

The Failed SACU-USA Free Trade Agreement in Hindsight: A Lost Opportunity or Disaster Averted?

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Abstract. Called off while still under negotiation, the impact of the failed SACU-USA Free Trade Agreement (FTA) will most likely never be known. Diverse opinions abound regarding the possible benefits and disadvantages of this would-be pioneering pact between a developed country and a group of developing countries. It is argued in this paper that there is no clear-cut answer to this complex question and that the implications of the agreement would depend largely on its specific content and the extent to which it accommodated the interests of all concerned. To determine how the agreement would have affected the Southern African Customs Union (SACU) in particular, several existing FTAs between the USA and other countries, all of which bear striking similarity, are examined. The paper also explores the significance of SACU's refusal to endorse what it perceived to be an unfavourable agreement and what this means for the future of trade between Africa and the West.

1. Introduction

The conclusion in 1999 of a free trade agreement (FTA) between the Republic of South Africa and the EU, better known as the Trade, Development and Co-operation Agreement (TDCA), generated a lot of interest from a host of other countries and regional bodies, not least from the United States.¹ This was primarily because the TDCA had the effect of limiting access to the South African market for non-EU firms relative to their EU counterparts. With a view to levelling the trade concessions plane field, some of the third parties were thus determined to negotiate similar pacts in the Southern Africa region, mostly with the Southern African Customs Union (SACU), a regional body comprising Botswana, Lesotho, Namibia, South Africa and Swaziland. This explains the origins of the negotiations for an FTA between SACU and the US.

On the part of South Africa and its SACU partners, commonly referred to as the BLNS countries, the proposed SACU-USA FTA was but part of a broader project to conclude trade agreements with a number of trading blocs in various parts of the world. This regional trading strategic policy was announced at a press conference held after the first WTO trade policy review of SACU in Geneva by the then Namibian Minister of Trade and Industry, Jesaya Myamu. He remarked on behalf of SACU as follows: "In order to position ourselves in the global economy, we are in the process of negotiating a SACU-USA Free Trade Area (FTA). At the same time, exploratory work for an FTA with Mercosur, European Free Trade Area (EFTA), India, China and Nigeria is underway."²

The US too was, while pursuing an FTA with SACU, also engaged in parallel negotiations with various other countries and regional trading blocs. According to Carim and Mashabela, by 2004, the country was actively negotiating FTAs with about 34 developing countries, among them, the Free Trade Area of the Americas (FTAA), the Central American Free Trade Area (CAFTA), Morocco, and Australia. Similar agreements with Chile and Singapore had already been finalized.³

However, only shortly after the negotiations on the proposed SACU-USA FTA commenced, opposition against it started brewing. The main concern among the agreement's critics was that certain elements proposed by the US for inclusion in it would be detrimental to the developmental aspirations of the SACU countries, while also putting public health, food security and service delivery in the region at risk.⁴ The criticism emanated from the US' insistence on an all-encompassing agreement modelled on its existing agreements in other parts of the world,⁵ an approach SACU considered to ignore.

¹ The other countries and regional bodies keen to conclude a trade agreement with SACU were the European Free Trade Association (EFTA), MERCOSUR, India, China and Nigeria.

² Leevashni Padayachee 'update: SACU Trade Negotiations with Other Countries' (2003), available at http://www.tralac.org/scripts/content_print.php?id=1593 Accessed on 13/05/08.

³ Xavier Carim and Victor Mashabela 'SACU-United States Free Trade Area', available at <http://www.dti.gov.za/fta/article.htm> Accessed on 13/05/08.

⁴ American Friends Service Committee 'Departing from USTR, Portman Leaves Dead US-Southern Africa Negotiations Behind', available at <http://www.afsc.org/trade-matters/trade-agreements/SACUDead.htm> Accessed on 23/02/08.

⁵ These include agreements in Latin America, South-east Asia, North Africa and the Middle East.

On the other hand, proponents of the agreement maintained that it held some advantages for both the US and SACU countries. They cited benefits such as rationalisation of SACU's production and services into a viable regional economy, integration of SACU into the global economy, SACU's increased attractiveness to investors due to its access to the world's largest economy, development through "trade not aid" for BLNS countries, and promotion of growth in an untapped market for US investors.⁶ Eventually, the negotiators failed to reach a consensus on many of the contested issues, leading to the collapse of the talks and elimination of any hope that an agreement would finally be concluded.

In this paper, an assessment of the likely impact of the SACU-USA FTA had it materialised, is made. The paper is divided into five sections besides the introduction. Section 1 surveys some of the existing regional trade regimes in Southern Africa, namely the SACU Agreement, the SADC Treaty, the TDCA and the AGOA Act. The purpose of this section is to explain the broad trade law framework within which the SACU-USA FTA would have operated. Section 2 looks at the aftermath of the TDCA nearly ten years into its signing. The section aims to draw on the experiences of SACU under the TDCA, which is also an agreement between developing and developed countries. Section 3 examines several FTAs the US concluded with a number of other countries prior to commencing negotiations with SACU. This section further seeks to piece together how the SACU-USA agreement might have turned out based on the striking similarities of these other agreements. Section 4 explores the implications of SACU's refusal to back down in the face of pressure from the US concerning what shape the agreement should take. The final section is the summary and conclusions.

