA, so as to make recommendations to the CoM.<sup>119</sup> However, the TB is currently

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oversee the implementation of the policies of SACU; e) approve customs tariffs, rebates, refunds or drawbacks and trade related remedies.

112 Article 11 of the 2002 Agreement. See also SACU 2007 [www.sacu.int](http://www.sacu.int).

113 Article 8(9) of the 2002 Agreement: "The Council shall meet at least once in each quarter of a financial year, unless agreed otherwise."

114 Article 8(7) of the 2002 Agreement: "The Council shall approve customs tariffs, rebates, refunds or drawbacks and trade related remedies."

115 Article 17 of the 2002 Agreement: "Except as otherwise provided in this Agreement, decisions of the institutions of SACU shall be made by consensus."

116 Joubert 2013 [www.wto.org](http://www.wto.org), where the South African Chamber of Business (SACOB) was quoted to have complained about the delays in decision-making in SACU due to the cumbersome and time-consuming decision-making process.

117 Article 11 of the 2002 Agreement provides for a tariff board which is an independent body that makes recommendations to the CoM regarding customs, anti-dumping, countervailing and safeguard duties, rebates, refunds or duty drawbacks.

118 Van Dijk "Agricultural Trade Negotiations" 11-18.

119 Van Dijk "Agricultural Trade Negotiations" 11-18.

not fully functional because member states are still in the process of selecting and establishing their national bodies and experts who will form part of SACU's TB.<sup>120</sup> In the interim, however, the CoM has mandated all duties of the TB to the International Trade Administration Commission of South Africa (hereafter ITAC).<sup>121</sup>

#### 2.2.4.2.1 The TB and ITAC

ITAC is the South African Trade Administration Commission created in terms of the *International Trade Administration Act 71 of 2002*.<sup>122</sup> ITAC is generally tasked with creating an enabling environment for fair trade in South Africa and SACU. It plays a dual role in that it administers South Africa's international trade,<sup>123</sup> while at the same time acts as SACU's TB.<sup>124</sup> The mandate of ITAC is to foster economic growth and development in the Republic of South Africa and SACU by establishing an efficient and effective system for the administration of international trade, subject to the ITAA and the 2002 Agreement.<sup>125</sup>

One of the functions of ITAC is to conduct investigations of anti-dumping protection, countervailing duties, and safeguard measures when imports are threatening to overwhelm a domestic producer, according to domestic law and the WTO rules.<sup>126</sup> As such, because ITAC is currently SACU's investigating body, it fulfills a role synonymous to a TB. It collects information and analyses various trade patterns in the region and makes recommendations to the CoM on tariffs and trade.<sup>127</sup>

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120 Trade Mark Southern Africa 2013 [www.trademarksa.org](http://www.trademarksa.org) (2).

121 This was done at the 7th Council of Ministers Meeting in Johannesburg, South Africa on 1 July 2004. See also Joubert 2013 [www.wto.org](http://www.wto.org).

122 Which replaced the *Board on Tariffs and Trade Act 107 of 1986* and the *Import and Export Control Act 45 of 1963*.

123 I.e. tariff investigations, trade and remedies and import and export control; see also *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC).

124 ITAC Report 188/2004.

125 Section 2 of the *International Trade Administration Act 71 of 2002* (hereafter ITAA); see also ITAC Chief Commissioner 2008 [www.itac.org.za](http://www.itac.org.za).

126 ITAA s 26; see also ITAC Date Unknown [www.itac.org.za](http://www.itac.org.za).

127 Article 5.10 of the *WTO Anti-dumping Agreement* (1994) requires that the investigation must be completed within 12 months or in special circumstances no more 18 months; see also Joubert 2013 [www.wto.org](http://www.wto.org).

With regards time frames, ITAC is required to finalise an anti-dumping investigation within twelve months or, in special circumstances, eighteen months.<sup>128</sup> However, in practice these deadlines are missed.<sup>129</sup> An interview with Colin McCarthy<sup>130</sup> pointed out that there are reasons for such delay. He stated that ITAC often has to refer submissions back to the parties involved when it is not entirely satisfied with the contents thereof, and this creates delays. Further, interested parties often ask for postponements, making the process even more protracted.<sup>131</sup>

#### 2.2.4.3 The Tribunal

The Tribunal<sup>132</sup> is comprised of three members, unless otherwise determined by the CoM. The parties to a dispute shall choose such three members from among a pool of names approved by the CoM. However, before parties refer a matter to the Tribunal, they are required to attempt settling the dispute amicably amongst themselves. Should the matter be referred to the Tribunal, the Tribunal makes its decisions by majority vote and its decision is final and binding. It may also, at the request of the CoM, consider any issues and furnish the council with recommendations thereon.

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128 Joubert 2013 [www.wto.org](http://www.wto.org).

129 Joubert 2013 [www.wto.org](http://www.wto.org).

130 Joubert 2013 [www.wto.org](http://www.wto.org).

131 Joubert 2013 [www.wto.org](http://www.wto.org).

132 "Article 13 of the 2002 Agreement provides for an Ad Hoc tribunal devised to settle any disputes regarding the interpretation or application of the Agreement. When the matter is referred to the tribunal, the parties are to choose members of the Tribunal from a pool of names to preside over the dispute.

2. The Tribunal shall be composed of three members, except as otherwise determined by the Council.

3. The Tribunal shall decide by majority vote and its decision shall be final and binding.

4. The Tribunal shall, at the request of the Council, consider any issue and furnish the Council with its recommendations.

5. In any matter referred to the Tribunal, the parties to the dispute shall choose the members of the Tribunal from amongst a pool of names, approved by the Council, and kept by the Secretariat.

6. Member States party to any dispute or difference shall attempt to settle such dispute or difference amicably before referring the matter to the Tribunal.

7. The Tribunal shall be assisted by the Secretariat in its work.

8. The Tribunal shall determine its own rules of procedure."

### 2.2.5 *The advantages of the 2002 Agreement*

The main advantage for joining SACU is the revenue gained as a result thereof. SACU's revenue pool is one that comprises the gross amounts of all customs, excise and additional duties on goods imported into, or produced in, the CCA. Such amounts are paid into the Common Revenue Pool within three months of the end of the quarter of a financial year.<sup>133</sup> The revenue-sharing formula determines the revenue shares of the BLNS,<sup>134</sup> with South Africa in the new 2002 Agreement sharing on the same basis as the BLNS.<sup>135</sup> Entitlement of each member is done by considering 3 components.<sup>136</sup> In terms of the customs component,<sup>137</sup> each member state's share of the customs component is calculated from the value of goods imported from all other member states in a specific year as a percentage of the total intra-SACU imports in such a year. To calculate a share of the excise component, the value of a member state's Gross Domestic Product (hereafter GDP) in a specific year is calculated as a percentage of the total SACU GDP in such year.<sup>138</sup>

Currently, Botswana and Namibia, due to their large tax base, are less dependent on SACU revenue, while countries like Swaziland and Lesotho highly depend on SACU revenue as it accounts for more than half of their recurrent expenditure.<sup>139</sup>

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133 Article 32 of the 2002 Agreement. The previous position in this regard was that South Africa received its share of the revenue as a residual after the BLNS were paid.

134 BLNS represents the member states to SACU, i.e. Botswana, Lesotho, Namibia and Swaziland.

135 McCarthy *Southern African Customs Union* 14.

136 Article 34(3) of the 2002 Agreement: The Customs Component

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

(b) Each Member State's share of the customs component shall be calculated from the value of goods imported from all other Member States in a specific year as a percentage of total intra-SACU imports in such year.

(c) The exact method and procedures for the calculation of each Member State's share of the customs component are specified in Annex A."

137 Article 34(3)(b) of the 2002 Agreement.

138 Article 34(4)(b) of the 2002 Agreement.

139 McCarthy *Southern African Customs Union* 14.

### 2.2.6 *The disadvantages of the 2002 Agreement*

The main disadvantage of the 2002 Agreement is that South Africa takes advantage of the gains of economic co-operation in the CCA.<sup>140</sup> This makes it difficult for BLNS to attract new industries.<sup>141</sup> McCarthy states that:<sup>142</sup>

protective tariffs are therefore especially important when the provisions of the 2002 Agreement, such as article 19,<sup>143</sup> impede the less advanced member state's chances of industrialisation and an equitable share in the benefits of trade.

Kirk and Stern<sup>144</sup> further note that the commodity pattern of South Africa's exports to the BLNS differs significantly from its exports to the rest of the world. Whereas South Africa continues to export predominantly resource based goods to the rest of the world, the BLNS represent a significant market for South African consumer products. In Namibia, for instance, free trade and the existence of article 19 of the 2002 Agreement<sup>145</sup> means that South Africa can import poultry products from non-CCA members such as Brazil or Europe and further export the products to Namibia and other member states at no extra duty.<sup>146</sup> In addition, because a customs union is a collective entity, with similar external tariffs, member states cannot achieve their goals contrary to the objectives of the customs union.<sup>147</sup> This means that member states are limited in their options for economic enhancement through tariffs.

## 2.3 *An analysis of SACU provisions relating to IIP*

### 2.3.1 *Free movement of goods within SACU*

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140 Setai 1988 *African Journal of Political Economy* 101.

