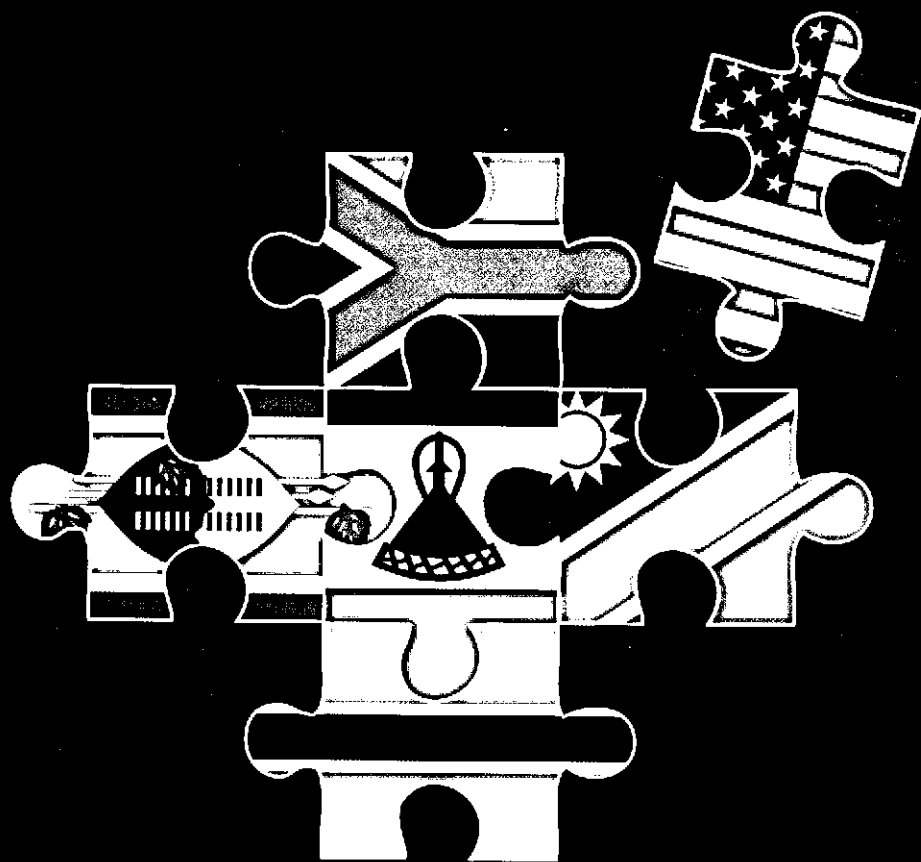


# **ONE SIZE DOESN'T FIT ALL**

## **Deal-Breaker Issues in the Failed US-SACU Free Trade Negotiations**



**Edited by Peter Draper and Nkululeko Khumalo**

**The South African Institute of International Affairs**



# **One Size Doesn't Fit All**

Deal-breaker Issues in the  
Failed US-SACU Free Trade  
Negotiations

Edited by  
Peter Draper and Nkululeko Khumalo



SOUTH AFRICAN INSTITUTE OF INTERNATIONAL AFFAIRS  
JAN SMUTS HOUSE, JOHANNESBURG

Published in October 2007 by

The South African Institute of International Affairs  
Jan Smuts House, East Campus  
University of the Witwatersrand  
Johannesburg, South Africa

P O Box 31596, Braamfontein 2017

[www.saiia.org.za](http://www.saiia.org.za)  
[info@saiia.org.za](mailto:info@saiia.org.za)

Tel +27 11 339-2021  
Fax +27 11 339-2154

© SAIIA

All rights reserved. The material in this publication may not be copied, stored or transmitted without the permission of the copyright holder. Short extracts may be quoted, provided the source is fully acknowledged.

ISBN 978-1-919969-02-2

Edited and produced by Acumen Publishing Solutions, Johannesburg  
Printed by Intrepid Printers, Pietermaritzburg  
4842

## Preface

There are many reasons why a closer economic relationship between the US and the Southern African Customs Union (SACU) is important. With a Gross Domestic Product (GDP) in 2006 of \$13.24 trillion, the US is the world's largest single economy while South Africa's GDP (in 2006) of \$255.2 billion makes it Africa's biggest economy. The US is South Africa's second largest trade partner after Germany (counting EU states separately), and its second largest export market (Japan is the largest). According to South African statistics, 11.5% of South Africa's exports went to the US, whilst 7.6% of South Africa's imports were sourced from it. This implies a healthy trade surplus in 2006 of \$884 million according to South African data.

It is clear that the US is a very important trading partner for South Africa. And of the African countries, SACU, of which South Africa is a member, is the US's second largest African trade partner after Nigeria (whose exports are mainly petroleum products).

Apart from the World Trade Organisation (WTO)'s most favoured nation (MFN) tariff system two important preferential trade schemes govern the bulk of South Africa's exports to the US: the Africa Growth and Opportunity Act (AGOA) and the Generalised System of Preferences. The challenge, however, is that these two schemes are unilateral in nature and can be theoretically withdrawn at any time. What is needed is a contractual agreement that is broad enough to include trade in services, investment, and intellectual property rights among other critical issues.

On investment ties, for instance, according to the US Department of Commerce, the total US-owned FDI stock held in South Africa totalled roughly \$5 billion in 2005, up marginally from the 2004 value. This is slightly bigger than other major investors in the South African economy, barring the United Kingdom, whose FDI stock by the end of 2005 stood at \$55 billion, and has been growing much more rapidly. All of Europe's fixed investment in South Africa totals \$69 billion. Given that the US is the world's largest, most technologically advanced and productive economy, these small numbers should be cause for concern.

Surprisingly, the stock of South African fixed investment in the US at the end of 2005 totalled \$2.3 billion, just half the amount the US has invested in South Africa. SASOL is reportedly planning a large investment in the US, just as it is in China, which would raise this figure substantially. Overall though, the US is



far from the top of the list of favoured investment destinations for South African companies—we invest more in Africa, the UK, Luxembourg, and Austria.

The most important points to note about bilateral investment are as follows. Regarding South African investment in the US, considering the size of the latter economy, South African companies are clearly not maximising potential. Concerning US investment in South Africa, questions must be asked of its very slow growth and relatively low level to date. The issues relevant to answering the question of slow growth probably apply generally (*i.e.* to all foreign investors). However, according to various sources, the three major constraints to greater investment by incumbent US companies are:

- Uncertainty over Broad-Based Black Economic Empowerment (B-BBEE)
- The difficulty of sourcing skilled labour in South Africa
- Crime

The single biggest concern of potential US investors is B-BBEE. It seems there is acceptance of the political and social necessity of black economic empowerment in South Africa, but there remains wide-spread misunderstanding, and even greater opposition to B-BBEE's core notion: that a portion of a company's equity should be transferred to black South Africans. The common criticism is that this amounts to little more than expropriation. It is the job of business and government leaders in South Africa to dispel unwarranted fears where possible, and construct creative solutions to satisfy the needs of all potential investors.

Based on the foregoing, it seems that there is significant untapped potential in the bilateral commercial relationship, and that clearer rules and greater market access, embedded in a legally binding agreement, would facilitate growth in trade and investment. That South Africa has not formalised commercial ties with the world's largest, most advanced economy is difficult to understand.

Through this book, South African business community and the SAIIA have stepped up to the plate in terms of shedding light on key issues that led to the failed US-SACU FTA and also proposing ways in which a mutually beneficial agreement could be achieved in future. This book would be particularly helpful to SACU and US negotiators as they engage in the Trade, Development and Cooperation Agreement (TIDCA) talks.

To be meaningful, the TIDCA should have a clear agenda on how the parties envisage the resumption of actual FTA talks. SACU countries, in particular, should not wait for AGOA to expire – in which case they will have less bargaining power- before they seriously consider the FTA. The US on the other hand should introduce certain flexibilities that take into account the unique challenges faced by

South Africa (i.e. redressing the imbalances of the past through black economic empowerment policies amongst others) and its counterparts in SACU.

**Michael Spicer**

Chief Executive Officer

Business Leadership South Africa

## Acknowledgements

We would like to thank all the contributors of the chapters in this book. Our appreciation goes also to Dr Laurraine Lotter of Business Unity South Africa, and to Mike Spicer of Business Leadership South Africa, for assisting in the formulation and execution of this project. We are grateful to the US Embassy in Pretoria, South Africa, for sponsoring Dr Jeffrey Schott's participation at our conference; and to Wits Business School and AmCham South Africa for providing the conference venue and funds for other conference expenses respectively. We also thank our colleagues at the SAIIA, particularly Leanne Smith and Nadia Pisanti, for their contribution to the publication of this book.

We also want to record our appreciation towards Business Unity South Africa and Business Leadership South Africa for sponsoring this publication.

# Contents

Acronyms	xi
Introduction	1
<b>Chapter 1</b>	
Survey of South African Business Perceptions of a US-SACU FTA	7
<i>Reg Rumney</i>	
<b>Chapter 2</b>	
A US-SACU FTA: Investment issues	26
<i>Riekie Wandrag</i>	
<b>Chapter 3</b>	
From Theory to Practice: Getting the most out of a services agreement with the US	58
<i>Matthew Stern and Nkululeko Khumalo</i>	
<b>Chapter 4</b>	
Intellectual Property Rights and the US-SACU FTA: A good reason to walk away from the deal, or cutting off one's nose to spite one's face?	106
<i>Marion Hummel</i>	
Index	171

# Acronyms

AGOA	Africa Growth and Opportunity Act
APC	Australian Productivity Commission
ASGISA	Accelerated and Shared Growth Initiative for South Africa
AUSFTA	Australia–United States Free Trade Agreement
BEE	Black economic empowerment
BLNS	Botswana, Lesotho, Namibia and Swaziland
BIT	bilateral investment treaty
BOP	balance of payments
CAFTA–DR	Central American Free Trade Area and Dominican Republic
CBD	Convention on Biological Diversity
CEO	chief executive officer
CGE	computable general equilibrium
CIPRO	Companies and Intellectual Property Office
DTI	Department of Trade and Industry
EFTA	European Free Trade Association
EIA	Environmental Impact Assessment
ERP	effective rate of production
FDI	foreign direct investment
FTA	free trade agreement
FTAA	Free Trade Area of the Americas
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	generalised system of preferences
GPA	government procurement agreement
ICSID	International Centre for the Settlement of Investment Disputes
IIPA	International Intellectual Property Alliance
IP	intellectual property
IPR	intellectual property rights
MAI	Multilateral Agreement on Investment
MFN	Most favoured nation
MIDP	Motor Industry Development Programme
NAFTA	North American Free Trade Agreement
NEDLAC	National Economic Development and Labour Council
NTBs	non-tariff barriers
OECD	Organisation for Economic Co-operation and Development
PTA	preferential trade agreement
QUAD	Canada, EU, Japan, US
SA	South Africa
SACU	Southern African Customs Union
SADC	Southern African Development Community
SAPS	South African Police Services
SARB	South African Reserve Bank

SARS	South African Revenue Services
SPS	sanitary and phytosanitary standards
TDCA	Trade, Development and Co-operation Agreement
TIDCA	Trade Investment Co-operation Agreement
TISA	Trade and Investment South Africa
TK	traditional knowledge
TPA	Trade Promotion Authority
TRIMS	trade-related investment measures
TRIPS	trade-related intellectual property rights
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UPOV	Union for the Protection of New Plant Varieties
US	United States
USTR	United States Trade Representative
VANS	value-added network services
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

# Introduction

The Southern African Customs Union (SACU)<sup>1</sup> is second only to Nigeria (whose exports are mainly petroleum products) as the US's largest trading partner in Africa.<sup>2</sup> Though a range of South African exports enter the US through unilateral schemes like the generalised system of preferences (GSP) and the Africa Growth and Opportunity Act (AGOA), there is no contractual agreement to guarantee and extend current market access opportunities enjoyed by these exports. Nor are there frameworks to regulate important issues in bilateral economic relations, especially investment and intellectual property rights. The US-SACU free trade agreement (FTA) negotiations that began in June 2003 aimed to address this situation.

The US sought to use the FTA to, among other things, eliminate barriers to its goods and services exports in the SACU market; strengthen intellectual rights; build alliances for the World Trade Organisation (WTO) negotiations; and level the playing field vis-à-vis the EU, which benefits from the Trade, development and cooperation agreement (TDCA) it signed with South Africa. SACU, on the other hand, aimed to use the potential FTA as a means to achieve AGOA-plus liberalisation (by locking in and possibly extending current market access), address non-tariff barriers affecting its US-bound exports, spur regional integration in SACU and strengthen relations with the US as insurance against possible failure of the Doha round.

The talks were initially scheduled to be concluded by December 2004, but it became clear by April 2006 that an FTA was unlikely to be reached before the expiry of the US Trade Promotion Authority (TPA)<sup>3</sup> in July 2007. The US attributed the failure of the talks to the absence of harmonised trade and investment

- 
- 1 Comprising Botswana, Lesotho, Namibia, South Africa and Swaziland. The new SACU Agreement of 2002 makes it mandatory for its members to approach any bilateral trade liberalisation agreements with external parties as a collective. In 2003 SACU member states had combined real gross domestic product (GDP) of \$201 billion, of which 93% was South Africa's contribution.
  - 2 In 2003 total two-way trade between the parties amounted to about \$7.3 billion. In the same year, US foreign direct investment in South Africa alone reportedly reached \$3.9 billion (mainly in manufacturing, chemicals and services), while the latter's investment in the former totalled around \$376 million. For more information, see <http://www.nationalaglawcenter.org/assets/crs/RS21387.pdf>.
  - 3 The TPA grants the US president 'fast-track' authority to enter into and conclude trade negotiations with other countries, and restricts the role of Congress to either approve or reject such treaties within 90 days of signature, without the possibility of amending them.

policies within SACU. SACU in turn blamed the US for being inflexible with its comprehensive negotiating template, which includes many new generation issues like investment that the US was not keen to engage in. Ultimately, the parties had to agree to lower their ambition from that of attaining a comprehensive trade agreement immediately to merely establishing a trade, investment, development and co-operation agreement (TIDCA) that would hopefully provide building blocks for a fully-fledged FTA in the future.

In light of the failure to conclude FTA talks, this book is the result of both SAILA's and the South African business community's initiative to contribute towards ensuring that bilateral trade relations between SACU and the US are restored to a firmer footing. At the core of this initiative was the understanding that it is important for business people to be involved in the process of unlocking the negotiations, as they are the people who could ultimately take advantage of the opportunities created by a successful agreement. The fundamental questions the initiative sought to address were as follows:

- What practical steps can be taken to bring the parties back to the negotiating table?
- In reality, how far apart are the parties' views concerning important new generation issues like investment, services and intellectual property?
- What benefits or threats does the FTA hold for South African business people?
- In particular, what should business people in SACU and the US do to ensure that the process moves in a direction that takes their interests into account?
- What compromises are possible to move the process forward?

To address the above questions, SAILA, in partnership with Business Unity South Africa and Business Leadership South Africa, commissioned four research papers covering trade in services, intellectual property rights, an investment agreement and a survey of South African companies' awareness of and perceptions about the FTA process. These papers (which form the chapters of this book) were presented at a high-level conference aimed at raising awareness in the South African business community of the possibilities for compromise, the importance to their own interests and the issues at stake in an FTA negotiation, in the hope that this would encourage them to become active participants in the process.

Rumney's survey of South African companies (chapter 1) indicates that South African business people generally support negotiating a trade agreement with the US. A number of firms are of the opinion that the FTA would not affect them



that much, either positively or negatively, even if it includes zero tariffs, because they have little protection at present and believe the benefits of closer economic ties with the US could enhance aspects of the free market in South Africa. Some companies noted the importance of locking in and even extending AGOA and GSP benefits through a contractual agreement. This is imperative especially in the context of recent threats by the US Congress to graduate South Africa from the GSP.

However, most companies strongly asserted that they would not countenance an agreement that allows US companies to ignore black economic empowerment (BEE) laws that provide for preferential procurement policies in favour of previously disadvantaged South Africans. Sector-specific concerns included worries about the prospect of lower duties in the automotive sector and fears that the potential harmonisation of environmental law could adversely affect the competitive advantages currently enjoyed by the chemical sector in South Africa owing to less onerous domestic regulation. Other areas where harmonisation was seen as a threat are labour, competition and, to a certain extent, intellectual property.

It is interesting to note that most services businesses interviewed were not perturbed by the potential entry of US multinationals. In the banking sector in particular, interviewees considered it as severely needed competition and were *wondering whether the FTA could bring about such competition.*

Wandrag's chapter (chapter 2) gives details of what the typical investment and government procurement chapters in recent US FTAs provide for. Such an analysis is meant to shed light on the potential impact of typical US FTA provisions on South African business and the government policies aimed at redressing apartheid injustices and promoting development. The author argues that SACU as a region currently does not have sufficient capacity to negotiate such a comprehensive FTA, and the prospect of regional harmonisation in the near future looks bleak.

Wandrag believes that the only way in which such a US-SACU FTA could succeed is if a more limited agreement is concluded first, with aspects such as investment and procurement postponed until a later date, when SACU has managed to get its house in order. Another option is a phased-in approach whereby a comprehensive agreement based on the US FTA 'template' is concluded, provided the chapters on foreign investment and procurement are initially applicable to South Africa, with the BLNS countries being included at a later stage.

This is because, where South Africa is concerned, bridging the gap between domestic provisions on investment and government procurement and the requirements of the US FTAs is not impracticable. South Africa's investment regime would not necessarily fall foul of US FTA investment provisions, and any problematic aspects could be accommodated as exclusions or 'non-conforming' measures. Likewise, government procurement measures should not be construed as a stumbling block, because they afford state parties enough policy space (in the form of exemptions) to accommodate South Africa's preferential procurement policy in terms of BEE, should it be seen as infringing national treatment provisions.

Another challenging issue is dispute settlement. Wandrag provides a number of viable options for dealing with this. She also contends that the South African legal regime is capable of – or should be capable of, providing long-overdue amendments are effected – handling a comprehensive US FTA.

Stern and Khumalo's chapter (chapter 3) shows that though South Africa's current General Agreement on Trade and Services (GATS)<sup>4</sup> commitments are above average for a developing country,<sup>5</sup> many domestic services sectors could benefit from greater competition, to the broader benefit of the economy. Therefore, the level of openness in services sectors could be enhanced by the US-SACU FTA. The authors contend that a really beneficial agreement in economic terms should provide better opportunities than those that are available under the GATS. A comprehensive FTA with the US has the potential to lock in reforms within SACU/South Africa, make new reforms likely and shape a longer-term reform agenda, and thus open new opportunities for trade and investment in both the US and SACU.