2. Survey of the Trade Law Regime in Existence within SACU during the SACU-USA FTA Negotiations.

The negotiations towards an FTA between SACU and the US took place in the context of a welter of both treaty-based and domestic statutory trade law commitments. These have already been alluded to in the introductory section, but they are further discussed below for purposes of completion.

2.1 The Southern African Customs Union (SACU)

The origins of SACU can be traced back to the 1889 Customs Union Convention between the British Colony of Cape of Good Hope and the Orange Free State Boer Republic, making it the oldest customs union in the world today. In 1910 the agreement was extended to cover the Union of South Africa and the British High Commission Territories of Bechuanaland, Basutoland and Swaziland, now respectively known as Botswana, Lesotho and Swaziland (BLS). Namibia only became an official SACU member after attaining independence in 1990, having previously been a *de facto* member by virtue of its status as a South African administered territory since 1915.

Important features of the 1910 agreement included a common external tariff in respect of all goods coming into SACU, a common pool of customs and excise duties, complete freedom of movement for goods manufactured inside the union; and an agreed formula for sharing the revenue collected. Another notable aspect of the customs union has been its complete domination by South Africa.⁷ This domination was perhaps most glaring in South Africa's control of the common revenue pool to the total exclusion of the other SACU members.

Dissatisfied with the power wielded by South Africa under the 1910 agreement, the BLS countries sought to democratize the union by pressing for new governing and administrative structures. This led to the 1969 amendments that introduced, among other things, a revised revenue sharing formula that resulted in a 42 per cent increase in BLS share of the revenue.⁸ Further amendments followed in 1976 and later in 2002 the other SACU members, including Namibia,⁹ expressed renewed discontent concerning the revenue sharing formula and South Africa's continuing decision-making monopoly in the formulation of customs and excise policies.

While South Africa is still by far SACU's most influential member, today the SACU agreement incorporates several clauses providing for a number of independent structures charged with overseeing the administration of the union.¹⁰ Most importantly, these structures are made up of representatives from the union's various members, giving each one a more equitable say in how it is run. The agreement also incorporates a new

⁶ Jill M Verbeck, John K Sagala, Yin Min Kyi, Daniel Ogbaharya and Luke M Olson 'The Proposed US-SACU Free Trade Agreement (FTA): Comparisons with the FTAA, CAFTA, US-Chile FTA, and US-Singapore FTA' (2004) 67 *ACAS Bulletin* 19.

⁷ South Africa, with a far more sophisticated economy, accounts for over 90 per cent of SACU's GDP and its manufacturing sector is responsible for around 58 per cent of the region's exports. See Mareike Meyn 'The TDCA and the Proposed SAUC-USA FTA: Are Free Trade Agreements with Industrialised Countries Beneficial for SACU?' (2003) Institute for World Economics and International Management at 2.

⁸ Verbeck et al op cit note 6 at 22.

⁹ The group was now called the BLNS countries.

¹⁰ These include an Administrative Secretariat, a Council of Ministers, a Customs Union Commission, a Technical Liaison Committee and a SACU Tariff Board.

revenue sharing formula in terms of which South Africa participates in the allocation of revenue on the same terms as the BLNS countries.

2.2 The Southern African Development Community (SADC)

The SADC¹¹ has its origins in the Southern African Development Co-ordinating Conference (SADCC), a loose coalition of Southern African states established in 1980.¹² The latter's primary objective was to establish an economic and political bloc aimed at reducing the member states' dependence on apartheid South Africa. It also sought to promote economic co-operation by attracting external donor financial resources to finance what were deemed to be important infrastructural projects with regional economic significance. It is this organisation that evolved into the SADC when it became clear that the political situation in South Africa would undergo radical changes for the better. South Africa subsequently joined SADC, whose aim now includes the promotion of economic integration and development within the Southern African region. Later amendments to the SADC treaty sought to strengthen the organisation's institutional capacity by establishing structures such as a summit of Heads of State, the Council of Ministers and a dispute settlement tribunal, among others. It is of interest that the SADC treaty has very few, if any, regional trade law provisions apart from the emphasis on the broad goal of integrating the economies of the various Southern African states.

This, however, changed in 1996 when SADC adopted a Protocol on regional trade.¹³ Its aims include gradually transforming SADC into a free trade area through tariff reductions and removal of quotas and other trade restrictions; promoting efficient production in the region taking into account the comparative advantages of the member states; promoting the in-flow of foreign investment; and enhancing industrialization and economic development.¹⁴ All in all, the Protocol is divided into nine parts with the broad goal of promoting intra-SADC trade in goods and services on an equitable and mutually beneficial basis.

Under the Protocol, the initial plan was to eliminate tariffs on 85 percent of all intra-SADC trade by 2008 and on the remaining 15 percent by 2012. To this end, the SADC member states were divided into three asymmetric categories. Category I comprised SACU member states led by South Africa, which were to begin tariff reductions in the early stages of the process. Category II were non-SACU member states classified as developing economies and they were to start tariff reductions during the middle stages of the process. The last category comprised non-SACU members qualifying as least-developed-countries, for whom tariff reductions were to commence in the final stages of the process.