141 Setai 1988 *African Journal of Political Economy* 101.

142 McCarthy *Common Industrial Policies* 14.

143 Article 19 of the 2002 Agreement: "Goods Imported from outside the Common Customs Area Except as otherwise provided in this Agreement, a Member State shall not impose any duties on goods which were imported from outside the Common Customs Area on importation of such goods from the area of any other Member State."

144 Kirk and Stern *New Southern African Customs Union Agreement* 6.

145 Article 19 of the 2002 Agreement: "Goods Imported from outside the Common Customs Area Except as otherwise provided in this Agreement, a member state shall not impose any duties on goods which were imported from outside the CCA on importation of such goods from the area of any other member state."

146 Klaus "Infant Industry Protection" 4.

147 Klaus "Infant Industry Protection" 4.

One of the main objectives of the 2002 Agreement is that of free movement of goods within the CCA. This is provided for in article 18<sup>148</sup> of the 2002 Agreement. It states that all goods grown, produced or manufactured in the CCA shall be free of customs duties upon importation into the area of another member state. This article also states that member states have the right to protect certain national interests in accordance with their national legislation.

### 2.3.2 *Customs duties on goods imported from outside the CCA*

Article 19 of the 2002 Agreement states that member states shall not impose any duties on goods imported from outside the CCA upon importation into the CCA, by a member state. This means that if a member state imports goods from outside the CCA, for further exportation to another member state, those goods shall not be subject to any duties. However, article 20<sup>149</sup> states that the CoM can, on recommendation from the TB, approve for customs duties to be applied on goods imported into the CCA from outside the area. Therefore, the general principle of this article is that, if there is a valid reason for it,<sup>150</sup> member states may apply to the TB to allow customs duties to apply to the products in question.<sup>151</sup> The TB then investigates such an allegation and makes a recommendation to the CoM, who then makes a final decision to impose, or not, duties on goods from outside the CCA. The problem with this article is that such decisions may be delayed because the CoM only sits four times a year, unless otherwise agreed.<sup>152</sup>

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148 Article 18 of the 2002 Agreement: Free Movement of Domestic Products

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

2. Notwithstanding the provisions of paragraph 1 above, Member States shall have the right to impose restrictions on imports or exports in accordance with national laws and regulations for the protection of - (a) health of humans, animals or plants; (b) the environment; (c) treasures of artistic, historic or archaeological value; (d) public morals; (e) intellectual property rights; (f) national security; and (g) exhaustible natural resources.”

149 Article 20(1) of the 2002 Agreement: “The Council shall, on recommendation of the Tariff Board, approve customs duties to be applied to goods imported into the CCA from outside that Area.”

150 Such as dumping.

151 The proviso is that such duties must be applied similarly by all member states (Article 20(2) of the 2002 Agreement).

152 Joubert 2013 [www.wto.org](http://www.wto.org).

### 2.3.3 Customs co-operation and legislation by member states

The 2002 Agreement in article 23<sup>153</sup> places an obligation on all member states to arrange their national customs affairs in a way that promotes the application of the provisions of the 2002 Agreement. This means that member states have a common goal under the Agreement and must therefore conduct their customs affairs in a manner that promotes the Agreement. Further, the principle of *pacta sunt servanda*<sup>154</sup> requires that states must execute their regional agreements, such as a customs union agreement, in good faith and take all steps to ensure that the objectives of the agreement are achieved. However, with regards to customs co-operation, Steenkamp<sup>155</sup> points out that SACU may be failing because its measures for monitoring co-operation are lacking.

He<sup>156</sup> further states that the above is due to the fact that, unless a member state complains about the effect of a decision taken by another member state, there is not much that is done to remedy such a situation. Steenkamp<sup>157</sup> presumes that one of the reasons for such a state of affairs may be because there are already other pending issues within SACU for which member states like South Africa are deemed to be wanting.<sup>158</sup> As a result, there is generally a reluctance to point fingers at other states for non-compliance.

Additionally, there is a potential challenge to the proper functioning of the Tribunal. Article 13(6) of the 2002 Agreement states that parties to a dispute may not refer a matter to the tribunal without first trying to resolve the matters amicably.<sup>159</sup> This may compromise customs co-operation in that two or more member states that have a dispute will aim to find a solution that addresses their problem and not that of the rest

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153 Article 34 of the 2002 Agreement: Customs Co-operation

“1. Member States shall take appropriate measures, including arrangements regarding customs cooperation, to ensure that the provisions of this Agreement are effectively and harmoniously applied.

2. Member states shall take such measures as are necessary to facilitate the simplification and harmonization of trade documentation and procedures.”

154 As discussed above.

155 Steenkamp 2013 *Ministry of Trade Interview: Import and Export Permit Department*.

156 Steenkamp 2013 *Ministry of Trade Interview: Import and Export Permit Department*.

157 Steenkamp 2013 *Ministry of Trade Interview: Import and Export Permit Department*.

158 Such as the issue of rebates and the interest accumulated on the revenue sharing account.

159 Article 13(6) of the 2002 Agreement discussed above.

of the CCA. The major problem would be of uniformity and certainty. For instance, if Botswana and Namibia have a dispute and manage to settle it, it is possible that the same problem might happen between Botswana and South Africa. The result would be that there would be different terms of settlement in one customs union because member states could make decisions that may not promote the goals of the CCA.<sup>160</sup> This could be easily avoided if all disputes are handled by one central body.

#### 2.3.4 *Import and export prohibitions*

As an exception to the free movement of goods in article 18(1), article 25<sup>161</sup> recognises a member states' right to restrict the importation into or exportation from its area of any goods for economic, social, cultural or other reasons as may be agreed upon by the CoM.<sup>162</sup> It also provides that SACU provisions shall not supersede previous enacted laws restricting importation or exportation of goods. At the same time, it indicates that these provisions may not be interpreted as prohibiting trade for the purpose of protecting its own industries producing such goods in the CCA. Therefore, article 25(1) and (2) allow member states to protect national interests, but in the CCA, this provision may not be used to protect infant

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160 This may be regardless of the fact that member states are bound by the terms of the Agreement and the principle of *pacta sunt servanda*.

161 Article 25 of the 2002 Agreement: Import and Export Prohibitions and Restrictions

"1. Member states recognise the right of each member state to prohibit or restrict the importation into or exportation from its area of any goods for economic, social, cultural or other reasons as may be agreed upon by the Council.

2. Except in so far as may be agreed upon between the member states from time to time, the provisions of this Agreement shall not be deemed to suspend or supersede the provisions of any law within any part of the CCA which prohibits or restricts the importation or exportation of goods.

3. The provisions of paragraphs 1 and 2 shall not be so construed as to permit the prohibition or restriction of the importation by any member state into its area of goods grown, produced or manufactured in other areas of the CCA for the purpose of protecting its own industries producing such goods.

4. A Member state shall upon request by any other member state take such steps as may be agreed upon between the member state concerned (including action to make such steps legally enforceable within its area) to prevent the exportation or unrestricted exportation from its area to the area of such other member state of such prohibited or restricted goods imported from outside the CCA or grown, produced or manufactured in its area or to prevent the exportation or unrestricted exportation from its area to a State outside the CCA of such prohibited or restricted goods imported from the area of such other member state. The expression "prohibited or restricted goods" includes second hand goods imported from outside the CCA.

5. Member states shall co-operate in the application of import restrictions with a view to ensuring that the economic objectives of any import control legislation in any State in the CCA are attained."

162 To be discussed in chapter three.

industries.<sup>163</sup> What is seen here is that although the 2002 Agreement recognises the right of countries to restrict import and export for reasons mentioned above, such protection is limited. This is so because member states aims to promote the common goals of the CCA by limiting restrictions on free trade.

One may argue that provisions such as article 25(3) limit the scope of industry protection<sup>164</sup> and diversification in the CCA. In this regard, Odada<sup>165</sup> is of the view that diversification in the SACU economies, as envisioned in the objectives of the Agreement, has not been achieved. He states that this failure to attract new industries in CCA can be attributed to South Africa's unwillingness to share the benefits of SACU's protectionist policies with the other members. This is because over 80% of South Africa's products are exported for sale in the CCA.<sup>166</sup> Therefore, because member states function as markets for South Africa, imposing restrictions in these countries would be detrimental to South Africa.<sup>167</sup> One may conclude that this line of reasoning has merit as it is difficult to determine how, or under what circumstances, article 25 may be used with success.

Article 25 ends with an emphasis on member states to co-operate in applying import restrictions to ensure that the economic objectives of national import control legislation are attained. This provision serves to extend the objectives of the customs union as a whole. If there is no co-operation between the states in support of infant industry protection in the form of these restrictions, then SACU would be failing in its objectives contained in the SACU Agreement.<sup>168</sup>

## **2.4 IIP under SACU**

Article 26 provides for the protection of infant industries in all member states, with the exception of South Africa.<sup>169</sup> Due to the fact that protection is afforded to other

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163 Protection may be granted in the CCA for second hand goods as provided in a 25(4) of the 2002 Agreement.

