

A PERMANENT SUMMIT OF THE SACU HEADS OF STATE AND GOVERNMENT FOR SACU – WHY AND HOW?

When the 2002 SACU Agreement was adopted it was decided to equip the Organization with institutions to ensure that the traditional operations regarding revenue sharing could be continued; while also creating additional bodies to cater for the new emphasis on *common policies and common institutions*. Article 7 lists the institutions of SACU. They are the Council of Ministers, the Customs Union Commission, the Secretariat, the Tariff Board, Technical Liaison Committees and the *ad hoc* Tribunal. Some of these bodies (the Tribunal and Tariff Board) are not yet operational.

It is common knowledge that the expectations with regard to the new SACU have not been fulfilled. The common policies on industrial development, agriculture, competition and unfair trade practices have not been adopted; while the negotiations to conclude the SADC EPA have revealed serious tensions in the membership of the Organization. There was in fact a growing impasse. The need for a meeting of the Heads of State and Government of SACU to provide strategic and political guidance became rather urgent.

The first SACU Heads of State and Government meeting took place in Windhoek on 22 April 2010 as an *ad hoc* occasion. That was also the occasion for adopting the new SACU Vision and Mission.

Although it would in principle be possible to convene such *ad hoc* Summit meetings again, the legal basis thereof and the effect of their decisions would be uncertain. There are no express provisions in the SACU Agreement dealing with this aspect. The political benefits of *ad hoc* summits would also be less certain. It was against this background that it was decided to “institutionalize” the SACU Summit and to make it a new and permanent institution of the Organization.

What advantages would a permanent Summit have for SACU? How could this development impact on SACU’s future activities and effectiveness? This Organization faces a number of serious challenges. Dealing with them requires strong institutions. These challenges stem from the outstanding tasks with respect to the implementation of the 2002 SACU Agreement, the momentum towards deeper regional integration in Africa, global economic developments and trade negotiations with third parties. The Member States and the region require the guidance of a dynamic and responsive organization with strong institutions. The Special

Meeting of the Council of Ministers of 17 September 2009 e.g. noted SACU's "potential role as a nucleus for regional integration and regional economic development with a focus on the Economic Community and Monetary Union."

Institutional arrangements are not an end in themselves. They have to promote effectiveness and the joint pursuit of specific outcomes. Their efficiency has to be evaluated in the light of evolving challenges and their ability to respond effectively and expeditiously. SACU is in need of some form of rejuvenation and a new focus; while Southern Africa requires a proper regional policy and strong leadership.

The practice in other regional organizations provides some useful insights. SADC, COMESA and the EAC have for example institutionalized their summits and have made them part of their permanent formal structures.

There are a number of issues to consider when establishing the SACU Summit as a permanent institution.

- At present the Council of Ministers is the highest authority in SACU and it exercises specific powers. According to Article 8 of the Agreement it is the "supreme decision making authority of SACU matters." The relationship between the Council and a Summit will have to be determined and the respective powers will have to be demarcated.
- The Summit will need an executive arm for implementing its decisions. Monitoring of compliance will be particularly important. The latter is often the Achilles heel of regional arrangements in Africa.
- The relationship between all the SACU institutions and the Summit (as well as between them) subsequent to such an enlargement should be considered. The Secretariat is for example responsible for certain functions in support of the work of the Council and the Commission. It will perform similar tasks in future for the Summit and provision should be made for such.
- Legal certainty and clarity about the powers, functioning and procedures of the Summit as a SACU institution merit careful consideration. The institutionalization of this forum should not be seen as simply another institutional feature to be added onto the existing SACU legal framework; which contains a particular institutional balance.
- It would be necessary to consider the Agreement as a whole and the aim should be to design a more effective arrangement. It would be a pity if this opportunity for meaningful reform is not fully utilized. The Summit should not be another talk shop.

There are certain gains to be had from establishing the Summit as a formal SACU structure. One will be legal certainly with regard to the effect of its decisions. Another advantage could be to provide SACU with a more effective structure for political guidance at the highest level.

What legal principles apply with regard to the institutionalization of the Summit? The 2002 SACU Agreement makes no express provision for a Summit. Its institutionalization requires a legal foundation; there should be clarity with regard to the status, powers and decisions of such a new SACU institution. The 2002 Agreement presents three possible routes that could be used to formally establish the Summit as a SACU institution.

Article 8 (8) presents the first such procedure. This provision states that "*The Council shall have the authority to create additional technical liaison committees and other additional institutions and to alter their terms of reference*". This procedure requires a decision by Council.

Article 43 of the 2002 Agreement presents the second option. It is the amendment clause in the SACU Agreement and states that "*Any Member State desirous of amending this Agreement shall put forward its proposal for such amendment, together with its submissions in motivation of the proposed amendment, to the Council for consideration and decision. An amendment of this Agreement shall be adopted by a decision of the Council*". In this instance a Member State or States will take the initiative to propose an amendment of the Agreement. Such a proposal will be submitted to the Council of Ministers for consideration and decision.

The third possibility is to go the route of Article 42 of the Agreement by adopting a special Annex. Article 42 (1) states that "*The Council may develop such annexes as may be necessary to facilitate the implementation of this Agreement*". This provision mentions the Council as the body which "may develop" future Annexes. A proposal to undertake such a task may be put on the Council agenda by any of its Members.

A number of specific legal issues will also have to be addressed when adopting the instrument for the institutionalization of the SACU Summit; such as the relationship with existing institutions, the frequency and formalities regarding Summit meetings, as well as the rules and procedures for conducting future its meetings. There are consequential changes such as the privileges and immunities provided for in Article 4 of the SACU Agreement. Heads of State and Government also enjoy the traditional privileges and immunities associated with sovereign immunity.

A formal amendment to the SACU Agreement needs ratification. There may be national constitutional requirements which the Member States will have to consider. Hopefully the proposed changes will not take too long before finalized.

The process to be undertaken for the institutionalization of the Summit as a SACU institution first requires a policy decision. This apparently has been taken. The extent and nature of the powers of the Summit, its status and functions, the relationship with existing institutions and the effect of its decisions are some of the substantive issues to be canvassed as part of this process. These matters will have to be finalized when the Council debates their decision to conclude the founding process and to adopt the necessary legal instrument. They will have to have a comprehensive plan; covering, amongst other things, rules for meetings, decision-making, chairing etc. A Summit of Heads of State and Government brings a *sui generis* dimension to an international organization and requires careful preparation.

What could be expected from a SACU Summit in terms of tangible political outcomes? Will it e.g. be able to resolve the tension around the South African wish to change the revenue sharing formula? What substantive regional policies regarding industrial development, agriculture and remedies against unfair trade practices could follow?

This institution will bring together the highest political leadership in the Member States of SACU. This will be an important new feature. It gives rise to the hope that it will not be business as usual. Let us study future SACU Summit meetings and its decisions with care.