With 2008 well underway, the deadline for finalizing the first stage of the tariff phase down process has already been missed, and indications are that the deadlines for implementing the other stages will also not be met. As things stand, most SADC member countries have only begun their tariff liberalisation offers products that are not traded regionally or which already have very low tariff rates.¹⁵ This cautious approach seems to stem from a desire by members to preserve existing domestic industries and reluctance to give up revenue from tariffs. As Kalenga (2004) rightly says, however, in seeking to protect their individual interests the members seem to have given little consideration to benefits such as more favourable trade patterns, which would be derived from lowering their tariff rates.¹⁶ It should be mentioned that SADC has announced plans to convert itself into a customs union by 2012.¹⁷

2.3 The Trade, Development and Co-operation Agreement (TDCA)

The TDCA constitutes something of a pioneering pact, being the first free trade agreement between the EU, a group of countries with capital intensive, technologically driven economies and South Africa, an economy anchored mainly on export of primary goods.¹⁸ With South Africa being the regional economic power house, initiation of the negotiations leading to the conclusion of the TDCA was bound to generate a lot of interest from the other SACU members. This was more so given these member states' common external tariff in respect of incoming goods. It meant that EU goods bound for South Africa would gain free entry into the markets of the other

¹¹ SADC member states are Angola, Botswana, The Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe.

¹² The cooperation between these countries had its roots in a group of "frontline states" which had been dedicated to advancing the struggle for political liberation.

¹³ The SADC Trade Protocol only came into force in January, 2000.

¹⁴ Articles 2 and 3.

¹⁵ Paul Kalenga 'Implementation of the SADC Trade Protocol: Some Reflections' (2004), available at <http://www.tralac.org/scripts/content.php?id=3045> Accessed on 6/08/08.

¹⁶ Ibid.

¹⁷ Andile Ntingi (2004) 'SADC Seeks Customs Union by 2012'. *The Star, Business Report* 22 October 7.

¹⁸ To a limited extent South Africa also relies on exports of manufactured products.

SACU members. An important aspect of the TDCA for both the EU and South Africa was the enhancement of market access by a process of phased-in roll-back of tariffs and non-tariff restrictions on trade in goods and services, as well as on movement of capital.¹⁹

The broad objectives of the TDCA are stated in article 1 as: promoting co-operation and economic integration in the Southern Africa region with the aim of contributing to harmonious and sustainable economic and social development; encouraging smooth and gradual integration of South Africa into the world economy; and promoting co-operation between the EU and South Africa within the bounds of their respective powers and in their mutual interest. Other trade related issues covered in the agreement include border security controls, safeguards, the right to take countervailing measures, protection of intellectual property rights and competition law.²⁰

The agreement also contains provisions dealing with the promotion of economic co-operation between the contracting parties in a wide spectrum of areas. The areas covered include trade and development, promotion of industrialization in South Africa, promotion and encouragement of the inflow of private investment.²¹

2.4 The Africa Growth and Opportunity Act, 2000 (AGOA)

From the perspective of the African continent, AGOA is perhaps the most important trade legislation ever to be adopted by the US. Its broad goals are stated in the preamble as, “[t]o authorise a new trade and investment policy for sub-Saharan Africa, expand trade benefits to the countries of the Caribbean basin, renew the generalised system of preferences and re-authorize the trade adjustment assistance program.” Title I of this Act is entitled, “Extension of Certain Trade Benefits to sub-Saharan Africa.” It is the short title to this part of the Act, which is often referred to as the “Africa Growth and Opportunity Act.”

The policy goals and underlying principles of the legislation are explained in section 102 in the form of several congressional findings. Thus, for example, it is provided in section 102 (1) that the Congress found it to be mutually beneficial to both the US and countries of sub-Saharan Africa to promote stable and sustainable economic growth as well as development in sub-Saharan Africa; in section 102 (8), it is stated that Congress found increased trade and investment flows to have the greatest impact in an environment where the trading partners eliminate tariff barriers and investment flows; and in section 102 (9), it is said that Congress found that offering countries of sub-Saharan Africa trade preferences would encourage both levels of trade and investment in support of the economic and political developments underway in the region.

Section 103 refers to various elements of the US trade policy towards Africa. These include, among others, encouraging increased trade and investment flow between the US and sub-Saharan Africa, cutting tariffs and non-tariff barriers in respect of trade between the two parties, and negotiating reciprocal and mutually beneficial trade agreements including the possibility of establishing free trade areas.²²

Under section 104, the power to decide on the African eligible for the benefits bequeathed by AGOA is left to the US President, who is guided by a list of specified requirements the candidate countries have to meet.²³ So far, 38 African countries, including the SACU member states, have been designated as eligible to benefit from AGOA. In the case of SACU members, South and Lesotho have been the main beneficiaries due to enhanced access to the US market for their textiles and apparel exports.²⁴

It should be mentioned, however, that a serious drawback to the AGOA arrangement is that the various trade preferences are due to lapse by 2015.²⁵ Thus, one of the key considerations behind the negotiations towards a SACU-USA FTA was to secure on a more permanent basis the trade preferences and gains accruing to SACU countries under AGOA.

3. Lessons from the TDCA Experience

The theory relating to the effects of economic integration between developing and developed countries points to the possibility of both dangers and benefits resulting from such a process. According to Viner (2005), the changes in the pattern of trade flowing from increased competition can lead to one of two consequences, either trade creation or trade diversion.²⁶ He postulates that trade creation results where consumption of cheaper goods

¹⁹ See Title II, Articles 4-17.