164 Although one may still have recourse to a 26 of the 2002 Agreement, which will be discussed below.

165 Odada and Godana 2002 "Sources of Growth in Africa" 18.

166 Odada and Godana 2002 "Sources of Growth in Africa" 19.

167 Nyaungwa 2013 [www.economist.com.na](http://www.economist.com.na) (2).

168 Sections 2(c), (e) and (h) of the 2002 Agreement.

169 Mathis *SACU: Regional Cooperation* 6.

member states except South Africa, one may conclude that it is meant to remedy the dominance South Africa has in the SACU market.<sup>170</sup> To this end, Keck and Low state<sup>171</sup> that developing countries should have the right to restrict imports to a greater degree than developed countries.

Article 26 of the 2002 Agreement defines an infant industry and the instances when protection under this article may be invoked. An “infant industry” in article 26 is defined as an industry which has been established in the area of a member state for not more than 8 years. Such an industry may be granted temporary protection for a period not exceeding 8 years, after which the CoM may, or may not impose further conditions as it deems appropriate. The protection of an industry that qualifies as above is to be implemented by means of temporary import duties on goods imported into the area where the industry is located. This is done to enable it to meet competition from other producers or manufacturers in the CCA. The proviso for this allowance is that the temporary duties must be levied equally on all like products grown, produced or manufactured in other parts of the customs union.

The definition of an infant industry in SACU needs some attention. The requirement that an infant industry must have been established in a member state for a period of not more than 8 years creates a problem for member states’ industries with genuine concerns. For example, what would happen to an industry that has been “established” but does not carry out business on a commercial level until after 8 years? Such an industry is clearly not infant by definition. However, in practice it is because it only after the lapse of eight years,<sup>172</sup> starts to produce on a large scale and therefore is still small and exposed to competition. Therefore, it is submitted that

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170 See Odada and Godana 2002 “Sources of Growth in Africa” fn 89. See also Keck and Low *Special and Differential Treatment* 6 where the authors state that: “If infant industry protection is to be granted on grounds of market imperfections and dynamic external economies of scale, two conditions that could be attached to such measures are worth bearing in mind. First, a time-table for the reduction and eventual elimination of restrictions should be spelled out in advance so as to motivate firms to catch up in terms of productivity and competitiveness. Secondly, if firms fail because they cannot compete when protection is relaxed, they should be allowed to go out of business. If limits to protection are not clearly specified, rent-seeking behaviour will set in with all the associated deadweight costs for the economy in terms of wasted resources, higher prices, lower quality and less choice. It must be clear that, at a certain point, domestic producers are required to compete. Special and differential treatment provisions could be designed in a calibrated manner to meet these conditions in a manner consistent with development needs.”

171 Keck and Low *Special and Differential Treatment* 6.

172 Since inception.

article 26 is not clear with regards to the criteria to be used to determine what an infant industry is.

## **2.5 IIP and regional integration in SACU**

IIP is a principle that operates as an exception to regional integration and free trade.<sup>173</sup> The above exposition shows that, even though IIP may slow regional integration, it is indeed necessary for member states to have the right to protect some of their industries. The leeway given to member states to protect some of their industries also goes to address industrialisation in the region and limit the economic dominance South Africa has in the CCA.

## **2.6 Dumping in SACU**

Article VI of GATT provides a definition for dumping. It states that:<sup>174</sup>

a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

The practice of dumping occurs mainly as a result of free trade.<sup>175</sup> Therefore, anti-dumping duties, in addition to IIP, can be imposed to protect industries injured as a result of dumping.

Due to the fact that SACU member states are WTO members and have notified the WTO of their intention to be bound by WTO provisions, the *WTO Anti-dumping Agreement* (1994) is binding on SACU.<sup>176</sup> This means that ITAC, as the current regulatory body for dumping in SACU,<sup>177</sup> is to consider the *Anti-dumping Agreement*.

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173 Baldwin *Journal of Political Economy* 295.

174 Article 2.1 of the *WTO Anti-dumping Agreement* (1994).

175 Ng'oma *Critical Analysis of the Anti-dumping Regulation* 18.

176 SACU 2009 [www.sacu.int](http://www.sacu.int) 1.

177 This is due to the fact that SACU's institutional framework is not yet fully functional, and so ITAC currently operates as SACU's TB body pending full operation of SACU institutions.

According to article 4, a complaint against dumping has to be made by or on behalf of the domestic industry<sup>178</sup> of the CCA.<sup>179</sup>

### 2.6.1 *The requirements for SACU and ITAC to initiate investigations into dumping*

In terms of the *Anti-dumping Regulations*,<sup>180</sup> section 7(2) provides that an application is regarded as brought by or on behalf of the SACU industry, if at least 25% of the SACU producers by domestic production volume support the application. Further, of those that express an opinion on the application, at least 50% of domestic producers must support such an application. This means that SACU based industries that produce like products<sup>181</sup> can apply to the Commissioner of ITAC<sup>182</sup> to investigate the possibility for a reduction or increase in duties or for trade remedies.<sup>183</sup>

The Commissioner of ITAC, once satisfied that the application discloses a *prima facie* case of injurious material dumping or a causal link between such dumping and material injury,<sup>184</sup> may initiate an investigation by publishing an initiation notice in the Government Gazette.<sup>185</sup> This procedure requires the Commission to notify the trade representative of the country from which the dumped imports originate and to provide a non-confidential version of the application to all interested parties.<sup>186</sup> Section 30 of ITAA states that the Commissioner may hereafter make recommendations to the SACU Tariff Board, whereafter the application may be approved or rejected. The Tariff Board will in turn make a recommendation to the CoM as to the duty to be imposed subject to approval by the CoM. However, Section

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178 Article 4 of the *WTO Anti-dumping Agreement* (1994) defines the term “domestic industry” as referring to the domestic producers of a CCA that produce like goods.

179 Article 7(1) of the *WTO Anti-dumping Agreement* (1994).

180 General Notice 3197 in Government Gazette 25684 of 14 November 2003 (hereafter *Anti-dumping Regulations*).

181 Provided they consist of 25% of the SACU producers of a certain product, i.e. if an industry counts for less than 25% of the entire SACU industry producing similar products, it cannot on its own approach ITAC to launch an investigation.

182 ITAC is an independent body that advises the CoM on trade policy for SACU, a function that will, when operational, be taken over by the Tariff Board.

183 Ng’oma *Critical Analysis of the Anti-dumping Regulation* 59.

184 Krishna *Anti-dumping* 21 states that the determination of material injury involves the examination of the volume of dumped products and their effect on domestic prices of the like product and the consequent impact of these imports on domestic producers; see also *Anti-dumping Regulation* 3(3).

185 *Anti-dumping Regulation* 28.

186 *Anti-dumping Regulation* 27.

30 is currently not in operation, as no appointments to the SACU Tariff Board have been made. Therefore, the CoM requested ITAC to continue taking all anti-dumping decisions on behalf of all SACU members.<sup>187</sup>

Recently, the South African Poultry Association (hereafter SAPA) made an application to ITAC to investigate the dumping of fowls in the CCA. SAPA constitutes approximately 72% of the SACU production volume of fowls.<sup>188</sup> The application was supported by Grain SA, Animal Feed Association, Namib Poultry Industries (Pty) Ltd, Swazi Poultry Processors, Botswana Poultry Association and Basotho Poultry Association. ITAC found that there was *prima facie* proof of dumping, material injury and a causal link to material injury.<sup>189</sup> On 25 October 2013, ITAC launched an investigation related to alleged dumping of frozen bone-in portions of fowls imported from Germany, the Netherlands and the United Kingdom.<sup>190</sup> The application alleges that frozen bone-in portions of fowls were being dumped in the SACU market, causing material injury to the SACU poultry industry.<sup>191</sup>

With regards the time frames, the *Anti-dumping Agreement* requires an investigation to be finalised within 12 months.<sup>192</sup> The application by SAPA and other poultry producers was made on 04 March 2013<sup>193</sup> and so it is yet to be seen whether ITAC will finalise this matter in the required time.

In brief conclusion, the above discussion shows that SACU, through the *Anti-dumping Agreement*, has the legal framework within which it can counter the effects of dumping. However, in order to make an application for a dumping investigation, the applicant (affected industry) must count for 25% of the total SACU industry that produces similar goods. This may prompt such industries to seek recourse in national legislation instead.<sup>194</sup>

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187 Brink 2008 *THRHR* 258. See also discussion above on SACU's institutional framework.

188 Stated in the application affidavit available at <http://www.itac.org>.

189 General Notice 1047 in Government Gazette 36951 of 25 October 2013.

190 General Notice 1047 in Government Gazette 36951 of 25 October 2013.

191 General Notice 1047 in Government Gazette 36951 of 25 October 2013.

192 Article 5.10 of the *WTO Anti-dumping Agreement* (1994) requires that the investigation must be completed within 12 months or, in special circumstances, no more 18 months.