Hummel's chapter (chapter 4) emphasises the potential benefits to South Africa and SACU of concluding an FTA that contains appropriate provisions on intellectual property rights (IPR). She argues that apart from the pharmaceutical patents issue,<sup>6</sup> the US's call for strict IPR provisions is also shining light on the problems in the SACU IPR systems and processes, which in some instances are in

---

4 This is a WTO agreement that governs the liberalisation of trade in services among the organisation's member states.

5 See Mortensen J, 'WTO vs. BEE: Why trade liberalisation may block black South Africans' access to wealth, prosperity or just a white-collar job', *DIIS Working Paper*, No. 2006/30, 2006.

6 The concern is that the FTA with US under the strict conditions set by Congress might compromise the ability of SACU countries to secure the production, import, export and provision of affordable medicines to respond to the HIV/AIDS epidemic and other pandemics.

dire need of improvement. A good example is the entertainment industry, which struggles almost hopelessly against piracy. It is also important to note that US IPR systems are compliant with the World Intellectual Property Organisation's standards, as are South Africa's. Hence, in principle aligning the two – at least from a commercial perspective – should not be too problematic.

Now that SACU has formally accepted the US proposal on establishing a TIDCA,<sup>7</sup> more action is required to ignite interest in and political commitment to the process. From a negotiating point of view, this approach offers flexibilities that were sorely missing in the FTA negotiations, since the ensuing agreements would only be memorandums of understanding and would not require sanction by US and SACU parliaments. More importantly, SACU and US business have an opportunity to drive the process by ensuring that those issues that are important to them are on the agenda. Agreements are more likely to be secured on some relatively challenging issues when negotiations are conducted in a less hostile atmosphere that emphasises mutual understanding and co-operation.

Finally, the two parties are encouraged to fix their eyes on the bigger picture, even as they embark on the TIDCA process. They should bear in mind that the original motivations for the US-SACU FTA remain valid despite the problems that have been encountered in the negotiations. The US still needs a real partnership with SACU that replaces unilateral preferential schemes, expands market access for its goods and services, and advances its objectives in the WTO. SACU also still needs a secure contractual agreement that is not subject to the whims of Washington's policy makers. The threats of being graduated from the GSP scheme and the fact that AGOA can theoretically be withdrawn at any time do not bode well for SACU exporters. What they require is a predictable contractual framework that enables them to effectively plan ahead beyond the duration of both AGOA and GSP trade preferences. As such, all parties must ensure that the TIDCA process helps unlock some of the difficulties encountered and should clear the ground for the resumption of actual FTA negotiations.

---

7 See *Mining Weekly (South Africa)*, 'Sacu-US to pursue scaled-back trade talks after FTA process ceases', 21 November 2006.

# **Chapter 1**

## **Survey of South African Business Perceptions of a US-SACU FTA**

Reg Rumney

### **INTRODUCTION**

The idea of this survey was to get an overview of business perceptions of the potential benefits and threats that a US-SACU FTA could hold.

The initial thrust of the survey was directed at the chief executive officers (CEOs) of major businesses in South Africa or those designated to speak on their behalf. Letters were sent out to representatives of selected companies, and follow-up calls were made. Regrettably, the response rate was low, at 20, perhaps indicating that the matter is not at the top of the agenda among South Africa's CEOs. However, most of those who did respond did so comprehensively and thoughtfully.

To get as much of a feel for the hopes and concerns of industry, use was also made of sector organisations, whose spokespersons could arguably speak more generally for those particular sectors than heads of individual companies. However, interviews were also conducted with CEOs or their representatives. Those surveyed ranged from commodities producers unlikely to be much affected by an FTA, through companies likely to be very much affected by a decline in tariff protection, to services companies not usually considered in trade agreements. Attempts were made to have as wide a spread of industries as possible.

Extensive use is made of quotes to convey the kind of thinking behind the generalisations made, and as far as possible the language used has been reproduced, which in some cases shows the strength of feeling about certain issues, such as dominance in industries.

### **INDIVIDUAL BENEFITS AND THREATS**

In general – and if generalities should be treated with caution, then this observation should especially be handled with care – business welcomes some sort of agreement on trade with the US. Since the language used in this survey

was of an 'FTA' without qualification, most of the respondents would indeed in theory welcome a trade agreement that drastically reduced duties between the US and SACU.<sup>1</sup>

At the most extreme, the US was seen as embodying free markets and an FTA with the US as encouraging free markets. One interviewee expressed the belief that the US was the 'most free-market-oriented, capitalist system' of countries with which South Africa could have an FTA. 'An FTA with the US could introduce positive change.'

Amplifying this point of view, an economist with a major South African multinational said:

As a broad principle, a free trade agreement with the EU and US, properly arranged, is almost certainly in South Africa's interest. FTAs with the US are not nearly as much of a problem as with developing countries like China and India. They get access to South African market, but what benefit do we get?

Putting the case for an FTA strongly, the head of a US-owned company said:

There is also a belief that there is no need because of AGOA for a free-trade agreement. Investors need the stability and longevity of an FTA, and South Africa cannot continue to rely on AGOA. Whether the absence of an FTA is inhibiting investment in South Africa or not is unknown, but one has to ask whether one would make long-term investment if the pay-back was short-lived. We must get all the potential issues on the table. I understand it is a relatively young economy, and you do need to walk before you can run. FTAs are needed with selected markets, not every market. FTAs are needed with the EU, US and Mercosur [Southern Cone Common Market]. These would benefit society as a whole.

Many companies thought an FTA might be neutral for their immediate operations, but good for them indirectly. A typical comment by a South African banker was:

Any net increase in trade flows is good for the bank. Some sectors will lose and some will gain, and because the bank serves all sectors, it will make up the losses from those sectors that gain. So the FTA could be fairly neutral, as long as there is a net gain of trade.

---

1 Comprising Botswana, Lesotho, Namibia, South Africa and Swaziland. See <http://www.dfa.gov.za/foreign/Multilateral/africa/sacu.htm>.

A gold miner believed that if the FTA locked in the benefits of AGOA for jewellery production in South Africa, this would also benefit the gold-mining company. Mining companies are under pressure from the government to engage in beneficiation, so this is a real benefit.

In another completely different sector, the comment was: 'It is fair to say that in principle we remain supportive [of an FTA]. But the policy needs to be far more specifically applied and not in a blanket fashion.'

Another way of looking at this, as expressed by another supplier, was that while an FTA might be good for the customers of some firms, some industries, like the automotive industry, might still need time to adjust to international competition, and any trade agreement would have to take account of this.

This points to the need for clear thinking about how an agreement would affect specific sectors. A strong feeling emerged that a one-size-fits-all approach would ill serve South African industries. A manufacturer felt that the terms of the agreement, 'definitely should distinguish between industries. What might be good for the automotive industry might not be good for agriculture.'

While the general feeling may be that an FTA with the US might not be a threat to South Africa, what is also abundantly clear is how diverse the views are of the risks and benefits when the responses are looked at in detail. Often views were so divergent that it was clear that some of the respondents were speaking on the basis of insufficient knowledge. This will become clear when looking at the chemical industry in the context of environmental standards.

An example of the divergence of views is that, on the one hand, a chemical company expressed the view that the FTA was more of an opportunity than a threat, because the industry had already been exposed to fierce international competition:

There has probably been minimal tariff protection for most of our products for quite a while – at most 5%. As the rand strengthened by 40% over the last three years, that 5% did not help a lot. We have had to face up to the reality and compete on world prices. More and more, we have been benchmarked by all our customers. The chemical sector has had quite a tough margin erosion since 1994 and certainly the rand strengthening in the last three or four years has shaken out the guys who were hiding behind tariff protection anyway. The chemical industry for a long time has not made too many decision on tariffs.

On the other hand, the belief in the motor industry – but not for all motor manufacturers – is that an agreement could not be a classic FTA.

The automotive industry has the Motor Industry Development Programme (MIDP), with levels of protection that decline gradually over time to enable industry to upgrade competitiveness so that it has a future. The prospect of no protection cannot even be considered in the short term.

One issue on which there was, unsurprisingly, mostly commonality was the benefit of locking in the benefits of AGOA through an FTA. Many companies saw this as a benefit. A motor industry spokesman noted: 'AGOA and the GSP dispensation does afford tremendous benefits to South African manufacturers, who can export parts and components and cars into the biggest market in the world.'

The South African sugar industry does not qualify for AGOA now, a financial sector representative noted:

For many companies benefiting from AGOA preferential access, as well as preferential access in terms of the US Generalised System of Preferences, a US-SACU FTA will have the benefit of locking in the preferences enjoyed. However, a free-trade agreement has the potential of also extending preferential access to other sectors currently excluded from preferential access to the US market. For instance, preferential access to the US market for the SACU sugar industries could to some extent alleviate the negative impact of trade distortive subsidies payable to producers in developed countries such as the US on world market prices.

In this respect, a sugar industry representative quite separately pointed out the benefits of greater access to the US. The sugar industry exports around 50% of its production to the rest of the world, and only about 2% to 3% to the US, when it has a shortage, under a quota. Exporting to the US could attract an out-of-quota duty of as high as 100%, he said.

The industry also benefits from the GSP, and this, it was noted by a few interviewees, could be under threat if an FTA were not implemented. According to the sugar industry representative:

The US is reviewing countries that benefit from the GSP. It would affect us to lose the GSP. The review targets countries like Brazil, India and South Africa. We're still eligible for GSP, but given our level of development, we could lose this. This could be detrimental, unless they limit products. They could remove countries rather than products.

It must be noted that AGOA is limited, and even where it applies, has not always had a major effect, because of other hurdles in the way of exporting to the US.

A car manufacturer put the issue of AGOA benefits versus the risks of lowering duties into perspective:

We have not identified any opportunities, because though we export and get benefits under AGOA, the shipping route presents problems, since there is no direct shipping to the US (for our products) and the time taken presents problems in ensuring customers get the latest model.

While supporting an agreement in principle, several interviewees expressed the concern that South Africa might be out-negotiated and not get a fair deal from the US:

In general, the concern would be, what do we get in return? And does it include NAFTA [North American Free Trade Area], because we would have a trade agreement with yet another megabloc. In the EU-SA TDCA [Trade, Development and Co-operation Agreement], one cannot yet understand the full implications, but the EU does not have the most aggressive exporting industries. It doesn't make much difference to our companies. It might give German heavy machinery companies an edge over Taiwanese heavy machinery manufacturers. South African industry is not threatened by that. The US is not quite Asia, but offers more products and has lower prices, and it could have impact on South African industry. Would industries that we would otherwise need time to build up be affected?

Another respondent put on record the view that bilaterals were *ipso facto* second best to multilateral agreements, especially for smaller countries: 'World Bank studies indicate that developing countries lose out in individual [bilateral] preferential agreements with QUAD [Canada, EU, Japan, US] and that these are no substitute for an effective collective stance on Doha Agenda.'

Finally, an economist made the point that business cannot speak with one voice on such matters: 'Business is a bunch of competing entities. There is little business agrees on: efficient government, little interference, low taxes and law and order.'

## HOW COMPREHENSIVE SHOULD AN FTA BE?

In replying to a question about how comprehensive an FTA with the US should be, and what level of ambition it should contain, most respondents were happy to speak of an FTA. A few made the crucial distinction between an FTA where reciprocal duties are zero, and the kind of agreement signed with the EU under the



banner of a TDCA. A motor industry spokesman, for instance, said he understood that the agreement was to fit within the framework of a TDCA. A sugar industry representative talked of a trade investment and facilitation agreement. It is clear from discussion that few interviewees were contemplating a classic FTA with zero duties and completely open access.

'To the extent that it might affect our customers, one should be cautious', was the typical reaction of a supplier of chemicals to manufacturers. A motor manufacturer was of the opinion that the agreement should be looked at per tariff line, since there were companies that could be competitive and some that could not. A few interviewees felt strongly that the agreement would need to have the same asymmetry of the EU-SA TDCA:

We should try to have asymmetrical ramp as in [the] EU-SA TDCA. There is logic in getting access to the US market first, because the impact we are likely to have on their market is much smaller than the impact they are likely to have on ours. We need to get as much time as possible for adjustment. The access to our markets should start after five years. We need that sort of timescale for adjustment.

In general, though, this question elicited little response, perhaps because there is a lack of knowledge of the degree of aggression of negotiators. One industry spokesman believed that the US did want an extensive agreement, and were pushing for a 'negative list', which is inflexible, because it does not take into account any future changes in the economic environment:

They don't want anything less [than a comprehensive agreement]. When we agreed to an FTA, Robert Zoellick was trade representative, and he had a list of ambitions, i.e. things the US was prepared to negotiate on. They now want a negative list, i.e. things we are not prepared to liberalise. Both South Africa and SACU have the same message. We would want agreement more along the lines of the EU, not along the lines of what they want to hammer into us.

The motor industry, for instance, would want to reduce duties by a few percentage points, because of the big difference in duty structure:

Since this dispensation [AGOA] is [a] major benefit for South Africa, it's understandable that the US wants something in return, but their duties are significantly different from ours. The import duty on cars into the US is 2.5%. Ours is 32%, declining in time to 25%. We would be giving up far more than they would. The motor industry would be happy to give the US preference of 2.5% along

the lines of the EU[-SA] TDCA. This would mean a duty, say, of 22.5% against a general level of 25%.

The degree of ambition to be entertained was also linked to the lesser development of the other SACU countries.

## SERVICES

The interviewees were asked in what way the opening of South Africa's services markets, which the US is pushing for, could benefit the South African economy, and what services sectors should be protected.

In general, with the usual caveats, the opening up of services was seen variously as neutral to positive, with more opportunities than threats. As long as the US entrants into the South African market were not offered special exclusions from local regulations, including competition law, their entry was seen as positive.

It was pointed out that many service sectors had already been liberalised since the Uruguay Round of the World Trade Organisation (WTO): 'There is not a lot we do not allow.'

The respondents actually representing services industries appeared to be unthreatened by the entry of new US firms. This was because, unlike in manufacturing, there are few – if any – barriers specifically preventing the entry of US firms, and domestic firms believe they can repel foreign invaders of their territory, and have done so already

So while at least one interviewee felt the takeover of our banking sector by foreign firms, US or otherwise, could not be allowed, one banker interviewed was self-assured about the domestic industry's ability to take on potential US competition:

We are open already, and provided foreign banks put down capital and abide by exchange controls and other banking regulations, then they can come in. We can't be much more open. So far, it would seem major foreign banks are not happy with the currency and country risk, and that is why they have not entered the market. So there will be no major impact on the banking sector.

Along the same lines, a local supermarket retailer noted: 'The major US players regard this as a small market.' This rather than other factors was why Wal-Mart, for instance, had not entered South Africa.

A recruitment agency interviewee said he believed the multinationals (in the field of recruitment) served mainly other multinationals based in South Africa. In the domestic market, the multinationals had been unsuccessful, so US companies would not be a major threat to SA firms. Rather, an FTA (or something like it) would present opportunities:

It would open opportunities for South African business, for instance, in call centres. We have staffed up a number of US call centres in South Africa. They have contracted with South African call centre providers, who have provided the staff. The benefit for the international clients is our local know-how.

A few interviewees felt that if the agreement could make it easier for US firms to enter the country to compete with local firms, this would enhance competition and so would be positive. There is a feeling that the dominance of a few companies in some markets is impeding competition.

One interviewee noted that the US market is geared towards services and so is a serious threat to the South African services industry, especially because there are only a few trading sectors where there is not an oligopoly, i.e. where the market is not dominated by a few players. These industries would not be keen to open up to competition:

The US market is geared towards services and so is a huge threat. An example is the very profitable banking sector: in the US financial services sector there are so many small niche products that can be exported with a potentially huge impact. It would be a Pandora's box, especially given the racket the financial services industry is running today.

Another interviewee welcomed international competition in certain areas with open arms:

If they can come here and compete price wise, that is good. I have to compete internationally. Don't have much sympathy with services companies who cannot compete with the US. The reality is that if South African services companies cannot compete with the US on salary differentials, then, quite frankly, we are in trouble. Particularly in the service industry, where salaries are a big part of your costs, that already is a big measure of protection. From a consumer point of view, we would love – telecoms would be one case – to see AT&T come in here and give Telkom a snotklap.<sup>2</sup> Anything that helps reduce our cost base we don't have a problem with.

---

2 Afrikaans for 'heavy blow'.

A balanced view of the services sector's strengths and weaknesses and how this could be affected by the entry of US services firms was presented by a financial sector interviewee:

The South African services sector is generally regarded as relatively efficient and effective in global terms. However, the monopoly service suppliers have to some extent been holding the South African industry at ransom. Increased market competition in those cases will impact positively on the South African [and SACU] industry cost structure, and could also make much-needed cutting-edge technology more affordable for South African firms.

Another interviewee was similarly hopeful – but not sanguine – about the possible effect, echoing the comments of the services sector interviewees about the lack of effect: 'I don't see any downside in opening up the system. Opening up services such as banking to the US in some ways might bring more competition. However, the few that have come in have raised fees to the level of local players.'

Some of the interviewees seemed uncertain about how the FTA might affect services. The services industry does not have an industry body to outline its position. One interviewee felt that the services industry was not well organised as a group: 'They distrust each other. In services, the intellectual property is your people. So it is hard to take a position.'

Hence, it is hard to get an idea of how an FTA might affect services in general:

Too much time is spent on tariffs. Services are important, though I'm not sure we should protect any. The difficulty is that government has to get services people to make their position clear. The US is bigger in services than anything else, so this is important to them. We need to know the challenges we would face. It is hard to know which services we might want to protect, which we would put on a negative list, because it is impossible to know what will happen in the future.

## **TECHNOLOGY TRANSFER**

Questions were posed about the benefits of technology transfer from US companies, whether our intellectual property (IP) regime supported or undermined this potential, and whether South Africa should adopt the rigorous requirements inherent in US IP rights regimes.

Further access to technology was generally seen as positive, with some concerns: 'All manufacturing could benefit from technology transfer. The only thing we

would worry about with technology transfer is that some technology transfer might limit you to a geographical area, so that you cannot export to the US, etc.'

Some interviewees did not see an FTA making any difference, with South Africa's IP regime already supporting a good flow of technology from the US and elsewhere, but would welcome greater technological transfer if it did.

A word of caution about technology transfer was expressed by one financial sector consultant: 'South Africa could in general benefit from technology transfer in cases where such transfer becomes embedded in the South African economy, and does not merely act as a conduit to relocate profits from South Africa to the US.'