²⁰ Title III, Articles 18-48.

²¹ Title IV - VIII.

²² Section 103 (1) - (9).

²³ Section 104 (a) (1) - (3).

²⁴ Carim & Mashabela op cit note 3 at 2-3.

²⁵ Initially AGOA was due to expire in 2008 but the US extended its time frame to 2015. See Tim Cohen and Carli Lourens (2005) ‘SACU and US to Resume Trade Talks’ *Business Day*, 1 September 3.

²⁶ Peterson Institute for International Economics ‘Notes on Trade Creation, Diversion, and Economic Efficiency’, available at http://www.petersoninstitute.org/publications/chapters_preview/326/appaie311x.pdf

produced regionally takes place at the expense of inefficiently produced and more expensive domestic goods. On the other hand, trade diversion is said to occur where products previously sourced from all over the world are now sourced only regionally due to low regional production costs resulting from non-payment of customs duty.²⁷

While trade creation is viewed in a positive light and welcomed as promotional of optimal regional factor allocation, trade diversion is considered to be undesirable and associated with inefficient production. The theory goes on to assert that whether or not an FTA succeeds in serving the interests of all the parties thereto depends on trade creation superseding trade diversion in a given situation. Regrettably though, there seems to be no sure way of ascertaining which one of the two results will be achieved following economic integration. As de Melo *et al* have remarked, “[t]he literature on RI (Regional Integration) is full of the ‘anything may happen’ type of results.”²⁸

Eight years after the TDCA was concluded between South Africa and the EU, the experience of negotiating that agreement and its aftermath certainly offer some hints concerning the probable impact of the SACU-USA FTA. The SACU states can also learn a number of important lessons from the TDCA experience which may prove useful in future FTA negotiations.

3.1 Unmet Expectations

One aspect of the TDCA worth noting is that the foreign direct investment (FDI) it was expected to attract has, to a large extent, failed to materialise. In the years since the agreement was concluded, the overall growth of FDI in South Africa has only averaged just less than 1 percent.²⁹ In view of the fact that one of the main justifications given in support of the SACU-USA FTA was its potential to attract investment into the SACU region, the TDCA experience suggests that this is not guaranteed. It appears that while FTAs with developed countries may contribute to attracting FDI to developing countries, they are inadequate to achieve this on their own, and that other factors also come into play.

There is also the widely held belief that an FTA between developed and developing automatically lead to the latter benefiting from outsourcing of production by the former. This assumption, however, has been criticised for overlooking the significance of the proximity of the trading partners in determining where the outsourcing actually goes. The tendency among developed countries, the critics point out, is to take production to countries that are geographically nearest to them as this significantly reduces the costs of production, while at the same time enhancing the likelihood of timely delivery.³⁰ The South African automotive industry is a good example of an industry where the creation of the TDCA has not guaranteed outsourcing of production from the EU. Instead, EU firms have continued to produce many of their cars in Eastern European countries, which are only a short distance away and have abundance of cheap labour. Similar geographical and economic conditions exist between the US and neighbouring countries like Mexico, and it is improbable that the SACU-US FTA would have resulted in US firms relocating production from these countries to the SACU region.

Another feature of the TDCA that deserves a closer examination is that, while it is generally asymmetrical in favour of South Africa in so far as its content and time-frame for implementation are concerned, this does not necessarily translate into benefits for South Africa. In the case of the agricultural sector, for example, the effect of the agreement has been to open up the South African market more to EU firms than the EU has for South African firms.³¹ In addition, considering that the extent of trade restrictions in South Africa prior to the TDCA was much higher than was the case for the EU, and that South Africa’s share of trade with the EU represents an enormous 40 percent of its total world trade compared to the EU’s 1.4 percent, South Africa has far more at stake in the TDCA than the EU and has assumed a greater risk. All of this suggests that, even though during the SACU-USA FTA negotiations the US had shown a willingness to accept an asymmetrical agreement, it does not follow that the benefits for the SACU members would be guaranteed.

3.2 Impact on the BLNS

While the EU and South Africa aimed to achieve specific objectives in signing the TDCA, the brunt of the agreement’s negative repercussions is borne mostly by the BLNS countries. The explanation for the EU’s keen interest in concluding an FTA with South Africa is to be found in a green paper published in 1996 announcing the EU’s change of trade policy towards the African, Caribbean and Pacific (ACP) countries. In the document, the EU

Accessed on 6/08/08.

²⁷ Ibid.

²⁸ Jaime de Melo, Arvind Panagariya & Dani Rodrik ‘New Regionalism: A Country Perspective’ in: J De Melo & A Panagariya (Eds) *New Dimensions in regional integration* (1993)159-193 at 160.

²⁹ This is despite the EU’s own FDI to South Africa standing at 90 percent compared to the US’ 6 percent.

³⁰ Meyn op cit note 7.

³¹ South Africa has opened 81 percent and the EU 62 percent.

declares its intention to move towards a more reciprocal trade relationship with the ACP states, signalling a change from what had previously been an asymmetric relationship. And so when the TDCA was signed, it became the first agreement to give effect to the EU's new plans.³²

On the part of South Africa, following the end of apartheid, it also set out on the path of trade liberalisation as part of its strategy for economic development. Eliminating trade barriers with certain industrialised countries and its regional neighbours on the African continent became an important aspect of that strategy. South Africa was, for example, keen to source cheap raw materials such as subsidised beef from European countries to satisfy its domestic demand.³³ An agreement like the TDCA, thus, provided an opportunity to advance this objective.