193 Application Affidavit available at <http://www.itac.org>.

194 I.e. if the industry does not consist of 25% or more.

## **2.7 Industrial development in SACU**

As an objective for economic development, article 38 recognises the importance of balanced industrial development of the CCA. This provision shows the importance of the development of other less advanced members of SACU to allow a balanced industrial development for the whole region. Pursuant to this end, common policies and strategies are to be implemented with respect to industrial development for all member states. This may be a problem, because in terms of article 38(2) of the 2002 Agreement, national industrial policies must foster common industrial development. Therefore, industrial development for the less advanced member states may be limited due to the fact that their national industrial policies must promote common industrial development.

McCarthy<sup>195</sup> adds that formulating a consolidated SACU industrial development policy has proven to be a challenge.<sup>196</sup> He states that this is because there is still some controversy surrounding the definition of an industrial policy and what it should entail. He further mentions that the different approaches on industrialisation<sup>197</sup> make it difficult to develop a common industrial policy. There is also the question of whether an industrial policy should only involve mechanisms that facilitate industrialisation or those that target specific sectors of the economy. And so, although SACU member states recognise the significance of industrialisation for the region's economic development, they may not particularly agree on the terms of industrialisation.<sup>198</sup>

## **2.8 Conclusion**

The 2002 Agreement provides for protection in two ways. The first one applies where member states wish to protect national interests such as economic, social, cultural or other reasons, as may be agreed upon by the CoM. However, this provision is limited as it cannot be used to protect an infant industry. The other problem is that,

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195 McCarthy "Challenge of Reconciling Revenue Distribution" 26.

196 For a comparison with SADC's industrial policy, see also Harlow *Regional Cooperation and Integration* 71-86.

197 Which place an emphasis on either the development of a manufacturing sector, a service sector, or a calculated combination of both.

198 Kiale *Politics of Trade* 94.

where member states wish to use this provision for other reasons besides the ones provided, it needs permission from the CoM. As highlighted above, the CoM only sits four times a year, unless otherwise agreed. This may negatively affect the time frame within which the CoM gives a decision.

Secondly, member states, except South Africa, may protect their infant industries for the purposes of meeting competition. The problem with this protection is that the definition of an infant industry is not clear with regard to when the inception of such industry must be. This makes the implementation of this provision difficult.

With regards to dumping, which is a threat to IIP, SACU, through ITAC and the WTO provisions, does provide some form of protection. However, with regard to Namibia, this protection is limited. This is so because the WTO Regulations on Anti-dumping require that, in order to make an application for a dumping investigation, the applicant must count for 25% of the total SACU industry that produces similar goods.

Therefore, chapter three discusses Namibia's legal position pertaining to import and export control of the poultry industry, in light of Namibia's obligations under SACU.

### **3 The position of IIP in Namibia**

#### **3.1 Introduction**

This chapter discusses the effectiveness of the current legal framework protecting infant industries in Namibia. This should shed more light as to whether SACU's framework and Namibia's import and export legislation are effective in IIP.

#### **3.2 Namibia's history**

In order to understand Namibia's import and export legal framework and the implementation thereof, it is necessary that Namibia's political and economic history is outlined. The Republic of Namibia is located on the West Coast of Southern Africa, with an area of 824,116km squares and 1,572 km of coastline.<sup>199</sup> It shares borders with Angola, Botswana, South Africa, and Zambia.<sup>200</sup> Its population is estimated to be about 2, 259 million<sup>201</sup> as at February 2013.<sup>202</sup> About 33% of this population lives in urban areas.<sup>203</sup> Further, of the total population of the Republic of Namibia, 51.2% are unemployed.<sup>204</sup> This percentage has not shown a significant drop since 2004.

##### **3.2.1 Political history**

The Republic of Namibia, as it is known today, was declared a German Protectorate in 1884 and a Crown Colony in 1890.<sup>205</sup> It thereafter became known as South West Africa (hereafter SWA).<sup>206</sup> German rule came to an end with the German forces surrendering on 09 July, 1915. Before South Africa was mandated to manage SWA, the administration was in the hands of a military governor who was replaced by a South African administrator.<sup>207</sup> Subsequently, SWA became a protectorate of South

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199 Hopwood *Guide to Namibian Politics* 5.

200 Saxena *Namibia and the World* 1

201 With more than 34% of its population aged between 25 and 54.

202 Index Mundi 2013 [indexmundi.com](http://indexmundi.com) (1).

203 Hopwood *Guide to Namibian Politics* 3.

204 Information correct as at 21 February 2013 ([Index Mundi 2013 indexmundi.com](http://Index Mundi 2013 indexmundi.com)) (3).

205 Amoo and Skeffers "Rule of Law in Namibia" 17.

206 Amoo and Skeffers "Rule of Law in Namibia" 17.

207 Totemeyer *South West Africa/Namibia* 11.

Africa in accordance with the *Peace Treaty of Versailles*.<sup>208</sup> This treaty delegated the administration of SWA to the Governor-General of South Africa who had both legislative and executive powers.<sup>209</sup> Subsequently, the Governor-General gave administrative powers to the Administrator of SWA by means of the *Proclamation Act of 1921*.<sup>210</sup> *Pari pasu* with this Act was the introduction of Roman-Dutch law to South West Africa by means of the *Administration of Justice Proclamation 21 of 1919*. In effect, this Act made Roman Dutch law applicable to SWA.

After long negotiations, caused by reports of abuse of legislative and administrative powers by South Africa, the International Court of Justice gave an advisory opinion in 1971.<sup>211</sup> This opinion stated that South Africa's mandate to administer South West Africa, be terminated. Subsequently the Security Council adopted various resolutions declaring the continued presence of South Africa in Namibia illegal.<sup>212</sup>

Among the resolutions passed, the UN Security Council passed Resolution 435 of 29 September 1976 which started the process for free and fair elections. This resolution saw South Africa finally acceding to the plan for a transition to independence. The end result was that free and fair elections were held, a constitution adopted and SWA became an independent nation on 21 March 1990 with a new name, Namibia. This vested executive authority with the President of the Republic of Namibia<sup>213</sup> while legislative authority rests with the legislature.<sup>214</sup> Namibia has maintained close links with South Africa even after independence.<sup>215</sup>

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208 *Treaty of Versailles* (1919).

209 Totemeyer *South West Africa/Namibia* 11.

210 Leys *et al Namibia's Liberation Struggle* 9.

211 *International Status of South-West Africa, Advisory Opinion*, 1950 ICJ Reports 128; see also Amoo *Introduction to Namibian Law* 60.

212 *International Status of South-West Africa, Advisory Opinion*, 1950 ICJ Reports 128.

213 Article 27 of the *Constitution of the Republic of Namibia*, 1990.

214 Article 78 of the *Constitution of the Republic of Namibia*, 1990.

215 As alluded to by Odada, based on a primary resources income remittance between 1983-1990 in Odada and Godana 2002 "Sources of Growth in Africa" 4.

### 3.2.2 Economic history

Namibia, as an upper middle-income country, has a per capita income per year of about US\$7, 800.<sup>216</sup> Since time immemorial Namibia has been known to be one of the world's largest producers of diamonds.<sup>217</sup> As a result, the 1960s and 70s, for example, were the golden years for Namibia in terms of growth, investment and trade.<sup>218</sup> This position was encouraged by world mineral prices.<sup>219</sup> After independence, the WTO Trade Policy Report on Namibia<sup>220</sup> reported that the country's real GDP during 2007 and 2008<sup>221</sup> improved and showed a steady rise. Unfortunately global recession compromised Namibia's competitiveness in this regard. Save for inflation, in real terms, Namibia has not had significant growth for most periods in its history.<sup>222</sup>

### 3.2.3 The structure of the Namibian economy

The Namibian economy has, to a large extent, been influenced by colonial trends.<sup>223</sup> Especially true is the influence South Africa continues to have<sup>224</sup> on the Namibian economy.<sup>225</sup> In terms of industry, the mining industry remains a dominant characteristic of the Namibian economy.<sup>226</sup> After independence, however, the

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216 Index Mundi 2013 [www.indexmundi.com](http://www.indexmundi.com) (2).

217 Hopwood *Guide to Namibian Politics* 5.

218 Odada and Godana 2002 "Sources of Growth in Africa" 7.

219 Odada and Godana 2002 "Sources of Growth in Africa" 7.

220 WT/TPR/S/222/NAM 207 available at [www.wto.org/english/tratop\\_e/tpr\\_e/s222-03\\_e](http://www.wto.org/english/tratop_e/tpr_e/s222-03_e).

221 For detailed economic history as from pre-colonial era until after independence, see Odada and Godana "Sources of Growth in Africa" 1-44.

222 Odada and Godana "Sources of Growth in Africa" 8.

223 McCarthy *Southern African Customs Union in Transition* 610.

224 McCarthy *Southern African Customs Union in Transition* 610.

225 An example of this fact is that, until date, the Namibian dollar is pegged one to one with the South African rand, which can also be used freely in Namibia, although the opposite is not applicable to the Namibian dollar.