One interviewee noted that technology transfer would benefit most manufacturing sectors, provided that the IP regime did not so constrain technology transfer as to make this impossible:

Generally speaking, South Africa's IP regime facilitates realisation of the potential, as US (and other Organisation for Economic Co-operation and Development country) companies are not disposed to transfer technology other than under licence, and enforcement of licence provisions by the courts and through ICC [International Chamber of Commerce]-based arbitration is effective.

He adds that the notable exception is in the pharmaceutical field in respect of life-saving drugs associated with diseases of poverty.

On South Africa's IP law, several interviewees felt that it was unproblematic and would not be affected by an FTA, though some felt it should be strengthened further in any case, with references to the plethora of counterfeit goods entering the country.

One interviewee felt that alignment with the US IP regime was inevitable:

There is no point in registering patents in South Africa alone anyway. There has been a lot of movement to have one global IP body. The WTO has been speaking about having one for years. The US is today the largest register of IP and patents but given the development of China, it won't have that status for much longer.

An interviewee identifies the problem for the US regarding IP in South Africa as one of enforcement. The US would want a more robust monitoring and prosecution facility than at present.

'As far as IP rights are concerned, any US agreement will be more palatable for SACU, in particular BLNS,<sup>3</sup> if it is restricted to WTO provisions,' is another observation that once more refers to the preferability of multilateral arrangements taking precedence.

## **NON-TARIFF BARRIERS**

The key question here was about what non-tariff barriers (NTBs) the FTA negotiations should address, including stringent rules of origin when entering the US market.

One view is that stringent rules of origin are not NTBs, though they clearly are NTBs:

Stringent rules of origin are not in themselves NTBs. Should an FTA go ahead, we would want to see a chapter on NTBs and technical barriers in particular. It has been agreed with government that such a chapter will form part of any FTA.

This was supported by another interviewee, who pinpointed other NTBs instead: 'Particular NTBs that need to be addressed are those applicable to agricultural products, where sanitary and phytosanitary requirements for products imported into the US are much more onerous than those required for US products.'

Antidumping duties to keep out products such as steel were mentioned more than once: 'A significant lowering of NTBs is an essential characteristic of any meaningful FTA – this includes irresponsible use of antidumping provisions to protect inefficient, energy-intensive US industries like steel, aluminium, ferro-products, etc.'

Another view was that NTBs are a fact of life:

A lot of NTBs are not national but state-level or local; some are not laws, but technical or contractual requirements. For instance, the US is the only country in the world not metric. The rest of the world has to adapt to them. Is this not an NTB? You have to live with them. Agricultural protection for food security is a case in point.

Can regulation be considered an NTB? If so, then South African oil companies would face some challenge from US fuel exporters. An oil industry executive explained that for US companies to import fuel into South Africa they require

---

3 Botswana, Lesotho, Namibia and Swaziland.

a licence. Local companies will be concerned about that because of the heavy regulation of the domestic market:

The market cannot respond to additional products being brought in while the regulatory system is in place. Therefore, there would have to be deregulation of the fuel industry. This is on the cards, but has been for some time. We've been saying it will happen in the next five years for the last ten years.

Clearly the scrapping of this requirement, whether it is considered an NTB or not, would have severe repercussions for the regulatory environment, but the Ministry of Energy and Mineral Affairs is aware of them.

## NEW ISSUES AND HARMONISATION

Here the issue was:

The US has been asking for a comprehensive FTA covering the 'new issues' plus 'non-trade' topics such as competition policy, customs transparency and harmonisation, environmental protection and labour standards. These may require harmonising SA regulations in these areas to US standards. Should SA accept more rigorous disciplines on these issues? Would we be able to implement such commitments?

There were various and conflicting views on both the issue of harmonisation and the degree to which South Africa's regulations matched or outdid those of the US. One interviewee disputed the entire basis of this question:

There is no indication that this means that South African laws should be harmonised with US laws. In many cases, our laws in the area of environment and labour are already more stringent than theirs. South African companies exporting to the US have to ensure that their products comply with US legislation. This is a given for all exported products to any market.

However, the inclusion of these issues does seem to indicate that an alignment with US law is desired. Most of the interviewees understood this to be the case.

## **COMPETITION POLICY**

On competition policy there was a strong feeling that South African law was as robust as, and possibly harsher than, the US version:

So what? I think our competition policies are more draconian than theirs. Our law is based on a combination of New Zealand law and US law anyway. The biggest difference is that the law is better administered in the US.

There was also a view that our competition policies are not as robust as the US version, and it was questionable whether we would want stricter policies.

A banking interviewee observed, however, that the South African authorities would want to preserve some banks, and it was important to know what US competition law would allow, and whether South Africa would have to abide by this. The banking sector is regulated by the minister of finance, who can prevent takeovers and mergers of banks.

One interviewee from a major South African firm stressed that the vastly different size of markets had implications for competition policy that had to be taken into account, though this could be perceived as justification of monopoly by a monopolist:

Should the US insist on no domination of market, not having 30% to 40% of the market, this doesn't work here. We have too many products which are produced by one or two plants serving the whole country. In some cases, a company has 90% of the market, where it is sub-optimal to have more plant. This has to be recognised. Also, our Competition Act is the only one with social obligations built in. I don't know that the US would accept that.

## **CUSTOMS TRANSPARENCY AND HARMONISATION**

This was generally seen as welcome, in that it helped remove some of the unwarranted hassle in trade, but the lack of harmonisation in SACU would make this difficult.

## **ENVIRONMENTAL PROTECTION**

Views here, again, varied from harmonising, with US law not being a problem, to being a particularly serious problem for South African industry.



Firstly, when environmental issues such as greenhouse gas emissions are considered, South Africa cannot be parochial, it was pointed out. Environmental issues at a global level affect everyone. However, an industry representative felt that the US would resist stricter environmental controls too.

A motor manufacturer welcomed harmonisation as a step in the right direction:

Fuel standards, for instance, are behind the EU, but all our technology is from the EU. Diesel is of poor quality, and this is a significant challenge. Products are excluded simply because of fuel. Our plant is equal to plant in the EU in ISO certification. So [we] would welcome environmental harmonisation.

The counterview is that US standards are not only stricter, but that they could damage South Africa's growth prospects. 'Do we want First World standards if it means we can't meet our growth targets?' asked one interviewee.

The representative of a chemical company emphasised that this was not a marginal issue, and could mean the loss of opportunities for South African firms:

Certainly, if you applied US environmental standards to the South African chemical sector specifically, you would have a 90% shut-down rate. Historically, because of the differences in the operations, to standardise you would have to have a substantial lead time. It would be ridiculous to try to harmonise them in under ten years – both for chemical suppliers and for our customers. We are about to build a R300 million plant because the US, Canada and Australia have all turned down the EIA [environmental impact assessment]<sup>1</sup> for that plant. That presents us with an opportunity. Half of that is exported. There is a worldwide shortage of this particular product.

*This is the case for Africa and other areas like China. A lot of manufacturing and chemical plants being built in China are attracted there not only because of the cheap labour. It is because the lead time from decision to building is weeks. In South Africa it is months, but in the First World it takes years to get approval.*

It is very important that they cannot apply their standards. You would not get permission in the US and most of Europe to build the Sasol plant in Secunda now, no matter what safety precautions were built in.

## **LABOUR**

Generally, companies were not unhappy about harmonising labour laws, if it meant relaxing the South African labour regime: 'I would love to have US labour laws on hiring and firing apply here, but not minimum wage legislation,' said one industrialist.

One interviewee notes that it would be positive for South Africa if we could align ourselves with US labour law. The casualisation of labour is growing in the world, and this is good for economies, but the union movement in South Africa has pushed for legislation to try to make it hard to use flexible and contract labour. In his view, harmonising with the US would bring us in line on labour casualisation.

## **TRANSPARENCY OF GOVERNMENT PROCUREMENT**

Interviewees were asked about two 'new issues' that could affect the government's ability to use procurement for BEE and ensure equity transfer. These are transparency in government procurement and bilateral investment protection measures.

The belief was that the US did indeed want to use transparency in procurement to avoid being subjected to affirmative procurement:

What the US wants is to go beyond transparency. It's a wedge to open the door. The only thing in government procurement is a voluntary agreement at the WTO, and one or two developing countries such as Hong Kong and Singapore have done that. We would want to keep it that way unless we could keep [our] ability to use it for empowerment, etc. If we lost that, we would be in trouble. Right now, plurilateral agreements do not have that many signatories. We would want to go into a WTO plurilateral agreement, and this would carry over into any bilateral. We have to treat this with extreme caution. Transparency is a good thing, but what will it lead to?

Views were mixed. Some companies would be happy if the US did succeed, because this would effectively destroy procurement as a transformation tool.

One company believed that it was impossible for it to comply either with procurement obligations or with demands for equity transfer, pointing out that most of its supplies were imported, limiting its ability to procure from black suppliers. This foreign-owned company could also, however, be exempted from

the equity transfer obligations of government regulation. This exemption already creates an uneven playing field.

The concern was that the principle of national treatment was followed and that US firms did not get special treatment on procurement: 'From the BEE perspective, it must be asked whether you can make allowance for preferential procurement. How is it accommodated? And what would the US want? For instance, only allowing 50% to be set aside for preferential procurement?'

## THE REGIONAL NATURE OF THE FTA

Interviewees were asked in what ways the regional nature of the agreement could affect South African business. The general response was that harmonisation within SACU was a problem in itself: 'The lack of common regulations within SACU is an ongoing nightmare for South African business, particularly in areas that affect cross-border activities. Any initiative that can promote harmonisation is to be welcomed.'

In this view, the FTA may contribute towards getting the BLNS members of SACU to move towards greater harmonisation. Another view is that they have little choice but to follow South Africa, because SACU is a major source of revenue, and South Africa usually sets the pace in many other ways:

Ultimately, South Africa is the dominant player in SACU, and to a certain degree one could regard us as putting the rules in place. It is important to get buy-in from other SACU members, though South Africa should take the lead. Other SACU members could be disadvantaged by harmonisation – e.g. Lesotho uses cheaper labour to its advantage.

Other interviewees stressed this last point on the lower levels of industrial development and different competitive advantage:

Any trade deal between SACU and the US should recognise the massive difference between the levels of development of the economies of the respective countries. If SACU industries are without reserve exposed to the market power of US firms and industries, which in some cases are also the recipients of substantive support from the US government, such agreement could subtract rather than add value in SACU. However, there should not be a need to protect any sector of the US economy against the rather insignificant market power of SACU firms.

The different level of development in South Africa's partner countries in SACU was also seen as a potential leverage point to get a better deal for South Africa: 'Lesotho is, for example, an LDC [least-developed country]. This could be a bargaining chip in our negotiating industrial tariffs, because it would be hard to fully develop their industry (without protection). Theoretically, we can use them to our advantage.'

### **Awareness of the US-SACU trade talks**

The question, 'What should be done to raise the level of awareness and interest in the US-SACU FTA in the South African business community?' did not elicit creative responses.

One response was that there is no need to raise awareness, because the negotiations have been suspended for reasons beyond the control of South Africa and the SACU governments: 'However, when resumed, market opportunities sought by US into SA should be identified on a product-by-product basis, and consulted on with firms active in those areas. US-requested exclusions need to be similarly identified and consulted on.'

For those actually involved in monitoring trade issues, the disappointment with the lack of interest is palpable: 'Peter Draper is doing good things, but a lot of people are not listening. It took a long time in Business Unity South Africa [BUSA] to form a trade committee. Black business is still not involved. For many people, trade agreements are not an issue.'

One interviewee pinpointed the practical problems of trade negotiations – and suggested that companies need to shoulder their share of the burden:

A lot of people think trade is a dull subject. They probably understand it, but don't internalise and think they can't do much about it. They would rather spend time on what they think they can affect. Once people do understand the impact of trade, they tend to get engaged in the issue, but there is a threshold to get over. How does one build awareness? Industry is responsible [for doing] that. Every company needs to ensure that it understands the issues sufficiently. They can't say nobody told us – that doesn't wash. Companies need in the first instance to take responsibility. One has to get them to a level of understanding first. From time to time, we seem to be the only ones worried about matters of policy. Other companies in an industry are content to let one company do the work. Organisations like BUSA need to build awareness among their members. We need to have a better partnership with government on this.

In general, proposals were to use the media to flag important issues and to use business organisations to spread the message about the importance of negotiations on an FTA, when and if they start up again.

## CONCLUSION

In general, with many caveats, the South African business people interviewed for this survey welcomed a trade agreement with the US, along the lines of the TDCA with the EU. Several firms see little gain, but also little direct harm in an FTA, even if it includes zero tariffs, because they have little protection at present, and believe that the benefits of closer economic ties with the US could enhance aspects of the free market here, including labour law, though whether this could even happen is moot. Also, there are definite and practical benefits evident in locking in and even extending the kind of benefits available under AGOA. This would be doubly welcome if, as is threatened, South Africa's preferential trade treatment under the GSP falls away.

There are warning bells in certain key areas. BEE is one, and industry would strongly resist any dispensation that allowed US business to sidestep preferential procurement obligations.

Clearly, certain automotive manufacturers have something to fear from very much lower duties on cars that may be negotiated in a trade agreement.

Yet uneven development of South Africa's SACU partners could mean that a comprehensive trade agreement will be difficult to achieve – and no longer seems to be even on the table, anyway.

Varied views were expressed about the harmonisation of South African law on competition, labour, environmental protection and IP. Issues of IP attracted the least controversy.

*An important threat is the issue of harmonisation of environmental law. It was pointed out that a major competitive advantage enjoyed by South African chemical companies could be wiped out. This is a warning to proceed with extreme caution in negotiations.*

On services, the services businesses interviewed were not overly concerned about the entry of US multinationals. Small market size is seen as an issue in aligning competition regulation with that of the US, and as a kind of natural defence against entry of multinationals.

It is always salutary to consider for a moment some fresh questions the survey has signalled for further research:

- The issue of services and trade agreements needs more examination and discussion. Businesses polled here may not be worried, but there may be firms that do have concerns.
- Concerns about technology need further detailed examination. Will closer trade and investment ties further lock South Africa into the use of proprietary as opposed to open-source software, for instance?
- Likewise, the exact sectors that US competition might prise open needs further study. Broadcasting, for instance, is unlikely to be opened. Without further liberalisation generally, it is also unlikely to be attractive for investors. The sole high-profile investor in free-to-air TV, Warner, incidentally a US firm, disinvested some time ago. Banking is a sector that is seen to be in dire need of competition. What, however, are the prospects of this happening, and would an FTA really bring about this competition?

## Chapter 2

### A US–SACU FTA

### Investment issues

Riekie Wandrag

*Free trade is an opportunity to improve southern Africa's commercial competitiveness and to better position the region for success in the US market and the global economy. An FTA can also help these countries attract much needed new foreign direct investment.<sup>1</sup>*

#### INTRODUCTION

Negotiations towards an FTA between the US and the member countries of SACU<sup>2</sup> were launched in Pretoria on 2 June 2003. These negotiations were aimed at establishing the first FTA between the US and sub-Saharan Africa,<sup>3</sup> and such an FTA was openly supported by President George W Bush.<sup>4</sup>

These FTA negotiations were launched under the auspices of the Trade Promotion Authority (TPA) granted to President Bush by the US Congress in 2002. In terms of the TPA legislation, the president has the authority to conclude trade agreements, with Congress only having the power to accept or reject such agreements, but not to amend or delay them.<sup>5</sup>

The 2002 TPA legislation grants the US trade representative (USTR) the authority to conclude bilateral and multilateral trade agreements, but it also includes very specific mandates for such negotiations, resulting in the so-called 'one-size-fits-all' comprehensive template for trade agreements.<sup>6</sup> In terms of this

---

1 'Background information on the US–SACU FTA', 6 February 2003, <http://www.ustr.gov>.

2 Botswana, Lesotho, South Africa, Swaziland and Namibia.

3 'Background information', op. cit.

4 'Bush declares support for free trade with SACU', 25 June 2002, <http://www.tralac.org>.

5 'US law paves way for free trade with SACU', 5 August 2002, <http://www.tralac.org>. For a detailed discussion of the TPA, see also Schott JJ, *US Trade Policy: Method to the Madness*, Institute for International Economics, 2002, <http://www.iese.com>.

6 US–South Africa Business Council, 'Background on a comprehensive US–SACU free trade agreement', 19 December 2005.

mandate, FTAs must address not only lowering tariff and non-tariff barriers to trade in goods, but also trade in services, foreign investment, protection of intellectual property rights, anticorruption measures, labour standards, environmental laws and government procurement.<sup>7</sup>

Although the negotiations started off quite positively in 2003,<sup>8</sup> it soon became clear that SACU countries were not happy with the comprehensive nature of the agreement proposed by the USTR. Negotiations stalled in July 2004,<sup>9</sup> and were scheduled to restart in May 2005, but were cancelled.<sup>10</sup> By April 2006 it was clear that consensus between the parties 'was unlikely, and that the chances of concluding the FTA before the expiry of the current TPA on 30 June 2007 were slim. In order for Congress to implement the necessary legislation before the expiry of the 2002 TPA, the agreement had to be concluded by December 2006.'<sup>11</sup>

Discussions between SACU representatives and deputy USTR Karan Bhatia in April 2006 concluded with the admission that the FTA negotiations would not be concluded before the expiry of the TPA,<sup>12</sup> and resulted in the US-SACU FTA being 'demoted' to a trade investment co-operation agreement (TIDCA). The TIDCA ('joint work programme') will allow the US to continue long-term negotiations on trade liberalisation with SACU member countries even after the TPA expires.<sup>13</sup>

The blame for the failure of the FTA negotiations was laid at the door of both parties. The US blamed the absence of harmonised trade policies among SACU member countries for the failure of the negotiations.<sup>14</sup> SACU member countries, on the other hand, made it clear that the comprehensive nature of the FTA proposed

---

7 Ibid. See also 'Trade talks between SACU and USA cancelled', 10 May 2005, <http://www.tralac.org>.

8 'SACU responds to US free trade offer', 9 September 2002, <http://www.tralac.org>.

9 'SACU-US talks stonewalled', 7 July 2004, <http://www.tralac.org>.

10 'Trade talks between SACU and USA cancelled', 20 May 2005, <http://www.tralac.org>.

11 US-South Africa Business Council, *op. cit.*

12 In the current political climate within the US, it appears unlikely that the TPA or 'fast-track' authority would be renewed after June 2007, as confirmed by lead negotiator Susan Schwab ('Too early to consider renewing US trade law', 21 August 2006, <http://www.tralac.org>).