Right from the start, however, some concerns were raised regarding the impact the TDCA would have on the BLNS countries, which effectively became parties to the agreement due to their economic integration with South Africa under SACU. The critics questioned whether the EU and South Africa had paid due regard to the interests of the BLNS states during the negotiations that preceded the agreement. Other concerns related to the methods employed by both the EU and South Africa in seeking to gain acceptance for the TDCA among the BLNS countries.

Among the main setbacks experienced by the BLNS states after the signing of the TDCA was having to forgo an estimated 30 percent of their tariffs on goods originating from the EU, while they received no new concessions from the EU in return. With the TDCA in place, EU goods destined for South Africa now had unrestricted access to the BLNS markets because of the common SACU tariff. The implementation of the agreement also resulted in a significant loss of customs revenue for the BLNS countries. Thus, while in 1998 the total government revenue from the common SACU customs was 17.1 percent for Botswana, 27.6 percent for Namibia, 44.8 percent for Swaziland and 41.7 percent for Lesotho, after the TDCA revenue from the same source has dwindled by 5.3 percent for Botswana, 8.6 percent for Namibia, 13.9 percent for Swaziland and 12.9 percent for Lesotho.³⁴ The advent of the TDCA also brought added pressure and competition for BLNS producers since they now had to compete with tax exempt imports, especially the heavily subsidised EU agricultural products.

In the face of these negative implications, the TDCA was met with stiff resistance from among the BLNS countries. However, the EU and South Africa were also determined to see their liberalisation plans through and did their utmost to find creative ways to overcome the growing opposition. According to Van der Staak, the primary tool used by both the EU and South Africa for this purpose came in the form of financial and other compensation to the BLNS countries.³⁵ In the case of the EU, its newly modified aid programme incorporated into the Lome Convention was particularly instrumental in this regard. The aid, whose stipulated aim now included enabling the ACP countries to cope with WTO standards and facilitate regional integration, certainly went a long way in softening the BLNS stance regarding the TDCA, while at the same time advancing the broader EU goal of trade liberalisation throughout the ACP area. The TDCA itself also contains several provisions designed to raise its popularity among the BLNS countries. For example, under the agreement, South Africa is permitted to export goods manufactured in the BLNS countries as 'South African' provided the final stage of processing taken place in South Africa.

As far as South Africa is concerned, the financial compensation to the BLNS countries involved concessions in the form of an increased share of the SACU customs revenue, as well as other compromises that had the effect of democratizing SACU's decision-making structures.³⁶ Although the BLNS had long criticized South Africa's dominance of the customs union, the timing of these changes and the fact that their implementation was conditional upon the BLNS countries raising their demands of trade liberalisation, suggest that the primary motive behind South Africa's newly found generosity was to persuade the BLNS countries to change their position on the TDCA.

Of significance for the current purposes is that the apparent acceptance of the TDCA by the BLNS countries was mainly due to external pressures that had very little to do with genuine consideration for their economic welfare. Rather, it was more about the EU and South Africa manipulating the situation to advance their own interests. As Van der Staak points out, the two powers "made it increasingly difficult for BLNS countries to withstand a move towards enhanced trade liberalisation". In his view, "[t]he various forms of pressure, stemming mainly from economic shocks, expanding conditionality and changes in the multilateral system, have created this environment."³⁷ In the end, these countries found themselves in a position where they had to compromise their long-term interests for temporary relief.

³² Under the Lome Convention, which has been revised several times, most ACP agricultural and mineral exports can enter the EU duty free and the EU committed to ploughing aid and investment into the ACP economies.

³³ Meyn op cit note 7.

³⁴ Sam van der Staak 'Trade Liberalisation and Financial Compensation: The BLNS states in the wake of the EU-South African Trade and Development Agreement' (2006) *Research Report* 84/2006 43 - 44.

³⁵ Idem 53 -56.

³⁶ Idem 44 - 45.

³⁷ Idem 47.

Based on the above, an important lesson for the SACU-USA FTA negotiators was to avoid being distracted by offers of immediate, but short-lived benefits and to maintain their focus on their countries' long-term objectives. During the negotiations, the US is said to have "[refused] to commit to restructuring the FTA in a way that takes grinding poverty, dependence on agriculture for livelihoods, and lack of access to essential services and medicines in the [SACU] region into account."³⁸ Given SACU's eventual rejection of the agreement, it appears that SACU members, the BLNS states in particular, took heed of the lessons of the TDCA and avoided repeating the mistake of accepting an agreement that is clearly detrimental to their interests.

4. Comparisons with Other US Trade Agreements

At the time the US commenced FTA talks with SACU in 2003, it had only recently concluded a number of other bilateral and multilateral trade agreements, and in the process of negotiating several more. In this section, the content and subsequent impact of some of these agreements, which closely resemble each other, are examined in an effort to work out the probable outcome of the aborted SACU-USA FTA negotiations.