226 For example, as according to Odada and Godana "Sources of Growth in Africa", in 1978, mining and quarrying represented more than 49% of GDP, while manufacturing constituted about 4%, and agriculture about 10%. By mid 80s, the share of mining had declined to about 26%, agriculture to 7% and manufacturing had risen slightly to over 5%. The only sectors, which expanded rapidly, were general government and personal services. Agricultural output has been dominated by commercial cattle farming (68% of agricultural products). The Trade Policy Review Report on Namibia, however shows that real GDP growth slowed from 3.4% in 1999 to 2.4% in 2001. It also states that, although mining is important, especially diamonds, the most growth has been from non-mining activities. These include manufacturing, services, tourism, transport, and communications. This position shows that there is a steady move away from over-dependence on mining activities and seeing diversification into other economic activities, which, given the

government intensified efforts to promote the agriculture and fishing industries as a means of boosting its economy and improving the levels of food security.<sup>227</sup> In addition, the manufacturing sector has been given much more consideration in the National Development Plan.<sup>228</sup> Prior to this, the processing of fish was the main form of manufacturing.<sup>229</sup> In 2000, it accounted for 25% of the manufacturing output. It must be noted here that then already, the state-owned Fisheries Development Corporation provided planning, capital and infrastructure which led to the early success of the fish processing industry.<sup>230</sup> Such successes increased employment opportunities for the Namibian people.

Much later in the year 2000, another contributor to the manufacturing industry was developed, namely food and beverage. The manufacturing of food and beverages accounted for 50% of the output in the year 2000.<sup>231</sup> This meant that the Namibian economy mainly consisted of mining, processing of fish, food and beverages.<sup>232</sup> Odada<sup>233</sup> states that this lack of diversity in the Namibian economy is partly due to Namibia's membership of SACU. Such membership has made it very easy for businesses and private individuals alike to import most of their needs from South Africa at very competitive prices. This makes it difficult for locals to start up business and compete due to the high start-up costs involved.<sup>234</sup>

### **3.3 Namibia's membership in SACU**

As highlighted above, South Africa took control of SWA in 1915.<sup>235</sup> Although attempts to make SWA the fifth province of South Africa failed, it was still treated as a territory of South Africa. Therefore, section 21 of the South African *Customs and Excise Act 35 of 1921*<sup>236</sup> was applicable to SWA. SWA became part of the customs

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chance to thrive, may positively contribute to the well-being of the Namibian economy. See also Shilimela *Preliminary Country Paper* 1.

227 Namibia's Second National Development Plan 2001/02 to 2005/6.

228 To be discussed below.

229 Klaus "Infant Industry Protection" 2.

230 Odada and Godana "Sources of Growth in Africa" 16.

231 Odada and Godana "Sources of Growth in Africa" 15.

232 Odada and Godana "Sources of Growth in Africa" 16.

233 Odada and Godana "Sources of Growth in Africa" 16.

234 McCarthy *Southern African Customs Union* 18.

235 See chapter three.

236 Under the Union of South Africa.

union by default. This is so because SWA signed the 1969 Agreement as part of South Africa and only in 1990 did it become independent.<sup>237</sup> The 1969 Agreement as discussed in chapter two was repealed, giving rise to the 2002 Agreement to which Namibia was a member at inception.

As discussed in chapter two, the main advantage for such membership is the revenue shared amongst these countries.<sup>238</sup> Secondly, the preamble envisages the industrialisation of member states.<sup>239</sup> The above could be part of the reasons Namibia decided to stay on as a member state of SACU, after its independence.

### **3.4 Namibia's policy and legislation on IIP**

#### *3.4.1 Pre and post-independence*

Before independence, the South African government was essentially in control of Namibia's economy, money supply and trade flows.<sup>240</sup> This was because SWA was a protectorate of South Africa. It was not treated as an independent country and therefore acted in the interest of South Africa and served as a market for South African products.<sup>241</sup>

Pre-independence, under South African administration, the people of SWA could do very little to either establish or implement industry protection. This was because it was administered by South Africa, who did not endeavour to protect SWA's infant industries.<sup>242</sup> However, the adoption of the *Namibian Constitution* on 9 February 1990 changed this position. In practice Namibia<sup>243</sup> could, for the first time, effectively

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237 See McCarthy *Southern African Customs Union*.

238 See chapter two.

239 See chapter two.

240 Freeman 1992 *Transformation* 30.

241 This meant that the South African *Import and Export Control Act* 45 of 1963 was also used to control South West Africa's imports and exports. This act, in section two, gave the Minister of Trade, Industry and Tourism the right to prohibit imports into both SA and SWA as he deems necessary or expedient in the public interest.

242 McCarthy *Southern African Customs Union* 18.

243 As it was called after independence.

address, among others, aspects of industry protection and industrialisation for economic development.<sup>244</sup>

Chapter 11 of the *Namibian Constitution* provides for Principles of State Policy which require the government to, *inter alia*, take measures to ensure that Namibians are paid a decent wage adequate for a decent standard of living. Further, article 21(j) of the *Namibian Constitution* provides that all persons have the right to practice any profession, or carry on any occupation, trade or business. Therefore the above objectives may be achieved by use of IIP. This empowers domestic producers to grow, develop a skill base and create employment. The result is that more people are employed to keep the business running successfully.

### 3.4.2 *Namibia's policies on IIP*

At independence in 1990, the Government of the Republic of Namibia embarked on an effort to put policies in place so as to supplement its economic goals. Shilimela<sup>245</sup> writes that the first move towards enhancing manufacturing or value adding activity came in the form of industrial strategy as set out in the “White Paper on Industrial Development” of August 1992. The policies, as relevant to this paper, embraces, *inter alia*, concepts aimed at making the private sector a leading economy. This is by means of creating an enabling environment to make the private sector internationally competitive. In addition, the government aimed to prevent further creation of monopolies in Namibia which expose the Namibian industry to import competition.<sup>246</sup>

In addition to the White Paper, in June 2004, the government launched a long term plan called the Vision 2030.<sup>247</sup> The Vision’s rationale is to provide long term policy scenarios for the country’s future development until the year 2030.<sup>248</sup> Vision 2030 also regards the sequential five-year National Development Plans as the main

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244 Ruppel 2010 *Namibia Law Journal* 80.

245 Shilimela *Preliminary Country Paper* 3.

246 *White Paper on Industrial Development* (1992).

247 Republic of Namibia Vision 2030 16.

248 Republic of Namibia Vision 2030 8.

vehicles for achieving its long term objectives.<sup>249</sup> These are called the Transitional Development Plans.<sup>250</sup> The first plan covered the period of 1991 until 1994, the second from 2001 until 2006, the third from 2007 until 2012. Namibia is currently using the fourth plan effective from 2012 until 2017.<sup>251</sup>

More recently the New Equitable Economic Empowerment Framework (hereafter NEEEF) was introduced, which promotes more economic participation by Namibians within their own economy.

Therefore, from policies mentioned above, it is clear that the Namibian Government is seeking to redress past economic injustices by creating platforms for economic growth and employment. One of the ways this can be done is by way of protecting infant industries to allow domestic industries to produce the goods that the Namibian population buys from South Africa and other foreign markets.

### 3.4.3 *The Import and Export Control Act 30 of 1994*

In 1994, Namibia enacted its own *Import and Export Control Act* (hereafter IECA).<sup>252</sup> This Act repealed the South African *Import and Export Control Act 45 of 1963*. It was enacted in order to provide for import and export control measures and other matters incidental to it.<sup>253</sup> It is also observed that this Act was brought into force in 1994, four years after Namibia became independent. Such a step shows the effort by government to help secure its economy by realising the need to protect certain industries from external pressure until such a time as the industry could compete favourably.

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249 Vision 2030 aims to achieve a prosperous and industrialised Namibia, developed by her human resources, enjoying peace, harmony and political stability; see Republic of Namibia Vision 2030 8.

250 Shilimela *Preliminary Country Paper 2*.

251 In 1995, NDP 1 focused on only four goals: boosting and sustaining economic growth, creating employment, reducing inequalities in income distribution, and reducing poverty. In 2001, NDP 2 focused on income inequality, high economic growth, increased employment, and the eradication of poverty. In 2007/8, NDP 3, similar to NDP 1 and 2, focused on income inequality, high economic growth, increased employment, and the eradication of poverty; NDP 4 is focusing on high and sustained economic growth, employment creation and increase income equality. See Namibia's Fourth National Development Plan 2012/13 to 2016/17.

252 This Act repealed the *Import and Export Control Act 45 of 1963*.

253 Introduction to the IECA.

### 3.4.3.1 The powers of the Minister of Trade

The Act gives the Minister of Trade and Industry (hereafter Minister)<sup>254</sup> the power to prohibit imports into and exports out of Namibia, whenever it is expedient to do so or in the interest of the public. The exception to this rule is where an importer or an exporter holds a permit<sup>255</sup> issued by the Minister. The permit must stipulate, among other requirements, the kind and quantity of goods he may import or export. The Minister has full discretion to decide which products may be prohibited. The powers of the Minister in this regard may be deemed necessary, especially for developing countries whose protection cannot be achieved only by means of additional duties.<sup>256</sup> In this regard, with respect to IIP, the Minister may make a decision to prohibit imports that threaten local industries producing similar goods. Such a decision squarely falls in the ambit of section 2, because IIP does indeed affect the public interests of Namibia. This is so because, as discussed above, Namibia's economic policies and endeavours affect the whole of Namibia.