13 McNeely K, 'Is the US trade agenda coming apart at the seams?', 3 May 2006, <http://www.afsc.org>. See also 'US-SACU agree to pursue concrete steps to deepen trade and investment relations', USTR press release, 18 April 2006, <http://www.ustr.gov>; and 'Departing from USTR, Portman leaves dead US-Southern Africa negotiations behind', press release, 19 April 2006, <http://www.afsc.org>.

14 'SACU-US deal "no longer possible" by December', 25 October 2004, <http://www.tralac.org>. See also letter from USTR Rob Portman to Minister Moroka of Botswana, dated 17 February 2006.



by the US was unacceptable to them, even though such comprehensive agreements were concluded between the US and CAFTA-DR,<sup>15</sup> Australia, Chile and Morocco in recent years. SACU clearly would have preferred to deal with market access on goods and services first, and to postpone discussions on investment and government procurement until after the conclusion of the FTA.<sup>16</sup>

SACU negotiators identified the investment chapter in the typical comprehensive FTA agreements previously concluded by the US as a particular obstacle. Such an investment chapter typically addresses the following issues:

- most-favoured-nation (MFN) and national treatment for investors;
- fair compensation for expropriation;
- a prohibition on performance requirements; and
- investor-state dispute resolution procedures.<sup>17</sup>

In addition to this, the typical detailed chapter on transparency and non-discrimination in government procurement regulations in US FTAs was identified as a problem. From a SACU perspective, this template (one-size-fits-all) comprehensive FTA does not take into account the peculiar socio-economic challenges and history of its member countries. From this perspective, it is imperative that member countries (in particular South Africa), maintain the policy space that would allow the continued implementation of programmes such as the BEE initiative to address these peculiar socio-economic and historical problems.<sup>18</sup>

The purpose of this chapter is therefore to examine the typical investment and government procurement chapters in recent US FTAs in order to ascertain the validity of the reasons advanced by both parties for the failure of the FTA negotiations. The typical contents of these US FTAs will be examined and evaluated against international law, as well as South African law and policy. This analysis will focus on the potential impact of typical US FTA provisions on South African business and government initiatives aimed at addressing poverty and development.

---

15 Central American states (including Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua), plus the Dominican Republic.

16 'Trade talks between SACU and USA cancelled', *op. cit.* See also 'SACU-US talks stonewalled', *op. cit.*

17 US-South Africa Business Council, *op. cit.*

18 As stated by Brendan Vickers in 'Departing from USTR, Portman leaves dead US-Southern Africa negotiations behind', *op. cit.*

Lastly, the potential capacity of SACU to negotiate agreements on these issues as a customs union will be examined and recommendations will be made regarding the future of a US-SACU FTA.

## RECENT US FTAS CONCLUDED IN TERMS OF THE 2002 TPA

Since the implementation of the 2002 TPA legislation, the US has concluded FTAs with Chile,<sup>19</sup> Australia,<sup>20</sup> Morocco<sup>21</sup> and Central America (CAFTA-DR).<sup>22</sup>

With the exception of the US-Australia FTA (US-AUS FTA), the other agreements follow the so-called 'one-size-fits-all' comprehensive US FTA template. Each of these agreements, inclusive of the US-AUS FTA, contains detailed chapters on investment, government procurement and dispute settlement.<sup>23</sup>

### Investment

Foreign investment can traditionally be divided into foreign direct investment (FDI), which would refer to the movement of business, assets and people across borders, and foreign indirect (equity) investment, which would include the movement of capital and financial instruments across borders. Most attempts at international regulation of foreign investment have focused on FDI.

The recent US FTAs define investment very widely to include both FDI and indirect (equity) investment. 'Investment' in these FTAs would mean every asset that an investor owns or controls, directly or indirectly, that has the characteristics of investment, including the expectation of gain or profit, or the assumption of risk. Forms of investment may include enterprises; shares; stock; bonds; debentures; other debt instruments and loans; futures; options; turnkey-, construction-, management-, production-, concession- and revenue-sharing contracts; intellectual property rights; licences; permits and other tangible or intangible, moveable or immoveable property.<sup>24</sup>

19 Entered into force on 1 January 2004.

20 Entered into force on 1 January 2005, after Congress's approval in July 2004.

21 Entered into force on 1 January 2006, after Congress's approval by way of the US-Morocco FTA Implementation Act.

22 Entering into force as each party ratifies the agreement. US Congress's approval granted in July 2005 and signed into US law on 2 August 2005, <http://www.export.gov/fta>.

23 For full texts of these agreements, see <http://www.export.gov>.

24 For example, US-Morocco FTA, art. 10.27 and US-CAFTA-DR, art. 10.28, <http://www.export.gov/fta>. See also Sornarajah M, *The International Law on Foreign Investment*. Cambridge: Cambridge University Press, 1994, chap. 6. This definition also corresponds in broad terms

The investment chapters invariably include the following provisions:

- *National treatment.* Investors of the other party and covered investments must be granted treatment no less favourable than that the party accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.<sup>25</sup>
- *MFN treatment.* Each party shall accord investors and covered investments of the other party no less favourable treatment than afforded in like circumstances to investors of any other party or of any non-party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.<sup>26</sup>
- *Minimum standard of treatment.* Each party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment, and full protection and security. 'Fair and equitable treatment' is defined as relating particularly to the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings, and 'full protection and security' refers to the level of police protection required under international law.<sup>27</sup>
- *Treatment in case of strife.* Parties shall accord investors of another party and covered investments non-discriminatory treatment with respect to compensation for losses suffered due to armed conflict or civil strife.<sup>28</sup>
- *Expropriation and compensation.* Neither party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation, except for a public purpose, in a non-discriminatory manner, on payment of prompt, adequate and effective compensation and in accordance with due process of law. Such compensation shall be paid without delay and be equivalent to the fair market value of the expropriated investment immediately before the expropriation, shall not

---

with the definition of investment in recent South African FTAs, e.g. the South Africa–Czech Republic FTA.

25 US–Chile FTA, art. 10.2; US–AUS FTA, art. 11.3; US–Morocco FTA, art. 10.3; US–CAFTA-DR, art. 10.3.

26 US–Chile FTA, art. 10.3; US–AUS FTA, art. 11.4; US–Morocco FTA, art. 10.4; US–CAFTA-DR, art. 10.4.

27 US–Chile FTA, art. 10.4; US–AUS FTA, art. 11.5; US–Morocco FTA, art. 10.5; US–CAFTA-DR, art. 10.5.

28 US–Chile FTA, art. 10.4; US–AUS FTA, art. 11.6; US–Morocco FTA, art. 10.5; US–CAFTA-DR, art. 10.6.

reflect changes in value due to the intended expropriation becoming known, and shall be fully realisable and transferable.<sup>29</sup>

- *Performance requirements.* There is a prohibition on performance requirements in relation to the establishment, acquisition, expansion, management, conduct, operation or sale or other disposition of an investment, such as export targets, domestic content, local sourcing, etc. Linking investment incentives to such performance requirements is equally prohibited.

An exception is created in relation to domestic content, sourcing of local goods/purchasing goods from local persons, and transfer of knowledge, as long as these measures are not applied in an arbitrary or unjustifiable manner and do not constitute a disguised restriction on international trade or investment. Such exceptions would include measures necessary to comply with laws and regulations not inconsistent with the FTA, and measures necessary to protect human, animal or plant life or health, or for the conservation of exhaustible natural resources.<sup>30</sup>

- *Senior management and boards of directors.* Parties may not require that senior management of a covered investment be appointed from any particular nationality, but parties may require that the majority of the board of directors of a covered investment be of a particular nationality or residence, provided that it does not materially impair the ability of the investor to exercise control over its investment.<sup>31</sup>
- *Non-conforming measures.* Each FTA excludes the application of the abovementioned principles to specific aspects, e.g. US-AUS FTA, US-CAFTA-DR and the US-Morocco FTA exclude the MFN and national treatment principles from application to government procurement.

In relation to investment, the only divergence among these FTAs can be found in the dispute resolution measures:

- The US-CAFTA-DR, and US-Morocco and US-Chile FTAs provide for investor-state dispute settlement according to the NAFTA example.
- Initially, parties undertake to seek resolutions for investment disputes by way of consultation and negotiation.

---

29 US-Chile FTA, art. 10.9, US-AUS FTA, art. 11.7; US-Morocco FTA, art. 10.6; US-CAFTA-DR, art. 10.7.

30 US-Chile FTA, art. 10.5; US-AUS FTA, art. 11.9, US-Morocco FTA, art. 10.8; US-CAFTA-DR, art. 10.9.

31 US-Chile FTA, art. 10.6; US-AUS FTA, art. 11.10; US-Morocco FTA, art. 10.9; US-CAFTA-DR, art. 10.10.

- In the event of failure to settle investment disputes by way of consultation and negotiation, the claimant (investor) may, on its own behalf, submit a claim to arbitration under the International Centre for the Settlement of Investment Disputes (ICSID) Convention (where both parties are members); the ICSID additional facility (where one party is a member and the other not); the UN Commission on International Trade Law (UNCITRAL) arbitration rules; or, with agreement of the disputing parties, to any other arbitration institution or under any other arbitration rules.
- The consent of the parties to the FTA will also constitute consent to jurisdiction as required by ICSID.
- Parties shall provide for the enforcement of awards made, but only after a certain period of time, or parties can seek enforcement of awards under the ICSID or New York Conventions.
- Despite the fact that ICSID awards, for example, are regarded as final in terms of the convention, all three agreements (US-CAFTA-DR, US-Morocco FTA and US-Chile FTA) provide for negotiations between parties on the establishment of an appellate body or similar mechanism within three years after entry into force of the agreements.

The US-AUS FTA, on the other hand, does not provide for investor-state dispute settlement. Article 11.16 of the US-AUS FTA only provides for the possibility that a state party may request consultations on possible investor-state arbitration and relevant procedures. Such request could be made if a party considered that changes in the circumstances affecting dispute settlement relating to investments may justify the possibility of an investor bringing direct arbitration proceedings against a state party.

In addition, the possibility of discussions on investor-state arbitration, sub-article 2, allows parties to the FTA to raise matters falling under the investment chapter in terms of the dispute settlement procedures provided for in chapter 21 (state-state dispute settlement via the joint committee or a dispute settlement panel, inclusive of a WTO dispute settlement unit panel). An investor is also allowed to institute arbitration claims against the state party 'to the extent permitted' under the law of the state party (i.e. national arbitration).

This article ostensibly gives effect to the realisation that 'both countries have established, robust and sophisticated legal systems that provide adequate scope

for both domestic and foreign investors to pursue concerns about government actions'.<sup>32</sup> The 'changes in the circumstances relating to investments' referred to in article 11.16(1) would then mean changes in the relevant economic and legal environments of the US and Australia that would affect this reciprocal trust in the fairness and integrity of their respective legal systems, and may therefore require the establishment of investor-state dispute mechanisms.<sup>33</sup>

## Procurement

The procurement chapters in the US-AUS FTA, US-Chile FTA, US-Morocco FTA and US-CAFTA-DR provide for 'unconditional' treatment no less favourable than the most favourable treatment the party accords to domestic goods, services and suppliers.<sup>34</sup> The agreements only apply to procurements by entities listed in the annexes to the agreements, and only to procurements equal to or higher than specified threshold values.

Parties are prohibited from using or imposing 'offsets' during any stage of procurement procedures.<sup>35</sup> 'Offsets' in relation to procurement are explained as 'measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements'.<sup>36</sup>

Transparency is required from parties in relation to the general laws and procedures relating to procurement, as well as specific tendering processes and reasons for awarding tenders. Despite these detailed requirements, these agreements also allow exceptions to the prescriptions in the procurement chapters, as long as such measures are not applied in a way that would constitute a means of arbitrary or unjustifiable discrimination between parties where the same conditions prevail, or a disguised restriction on international trade. Such

---

32 ADFAT (Australian Department of Foreign Affairs and Trade), *Advancing Australian Investment and Services Exports and AUS-US FTA Guide to the Agreement*, both at <http://www.dfat.gov.au>.

33 ADFAT, *AUS-US FTA Guide to the Agreement*, op. cit., para. 6.4.

34 US-AUS FTA, art. 15.2; US-CAFTA-DR, art. 9.2. Note that this differs from the standard national treatment clauses in WTO agreements that require 'no less favourable treatment ... in like circumstances' (emphasis added). As stated previously, government procurement is excluded from the application of the 'like circumstances' MFN and national treatment provisions in terms of the article on non-conforming measures in the investment chapters of these FTAs.

35 US-AUS FTA, art. 15.2(5); US-CAFTA-DR, art. 9.2(4).

36 US-CAFTA-DR, art. 9.17; US-AUS FTA, art. 15.15.

exceptions could include measures 'necessary to protect public morals, order or safety'.<sup>37</sup>

It is important to note, however, that parties to these agreements have excluded certain categories of procurement from the stringent requirements of the procurement chapters. In Annexure 15-G to the US-AUS FTA, both countries reserved the right to exempt certain procurements from the ambit of the FTA. In terms of these reservations, the US retains its preference policies in respect of small and minority businesses, while Australia reserves the right to continue with procurement policies that assist small and medium enterprises and those that provide 'economic and social assistance to indigenous persons'.<sup>38</sup>

These exemptions (exclusions) also apply to the 'offset' provisions, with the result that such offsets aimed at supporting small and minority businesses in the US, and small and medium enterprises and those assisting indigenous persons in Australia would be exempted from the FTA procurement chapter as well.<sup>39</sup> This is of clear relevance to the South African situation, as outlined in part 4, below.

## COMPLIANCE OF US FTAS WITH INTERNATIONAL LAW

### Investment

The creation of the WTO in 1995 has resulted in extensive multilateral regulation of trade in goods and services. The same is unfortunately not true of foreign investment regulation, and there is no real international regime for the regulation of foreign investment. During the 1990s, the OECD attempted to create such an international regime in the form of a multilateral agreement on investment (MAI).<sup>40</sup> The concept of an MAI unfortunately elicited negative responses from various stakeholders and was officially discontinued in an OECD press release of 3 December 1998.<sup>41</sup>

During the Doha Round of trade negotiations within the WTO, attempts were made to bring FDI regulation within the ambit of the WTO. The Singapore Ministerial Conference constituted a committee to examine the possibility of

---

37 US-AUS FTA, art. 15.12(5); US-CAFTA-DR, art. 9.14.

38 ADFAT, AUS-US FTA *Guide to the Agreement*, op. cit., para. 15.3.

39 Ibid., para. 15.4.

40 For a discussion of the main themes of the MAI, see Wandrag MS & E Snyman, 'Die multilaterale beleggingssooreenkoms (MAI): 'n Kruispad vir internasionale beleggingsregulering', *Journal for Juridical Science*, 26, 2, 2001, p. 78.

41 Ibid., p. 86.

drafting a multilateral agreement on investment that could be administered by the WTO.<sup>42</sup> In view of more pressing concerns, such as agricultural subsidies, the regulation of foreign investment has since been placed on the back burner as far as the WTO is concerned.

Currently, the only multilateral attempt at foreign investment regulation can be found in the Trade-Related Investment Measures (TRIMS) agreement of the WTO and in mode 3 of the GATS.<sup>43</sup> The TRIMS agreement is a multilateral agreement, therefore binding all WTO member states, but its scope is limited.

The TRIMS agreement is directly linked to trade in goods, with the concept of national treatment embedded in article 2: 'no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of [General Agreement on Tariffs and Trade] GATT 1994'. The agreement then further contains an illustrative list of TRIMs that would be regarded as inconsistent with the national treatment provisions in article III, paragraph 4 and the elimination of quantitative restrictions in article XI, paragraph 1 of the GATT 1994. This illustrative list refers to measures such as local content and export target requirements. These can by no means be seen as dealing with the international regulation of foreign investment.<sup>44</sup> Foreign investment regulation is therefore still very much in the domain of national governments in the form of investment codes or acts, and, increasingly, by way of bilateral investment treaties (BITs) or FTAs among national governments.

With reference to the US FTAs discussed above, this means that there are no 'international' or 'multilateral' rules against which the investment measures in these FTAs can be tested. At most, an enquiry can be made as to the compliance of these measures with those referred to in TRIMS and similar measures typically found in other BITs, FTAs or national foreign investment regulation systems.

The fact that foreign investment regulation largely takes place at national government level<sup>45</sup> raises concerns of state sovereignty<sup>46</sup> and the amount of 'national policy space' available to governments to pursue development-oriented

---

42 Sornarajah M, 'The clash of globalizations and the international law on foreign investment', Simon Reisman Lecture in International Trade Policy, Ottawa, 12 September 2002.

43 Services will be addressed in a separate chapter in this book.

44 See Wandrag MS & E Snyman, op. cit.

45 Ibid.

46 '... the right to regulate, a sovereign prerogative that arises out of a State's control over its own territory and that is a fundamental element in the international legal regime of State sovereignty' (UNCTAD, *World Investment Report 2003*, UNCTAD/WIR/2003. Geneva: UNCTAD).



foreign investment policies in national legislation or bilateral treaties while still adhering to the requirements of what little international foreign investment regulation may exist. As was so eloquently stated in the UN Conference on Trade and Development (UNCTAD) *World Investment Report*, 'tension can arise between the will to cooperate at the international level through binding rules and the need for governments to discharge their domestic regulatory functions'<sup>47</sup> – and responsibilities, one may add.

The right of governments to regulate activities within their territories in order to meet national policy objectives is recognised in the preamble of the GATS, as well as in the WTO Doha ministerial declaration relating to investment, which states that 'any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their rights to regulate in the public interest'.<sup>48</sup>

The UNCTAD commission on investment, technology and related financial issues reported that the need for government policies to reflect the special circumstances prevailing in countries had been stressed by many of its delegates. These delegates emphasised the need to 'ensure sufficient policy space for the pursuit of national policy objectives'.<sup>49</sup> The investment measures in the various US FTAs should therefore also be examined against the need of parties to these agreements to maintain national policy space and pursue national development and other goals.

### *National and MFN treatment of foreign investors and investments*

The national and MFN treatment principles found in the US FTAs are in compliance with these principles as found in the GATT (and therefore TRIMS), as well as those typically found in other bilateral agreements. In principle, foreign investors and investments should receive treatment 'no less favourable' than that accorded to locals 'in like circumstances' or that accorded to investors or investments from other parties 'in like circumstances'.