4.1 US-Singapore Free Trade Agreement

Brought into force on 1 January 2004, the US-Singapore FTA was the first free trade agreement between the US and an Asian country, and the first agreement anywhere to incorporate electronic commerce commitments.³⁹ Other commitments contained in the agreement include the protection of intellectual property, ICT services, advanced rules of origin and customs co-operation. The agreement was hailed by both the US and Singapore governments as a landmark agreement and touted to become a model for future US agreements. It also received wide acclaim from among trade advisory committees in the US for promoting the country's economic interests.⁴⁰

However, elsewhere the agreement received widespread condemnation on several grounds. These included, *inter alia*, lack of meaningful protection for workers' rights and the environment, while catering extensively for commercial interests; restricting access to affordable medicines – violation of the parties' undertakings made during the Doha Ministerial; prohibiting the use of capital controls in disregard of their proven ability to restore stability in times of financial turmoil; and constraining government regulation of the services sector, thereby rendering it difficult to implement procurement policies that are sensitive to public interest.⁴¹

4.2 US-Chile Free Trade Agreement

The US-Chile FTA was also a pioneering agreement in its own right, being the first agreement between the US and a South American country. After its signing on 6 May 2003, the agreement was described by US authorities as "state of the art" for cutting tariffs and quotas, reducing obstacles to services trade, protecting leading-edge intellectual property and ensuring regulatory transparency, among other things. In highlighting the main achievements of the agreement, the former U.S. Trade Representative, Robert Zwick remarked that, "American farmers, workers, consumers and businesses will benefit from improved access to the Chilean market..." while also enjoying strong protection for their investment.⁴²

Like the Singapore agreement, the US-Chile FTA was heavily criticised outside the US and Chilean government circles, mostly for the same reasons as the former. More specifically, the agreement was denounced for bringing only marginal benefits to Chile, while aggressively advancing US economic interests. The real achievement of the agreement, the critics say, was successfully opening up opportunities for sectors such as information technologies, telecommunications and services, which are important to the US economy. As far as Chile is concerned, commentators like Pizarro argue that "...when making an unbiased evaluation of the possible benefits of the agreement, it is difficult to understand why it is considered to be so important..."⁴³ Others see the

³⁸ American Friends Service Committee op cit note 4.

³⁹ Verbeck *et al* op cit note 6 at 24.

⁴⁰ Office of the United States Trade Representative. 'Singapore FTA Reports' Available at http://www.ustr.gov/Trade_Agreement/Bilateral/Singapore_FTA/Reports/Section_Index.html?ht= Accessed 21/06/08.

⁴¹ The Citizens Trade Campaign. 'Re: U.S.-Chile and U.S.-Singapore Free Trade Agreements are Bad Policy as they Stand', available at http://www.citizenstrade.org/pdf/ctc_chile_sing_itr.pdf Accessed on 22/06/08.

⁴² Office of the United States Trade Representative 'United States and Chile Sign Historic Free Trade Agreement', available at http://www.ustr.gov/Document_Library/Press_Releases/2003/June/United_States_Chile_Sign_Historic_FreeTrade_Agreement.html Accessed on 22/06/08.

⁴³ Rodrigo Pizarro 'The Free Trade Agreement between the US and Chile: An Instrument of US Commercial Interest' (2006) *The IDEAs Working Paper Series: Paper no. 02/2006* 1.

US-Chile FTA as an unfortunate product of a growing tendency among developed countries to overstate the benefits of open trade, which has led to the undervaluing or total disregard of other strategies that might be more beneficial to developing countries.⁴⁴ They point to countries such as China, India and Vietnam as examples that have achieved better success by adopting more unconventional economic policies.

4.3 Free Trade Agreement of the Americas (FTAA)

The negotiations on the FTAA were launched in 1994 with the primary aim of extending the NAFTA model to the whole of the Western Hemisphere, covering 34 countries that comprise the Organisation of American States, but for Cuba. The proposed agreement would essentially seek to eliminate or reduce trade barriers among all the countries in the region.

Proponents of the agreement maintained that it would help create more jobs and enhance the welfare of the peoples of the countries concerned. Horbeck wrote that, "many see the FTAA as the next important step for Latin American trade opening and an essential element of an export-led development strategy".⁴⁵ Its critics, however, held the opposite view. They saw the FTAA as having the potential to lead to even more poverty and environmental damage in the region. In Latin America in particular, many regarded the agreement simply as a hemisphere-wide economic constitution through which countries of North America intended to take over their national sovereignty.⁴⁶ Thus, ten years into the negotiations, there was still no agreement and the talks were eventually suspended.

The main stumbling block to an agreement acceptable to all parties was the wide gap existing between the positions of the four members of Mercosur⁴⁷ and Venezuela, on the one hand, and the US, on the other, concerning the form the basic model of the agreement should take. Led by Brazil, the countries of Mercosur and Venezuela contended that the conditions prevailing at the time of the negotiations made it impossible to conclude an FTA that was balanced and equitable. In particular, they pointed to the US subsidies to its agriculture and other trade distorting practices, as well as the country's demands during the negotiations, which failed to take into consideration the needs and sensitivities of the other parties.⁴⁸ Conversely, the US was adamant that its agricultural subsidies in particular were not up for discussion as part of the FTAA talks.

Other disputed issues between the Mercosur group and the US included the latter's insistence on gaining near-complete access to the markets of the Latin American countries, while maintaining restrictions in respect of many of the same products; intellectual property rights, especially as they pertain to life-threatening medicines; government procurement; and investor guarantees.