On the other hand, these powers have been questioned and are due for hearing in the Namibian High Court in 2014.<sup>257</sup> Metador Enterprises launched a case in the Windhoek High Court asking the Court to declare Government Notice 245 of 2013,<sup>258</sup> in which the Minister of Trade imposed quotas for dairy products, unconstitutional. Metador asked the Court to declare sections of the IECA unconstitutional because they give the Minister power to legislate which is unconstitutional and infringes Metador's constitutional right to carry on its trade and business. Metador also argue

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254 Of any goods of a class or kind specified in such notice or of any goods other than the ones specified in such notice.

255 IECA s 2(1): "The Minister may, whenever it is necessary or expedient in the public interest, by notice in the *Gazette* prohibit - (a) the import into or the export from Namibia; or (b) the import into or the export from Namibia, except under the authority of and in accordance with the conditions stated in a permit issued by the Minister or by a person authorised by him other, of any goods of a class or kind specified in such notice or of any goods other than goods of a class or kind specified in such notice."

256 Although some international companies may actually, due to their capital base, be able to pay such duties and still trade. Therefore a prohibition, subject to a permit, may in this instance prove necessary. See Elliott *Tariff Procedures* 218.

257 This case is due to meet a legal challenge in the Windhoek High Court in early 2014; see Menges 2013 <http://allafrica.com/stories/201310160878.html>.

258 In this notice, the Minister of Trade and Industry, Calle Schlettwein, prohibited the importation of dairy products into Namibia, except when an import permit had been issued. He also prescribed a limit of 500 000 litres per month for the importation of milk and cream into Namibia, and a limit of 200 000 litres per month for the importation of cultured milk products.

that the Minister did not properly apply his mind to consider whether the dairy import restrictions are merited and necessary in the public interest. The basis for this argument was that, if an industry is not established during the twelve years of protection, it will never be able to do so.<sup>259</sup>

In response to the case raised by Metador, the Ministry of Trade stated that the import restrictions were necessary to build and maintain domestic capacity for the development and production of food products in Namibia. It further stated that the government notice was issued in terms of IECA because it gave the Minister of Trade the power to regulate the import and export of goods. Therefore, there was no basis to contend that the Minister's decision and the relevant sections of the Act<sup>260</sup> are unconstitutional. He also mentioned that the import restrictions are based on a legitimate government objective which considers the interests of Namibia to boost industrial development, job creation and the benefits that the development of the local dairy industry would have for the country in the long term.<sup>261</sup>

The above application shows that the Ministry of Trade can, through the IECA impose restrictions as is deemed necessary for the interest of the public. However, as discussed in chapter one,<sup>262</sup> there must be due regard to the concerns raised therein.

#### 3.4.3.2 The means of protection

The protection granted by the Minister is achieved by the issuing of a permit.<sup>263</sup> It should prescribe the quantity or value of the goods, their price and the period for which such permit is applicable. The permit must also include the port from which such goods will be imported or exported and the manner in which the goods will be

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259 This is one of the disadvantages of protection by use of national legislation. It excessively prolongs protection, making the protected industry constantly dependent on the government. See also Menges 2013 <http://allafrica.com/stories/201310160878.html>.

260 Section 2 of the IECA.

261 See Menges 2013 <http://allafrica.com/stories/201310160878.html>.

262 Paragraph 1.2.

263 This means that if an exporter or exported has no permit to this effect, he may not import or export into or out of Namibia.

imported or exported.<sup>264</sup> There must be strict adherence to the provisions of the permit, failure to which the permit may be cancelled as discussed below. With respect to IIP, such a permit, if issued, will indicate the quantity of a product a particular company is allowed to import into Namibia.<sup>265</sup> They must adhere to such a requirement strictly, failure to which the company will face a penalty.<sup>266</sup>

#### 3.4.3.3 Cancellation

With regards to the cancellation of such a permit, the Minister may cancel or amend it if he is satisfied that some or all of the conditions of such a permit have not been adhered to.<sup>267</sup> Any person who fails to comply with the requirements and conditions of the IECA shall be guilty of an offence and liable to a fine not exceeding N\$20 000 or imprisonment not exceeding 2 years, or both such fine and imprisonment upon conviction. He may even be liable to a fine three times the commercial value of the goods in respect of which the offence was committed, or forfeiture of such goods to the state.<sup>268</sup>

The provision of sanctions, should an importer or exporter fail to comply with the terms of the permit, is definitely an added help to the effectiveness of infant industry protection. It makes it clear that, should the importer or exporter fail to comply,<sup>269</sup> there is a consequence to be suffered.<sup>270</sup>

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264 Section 2(3) of the IECA: "A permit issued under subsection (1) may prescribe the quantity or value of goods which may be imported or exported thereunder, the price at which, the period within which, the port through or from which, the country or territory from or to which and the manner in which the goods may be imported or exported, and such other conditions as the Minister may direct, including any condition relating to the possession, ownership or disposal of goods after the import thereof or to the use to which they may be put."

265 This is done in order to allow the local industry producing similar goods to supply the rest of the market.

266 Although as noted above, it is too low.

267 Such as conditions as to the quantity of goods that may be brought into Namibia, as indicated on the permit.

268 Section 4 of the IECA.

269 Even though not gravely, considering the volumes involved in trade.

270 Of note is that the 2002 Agreement is an international agreement, and the IECA is national legislation. Therefore, the two instruments cannot be interpreted in a similar fashion. However, even in an agreement, the member states could have agreed that the 2002 Agreement impose some form of penalty when member states do not comply. A lack of penalties or sanctions may make implementation difficult, because member states do not face a penalty for non-compliance. The only principle that guides them, is that of *pacta sunt servanda*.

In brief conclusion, the above discussion on Namibia's policy and legislation shows that, indeed, Namibia has economic and social injustices that it needs to redress as per article 25(1) of the 2002 Agreement. Therefore, Namibia can, for this reason, use its national import and export legislation to prohibit imports or exports in its area. However, article 25(3) states that member states cannot use the above provisions to prohibit imports and exports for the purposes of protect an infant industry. It seems as though article 25 allows prohibition of imports and exports for economic, social and cultural purposes, with reference to a member state's national import and export legislation.<sup>271</sup> However, it does not allow prohibition of imports and exports in order to protect infant industries. This distinction draws a very thin line between prohibition for economic, social and cultural purpose and prohibition for IIP, thereby limiting the member states scope for protection.

### **3.5 IIP and the Namibian industry**

Namibia's unemployment rate currently sits at over 50%.<sup>272</sup> This shows that there is an urgent need to address unemployment in Namibia. The problem with free trade is that investors are not obliged to set up large facilities that employ the masses.<sup>273</sup> Their aim is really to make as much profit as possible without much investment. Therefore, the Ministry of Trade in Namibia has taken a new route which now encourages expansion of local industries that will facilitate job creation.<sup>274</sup> The Namib Poultry Industries (Pty) Ltd (hereafter NPI)<sup>275</sup> for instance, once fully operational, plan to create over 500 employment opportunities. Apart from this, NPI will develop the employee's skills through the transfer of knowledge and information.<sup>276</sup>

In the same light, Namib Mills (Pty) Ltd, who also utilised IIP for the pasta industry, have since increased their capacity. This protection led to the second pasta producing operation through Bokomo Namibia (Pty) Ltd who also recently expanded

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271 This may include policies, because they contain the economic, social and cultural interests of member states.

272 Index Mundi 2013 [www.indexmundi.com](http://www.indexmundi.com) (3).

273 Xoagub 2013 [www.observer24.com.na](http://www.observer24.com.na).

274 Steenkamp 2013 *Ministry of Trade Interview: Import and Export Permit Department*.

275 To be discussed in detail below.

276 Roux 2012 [www.namibian.com](http://www.namibian.com).

their production.<sup>277</sup> Presently, Namibia's consumption of pasta is higher than that of South Africa, earning the country the chance to explore foreign markets and earn foreign currency.<sup>278</sup> NPI, for instance, was quoted to have lost millions of its \$600 million investment before protection was granted.<sup>279</sup> And so, such businesses need to be given some protection to enable them to build skills, expertise and a good capital base in order to compete with the established foreign poultry producers.<sup>280</sup>

Another significant advantage of IIP is that the raw material necessary for production will be sourced within the country. A case in point is that of Ohorong Cement (Pty) Ltd in Namibia which sources all its raw materials from Namibia, making it one of the few companies that complete the value chain of their product within Namibia.<sup>281</sup> However, because South Africa has remained a dominant producer, member states obtain their raw material and finished products from South Africa.<sup>282</sup>

### **3.6 The Namib Poultry Industries case study – general overview**

The demand for chicken as a source of protein in Namibia has become ever greater in recent years. The Namibian market as at 2011 was estimated at 250 000 chickens per week or a per capita consumption of 8 kg per year.<sup>283</sup> The continued rise in such demand has catapulted the supply of chicken to the Namibian market by South African companies. Therefore, there is no reason why local producers should not grow to help meet this demand. Unfortunately this has, until recently, been a challenge and concern especially for NPI.

The reason behind such concerns is that South Africa has been importing large amounts of chicken into Namibia at prices lower than the cost of producing chicken

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277 Roux 2012 [www.namibian.com](http://www.namibian.com).