This inherent limitation (in like circumstances) contained in the national and MFN treatment principles is often overlooked. The purpose of these principles is to prevent discrimination between local and foreign enterprises who are

---

47 Ibid.

48 Para. 22. This principle was also contained in the failed MAI. See UNCTAD, *op. cit.*

49 Ibid.

competing in 'like circumstances'. This qualification is typically understood to refer to broad, objective characteristics of a business, such as its economic sector, the size of the business or its geographical location.<sup>50</sup>

The implication of this qualification is that national treatment in particular is a comparative standard that should only be applied in comparable circumstances. It would therefore mean that preferential treatment of domestic investors (and therefore 'less favourable' treatment of foreign investors) may be justifiable on the basis of their actual economic conditions, such as, for example, 'infant industries' or 'minority industries'.<sup>51</sup> Governments may therefore use the comparative nature of the national treatment principle to retain policy space and pursue national policies through preferential rules and regulations. For example, preferential regimes for small- and medium-sized businesses would not have to be extended to include large multinational corporations, as these would not compete in 'like circumstances'.<sup>52</sup> This could even include BEE initiatives, as previously disadvantaged South African businesses could be regarded as not competing under 'like circumstances' with foreign-owned or white-owned South African businesses, and could therefore be subject to different, even preferential rules.<sup>53</sup>

It has further been pointed out<sup>54</sup> that the national treatment principle as contained in WTO agreements only requires foreign goods and investors not to be treated 'less favourably' than local or domestic goods or investors, but that it would in fact not prohibit foreign goods and investors from receiving better treatment than local or domestic goods or investors. Therefore, it would be quite acceptable within the WTO rules to discriminate against local investors or investments in favour of foreign investors or investments. Politically and strategically, governments may of course find it very difficult to justify such an application of the national treatment principle to the local business sector.

---

50 Ibid. See also Wandrag MS & E Snyman, op. cit., p.80.

51 Ibid.

52 Ibid., p.81.

53 See also Peterson LE, 'South Africa's bilateral investment treaties: Implications for development and human rights.' *Occasional Paper*, No. 26, in the Friedrich Ebert Stiftung's Dialogue on Globalisation series, 2006, <http://www.saiia.org.za>.

54 Picciotto S, 'Linkages in international investment regulation: The antinomies of the draft Multilateral Agreement on Investment', *Journal of International Economic Law*, 19, 3, 1998, pp.731-68.

### *Minimum standard of treatment*

The requirement of a 'minimum standard of treatment' to be afforded to investors and investments 'in accordance with the customary international law minimum standard' is more problematic.

The WTO agreements only contain the above-mentioned national and MFN standards, and do not require any 'minimum international standard' of treatment. This so-called 'international minimum standard' of treatment for foreign investments and goods has found favour mostly with developed countries, but has not been properly defined or clarified.<sup>55</sup>

Similar requirements of 'minimum international standard' of treatment, particularly in relation to safety and security, did form part of the failed MAI, chapter 4, and is contained in the NAFTA Agreement.<sup>56</sup> The NAFTA member countries have clarified these provisions, and particularly the minimum standard of treatment to be accorded to foreign investors under the fair and equitable treatment provision, to mean the 'customary international law minimum standard of treatment'.<sup>57</sup> The exact scope of such a standard unfortunately does not appear to be clear, and it would be left to tribunals to determine whether a host government was in breach of this required standard of treatment.

### *Performance requirements*

The prohibition on performance requirements such as local content, export targets, domestic sourcing, etc. is in line with the TRIMS and the *specific measures* 'outlawed' by this agreement.

The exceptions to these prohibitions provided for in the FTAs themselves<sup>58</sup> would appear to provide some scope for governments to retain policy space and implement national policies and laws, as long as these are not applied in an arbitrary or unjustifiable manner, do not constitute a disguised restriction on international trade or investment, and are not inconsistent with the FTA.

---

55 Sornarajah M, 2002, op. cit.

56 See Wandrag MS & E Snyman, op. cit., p. 81.

57 UNCTAD, op. cit.

58 For example, measures necessary to secure compliance with laws and regulations that are not inconsistent with the FTA; measures necessary to protect human, animal, plant life or health, etc. See US-Morocco FTA, art. 10.8, <http://www.export.gov.fta>.

### *Expropriation and nationalisation*

The fear of expropriation has always been one of the main concerns of foreign investors venturing into the territory of host states. This is also very much linked to the sovereign right of governments to regulate the activities of nationals and foreigners alike.

It appears to be generally accepted that within their right to regulate, sovereign governments cannot be prohibited from expropriating property, but that it should be done only for 'public purposes' in accordance with the law, in a non-discriminatory manner and upon payment of appropriate compensation. These principles were also provided for in the MAI agreement, and can be found in most bilateral investment and trade agreements.<sup>59</sup> The right of the government to regulate in the 'public interest' appears once again to allow for the retention of policy space and the implementation of national policies and laws, as long as these do not breach the requirement of non-discrimination.<sup>60</sup>

Until recently, it seemed equally generally accepted that 'expropriation' includes both direct and indirect expropriation, as defined in the US FTAs.<sup>61</sup> This was confirmed in the *Metalclad*<sup>62</sup> case, where a broad definition of expropriation was given so that it would include covert or incidental interferences with the use of property that has the effect of depriving the owner in whole or in significant part of the use or reasonably expected economic benefits of the property.<sup>63</sup> Sornarajah is, however, of the opinion that this wide interpretation of the concept of expropriation is an American invention that is now being transported into international regulation, but that it is in contravention of many national legal systems.<sup>64</sup> This opinion has been confirmed by recent arbitration tribunals that preferred a more restrictive interpretation of expropriation. In the case of *Saluka Investments BV (The Netherlands) v. The Czech Republic*,<sup>65</sup> the tribunal ruled that bona fide regulations, adopted in a non-discriminatory manner and aimed at the general welfare, would not be regarded as expropriation. Similarly, a recent NAFTA tribunal dismissed expropriation claims from Methanex Corporation<sup>66</sup>

59 See Wandrag MS & E Snyman, op. cit., pp. 81–82.

60 ADFAT, AUS–US FTA Guide to the Agreement, op. cit.

61 Ibid.

62 *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB (AF)/97/01.

63 See Sornarajah M, 2002, op. cit., p. 21.

64 Ibid., p. 11.

65 Partial Award, 17 March 2006, [http://www.investmentclaims.com/decisions/Saluka-CzechRep-Partial\\_Award.pdf](http://www.investmentclaims.com/decisions/Saluka-CzechRep-Partial_Award.pdf).

66 *Methanex Corporation v. United States*, Final Award, 9 August 2005.

and ruled that non-discriminatory regulations for a public purpose, if enacted with due process, will not amount to expropriation if it affects, among others, a foreign investor or investment. Arbitration tribunals are therefore also willing to allow governments policy space in relation to expropriation.

The main point of contention internationally appears to be the standard of compensation to be paid in the event of expropriation. The 'prompt, adequate and effective' compensation required by the US FTAs is the standard particularly favoured by the US, and it was also contained in the MAI. Other countries and legal systems use different standards such as 'fair and equitable' or 'appropriate' compensation.<sup>67</sup> There is no international standard for compensation in the event of expropriation.

### *Dispute settlement*

In view of the lack of a multilateral regime of foreign investment regulation, it is imperative that the measures that do exist at national or bilateral level be enforceable via an effective dispute settlement mechanism. Until the creation of ICSID in 1966, disputes between host governments and foreign investors could only be settled via national courts or arbitration tribunals, or, if the home government of the investor was willing to take up its cause, via state-to-state dispute settlement. Owing to the inherent power balance in such disputes, these mechanisms were not seen as particularly satisfactory.<sup>68</sup>

The advent of ICSID, a specialised arbitral institution, created specifically to settle disputes between host governments and foreign investors arising from investments, appeared to address many of these concerns. ICSID was created by convention,<sup>69</sup> and arbitration is only available if both the host government and the home government of the foreign investor have ratified the convention in terms of international law. ICSID arbitration is therefore removed from the ambit of national courts or tribunals, although the applicable law will remain that of the host government. Jurisdiction of ICSID dispute settlement processes is based on written consent, either in a particular arbitration clause or agreement, or in a

---

67 See Snyman E & MS Wandrag, 'Inleidende aantekeninge oor die transnasionale onderneming in die internasionale reg', *Journal for Juridical Science*, 23, 1, 1998 and Sornarajah M, 1994, op. cit., chap. 6.32.

68 See also Sornarajah M, 1994, op. cit., chap. 6.

69 Convention on the Settlement of Investment Disputes between States and Nationals of other States, signed in Washington, DC in March 1965.

bilateral treaty or agreement between state parties. Once such consent has been granted, it cannot unilaterally be revoked.

A particular advantage of ICSID dispute settlement is the enforcement measures provided for in the convention. In terms of article 54(1), each contracting state must recognise an ICSID award and enforce the pecuniary obligations imposed by the award as if it were a final judgement of a court in that state.

Owing to the limited scope of application of ICSID arbitration, an additional facility to the convention was created. The additional facility dispute settlement mechanisms can be used to settle disputes where the convention itself does not apply; in other words, where one of the states involved has not ratified the convention, or where the dispute does not arise directly from investment. Additional facility dispute settlement does, however, fall outside the ambit of the convention, and therefore also outside of the ambit of the enforcement measures in the convention. Parties to additional facility dispute settlement would therefore have to use national rules (which may be unpredictable and based on reciprocity), or rely on the 1958 New York convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) to secure the enforcement of awards. State parties to the New York convention are obliged (barring reservations of reciprocity) to recognise and enforce arbitral awards made in other countries.<sup>70</sup>

It has become quite popular to include submission of investment disputes between host governments and foreign investors to ICSID arbitration by way of BITs or FTAs, such as the US FTAs. As such stipulations in bilateral treaties will be enough to constitute consent in terms of the convention, foreign investors from state parties to such agreements will have the right to bring such disputes before ICSID, without the host government that is a party to the bilateral agreement having the right to prevent it or to revoke its consent.

The possibility of host governments being forced to participate in compulsory arbitration before ICSID tribunals has been criticised as an infringement of sovereignty.<sup>71</sup> Others see this as one of the biggest advantages of ICSID, as it provides foreign investors with recourse to an independent dispute settlement mechanism, outside of the control and jurisdiction of the host government.<sup>72</sup>

The investor-state dispute settlement provisions in the majority of the US FTAs are therefore in line with those found in most other BITs or FTAs. As in the

---

70 Note that South Africa is not a signatory of the ICSID convention, as discussed further below.

71 Sornarajah M, 2002, *op. cit.*, p. 14.

72 Sornarajah M, 1994, *op. cit.*, chap. 6.

US FTAs, other bilateral agreements often provide for alternative investor–state dispute settlement procedures as well, such as arbitration under the additional facility of ICSID if one of the parties to the treaty is not a member of ICSID, or arbitration under UNCITRAL arbitration rules, or ad hoc arbitration as agreed by the parties.

UNCITRAL was established by the General Assembly in 1966 with the mandate to further the progressive harmonisation and unification of international trade law. UNCITRAL specialises in drafting international legal texts and instruments aimed at harmonising different aspects of international trade law.<sup>73</sup> One of the most successful and widely used instruments is the UNCITRAL arbitration rules, which can be used to govern the procedures of arbitrations under ad hoc arbitration proceedings, or proceedings under institutions such as the International Chamber of Commerce. Dispute settlement under UNCITRAL arbitration rules (as an alternative to ICSID mechanisms) are contained in NAFTA chapter 11, as well as in recent South African FTAs.<sup>74</sup>

It should be noted, however, that these alternative mechanisms may still be subject to the control of national courts, and will lack the inherent enforcement measures contained in the ICSID convention.<sup>75</sup>

As explained above, the US–AUS FTA does not provide for such investor–state dispute settlement procedures, but leaves investors in the hands of the Australian and US national legal systems. It does restrict dispute resolution claims by the investor to national arbitration procedures in terms of the law of the host state, or state-to-state dispute settlement in terms of the FTA, as opposed to litigation in the national courts of the US or Australia.

## Government procurement

*Procurement of products and services by government agencies for their own purposes represents an important share of total government expenditure and thus has a significant role in domestic economies.*<sup>76</sup>

---

73 UNCITRAL is made up of 60 member states, two of which are the US and South Africa, <http://www.uncitral.org>.

74 For example, the South Africa–Czech Republic FTA and South Africa–Canada FTA.

75 Butler D, *Arbitration: An International Arbitration Act for South Africa*. SA Law Commission Project, No. 94. Pretoria: SA Law Commission, 1998.

76 [http://www.wto.org/english/tratop\\_e/over\\_e.htm](http://www.wto.org/english/tratop_e/over_e.htm).

Because of the potential impact of government procurement on domestic economies, governments often use procurement policies to achieve specific national policy goals, such as the development of specific domestic groups or industries. Should such policies be used to discriminate against foreign industries in favour of local industries, they are perceived to be trade-distorting.<sup>77</sup>

Government procurement, although potentially trade-distorting, is not included in the multilateral WTO trade rules. In view of the WTO's mandate to eliminate trade distortions, the plurilateral Government Procurement Agreement (GPA) was signed in 1994 and entered into force on 1 January 1996.

This agreement only binds signatory countries,<sup>78</sup> and it only applies to procurement in those countries above specified threshold values relating to goods and services as listed by the countries and procured by the procuring entities listed by each party. In addition to these restrictions, most signatory countries specified further exceptions from the GPA in their schedules. The GPA requires 'unconditional' national and non-discriminatory treatment 'no less favourable' than that provided to domestic products, services or suppliers, or those of other parties. The agreement further prescribes detailed procedural provisions for those procurements covered by the agreement.

There is a substantial difference between the national treatment provisions relating to procurement and those found in the GATT and TRIMS. Whereas the 'like circumstances' limitation in the GATT (and TRIMS) national treatment provisions allowed for the retention of policy space and possible discrimination between investors not in 'like circumstances', this possibility does not exist in the GPA. On the other hand, the GPA itself contains so many limitations and possible exceptions that signatory countries can retain policy space in order to give effect to national policies and legislation (and have done so until now).<sup>79</sup>

Although only the US is a member of the GPA, the procurement provisions in the abovementioned US FTAs are in line with the provisions of the GPA. In the US-AUS FTA, for example, both parties have used the exceptions thus created by

---

77 Ibid.

78 Current membership is 38 countries, including the European Community and its 25 individual members. The US is a member, but neither Australia, nor any African or South American country is a member, although some of these have observer status.

79 The US, for example excluded set asides on behalf of small and minority businesses from the GPA. The US states have equally excluded programmes 'promoting the development of distressed areas and businesses owned by minorities, disabled veterans and women' from the coverage of the GPA. See also Steytler N, 'Global governance and national sovereignty: The WTO and South Africa's new constitutional framework', *Law, Democracy and Development*, 1, 1999, p. 101.



the FTA to exempt some industries from the scope of the agreement. In terms of Annex 15-G to the US-AUS FTA, the US retains its preference policies in respect of small and minority businesses, while Australia reserves the right to continue with procurement policies that assist small and medium enterprises, and those that provide 'economic and social assistance to indigenous persons'. Both countries have therefore retained policy space in pursuit of specific national goals.

## COMPLIANCE OF US FTAS WITH SOUTH AFRICAN LAW

### Investment

*President Thabo Mbeki has made it clear that foreign investment is welcome in South Africa, and government policy supports the public pronouncements.<sup>80</sup>*

Despite this rather bold statement, South Africa does not have a specific investment policy, or any investment-specific legislation. The government has always made it clear that South Africa is open to foreign investment, and wants to attract such investment,<sup>81</sup> but no attempts have been made to centralise or simplify investment regulation. According to UNCTAD,<sup>82</sup> investors 'tend to favour countries with strong investment protection laws or practice'. Contrary to a number of developing countries (Zambia,<sup>83</sup> Iraq,<sup>84</sup> Namibia, Uganda, Ethiopia, Ghana, Tunisia and Egypt<sup>85</sup>), South Africa does not have an investment act or code, or a centralised policy. A foreign investor will therefore have to comply with the same rules and regulations as a local investor or business. This may sound like fair and equal treatment, but it creates uncertainty, as a foreign investor (depending on the nature of the investment) may have to wade through a range of South African laws relating to business, tax, administrative regulations, visa requirements, contracts, etc. in order to determine the legal regime applicable to the particular investment.

---

80 'South Africa: Open for business', <http://www.southafrica.info>.

81 See Wandrag MS & E Snyman, op. cit., p. 88.

82 UNCTAD, 'Effectiveness of foreign direct investment policy measures', TD/COM/.2/EM.13/2. Item 3 on agenda of Expert Meeting on the Effectiveness of Foreign Direct Investment Policy Measures, Geneva, 25-27 June 2003.

83 'Zambia's Investment Act plays key role in exports', 19 June 2006, <http://www.tralac.org>.

84 <http://www.internationallawoffice.com/newsletters>.

85 Lai J (chief investment officer, Enterprise Support Services Division, African Development Bank [AFB]), 'International investment in Africa: Trends and opportunities', *Private Sector Working Paper Series*, No. 1, Private Sector Department, AFB, August 2001.

This uncertainty may be somewhat alleviated by the activities of Trade and Investment South Africa (TISA). TISA works under the umbrella of the Department of Trade and Industry and provides a 'one-stop-shop' for investors and exporters.<sup>86</sup> At the very least, this means that TISA could assist and guide potential investors through the South African legal system and regulations applicable to their investment.

### *National and MFN treatment of foreign investors and investments*

TISA summarises South African foreign investment law as follows:

South Africa actively encourages direct and indirect investment by non-resident persons and companies. *Virtually all* business activities are open to foreign investors and there are *generally no restrictions* on foreign investment. Restrictions would usually relate to a particular industry and be applicable both to residents and non-residents. Very few restrictions apply only to foreign companies.<sup>87</sup>

The only good news for investors who have waded through the South African legal system to find the rules applicable to their particular business is that, generally speaking, these rules apply equally to local and foreign investors, and would therefore satisfy the national and MFN requirements in the US FTAs.

Examples of instances where restrictions apply only to foreign investors would typically relate to the finance sector, such as the restriction placed on local borrowing powers of business entities that are 75% or more owned or controlled by non-residents,<sup>88</sup> and detailed application and minimum capital requirements for foreign banks wanting to establish a branch in South Africa.<sup>89</sup>

It is possible that such differentiation in treatment could be justified on the basis of the 'like circumstances' exception in the national and MFN treatment provisions,<sup>90</sup> but in addition to that, the US FTAs allow for 'non-conforming measures'. This allows parties to maintain or implement measures in Annexures I and II that are *not consistent with national or MFN treatment principles*. In the US-Chile FTA, for example, such 'non-conforming measures' in Annexures I

---

86 [http://www.safica.info/doing\\_business/investment/agencies/onestop.htm](http://www.safica.info/doing_business/investment/agencies/onestop.htm).