4.4 Central American Free Trade Agreement (CAFTA)

The US-Central American Free Trade Agreement (CAFTA) between the United States and the Central American states of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua was signed on 28 May, 2004. The US concluded a separate agreement with the Dominican Republic in the same year, later to be incorporated into CAFTA as part of a broader agreement. The commitments undertaken by the parties in these agreements pertain to rules on market access for goods and services, government procurement, intellectual property, as well as investment.

A defining feature of CAFTA is that all the parties to the agreement have undertaken the same obligations and commitments.⁴⁹ From the perspective of the US, it means that its firms are now able to save up to 80 percent more in export taxes.⁵⁰ The reciprocal nature of the agreement also marks a significant shift away from the CBI unilateral preferential arrangement that the US has had with some of the parties to CAFTA since the early 1980s.⁵¹ On the part of the Central American states, they saw CAFTA as a way of securing the benefits of CBI legislation

⁴⁴ Francisco Rodriguez & Dani Rodrik 'Trade Policy and Economic Growth: A Skeptic's Guide to Cross-national Evidence' (2000) at 62-63.

⁴⁵ J F Horbeck 'A free Trade Area of the Americas: Status of Negotiations and Major Policy Issues' *CRS Report for Congress* Order Code RS20864 p 2.

⁴⁶ Jonathan Cook 'Free Trade of the Americas Takes Shape' available at <http://www.ens-newswire.com/ens/nov2002/2002-11-06.asp> Accessed 28/06/08.

⁴⁷ Mercosur comprises Argentina, Brazil, Paraguay and Uruguay.

⁴⁸ Laura Carlson 'Timely Demise for Free Trade Area of the Americas (2005), available at <http://americas.irc-online.org/am/2954> Accessed on 28/06/08.

⁴⁹ Hornbeck op cit note 45.

⁵⁰ Raymond J Ahearn 'Trade Liberalization Challenges Post-CAFTA' (November 2005) *CRS Report for Congress* Order Code RS 22339 p 3.

⁵¹ The CBI (Caribbean Basin Initiative) is a US trade preference program that extends duty-free treatment to eligible products originating from 24 Central American and Caribbean countries.

on a more permanent basis.⁵² These countries were also hopeful that the agreement would help expand intra-regional trade and promote social, political and economic development.⁵³

Despite the seemingly positive sentiment towards the agreement, there are lingering concerns about CAFTA's eventual impact, especially as regards small farmers, workers and other vulnerable groups that have to cope with challenges such as adjustment costs and lack of protection from poor working conditions. The fact that the primary motive for the US in pursuing CAFTA was "to expand support for US positions in the FTAA...and help rationalize the system of disparate preferential trade agreements that ... define[d] Central American trade relations"⁵⁴ does little to allay these concerns. Rather, it supports the view that promoting mutual interests of the parties had little to do with the creation of this agreement. Many of CAFTA's opponents also decry the loss of control by the Central American countries over their own destiny as a result of the agreement.

4.5 Common Features of the FTAs

Across all the agreements discussed above, there is an unmistakable pattern in the way negotiations were conducted and the provisions contained in the final product. Firstly, the working texts of the different agreements, save for the FTAA,⁵⁵ were shrouded in secrecy throughout the negotiations. This ensured that the texts were safe from public scrutiny and any resistance that they might have attracted. Secondly, protection of intellectual property rights, of which the US is the main beneficiary, is central to each agreement. Thirdly, even though the agreements generally promote removal of trade barriers, they consistently exclude US subsidies to its farmers. This benefits US farmers at the expense of the poorer countries which have lost crucial customs revenue through tariff reductions. Fourthly, the agreements do away with capital controls, thereby exposing some of the smaller countries to speculative capital transfers that have proved capable of ruining these countries' economies in the past.⁵⁶ Lastly, although all the agreements incorporate workers' rights, hardly any of them adhere to ILO guidelines and none provide for mechanisms to enforce such rights.

It is remarkable that agreements involving such a diverse array of countries in terms of geographical location, level of development, and economic size could be so similar. More significantly, this casts doubts on the suitability of the treaties and their ability to tackle the multiplicity and variety of challenges that confront these countries. It also raises questions about the intentions of the US in negotiating these pacts, especially as regards whether the interests of the other parties were taken into account.

5. Implications of the Collapse of the Negotiations

5.1 Avoiding Possible Adverse Effects

Based on the similarities found in all of the US' FTAs reviewed above, it is possible to form a general opinion concerning the probable outcome of the free trade talks between SACU and the US. One aspect that comes out quite clearly is that the resulting agreement, if modelled on these past US treaties, would have potentially detrimental economic and human effects on Southern Africa as shown below.

To start with, the lack of direct and meaningful participation by the affected communities meant that the debates, and ultimately the agreement, would not be informed by the views and experiences of ordinary people. With past experience showing that it is the weakest and poorest citizens that are most vulnerable to the adverse effects of FTAs,⁵⁷ this would be regrettable. The relentless pursuit of extensive intellectual property rights by the US would also threaten Southern Africa's ability to provide affordable medicines to the region's sick people. Considering that Southern Africa already has to deal with the world's highest number of HIV infections, this would also be unacceptable.