278 Roux 2012 [www.namibian.com](http://www.namibian.com).

279 Nyaungwa 2013 [www.economist.com.na](http://www.economist.com.na) (1).

280 Roux 2012 [www.namibian.com](http://www.namibian.com).

281 Roux 2012 [www.namibian.com](http://www.namibian.com).

282 McCarthy *Southern African Customs Union* 12.

283 Agritrade 2011 [www.agritrade.cta.int](http://www.agritrade.cta.int).

in Namibia. Such products, due to article 18 and 19,<sup>284</sup> are imported into South Africa from Brazil pending exportation to other member states at no extra charge of duty.<sup>285</sup> In addition, due to the dominance South Africa has in the CCA market, it exports large amounts of poultry produced in South Africa at cheaper prices than NPI. This is done partly by way of franchises such as Shoprite and Checkers.<sup>286</sup>

### 3.6.1 *The Namib Poultry Industries - case study*

NPI<sup>287</sup> is a Namibian company duly registered under the laws of Namibia.<sup>288</sup> It was established as a result of a diversification by Namib Mills into poultry with an investment of N\$500 million.<sup>289</sup> NPI responded to a void at that time because Namibia did not produce broilers.<sup>290</sup> However, this move by NPI soon became a challenge due to the fact that Namibia imported over 2 000 tonnes of poultry products from South Africa and South America, which accustomed the Namibian consumer to frozen imported chicken.<sup>291</sup> The direct consequence of such dumping was that NPI was losing millions in piled stock.

Due to the above conditions of trade, Namib Poultry Industries made an application to the Ministry of Trade and Industry to effect infant industry protection under article 26 of the 2002 Agreement. Such protection would impose a 46% levy to be charged on all poultry imports from Brazil and South Africa for a period of 6 years, after which the percentage would be reduced to 30% until 2018 and subsequently 20% until March 2020, after which it would be phased out.<sup>292</sup> This protection was never granted.<sup>293</sup> There has been no official reason as to why IIP was not implemented.

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284 Free trade and lack of duties on goods imported from outside the CCA by a member state discussed in chapter two.

285 Agritrade 2011 [www.agritrade.cta.int](http://www.agritrade.cta.int).

286 Nyaungwa 2013 [www.economist.com.na](http://www.economist.com.na) (1).

287 This study focuses on NPI as an infant industry because, even though a 26 of the 2002 Agreement, counting from its date of registration until present, does not recognise it as an infant industry, indeed it needs protection. This is so because its success is directly linked to the achievement of Namibia's economic goals. Further, the issue of dumping of chickens has become a contentious topic in the region and, as such, the company at the heart of such contention must be discussed.

288 Company Registration No. 2002/0159 available at [www.namibpoultry.com](http://www.namibpoultry.com)

289 Xoagub 2013 [www.observer24.com.na](http://www.observer24.com.na).

290 Xoagub 2013 [www.observer24.com.na](http://www.observer24.com.na).

291 Namib Poultry 2012 [www.namibpoultry.com](http://www.namibpoultry.com).

292 Agritrade 2011 [www.agritrade.cta.int](http://www.agritrade.cta.int).

293 Nyaungwa 2011 [www.economist.com.na](http://www.economist.com.na).

However, considering the discussion of the CoM in chapter two, one may attribute this to the failure by the CoM to make a timely decision. As a result, NPI approached the Ministry of Trade and Industry who granted an interim measure as follows.<sup>294</sup>

The Minister of Trade, Calle Schlettwein authorised the Meat Board of Namibia in terms of the Import and Export Control Act to issue permits upon application for the importation of poultry products into Namibia. The new control measures were gazetted on 5 April 2013 and came into force on 6 May 2013. From that date, importers of poultry products derived from slaughtered chickens will be issued with permits to import poultry products not produced locally, with the ministry settling for a monthly quota of 600 tonnes, which will be apportioned amongst importers. No such restrictions were in place in the past, which allowed importers to import unlimited amounts of poultry products already produced in the country. Manager of operations at the Meat Board, Willie Schutz, said only basic products not produced locally will be permitted to enter the country. These include frozen products such as wings, baby chicken and breast fillets, while Individual Quick Frozen (IQF) products such as fresh whole birds will be restricted from entering Namibia. According to Mr Schutz, the apportioning of the 600 tonnes will be weighed on the basis of each individual importer's import history from the previous financial year, against what they currently intend to import. The apportioning will be done monthly by a steering committee which will take into account the situation at that given time. "In the first three months (May to July), the apportionment of the 600 tonnes, if needed, will be done on previous year's import data. "After the three months we will apportion based on how much importers buy locally. It is important that companies wishing to import, including in transit, should register with the Meat Board so as to receive relevant information on time," Mr Schutz concluded.

To this end the new Managing Director for NPI was appreciative of the government for taking such a step and indicated that NPI would not be pursuing the infant industry protection.<sup>295</sup> This position shows that, at present, the import and export offers better protection than the 2002 Agreement because of its ability to make timeous decisions that further the achievement of Namibia's economic goals and policies.<sup>296</sup>

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294 Haufiku 2013 [www.informante.web.na](http://www.informante.web.na).

295 Trade Mark Southern Africa 2013 [www.trademarksa.org](http://www.trademarksa.org) (1).

296 It must be mentioned briefly that the result of the Minister of Trade's decision to restrict imports to 600 metric tonnes, is that imported chicken in the Namibian market become limited and scarce, thereby allowing local producers to increase their process. However, consumers are complaining that these prices are too high. NPI responded to this by saying that the previous prices before the interim measure were unrealistic, and because of the levy system, chicken prices have also gone up in South Africa. Further, the prices do not affect the annual inflation rate and are actually necessary to give the local industries the relief they seek (Xoagub 2013 [observer24.com.na](http://observer24.com.na)). In addition, the Ministry of Trade also mentioned that the permit system they are currently using as a condition, requires that the prices consumers pay for such goods must have due regard to the needs of the consumer. The Ministry of Trade also now has the right to check compliance of such conditions and revoke the permit if need be. (Steenkamp 2013 *Ministry of Trade Interview: Import and Export Permit Department*).

### **3.7 The application of SACU IIP provisions to the case study**

The objective of a customs union make it clear that member states will either agree to apply low tariffs or not impose any tariffs at all, for products that are traded within the region.<sup>297</sup> Article 19, due to the fact that it prohibits the imposition of any duties on goods imported from outside the CCA,<sup>298</sup> makes the situation difficult, because not only is this treatment afforded to member states, but if a member state imports certain products from another country (which is not a member state), those goods will enjoy the same treatment as if they are grown or produced by the member state. Further, according to Ferreira,<sup>299</sup> the free trade policy in SACU attracts imports from South Africa and abroad, thereby compromising IIP in Namibia. The above provisions create the perfect conditions for South Africa and Brazil to import large amounts of chicken into Namibia at very low cost prices. Such products find their way into Namibia through franchises such as Checkers and Pick Pay and other smaller entrepreneurs.<sup>300</sup>

Despite the interpretations one may deduce from the 2002 Agreement, the question still remains: to what extent does SACU presently protect Namibia's infant industry?

With respect to IIP in SACU, one cannot resist observing that NPI, according to article 26 of the 2002 Agreement, does not qualify as an infant industry because it has been in existence for more than 8 years. In this regard, it is clear that the protection granted by SACU is limited. In this regard SACU may learn from the European Customs Union. The European Commission<sup>301</sup> found that internal market regulations, research and policy went a long way to protect infant industries.<sup>302</sup> This was so because internal market regulations could, on a smaller scale as compared to the CCA, monitor and implement IIP. In addition research and policy allowed member states to gather information and assess information pertaining to IIP. This allows member states and stakeholders to make informed decisions.<sup>303</sup> Further, the

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297 Kruger *Customs Unions* 33.

298 On importation of such goods from the area of any other member state.

299 Nyaungwa 2013 [www.economist.com.na](http://www.economist.com.na).

300 Such as hostels and hospitals (Xoagub 2013 [www.observer24.com.na](http://www.observer24.com.na)).

301 European Commission *Communication from the Commission to the EU Parliament* 5.

302 See European Commission *Communication from the Commission to the EU Parliament* 5.

303 See European Commission *Communication from the Commission to the EU Parliament* 5-7.

European Commission proposed the identification of small SMEs that had potential and help establish them.<sup>304</sup>

With regard to the dumping of poultry products from Brazil, ITAC, in January 2012, after receiving a complaint from the South African Poultry Association in June 2011, imposed provisional anti-dumping duties of between 6% and 63% on Brazil's chicken imports, following an investigation that found that three Brazilian exporters sold their chicken in the SACU market at lower prices than in the Brazilian market.<sup>305</sup> However, the Namibian poultry industry has not received any protection under SACU for poultry imported from South Africa to Namibia. In the interim, pending the outcome of whether NPI will be granted protection from South African products under SACU, the Ministry of Trade agreed to utilise the IECA to give the poultry investment interim protection.<sup>306</sup> Therefore, once again the extent to which SACU can protect NPI from dumping is limited.