87 <http://www.southafrica.info>.

88 *Ibid.*

89 Regulations published in terms of the Banks Act 94 of 1990. *Regulation Gazette*, No. 6971, 28 December 2000.

90 As discussed above.

include exceptions in the mining, air transportation, atomic energy and business sectors. In addition to the measures detailed in Annexures I and II, article 10.7 of the US–Chile FTA explicitly excludes procurement and government subsidies or grants from the application of the MFN and national treatment provisions.

### *Minimum standard of treatment*

In the absence of a specific investment code or law, there is nothing in South African law that would require a specific standard of treatment for foreign investors or investments. Where minimum standards of treatment are prescribed for nationals or domestic businesses, the same would generally apply equally to foreign nationals or businesses.

The specific standards of ‘fair and equitable treatment’ in relation to access to justice, due process, and safety and security are protected by the Bill of Rights in the Constitution of the Republic of South Africa of 2006. Sections 12 (‘Freedom and Security of the Person’), 33 (‘Access to Courts’) and 34 (‘Just Administrative Action’) secure the same standard of treatment for ‘everyone’ and do not provide protection on the basis of nationality. Whether this standard of treatment would be equal to the ‘customary international law minimum standard’ is a matter of interpretation, but it appears to comply with the requirements set out in the FTAs.

Furthermore, section 39 of the Bill of Rights requires any interpretation of these rights to be done with consideration of international law.

### *Performance requirements*

South Africa is a founding member of the WTO, and is therefore bound by the provisions of TRIMS which, in principle, outlaws performance requirements in relation to foreign investment.

One specific requirement in South African law that may be regarded as a local content requirement is the stipulation that a foreign bank establishing a branch in South Africa may be required to employ a minimum number of local residents in order to obtain a banking licence.<sup>91</sup> If necessary to maintain such a requirement in the public interest, South Africa could identify it and like measures as non-conforming under Annexure I to the typical US FTA.

---

91 <http://www.southafrica.info>.

### *Expropriation and nationalisation*

Section 25 of the Bill of Rights in the 1996 Constitution of South Africa provides protection of property rights to everyone. In terms of section 25, no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Expropriation may only take place in terms of generally applicable laws, for public purposes or in the public interest, and subject to compensation that is just and equitable as decided or approved by a court, and that reflects an equitable balance between the public interest and the interests of those affected.

The basic provisions of section 25 are in line with the expropriation provisions in the US FTAs. There are, however, a number of clear differences:

- The US FTA contains very explicit requirements that expropriation must take place in a non-discriminatory manner. Section 25 does not contain any such reference to non-discrimination, but does require expropriation to take place in terms of a law of 'general application',<sup>92</sup> and therefore prohibits arbitrary expropriations.<sup>93</sup>
- The calculation of compensation clearly differs, particularly because section 25 requires historical and previously discriminatory factors to be taken into account when determining such compensation.
- Annexure 11-B of the US-AUS FTA, for example, further clarifies the provisions regarding expropriation, and provides that non-discriminatory actions by a party that are designed and applied to achieve legitimate public welfare objectives will not (except in rare circumstances) constitute indirect expropriations.

It can no doubt be argued that the desire to address previous dispossession of land, for example, would be designed to achieve a legitimate public welfare objective.<sup>94</sup> The question would be whether these measures would qualify as 'discriminatory'. If 'discriminatory' in this context is intended to refer to national treatment principles, then section 25 would not be discriminatory, as it would apply equally to South Africans and foreign investors or foreign investments.

---

92 Legislation that applies uniformly and is not aimed at arbitrarily targeting foreign investors or investments.

93 See, in general, Davis D, H Cheadle & N Haysom, *Fundamental Rights in the Constitution: Commentary and Cases 1997*. Cape Town: Juta; and Peterson LE, op. cit., p.17.

94 The use of the words 'such as' would indicate that the list of public welfare objectives mentioned in section 25 is not exhaustive.

*Dispute settlement*

The majority of the US FTAs provide for investor–state dispute settlement via ICSID, or the ICSID additional facility, or arbitration under UNCITRAL rules, or ad hoc arbitration.

South Africa is not a member of ICSID, and disputes concerning South Africa or South African investors would therefore not fall under the jurisdiction of the ICSID convention. A number of South African BITs do, however, include references to investor–state arbitration in terms of the ICSID additional facility. The BIT between South Africa and Germany specifically provides for additional facility arbitration for the time being, while South Africa is not a party to the convention. Other South African BITs that include references to ICSID additional facility arbitration are those with Denmark, Korea, France, Canada, the Czech Republic and Switzerland.<sup>95</sup>

These provisions have certainly created the impression that South Africa intends to ratify the ICSID convention. This course of action is also directly advised by the South African Law Commission in the Draft International Arbitration Bill for South Africa of 1998. The Law Commission justified this recommendation on the basis of specific perceived benefits of ratification for South Africa. These include the fact that the purpose of the convention is to encourage foreign investment in signatory countries, and that ratification would therefore send a strong signal of the government's eagerness to create the necessary legal framework to encourage foreign investment. In addition to the benefits for South Africa as an investment destination, ratification would also open up possibilities of binding ICSID investor–state arbitration for South African investors in other countries. South African investors are increasingly investing in other African countries, and South Africa is one of a few African countries that have not ratified the ICSID convention.<sup>96</sup> Within SACU, South Africa is the only member country that is not a signatory to the ICSID convention (Namibia is a signatory, but has not ratified the convention yet).<sup>97</sup>

Although this draft bill was proposed by the Law Commission Project Committee on International Arbitration in 1998, it has totally disappeared from the radar screen, and nobody appears to know why. The bill had the clear support

---

95 Butler D, *op. cit.*

96 At least 34 least developed countries are members of ICSID (Simon J, 'How low income countries can facilitate the inflow of foreign direct investment.' Presentation, UNCTAD, Geneva, 2003).

97 *Ibid.*

of the late Dullah Omar, who had legislation based on the Law Commission report on the issue approved by cabinet before the end of his tenure as minister of justice. Since then, political support and enthusiasm for the passing of the bill have dwindled.<sup>98</sup> The urgency of the situation has, however, not diminished, as evidenced by recent newspaper reports questioning the government's failure to implement this legislation.<sup>99</sup> The chief state law advisor, Enver Daniels, is reported as having expressed doubts about the constitutionality of the introduction of the UNCITRAL model law, but without elaborating on the exact nature and extent of the potential problems.<sup>100</sup> In the absence of details around the perceived unconstitutionality of the bill, it appears that the reason for its non-implementation may still be lack of political will, combined with perceptions of the 'non-representative' nature of arbitration in South Africa.<sup>101</sup>

The Law Commission advanced the reduced involvement of state courts within the ICSID arbitration mechanism as an advantage, as it would calm the fears of investors.<sup>102</sup> In relation to the SACU FTA negotiations, however, opponents of this FTA insisted that foreign investor-state dispute settlement would allow governments to be held 'hostage' by foreign investors and that dispute settlement should be referred to national courts. Leading scholars, such as Sornarajah<sup>103</sup> are, however, of the opinion that foreign investors would typically not have much confidence in the impartiality of national courts, and that an 'effective provision on arbitration should create a compulsory obligation to arbitrate disputes arising from the foreign investment contract and vest that right directly in the foreign investor'.

Although it may be true that the first BITs signed by South Africa after the advent of democracy could be seen as too favourable to foreign investors,<sup>104</sup> this can be ascribed to inappropriate (and probably inexperienced) drafting. The same cannot be said of more recent South African FTAs, such as those with the

---

98 Butler D, 'Development and practice of arbitration and ADR in South Africa.' Unpublished paper presented at the second International Workshop on Arbitration and ADR in Africa, Johannesburg, 14 June 2006.

99 See, for example, Temkin S, 'Jurists question governments laxity on implementing recommendations', *Business Day*, 12 May 2006.

100 As reported by Butler D, 2006, op. cit., fn. 59.

101 Ibid. Even the Law Commission report on the issue pointed out this perception that arbitration is seen as predominantly the domain of 'white' lawyers, and as a form of 'privatised litigation' (SA Law Commission, *SA Law Commission Report on Domestic Arbitration*, May 2001, par. 2.18).

102 Simon J, op. cit.

103 Sornarajah M, 1994, op. cit., chap. 6.

104 See Peterson LE, op. cit. p. 7.

Czech Republic and Canada. In these latter agreements, drafting options have been used to exclude 'non-conforming measures', as well as laws or measures aimed at the achievement of equality from the application of MFN and national treatment provisions. As explained above, the typical US FTA also provides ample opportunity for governments to exclude specific measures from the ambit of the agreement in order to retain policy space for the advancement of national goals. Should these opportunities be used, there is no reason why such an FTA should advantage foreign investors to the detriment of government responsibilities towards the nation.

The US-AUS FTA does not provide for investor-state dispute settlement mechanisms, but neither does it allow host governments to be sued in national courts. It provides either for state-state dispute settlement in terms of the FTA, or it allows foreign investors to institute arbitration proceedings against host governments in terms of the laws of the host government (i.e. national arbitration proceedings).

The latter option would currently not be suitable for South Africa at all. Any such arbitration proceedings in South Africa would currently have to take place in terms of the National Arbitration Act 42 of 1965. This act does not provide for international or investment arbitration at all, and is singularly unsuitable for international arbitrations, primarily because it allows excessive interference by national courts. Such interferences can cause undue delays and can eventually totally derail the arbitration proceedings.<sup>105</sup> The possibility of such continued recourse to the courts can be so detrimental to an arbitration proceeding (and the underlying contract) that, in Christie's words, 'a businessman would be ill advised to sign an international contract containing an arbitration clause that specified South Africa as the place of arbitration'.<sup>106</sup> At the same time, it must be stated that arbitration cannot function completely independently of the courts, as arbitration tribunals do not, for example, have the power to grant interdicts or seize assets if necessary. A careful balance has to be struck between the need for the enforcement powers of the courts and the independence of the arbitration proceedings, and unfortunately the current South African Arbitration Act does not strike that balance.

Should a party eventually obtain an arbitration award, enforcement of such an award would depend upon national law. South Africa is a member of the

---

105 Steyn J, 'Arbitration: Bringing South Africa in from the cold', *De Rebus*, March 1997, p. 197.

106 Christie CH, 'South Africa as a venue for international commercial arbitration', *Arbitration International*, 9, 1993, p. 153.

1958 New York convention,<sup>107</sup> and has implemented legislation to give effect to the country's obligations under this convention. Unfortunately, the wording of this act (40 of 1977) does not conform to that of the convention, and therefore may create uncertainty in relation to the enforcement of arbitration agreements, if not awards.<sup>108</sup>

In addition to these hindrances in the way of recognition and enforcement of foreign arbitral awards, there are also very restrictive provisions in the Protection of Businesses Act 99 of 1978. These provisions prohibit the recognition and enforcement of foreign arbitral awards relating to certain business transactions, except with the consent of the minister of economic affairs. The original intention of this act was to protect South African businesses against the enforcement of 'punitive' awards made in other countries, because such awards are regarded as 'against public policy' in South Africa.

The good news is that where this act has come before our courts, it has been interpreted restrictively, in order to (as far as possible) give effect to judgements and awards. The New York Convention, and therefore also Act 40 of 1977, allows a court to refuse enforcement of a foreign arbitral award on the grounds that such enforcement would be contrary to public policy. This stipulation has also been interpreted restrictively by South African courts.<sup>109</sup> It appears, therefore, that the 'public interest' limitation in the New York Convention, as interpreted by South African courts, does provide adequate protection to the interests of affected parties.<sup>110</sup>

This rather limited history of restrictive applications of these acts is unfortunately not enough to inspire confidence in international arbitration proceedings taking place in terms of national law in South Africa and having to be enforced in terms of South African law.

The situation could be remedied should the International Arbitration Bill that was proposed by the Law Commission in 1998 be implemented. That would result in a proper international arbitration law for South Africa, with limited interference from national courts, and would also include accession to the ICSID Convention, amendments to Act 40 of 1977 and the Protection of Businesses Act.

---

107 International Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

108 Ibid. See also Butler D, 1998, op. cit. In particular, the act refers to the enforcement of awards, but not arbitration agreements, while the convention includes both.

109 See *Seton v. Silveroak Industries Ltd* 2000 (2) SA 215 (T).

110 See also Butler D, 2006, op. cit.



## Government procurement and BEE

The extensive government procurement provisions in recent US FTAs and the potential conflict between such provisions and South Africa's BEE programme has been flagged out as one of the major stumbling blocks in the US-SACU FTA negotiations. The main concern expressed in relation to these government procurement provisions is that it would take away the South African government's right to policy space, and that it is critical that our government maintain this right and the right to protect programmes like the BEE initiative.<sup>111</sup>

BEE in relation to government procurement is regulated by the Preferential Procurement Policy Framework Act 5 of 2000. This act was promulgated to give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy envisaged by this section of the Constitution. The Preferential Procurement Policy Framework Act provides for procurement systems in terms of which preference points are allocated to tenderers for contracts above certain rand values if prescribed goals are met. These goals may include contracting with previously disadvantaged persons, but all goals must be clearly specified in the invitation to submit a tender. Contracts must ultimately be awarded to the tenderer who scores the highest points, unless objective criteria in addition to the stated goals justify awarding the tender to another tenderer.<sup>112</sup> The question is whether these BEE-related procurement provisions are incompatible with the procurement provisions in the WTO GPA and US FTAs, as discussed above. Would the US FTA procurement provisions deny the South African government the policy space required to continue the implementation of BEE procurement policies?

The answer should be that the South African BEE procurement policies are not necessarily incompatible with the WTO GPA and the US FTAs. As has been discussed above, both the WTO GPA and the corresponding provisions in the US FTAs allow a number of exceptions and exclusions to the basic national treatment

---

111 As stated by Vickers B (senior researcher at the Institute for Global Dialogue in South Africa), 'SACU press release', <http://www.afsc.org>.

112 COEGA recently faced a court challenge from a tenderer who had scored the highest points in terms of COEGA's published procurement process and who should have been awarded the tender, only to find that the tender was awarded to another tenderer after COEGA changed the process by adding an extra requirement without notifying the applicants ('COEGA hit with court challenge over BEE', *Mail & Guardian Online*, 20 July 2006, <http://www.mg.co.za>). The court found in favour of the tenderer, Scribante Construction, and awarded costs against COEGA (CDC) (Van Niekerk P, 'CDC loses battle with Scribante', *The Herald Online*, 14 September 2006, <http://www.epherald.co.za>). This victory proves that the BEE procurement processes are not above the law.

(non-discrimination) provisions.<sup>113</sup> Both the US and Australia made use of these exemptions to maintain policy space and to exclude from the scope of the FTA preferential policies in respect of small and minority businesses (the US) and in support of small and medium enterprises and those that provide economic and social assistance to indigenous persons (Australia). There appears to be no reason why South Africa could not equally exclude the BEE preferential procurement policies from a US FTA.

In addition to such exclusions, it could also be argued that the country's BEE procurement policies are not in contravention of the basic national treatment (non-discrimination) provisions of the WTO GPA and resultant US FTAs. The US FTA requires unconditional treatment for products, services and suppliers of other parties no less favourable than that afforded to domestic products, services and suppliers, or those of any other party. The preferential procurement policies in terms of the Preferential Procurement Policy Framework Act in no way discriminate on the basis of nationality, and tenderers from different countries would be judged according to the same goals and awarded preference points on the same criteria. It could thus be argued that these provisions are not in contravention of the US FTA national treatment provisions.<sup>114</sup>

Yet another opinion would be that BEE could be justified as a 'public morals' exception to non-discrimination under GATT XX and GATS XIV. It is opined that it would be difficult for any WTO member country to attack this stance without appearing to attack the government's attempts to redress the effects of apartheid.<sup>115</sup>

---

<sup>113</sup> See also Bolton P, 'The legal regulation of government procurement in South Africa', LLD dissertation, University of the Western Cape, November 2005, p. 399.

<sup>114</sup> See also Steytler N, 'Global governance and national sovereignty: The WTO and South Africa's new constitutional framework', *Law, Democracy and Development*, 1, 1999, p. 101. An alternative view is expressed by Geldenhuys R, 'Is BEE against South Africa's commitments at the WTO?', *Floor Inc Attorneys Newsletter*, 11 August 2006, <http://www.floor-inc.co.za/news>, who is of the opinion that although the BEE provisions do not directly contravene national treatment principles, they may be said to constitute indirect discrimination towards private companies who are forced to apply BEE preferential procurement policies themselves in order to qualify as being 'black-empowered'. This may exclude foreign firms from procurement processes, as they may find it difficult to comply with 'black empowerment' criteria.

<sup>115</sup> See Geldenhuys R, op. cit.

## THE CAPACITY OF SACU TO NEGOTIATE ON AND COMPLY WITH THE TERMS OF THE US FTAS

SACU is the oldest customs union in the world, and was established through the Customs Union Agreement of 1910 between the (then) Union of South Africa, Botswana (then Bechuanaland), Lesotho (then Basutoland) and Swaziland. This agreement was replaced by the 1969 Customs Union Agreement among the same countries. Namibia joined this 1969 agreement in 1990 upon attaining independence from South Africa.<sup>116</sup> The 1969 agreement was replaced by a new SACU agreement that entered into force on 15 July 2004. This new agreement creates a number of new SACU institutions tasked with the responsibility of, among other things, promoting the integration of the member states into the global economy.<sup>117</sup>

The negotiation of the new agreement was justified by the lack of common policies and common institutions in the 1969 agreement.<sup>118</sup> Unfortunately, the new SACU Agreement has not solved all these problems. The objectives of the 2004 agreement are contained in article 2 and include the objective 'to substantially increase investment opportunities in the Common Customs Area' and 'to promote the integration of Member States into the global economy through enhanced trade and investment'.<sup>119</sup>

Part 8 of the agreement is entitled 'Common Policies', and includes the agreement to develop common policies, or to at least co-operate on policies in specific areas. Unfortunately, these do not include investment or government procurement policies. There are therefore no harmonised policies within SACU on issues typically addressed in US FTAs, such as investment and government procurement, and it must be conceded that this probably rendered SACU 'unwilling or (and) unable to conclude a comprehensive FTA with the US'.<sup>120</sup>

Trudi Hartzenberg of the Trade Law Centre is on record as stating that SACU may have been shortsighted in failing to use this opportunity to push for

---

116 'An overview of SACU', 27 May 2002, <http://www.tralac.org>.