Southern Africa's impoverished, small-scale rural farmers would also have been unable to compete against the heavily subsidized US farmers under the FTA. Given that food security in the region is largely dependent on access by these farmers to productive resources like land, credit and farm inputs,⁵⁸ an FTA with the US which continues to subsidize its farmers would have risked further food shortages in an area already grappling with

⁵² Like AGOA, the CBI arrangement requires regular reauth by the US Congress.

⁵³ Hornbeck op cit note 45.

⁵⁴ Ibid. See also Section 4.2 supra.

⁵⁵ The working text of FTAA was made publicly available after every ministerial following intense pressure from civil society. This, however, resulted in criticism and resistance against the agreement that eventually led to the collapse of the negotiations. See section 3.3 above.

⁵⁶ The 1998 Asian Crisis is a good example of this.

⁵⁷ E.g. the low-skilled workers are often the first to lose jobs upon the arrival of foreign competition.

⁵⁸ US-SACU Working Group 'Equitable trade and Southern Africa: A cookie cutter approach will cost lives and livelihoods' (2006), available at http://www.bilaterals.org/article.php3?id_article=6414. Accessed on 25/07/08.

extreme poverty. Moreover, the FTA would most likely force the SACU members to give up their right to take legislative measures to protect agricultural products that have special economic and food security significance.⁵⁹

SACU governments would most probably have to refrain from imposing capital controls, thereby exposing their economies to adverse effects of speculative investment. Initiatives like South Africa's Black Economic empowerment program, which was designed to redress economic imbalances left behind by decades of apartheid policies, might also have been rendered illegal for clashing with provisions on investor rights found in many of the US' previous FTAs.⁶⁰ The fact that such programmes might be intended to promote public interest would be considered irrelevant.

In view of the likelihood of SACU countries facing so many harmful ramifications, there is little doubt that the time and conditions were not ripe for the parties to conclude a mutually beneficial agreement. And so, by all indications SACU did the right thing in refusing to sign a NAFTA inspired FTA with the US.

After the FTA talks were abandoned, the US did extend an offer of a Trade and Investment Framework Agreement (TIFA) to SACU, which the latter duly accepted. While this new agreement excludes most of the issues on which the two parties had differed sharply and seems to hold no obvious benefits for the US, the primary motive for the US appears to be a desire to counter the growing influence of China in Africa.⁶¹ The US clearly sees China's blossoming economic and political relationship with the continent as a danger to its own interests and seems prepared to do anything, however insignificant, that might possibly reduce its rival's now advantaged position.⁶² It remains to be seen what useful purpose the TIFA will achieve.

5.2 A Growing Pattern of Dissent

The refusal by SACU members to bow to US pressure to sign an agreement they perceived to be unfavourable seems to be part of a growing trend among developing countries to insist on asserting their rights and demanding equitable treatment from their developed counterparts in trade matters. A similar scenario was witnessed during the Cancun Ministerial conference in 2003 where the G20, in which South Africa is actively involved, openly rejected a joint US-EU proposal on agriculture, thereby forcing the talks to come to an abrupt end. Just recently, India and China also played a role in the collapse of Doha trade talks after seven years of difficult negotiations by refusing to change their position concerning *inter alia* the protection of poor farmers.⁶³

In the light of the recurrence of these defiant challenges by developing countries against the wishes of developed countries in the last few years, it seems unlikely that we have seen the last of them. It remains to be seen how developed countries will deal with this new reality. However, they seem to have little choice but to accept that the aspirations of developing countries for fair trade and development can no longer be ignored. Sooner or later all the parties will have to come together and work out a better way of regulating cross-border trade so that it take into account the interests of everyone involved.

6. Conclusion and Summary

The decision to pursue an FTA with SACU was seen by the US as a way to diminish the trade concessions advantage enjoyed by the EU in Southern Africa under the TDCA. For SACU, the agreement was meant to help propel the region into the mainstream of global trade decades of economic sanctions against the regional power house, South Africa. However, differences of opinion regarding the contents of the FTA and the US' inflexible approach to the negotiations proved fatal and ensured that an agreement never materialised.

While views on the merits and demerits of the failed agreement are many and varied, the existing trade law regime within SACU, their impact on the Southern Africa region, as well as previous agreements concluded by the US in other parts of the world, offer insightful clues concerning what the SACU-USA FTA might have been like. If these indicators are anything to go by, although the failed agreement would bring some benefits, e.g. making permanent the benefits enjoyed by SACU under AGOA, much more harm would probably have resulted if the agreement had been finalized. A good example is the extensive intellectual property rights sought by the US, which would have constrained the region's ability to provide medical care to its people. Another example is the

⁵⁹ Ibid.

⁶⁰ In terms of these rights, investors can demand compensation from signatory states for passing legislation that could undercut their profits.

⁶¹ Eckart Naumann 'US Rekindles Scramble for Africa as China Pulls in' *Business Report* 01/07/08, available at <http://rta.tralac.org/scripts/content.php?id=5020> Accessed on 25/07/08.

⁶² With the on-going energy crisis, political instability around the world and economic stagnation in many developed countries, Africa is becoming an increasingly attractive market.

⁶³ BBC News 'Dismay at Collapse of Trade Talks', available at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/business/7532302.s...> Accessed on 30/07/08.

US' persistent refusal to reverse its farm subsidy policy, which would have put the region at risk of serious food shortages.

In the end, consideration of all the facts leads to the conclusion that a SACU-USA FTA would have caused far more harm than good for the Southern Africa region.