Another concern of the anti-dumping measures taken by ITAC with respect to the imports from Brazil is in the anti-dumping regulations that guide ITAC. Article 5.10 of the *Anti-dumping Regulations* states that a SACU industry may apply to ITAC for an investigation into dumping, if it accounts for 25% or more, of the SACU industry that produces the same good. This is a problem for NPI because, as it stands, the South African Poultry Association already counts for about 75%<sup>307</sup> of SACUs poultry industry. This means that NPI cannot approach ITAC to investigate dumping allegations against South Africa.

### **3.8 Conclusion**

At present, SACU is not adequately protecting NPI because there are still a lot of foreign poultry products on the Namibian market.<sup>308</sup> As a result, Namibia has utilised the IECA to protect the poultry industry. With reference to Namibia's policy and

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304 European Commission Communication from the Commission to the EU Parliament 6.

305 Xoagub 2013 [www.observer24.com.na](http://www.observer24.com.na).

306 Xoagub 2013 [www.observer24.com.na](http://www.observer24.com.na).

307 ITAC Notice 1047 in Government Gazette 36951 of 25 October 2013.

308 Xoagub 2013 [www.observer24.com.na](http://www.observer24.com.na).

legislation, Vision 2030, the Transitional Development Plans and NEEEF, it is clear that IIP is a relevant tool for the growth and development of the Namibian Industry.

However, reading from article 25(3) of the 2002 Agreement, Namibia seems to have violated article 25 of the 2002 Agreement because it cannot be used to protect infant industries. With regard to the definition of an infant industry in article 26, NPI does not qualify for protection, even though there was material injury to the Namibian poultry industry. This analysis and conclusion exposes the shortcomings of the 2002 Agreement because, even though the 2002 Agreement has protection provisions, they are not sufficient. This is due to their inability to accommodate the different economic needs of the member states. Furthermore, the institutional arrangements of SACU leave much to be desired. This is because, firstly, the framework is not fully operational, thereby frustrating the decision processes in SACU. Secondly, the framework has shied away from taking an active and decisive role in creating policy to help cater for the implementation of the provisions of the 2002 Agreement.

With regards to dumping, it is undisputed that SACU and ITAC have made considerable efforts in curbing Brazil's dumping in the SACU region. However, South Africa's dumping in Namibia still remains unaddressed. This could be so because NPI does not account for 25% or more of the SACU poultry industry as required in the anti-dumping regulations. Therefore, NPI cannot, on its own make an application to ITAC for an investigation into South Africa's dumping. This could very well be the reason why the Namibian Ministry of Trade and Industry, even though in contravention of the 2002 Agreement, implemented protection using the IECA.

## **4 Summary and conclusions**

### **4.1 Introduction**

The GATT/WTO was established with the aim to liberalise trade. Although this is its primary aim, it equally recognises the different levels of economic growth and change in the world. To this end, it provides for safeguard measures which countries may take in order to protect their infant industries. With reference to the protection of infant industries in SACU, in particular Namibia's poultry industry, such recognition implies that the Namibian government has the right to protect its infant industry.

Reverenced as the oldest customs union in the world, SACU has survived colonial influence. It has evolved from an instrument that was created to facilitate free flows of goods and the distribution of revenue to one that has acknowledged the economic difference of the member states. It has achieved this by providing for, among others, IIP, the establishment of an institutional framework and the re-working of the revenue sharing formula.

The following provisions are key to IIP. Firstly, as a foundational principle, article 18 of the 2002 Agreement calls for the removal of trade barriers in the CCA. Article 19 of the 2002 Agreement makes it clear that member states shall not impose any duties on goods imported from outside the CCA on importation of such goods into the area of any other member state. Article 25, as an exception to free trade, gives a limited right to member states to take measures to restrict imports into their countries for economic, social, cultural or other reasons as may be agreed upon by the Council. This provision is limited because article 25(3) states that it cannot be used to protect member state's infant industry. In addition, article 26 of the 2002 Agreement, also as an exception to free trade, allows Botswana, Namibia, Lesotho and Swaziland to impose temporal additional duties in order to protect their infant industries from competition. This article goes further and defines what will be considered an infant industry. The concern with this provision is that the definition of an infant industry is limited to one that exists for not more than eight years. This limits the protection of industries that may have been in existence for more than eight

years but suffer material injury due to a lack of protection. To this end, the Namibian Ministry of Trade has employed the use of IECA to protect NPI.

Drawing from the economic history of Namibia, the IECA, Vision 2030, the Transitional Development Plans and NEEEF, it is clear that Namibia is in dire need of industrial diversification. This is to allow it to broaden the platform on which it may remedy past economic injustices, due to colonialism. This will also allow Namibia to achieve its future economic goals by supporting industries such as NPI. In this regard, NPI has expressed satisfaction with the protection granted using the IECA. However, according to article 25(3) of the 2002 Agreement, the use of the IECA by Namibia to protect its poultry industry, as an infant industry, is a violation of the 2002 Agreement.

Of particular concern is the flooding of poultry products on the Namibian market by South Africa. SACU, through ITAC, has quite notably made some strides in restricting poultry products from Brazil and other EU countries. However, the Namibian market is still flooded with South Africa poultry products that filter into the country through South African franchises such as Shoprite and Checkers. SACU and ITAC have not dealt with this issue neither have they expressed their position on the matter. Clearly the present situation reflects that SACU does not adequately protect Namibia's interests. The 2002 Agreement may have the provisions necessary for such protection, but thus far, the implementation has been inadequate.

The CoM as the decision making and policy implementing body of SACU must ensure that the 2002 Agreement is supplemented by policy that will guide implementation of its provisions. The lack of such an effort from the CoM exposes the 2002 Agreement to increasing criticism. Further, because SACU's institutional framework is not fully operational, the CoM, TB and the Tribunal do not perform their duties effectively. This has made member states resort to their national legislation for IIP and dispute resolution mechanisms that exclude the Tribunal.

With regard to dumping, SACU through ITAC may investigate and impose anti-dumping duties. However this protection is limited. This is due to the fact that the *Anti-dumping Regulations* require that, to apply for an investigation and thereby

protection if approved, NPI must account for more than 25% of the SACU poultry industry. NPI does not account for more than 25% of the SACU poultry industry because SAPA already accounts for close to 75%.

Secondly, although SACU through ITAC has made considerable strides to protecting the region's poultry industry, it is lagging behind when it comes to protecting the region against poultry products emanating from South Africa. It is most probably another reason why Namibia has implemented protection using the IECA.

#### **4.2 Recommendations**

SACU should consider having inclusive industrial policies that deal with the external pressures that weak, but promising industries have to overcome in order to develop the necessary capital base, training and skill. This can be done by employing the following approach:

Identify industries in the customs union that have the potential to become great economic boosters. The NPI has thus far created over 600 jobs and is in the process of expanding its capacity in order to cater for the Namibian market. It is safe to say that the Namibian poultry industry has potential and must be protected.

SACU can protect NPI by impose more stringent levies on poultry exports from South Africa to Namibia. This can be done in line with a 'buy Namibian' slogan where the Government out rightly encourages its people to buy Namibian products for a specified period of time. This will allow NPI to have a good undisturbed flow of income into its business, allowing it to build the necessary capacity and expand. These steps may seem radical, but a dumping problem such as the one discussed in this paper needs a radical solution.

SACU can also learn from other customs unions such as the European Union. The European Union encouraged stake holders to actively identify European industries with lesser comparative advantage, but more potential. Such industries were supported with protectionist measures such as tariffs, subsidies and anti-dumping measures. Further the European Union introduced policies that encouraged research

and development which availed the necessary information to stakeholders and industries alike to re-enforce their operations. These steps by the European Union saw a 64% increase of exports between 1959 and 1970 alone.

Further, SACU must allow member states to protect their infant industries through their national legislation. This would have to be done in good faith, with each country considering its economic goals, whilst still upholding the tenets of the 2002 Agreement. The member states can also be accountable to the CoM and periodically report to all stakeholders on the progress of such implementations. Should the process by member states be found wanting, then all stakeholders may decide on the best way forward.

### **4.3 Conclusion**

The purpose of this study was to legally analyse the effectiveness of the 2002 Agreement in protecting the infant industries of its member states, particularly that of Namibia, with specific reference to the NPI. The findings of this study are that although present, the provisions in the 2002 Agreement are limiting and create implementation problems for member states.

One of the great changes in the 2002 Agreement is that it recognises that some member states are less developed, and as such must be allowed to take restrictive measures on imports to protect industries that are weak, but have potential to contribute to the economy. However, the implementation of such provisions remains unsatisfactory. As a result, Namibia has implemented protection under its IECA 30 of 1994. Further, the CoM has failed to supplement the Agreement with common policy that can facilitate a cohesive system for industry protection in SACU.

This study does not in any way allude to the possibility that Namibia should withdraw from SACU, but rather that there is a need for some degree of fairness and fair competition in the SACU market. At the moment it's tilted, mostly in favor of South Africa. The region needs to see more committed and continued efforts by all key players to implement the 2002 Agreement and the establishment of the complete

institutional framework of SACU. This will also enhance the confidence that member states have in the 2002 Agreement.

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