117 Erasmus G, 'New SACU institutions: Prospects for regional integration', November 2004, <http://www.tralac.org>

118 Ibid.

119 See Clark Leith J & J Whalley, 'Competitive liberalisation and a US-SACU FTA', in Schott JJ (ed.), *Free Trade Agreements: US Strategies and Priorities*. Washington, DC: Institute of International Economics, April 2004, p. 336.

120 Lourens C, 'The "one size" trade pact that doesn't fit at all', *Business Day Online*, 25 April 2006, <http://www.businessday.co.za>. See also Clark Leith J & J Whalley, op. cit., p. 334.

harmonisation and to commit itself to a comprehensive deal.<sup>121</sup> This is probably a very over-optimistic assessment of the situation. There is no evidence of any progress within SACU on the process of harmonisation, and it is very evident that this will not happen before the expiry of the TPA at the end of June 2007.<sup>122</sup>

Recent FTA negotiations between SACU and other regions do not provide much more hope of harmonisation in the areas of investment and government procurement. The new SACU-European Free Trade Association (EFTA) FTA includes an article (article 28) on investment, but this is very vague and only stipulates that:

the Parties shall endeavour to create and maintain a stable and transparent investment framework and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments by investors of the other Parties. Parties shall admit investments by investors of the other Parties in accordance with their laws and regulations.<sup>123</sup>

Article 28 further recognises the importance of promoting cross-border investment and technology flows as a means of achieving economic growth and development, and aims at co-operation in this respect by way of, among other things, 'the furthering of a legal environment conducive to increased investment flows'. There is, however, no indication of what such a 'legal environment' may include and whether it would be based on harmonised policies within each of the regional parties.

Article 29 of the SACU-EFTA FTA signifies the parties' agreement on the importance of co-operation to enhance the 'understanding of their respective government procurement laws and regulations'. It goes as far as potential 'mutual liberalisation' of procurement markets, but no mention is made of harmonised policies, not even within the separate regions.

Article 37 provides for arbitration of disputes either in terms of the agreement or the WTO dispute settlement body at the discretion of the complainant where disputes arise under both agreements. The investment and procurement provisions are, however, excluded from the application of article 37, and no other specific dispute settlement mechanisms are provided in relation to disputes in these areas. Lastly, article 32 provides for modalities on technical assistance and co-operation on, among other things, the implementation of laws in areas such

---

<sup>121</sup> Ibid.

<sup>122</sup> 'US & SACU fail to reach consensus on free trade', 19 April 2006, <http://www.tralac.org>.

<sup>123</sup> See also Clark Leith J & J Whalley, *op. cit.*, p. 341.

as services, investment, intellectual property and public procurement, but this is as close as it gets to proper regulation of these issues.

## THE FUTURE OF US-SACU FTA NEGOTIATIONS

It is clear that the US-SACU FTA will not be negotiated within the current TPA, and at this stage it appears unlikely that the TPA will be renewed. The parties have, however, reached agreement on the continuation of negotiations in the form of a TIDCA or 'joint work programme'.

From the examination of recent US FTAs above, it is clear that SACU as a region does not have the ability at this stage to negotiate such a comprehensive FTA, and it appears unlikely that the region will develop the necessary harmonised policies in the near future.<sup>124</sup>

From a South African perspective, the examination of the recent FTA agreements makes it clear that the divide between South African law and the investment and government procurement measures are not unbridgeable. South Africa's basic investment regulation (or the lack thereof) is unlikely to breach the US FTA investment provisions, or could be accommodated via exclusions or 'non-conforming' measures. In relation to a potential SACU-India PTA, Mandigora suggests that an investment chapter in such a PTA could serve to create a more predictable environment for foreign investors from India and SACU firms alike, and that it could encourage further investment or increases in current investment.<sup>125</sup> The same could presumably be said of an investment chapter in a US-SACU FTA. Equally so, the government procurement measures leave state parties enough policy space (in the form of exemptions) to accommodate South Africa's BEE preferential procurement policy, in the event that it is deemed to be in breach of the basic national treatment provisions.

As far as the resolution of investment disputes between foreign investors and host governments is concerned, different options are available. Should the government implement the 1998 International Arbitration Bill as suggested by the Law Commission, the South African legal system should be capable of handling dispute settlement provisions along the lines of the US-AUS FTA (within national arbitration tribunals). Alternatively, South Africa should ratify the ICSID Convention and negotiate provisions only allowing for the submission

---

124 See also *ibid.*, p. 343.

125 Mandigora G, 'The proposed SACU-India PTA: Where do the opportunities lie?', 10 October 2006, <http://www.tralac.org>.

of investor-state disputes to arbitration under the ICSID Convention itself. This will provide security and enforcement measures.

Should neither of the above options be realisable, then the precedents in recent South African BITs should be followed to allow submission of investor-state disputes to arbitration in terms of the ICSID additional facility, but with the proviso that the arbitration must take place in a member state of the New York Convention (to facilitate the recognition and enforcement of awards) and excluding any possible ad hoc arbitration, as that would lead to uncertainty. The South African legal regime is therefore capable (or should be capable, providing long-overdue amendments are effected) of handling a comprehensive US FTA.

In addition to the suitability of the South African legal regime, the current investment climate in the country has been rated 'favourable' in the 2004 joint World Bank and Department of Trade and Industry investment climate survey. The result of the survey indicates that the investment climate in South Africa compares favourably with that of other sub-Saharan African countries and other middle-income countries around the world.<sup>126</sup> At the same time, the survey and resultant report highlight some remaining challenges to the investment climate. Interestingly, the most problematic areas appear to be labour regulation, workers' skills (or lack thereof) and high labour costs. Other irksome areas are exchange rate instability and the high crime rate. Notably, while some administrative regulations, such as business licensing and tax administration, were mentioned as minor concerns, government procurement and other affirmative action policies were not mentioned as possible obstacles to the operations or growth of enterprises in South Africa.

In conclusion, the future for a US-SACU FTA appears bleak as long as the USTR remains bound by the mandate of concluding a 'typical' or 'comprehensive' FTA that includes issues such as investment and procurement. The only way in which such an US-SACU FTA could succeed is if a more limited agreement is concluded first, with aspects such as investment and procurement postponed until a later date when SACU has managed to get its house in order.

Alternatively, a comprehensive agreement based on the US FTA 'template' could be concluded, provided the chapters on foreign investment and procurement are only applicable to South Africa at first, and only become applicable to the BLNS countries<sup>127</sup> upon ratification and after proper policies have been put in place (a phased-in approach).

---

126 <http://www.worldbank.org>.

127 Botswana, Lesotho, Namibia and Swaziland.

# Chapter 3

## From Theory to Practice:

### Getting the most out of a services agreement with the US

Matthew Stern and Nkululeko Khumalo

#### INTRODUCTION

Until relatively recently, policy makers and academics directed little attention to trade in services. In economic theory, services epitomised the non-tradable, and the service sector was seen as a constraint to economic growth.<sup>1</sup> This view has changed over the last few decades for two main reasons.

Firstly, the service sector has grown to account for the largest share of jobs and output in most developed and developing countries, and a well-functioning service sector is now perceived as a primary force for economic development.<sup>2</sup> Secondly, advances in information technology have increased the tradability of services and made trade possible in a much wider range of subsectors. The service sector is particularly important for middle-income developing countries, accounting on average for more than 50% of gross domestic product (GDP) and employment.<sup>3</sup> Riddle shows that developing countries with larger services sectors are correlated with higher GDP per capita and better quality of life.<sup>4</sup> Moreover, the potential for job creation in the service sector is particularly large and requires

- 
- 1 Sapir A & E Lutz, 'Trade in services: Economic determinants and development-related issues', *World Bank Staff Working Paper*, No. 480. Washington, DC: World Bank, 1981; Bhagwati J, 'Splintering and disembodiment of services and developing nations', in Singer H, N Hatti & R Tandon (eds), *Trade in Services*. Delhi: BR Publishing, 1999.
  - 2 Riddle DI, 'The role of the service sector in economic development: Similarities and differences by development category', in Orio G (ed.), *The Emerging Service Economy*. Oxford: Pergamon Press, 1987; Stephenson SM, 'Approaches to liberalizing services', *World Bank Working Paper*, No. 2107. Washington, DC: World Bank, 1999; UNCTAD (UN Conference on Trade and Development), *Liberalising International Transactions in Services: A Handbook*. New York: United Nations, 1994.
  - 3 Sauve P & RM Stern (eds), *GATS 2000: New Directions in Services Trade Liberalisation*. Washington, DC: Brookings Institution Press.
  - 4 Riddle DI, op. cit.

relatively little capital investment. With regard to trade, Riddle calculates that countries with a higher proportion of service exports grow much faster, while low-growth countries import a significantly higher proportion of services.<sup>5</sup> Grubel and Walker add that access to efficient and globally competitive service inputs is a key source of productivity gains.<sup>6</sup> The WTO shows that the share of developing country exports in world service exports has increased strongly over the last decade, from 16% in 1992 to around 23% in 2002.<sup>7</sup> Chadha provides different numbers, but the trend is the same.<sup>8</sup> Critically, the service exports of developing countries are no longer restricted to traditional areas of comparative advantage, such as tourism. A significant number of countries have emerged as competitive exporters of a much wider range of services, including construction (South Korea), finance (Mauritius), computer software (India) and health (Cuba). Suppliers in some countries have also developed niche service industries in areas such as film production and advertising.<sup>9</sup> The service sector also accounts for a large proportion of all foreign direct investment (FDI) into developing countries.<sup>10</sup> Service companies now account for more than 50% of all new FDI and around 55% of the Fortune Global 500 companies.<sup>11</sup>

In South Africa, official statistics show that the service sector contributes about 70% of GDP<sup>12</sup> and around 72% of formal sector employment.<sup>13</sup> Service exports are dominated by the travel and transport subsectors, but export growth has been fastest in a diverse and more dynamic range of business, professional and information services, classified as 'other' by the central bank. This data is supported by anecdotal evidence: South African service firms are particularly active in Africa, where South African banks, supermarkets, restaurant chains, telecommunications companies and construction firms dominate the regional landscape. Foreign involvement and competition within South Africa has also

---

5 Ibid.

6 Grubel HG & MA Walker, 'Services and the changing economic structure', in Grubel HG & MA Walker (eds), *Service Industry Growth: Causes and Effects*. Vancouver: Fraser Institute, 1989.

7 WTO (World Trade Organisation), *International Trade Statistics 2003*. Geneva: WTO, 2003.

8 Chadha R, *GATS and Developing: A Case Study of India*. Washington, DC: World Bank, 2000.

9 Stephenson SM, op. cit.

10 UNCTAD, op. cit.

11 Hufbauer G & T Warren, 'The globalization of services: What has happened? What are the implications?' *Institute of International Economics Working Paper*, 99, 12, 1999.

12 SARB (South African Reserve Bank), *Quarterly Bulletin*, March 2003. Pretoria: SARB, 2003a.

13 Mayer M, *Trade in Services Research Findings and Roadmap*. Johannesburg: HSRC, 2005, unpublished.



increased. The national airline and airports management company have been partially privatised and new private airlines have emerged; foreign private universities have entered the tertiary education sector; three private cell phone companies have been licensed and a second fixed-line license awarded; and foreign banks have been permitted to enter the South African market directly, and through the purchase of existing South African banks.

Despite the growing contribution of services to economic development, the sector is heavily regulated. And in most countries, regulations restrict or even prevent international trade. This is especially true within the developing world.<sup>14</sup> It follows that developing countries could derive significant efficiency gains from service liberalisation, and recent empirical analyses suggest that these gains could be much greater than those that might arise from further goods liberalisation.<sup>15</sup> In WTO and other trade negotiations, discussions relating to services have become as important, if not more important, than the remaining discussions on trade in goods. But most developing countries remain sceptical about the benefits of liberalisation for three main reasons: they believe that most of the gains from freer trade in services will accrue to the world's industrialised nations; that further negotiations in this area will distract from discussions on issues of importance to developing countries, such as agriculture; and that globalisation might undermine the provision of key social or infrastructure services to the poor.<sup>16</sup>

These concerns are not baseless, but are in most cases overstated.<sup>17</sup> This is partially because trade in services is extremely complex, but also because there is insufficient information available to assess the real costs and benefits of increased trade and competition in services. It is therefore difficult for developing countries to identify and express their interests domestically and internationally. Negotiations relating to the GATS resumed in mid-2002, and developing countries need to respond to requests from the North for further liberalisation. Many developing countries are also involved in some form of bilateral or regional discussions on trade in services. Without appropriate economic information and analysis, developing countries are likely to remain reluctant participants in these processes, and progress will be slow.

---

14 Hoekman B, 'Tentative first steps: An assessment of the Uruguay Round Agreement on Services', *World Bank Policy Research Paper*, No. 1455. Washington, DC: World Bank, 1995.

15 Brown DK & RM Stern, 'Measurement and modeling of the economic effects of trade and investment barriers in services.' *Review of International Economics*, 9, 2, 2001, pp. 262-86.

16 Bhagwati J, 1999, op. cit.; Streeten P, 'Gains and losses to countries from trade in services', in Singer H, N Hatti & R Tandon (eds), *Trade in Services*. Delhi: BR Publishing, 1999.

17 Deardorff AV, 'International provision of trade services, trade, and fragmentation', *World Bank Policy Research Working Paper*, No. 2548. Washington, DC: World Bank, 2001.

This paper examines the existing economic literature on trade in services and the experiences of a range of other countries to explain the likely shape, costs and benefits of a bilateral services agreement between South Africa and the US. It begins with a review of some of the key concepts, debates and analyses arising from the literature. This is important in understanding the structure and intent of world service negotiations. The next section describes the gains from exporting and importing services, and proposes a simple framework for evaluating the impact of service liberalisation on individual sectors. Section 4 focuses on barriers to trade in services and the costs of protection. All of this information and analysis is then used, in the final section, to consider the potential structure and contribution of a US-SACU services agreement.

## THE 'ECONOMICS' OF TRADE IN SERVICES

Until the late 1970s most services were regarded as non-tradables and invisible, and were largely ignored by international economists.<sup>18</sup> Experience has shown, however, that most services can be traded, and over the last few decades the growth in trade in services has outstripped trade in merchandise goods. By 1997 cross-border trade in services reached \$1.3 trillion, approximately 20% of global trade. When the sales of affiliates to multinational corporations are included, this figure rises to above \$2 trillion.<sup>19</sup>

This trend, coupled with pressure from services practitioners, have convinced governments and economists to review their approach to trade in services. But it was only after the launch of the Uruguay Round of the GATT in 1984 that trade economists began to devote significant attention to this sector. As a result, we now have a fairly good idea as to how services are traded and the implications of this trade for exporting and importing countries.

There are two ways in which economists approach trade in services. Firstly, there is a growing body of theoretical literature that tries to explain why and how trade in services takes place. This literature is important because it informs the way in which services are categorised and negotiated in WTO and bilateral trade discussions. Secondly, a significant amount of effort has gone into estimating

---

18 Bhagwati J, *Political Economy and International Economics*. Cambridge, Mass., MIT Press, 2001.

19 Hoekman B & A Mattoo, 'Services, economic development and the next round of negotiations on services', *Journal of International Development*, 12, 2, 2000; Karsenty G, 'Assessing service by modes of supply', in Sauve P & RM Stern (eds), *GATS 2000: New Directions in Services Trade Liberalisation*. Washington, DC: Brookings Institution Press, 2000.

the determinants of trade in services and the quantitative impact of service liberalisation.

## Theory and concepts

Research into trade in services has been greatly hampered by 'controversies about definitions'.<sup>20</sup> Most of this controversial debate has focused on what constitutes trade and the coverage of services.<sup>21</sup> This is not just a conceptual problem. Different definitions impair our ability to generate meaningful statistics and have been shown to contribute to significant differences in the calculation of the contribution of services trade to total trade.<sup>22</sup>

In his seminal work on the concept, definition and measurement of services, Hill defines a service as a 'change in the condition of a person or of a good belonging to some economic unit, which is brought about as a result of the activity of some other economic unit, with the prior agreement of the former person or economic unit'.<sup>23</sup> Many other theorists have built on or extracted from Hill's work. Grubel, for example, proposes a similar, though reduced definition: 'an economic transaction between two agents which leads to a change in the condition of a person or a good'.<sup>24</sup> From this he draws two important implications for international trade in services. Firstly, trade occurs when people, capital and firms cross from one country into another to use or provide services. Secondly, trade in services can also take place as a part of trade in physical goods, such as records and books, which necessarily include a high proportion of services in the total value added. Sampson and Snape take this approach a little further, identifying four different categories or 'modes' through which services transactions take place.<sup>25</sup> In so doing, they helped to establish the conceptual framework for the GATS (see Box 1). The first category, which they term 'separated services', does not require the close physical proximity of the producer and the recipient of the service.

---

20 Langhammer RJ, 'Trade in services between Brazil and the European Community: Empirical trends and preliminary hypotheses on determinants', *Kiel Working Paper*, No. 464. Kiel: Kiel Institute of World Economics, 1991, p. 1.

21 Richardson JB, 'A sub-sectoral approach to services' trade theory', in Orio G (ed.), *The Emerging Service Economy*. Oxford: Pergamon Press, 1987.

22 Bhagwati J, 2001, op. cit.; Langhammer RJ, op. cit.

23 Hill T, 'On goods and services', *Review of Income and Wealth*, 23, 1977, p. 318.

24 Grubel HG, 'All trade services are embodied in materials or people', in Singer H, N Hatti & R Tandon (eds), *Trade in Services*. Delhi: BR Publishing, 1999, p. 19.

25 Sampson GP & RH Snape, 'Identifying the issues in trade in services', in Singer H, A Sapir & C Winter (eds), *Trade in Services*, 1985.

These services are often embodied in goods, such as computer software or books, and can be classified and traded across borders as goods. The other three categories (non-separated services) depend upon the movement of the factors of production, the receiver of the services, or both. Typically, this involves the temporary movement of labour or financial capital to the importing country, but also includes the movement of service receivers, such as tourists and students. 'This non-separation is the essential difference between trade in goods and trade in some services'.<sup>26</sup>

#### **BOX 1: THE GATS APPROACH TO ANALYSING TRADE IN SERVICES**

##### **Cross-border trade (GATS mode 1)**

Some services can be traded across borders and do not require the close proximity of the producer to the recipient of the service. Until recently, such services were rare. But advances in audio and video communications technology have had a dramatic impact on cross-border trade. This has not only facilitated international trade in a much wider range of services, but has also contributed towards the global outsourcing of certain business functions. A notable example is the emergence of international call centres, especially in India and the Philippines, and to a lesser extent in South Africa.

##### **Consumption abroad (GATS mode 2)**

The other three modes depend upon the movement of the factors of production, the receiver of the services, or both. In mode 2, this involves the movement of people (or organisations) across borders to consume a service provided in a foreign country. The most common example is tourism, and South Africa is a net exporter of tourism services. The total number of foreign tourists visiting South Africa and consuming domestic services was estimated at more than six million in 2003.<sup>27</sup>

##### **Commercial presence (GATS mode 3)**

Many services are delivered through purchasing or establishing operations in foreign countries. The South African food retailer, Shoprite, operates 66 supermarkets and 12 furniture stores in 13 African countries outside South Africa. Locating close to their target markets enables such retailers to 'increase customer traffic' and source products from producers in these markets.<sup>28</sup>

<sup>26</sup> Ibid., p.138.

<sup>27</sup> South Africa, 'South Africa rides tourism wave', 12 March 2005, [http://www.southafrica.info/plan\\_trip/holiday/tourism\\_080503.htm](http://www.southafrica.info/plan_trip/holiday/tourism_080503.htm).

<sup>28</sup> 'Massmart, Shoprite open stores in Ugandan capital city', *Business Day*, 25 June 2004.

#### Temporary movement of natural persons (GATS mode 4)

The final mode of supply is through the temporary movement of people. Current levels of international labour movement are exceptional. There were over 50 million foreigners living in OECD countries in 1996<sup>29</sup> and 175 million people living outside their countries of birth in 2000.<sup>30</sup> Certain South African professionals are particularly mobile: in Australia, there is strong demand for South African metallurgists, mining engineers and geologists. Some settle permanently in Australia, but many are on temporary assignments and do return to South Africa.<sup>31</sup>

The main purpose of these definitions and classifications of services should be to distinguish them from goods, and then from one another. For some economists, like Hill and Bhagwati, this distinction is relatively clear. Hill is adamant that 'services are not goods and their characteristics differ fundamentally from goods'.<sup>32</sup> For most other economists, distinguishing between goods and services is more complex. Hirsch, for example, envisages a continuum of tangible and intangible services and goods.<sup>33</sup> Gray proposes a simpler approach:

if the final stage of production is predominantly a service and is seen as such domestically, then the transaction should be included in international trade as a service irrespective of whether the product is temporarily embodied in a good for delivery purposes.<sup>34</sup>

Thus, for Gray, a music CD recorded domestically, but sold abroad is unquestionably a service export. Sauve is less accommodating.<sup>35</sup> He argues that it is neither useful nor possible to distinguish between goods and services. The production, distribution and marketing of goods and services are too 'intertwined' and should not be dealt with separately. Grubel agrees. He argues that all

29 Solimano A, *International Migration and the Global Economic Order: An Overview*. Washington, DC: World Bank, 2001.

30 UN, *Replacement Migration: Is It a Solution to Declining and Ageing Populations?* New York: UN, 2000.

31 'Australia offers openings for SA mining experts', *Business Day*, 2 August 2004.

32 Hill T, op. cit., p. 315.

33 Hirsch S, 'International transactions involving interactions: A conceptual framework combining goods and services', in Grubel HG & MA Walker (eds), *Service Industry Growth: Causes and Effects*. Vancouver: Fraser Institute, 1989, p. 81.

34 Gray HP, 'Services and comparative advantage theory', in Grubel HG & MA Walker (eds), *Service Industry Growth: Causes and Effects*. Vancouver: Fraser Institute, 1989, p. 87.

35 Sauve P, 'Services and the international contestability of markets', in Singer H, N Hatti & R Tandon (eds), *Trade in Services*. Delhi: BR Publishing, 1999.

manufactured goods contain some service content and that attempts to distinguish between trade in goods and trade in services are arbitrary and invalid.<sup>36</sup> Even the WTO seems to accept that from an economic perspective there are in principle no differences between the production of goods and services.<sup>37</sup>

It is for this reason that many economists avoid the use of generic definitions and do not even try to distinguish between the characteristics of goods and services. Sapir, for example, argues that

it is perhaps more useful to list the major activities generally considered to be services: accounting, advertising, banking, business, professional and technological services, communication, construction and engineering, health, information, insurance, legal services, motion-pictures, tourism and transportation.<sup>38</sup>

Grubel and Walker and the UNCTAD also favour a pragmatic approach, using the UN system of national accounts to define the boundaries of the service sector.<sup>39</sup> The WTO also adopts this approach in defining the service sectors covered by the GATS negotiations. Until new and better data enables a more accurate definition, this is perhaps the only way forward.

### Empirical analysis

One of the main reasons for the lack of agreement on the characteristics of trade in services is that there has been so little empirical work in this area. Sapir and Lutz give three reasons for this. Firstly, economists did not recognise, until recently, the contribution of services to total trade. Secondly, the lack or poor quality of data, which remains a significant problem today, has hampered research in this area. Thirdly, economists have tended to accept, a priori, that trade in services is determined by the same factors as trade in goods or, alternatively, by non-economic factors.<sup>40</sup> Either way, no dedicated research seemed necessary. Thus, in their review of the theoretical literature on trade in services, Sapir and Winter<sup>41</sup> cite just two 'systematic' studies of the determinants of trade in services: Dick

---

36 Grubel HG, op. cit.

37 WTO, *Economics Effects of Services Liberalisation: Background Note by the Secretariat*, S/C/W/26. Geneva: WTO, 1997.

38 Sapir A, 'Trade in investment-related technological services', *World Development*, 14, 5, 1986, p. 605.

39 Grubel HG & MA Walker, op. cit.; UNCTAD, op. cit.

40 Sapir A & E Lutz, op. cit.

41 Sapir A & C Winter, op. cit.

and Dicke<sup>42</sup> and Sapir and Lutz.<sup>43</sup> Although the two papers use relatively similar data and methodologies, they deliver bold but contradictory conclusions.<sup>44</sup>

A number of sector-specific studies have also been completed. For example, Ter Wengel investigates the factors underlying revealed bilateral comparative advantage in banking services. From a sample of 141 countries, he concludes that the economic size of the exporting country is significant and positive; the level of trade in goods has a positive influence on the provision of international banking services; and regulations are an important deterrent.<sup>45</sup> Sapir examines developing country exports of construction services. He concludes that a small group of labour-abundant developing countries have acquired the necessary 'technological mastery' to become competitive exporters in specific service sectors, particularly to other developing countries.<sup>46</sup>

There is also a growing body of literature on the economic effects of services liberalisation. Most of this work is fairly qualitative, and focuses on the success of specific liberalisation exercises, particularly in developing countries. For example, Hoekman and Braga describe the positive multiplier effects emanating from the lifting of Chilean cargo restrictions, the opening up of Mexican ports, the privatisation of the Argentinean telecommunication industry and the liberalisation of the Australian banking sector.<sup>47</sup> Limao and Venables argue that Africa's poor trade performance emanates from its poor infrastructure.<sup>48</sup> They suggest that a 10% drop in transport costs would raise trade by 25%. Hufbauer and Warren guesstimate that the 'meaningful' liberalisation of the world's services markets would boost global GDP by between 4% and 6%.<sup>49</sup>

Hoekman and Mattoo argue that any assessment of the welfare and efficiency gains emanating from services liberalisation must use a computable

---

42 Dick R & H Dicke, 'Patterns of trade in knowledge', in Giersch H (ed.), *International Economic Development and Resources Transfer*. Tübingen: JCB Mohr, 1979.

43 Sapir A & E Lutz, op. cit.

44 Whereas Dick and Dicke conclude that trade in knowledge-intensive services cannot be explained by a country's endowments of capital, labour and land, Sapir and Lutz find that such economic determinants of comparative advantage are statistically significant.

45 Ter Wengel J, 'The determinants of international trade in banking services', in Singer H, N Hatti & R Tandon (eds), *Trade in Services*. Delhi: BR Publishing, 1999.

46 Sapir J, op. cit.

47 Hoekman B & C Braga, *Protection and Trade in Services: A Survey*. Washington, DC: World Bank, 1997. See also Brown DK & RM Stern, op. cit., for a review of the growing work in this area.

48 Limao & Venables (1999) cited in Hodge J, *Services, Trade Liberalisation and Developing Countries*. Cape Town: DPRU, 1999, unpublished.

49 Hufbauer G & T Warren, op. cit.

general equilibrium (CGE) approach, and a number of CGE-type analyses have been attempted. For example, Brown simulates the effect of various tariff and service liberalisation scenarios on trade, employment and welfare across a number of countries and regions, and concludes that the benefits from services liberalisation compare to those emanating from the complete liberalisation of all industrial goods.<sup>50</sup> Chadha uses the same CGE model to highlight the impact on developing countries. Like Brown, he finds that the welfare gains from service liberalisation are large, but more so for developing countries in percentage terms.<sup>51</sup> Konan and Maskus suggest that the way in which service liberalisation impacts on welfare differs from goods liberalisation: whereas goods liberalisation shifts an economy towards specialisation, service liberalisation benefits all sectors and therefore leads to a more balanced expansion in output.<sup>52</sup> Modelling the impact of both services and goods liberalisation on Tunisia, Konan and Maskus show that 'the distribution of gains under service liberalisation are more evenly distributed across factors than those under goods liberalisation, where gains are strongly concentrated in the hands of workers (the abundant factor)'.<sup>53</sup> The gains are also more than three times larger.

## THE GAINS FROM SERVICES LIBERALISATION

The previous section suggests that the gains from service liberalisation are large, and extend across the entire economy. But what does service liberalisation entail and how can these gains be 'measured'? Who are the likely winners and losers from increased trade in this sector and its numerous subsectors? A simple framework for comparing the relative gains from service exports and imports is developed and described below. This framework draws on the above literature and a number of real-world examples from South Africa.

---

50 Brown DK, 'The liberalisation of services trade: Potential impacts in the aftermath of the Uruguay round', in Martin WL & LA Winters (eds), *The Uruguay Round and the Developing Countries*. Cambridge: Cambridge University Press, 1996.

51 Chadha R, op. cit.

52 Konan DE & KE Maskus, 'Quantifying the impact of services liberalisation in a developing country', *World Bank Policy Research Working Paper*, No. 3193. Washington, DC: World Bank, 2004.

53 *Ibid*, p.18.



## Understanding service liberalisation

Service liberalisation entails the removal or relaxation of domestic and foreign regulatory controls, rather than the simple reduction of border tariffs. To the extent that such reforms open countries to greater trade and competition, they should lead to welfare and efficiency gains.

As with goods, changes in trade policy in one sector can have spin-off and sometimes different effects in other services *and* goods sectors. But because of the high degree of interdependence between services and goods, these effects are particularly important in evaluating the benefits of services trade. A common example is air traffic – liberalisation of this sector may have an adverse effect on transport receipts, but boost tourism significantly. Similarly, the spread of South African retail firms across Africa generates significant service receipts, but has also contributed to a rise in goods exports to these countries.<sup>54</sup>

There are also some service-specific types of effect. Mattoo, Rathindran and Subramanian suggest two ways in which service liberalisation can differ from that of goods liberalisation, particularly in GATS modes 3 and 4 (see Box 1). Firstly, because trade in these modes requires the proximity of producer and consumer, liberalisation should lead to the movement of the factors of production (capital and labour) from one country to another. Thus, exports do not only impact on the scale of production in the exporting country, but can also increase the scale of economic activity in the importing country. Moreover, when capital and skills move across borders, the possibilities for knowledge and technology transfers to the importing country are much higher than those that arise from importing goods. For example, 'Standard Chartered Bank's expanded presence in South Africa has created twenty-one highly skilled new jobs and it intends to create further jobs to match its expansion in consumer banking'.<sup>55</sup>

Secondly, whereas most barriers to trade in goods are encountered at the border and therefore discriminate against foreign producers, most barriers to trade in services arise from domestic regulations and are usually applied equally to domestic and foreign producers. Restrictions on the activities of foreign service providers would have a similar effect as tariffs or quotas on goods, either raising the cost or effectively prohibiting foreign provision. But removing discriminatory

54 South African retailers in Zambia depend heavily on their supply networks in South Africa to deliver competitive products to the Zambian market, which 'in effect turns the country into a retail province of South Africa' (DBSA [Development Bank of Southern Africa], *Development Report 2003*. Johannesburg: DBSA, 2003, p. 173).

55 Itweb, 'Standard Chartered Bank expands into full-service banking in SA', 11 November 2004, <http://www.itweb.co.za/office/20twenty/0308050009.htm>.

restrictions on foreign providers is often not enough to improve access and raise competition in the domestic market. This is because existing domestic regulations might make it difficult for any new entrant, foreign or domestic, to compete.

Thus, unlike goods liberalisation, which aims to level the playing field between foreign and domestic producers, the primary focus of service liberalisation is on the removal of barriers to both domestic and foreign competition. The net effect on domestic output and employment is therefore ambiguous, and depends on the competitiveness and response of both domestic and foreign service providers. If domestic service providers are uncompetitive and are replaced by foreign firms, then some employment in the importing country may be lost to labour from the exporting country (though users will benefit from lower costs or improved quality). But if the local industry is internationally competitive and its size is restricted by domestic barriers to entry, then liberalisation may lead to a reallocation of resources to service activities, and national employment may rise.<sup>56</sup> These matters are explored in greater detail below.

### Identifying the gains from exports

South Africa exports a wide range of services to both developed and developing countries. The benefits to importing countries and the exporting firm are obvious, *but does the South African economy gain from exporting scarce skills and capital abroad?* It is impossible to obtain definitive information on actual trade in services, and this makes the modelling or calculation of export gains difficult. Instead, the approach here is to develop a qualitative framework that will enable an objective assessment of the type and scale of benefits that might accrue to South Africa from exporting specific services. This, in turn, depends on the identification of a set of clear and appropriate economic criteria against which service exports can be evaluated.

Conventional welfare analysis measures the gains from exports in terms of national income and employment. The impact of services on jobs differs markedly by sector, mode and company. For example, the number of South Africans employed by South African retailers in their foreign operations is relatively low: the new Game store in Uganda employs 150 people, of which just three are South Africans.<sup>57</sup> At the other end of the scale, the growing call centre market has had a

---

56 Mattoo A, R Rathindran & A Subramanian, 'Measuring services trade liberalisation and its impact on economic growth', *World Bank Research Working Paper*, No. 2655. Washington, DC: World Bank, 2001.

57 'Massmart, Shoprite', *op. cit.*

major impact on employment. Internationally, this market is dominated by India, but with two to four million call centre seats expected to migrate out of the US and Europe over the next few years, there is ample scope for competition,<sup>58</sup> and a number of South African firms provide back-office functions to foreign-based organisations.<sup>59</sup>

The foreign revenue earned on these exports can be considerable. The foreign operations of Shoprite contributed 10% of total revenues in 2002/03, or R2.4 billion.<sup>60</sup> Moreover, the returns on the company's African operations are twice those in South Africa.<sup>61</sup> South Africa's four largest banks earned R1.2 billion from their (non-South African) African operations in 2002, up from R800 million in 2001.<sup>62</sup> The African operations of the South African cell phone operators, MTN and Vodacom, earned a combined R3.5 billion for the six months ending September 2003.<sup>63</sup>

The contribution of exports to income and employment are necessary, but not sufficient criteria for assessing the benefits of trade in services. From the above discussion, it is possible to derive three additional criteria against which service exports should be evaluated. Firstly, service exports might generate complementary exports in other service or goods sectors.<sup>64</sup> For example, Protea Hotels recently announced plans to build its first five-star hotel in Ghana, and is currently engaged in negotiations to operate a 250-bedroom luxury hotel in Angola. Critically, Protea's foreign ventures are undertaken in partnership with two key South African partners: Group Five, a construction and materials company, and Plan One, a décor design and procurement operation. The resulting exports of hotel management services are probably small in comparison to the

---

58 'Global players expand locally', *Business Day*, 14 July 2004.

59 South African law firms provide basic legal functions to UK companies and law practices: 'We will draft documents and agreements; they will negotiate them in the UK; and when we get to the stage of a semi-final document, it will be reviewed by UK lawyers to ensure we are not breaching any UK laws' ('Lower SA fees fuel demand', *Business Day*, 4 August 2003). Similarly, Computer Sciences Corporation (CSC) provides offshore software support to Anglian Water, a UK public utility. A small team of UK staff discusses and logs customer's problems, which are then transferred to CSC in South Africa for attention ('Local firms set for bigger role', *Business Day*, 25 March 2004). In both cases, routine and labour-intensive work is outsourced to inexpensive South African employees, but higher value-added, specialist skills and services are retained in South Africa.

60 'Shoprite to rule shopping in Africa with 171 more stores', *Business Day*, 20 August 2003.

61 'Ventures into the interior', *Mail and Guardian*, 30 January 2004.

62 'SA banks profits in new scramble for Africa', *Business Day*, 15 July 2003.

63 'MTN's cellular colonisation of Africa gets a leg up', *Business Day*, 2 June 2004.

64 Mattoo A, R Rathindran & A Subramanian, op. cit.

complementary benefits accruing to South Africa from designing, constructing and equipping large hotels across the continent.<sup>65</sup>

Mattoo, Rathindran and Subramanian, and Hufbauer and Warren explain how trade in services can contribute to increased economies of scale in exporting and importing countries.<sup>66</sup> This too is borne out by South Africa's experience. ABSA Bank, for example, has set-up an 'offshore' operation within its existing 1 450-seat call centre in Johannesburg. By using its existing infrastructure to offer call centre services to an American-based credit union, it has effectively halved the fixed costs of its domestic operations.<sup>67</sup> Similarly, Arivia.com, the state-owned technology provider, has concluded a contract to provide R4.8 million in Internet infrastructure to the Botswana agriculture ministry. 'The contract serves Arivia's strategy of extending its reach beyond South Africa's borders and reducing dependence on local Government contracts'.<sup>68</sup>

Finally, the goods literature suggests that companies learn a great deal from the process of exporting, and international experience confirms that this is applicable to services as well.<sup>69</sup> Many South African services firms have gained new knowledge and expertise from exporting. This is particularly evident in the film industry:

A huge infrastructure is being built up, and with it a highly developed skills base, notably in special effects, model making, props and wardrobe. More significantly, the start of a culture of directing has begun to emerge, with domestic directors now able to pitch for foreign work.<sup>70</sup>

The same would apply to the operations of some international service firms in South Africa. For example, foreign banks exporting to South Africa are not only looking at direct opportunities in the South African market, but also hope

---

65 'Protea expands in Africa', *Business Day*, 25 June 2004.

66 Mattoo A, R Rathindran & A Subramanian, op. cit.; Hufbauer G & T Warren, op. cit.

67 'Global companies eye local firms for support services', *Business Day Online*, 8 April 2004, <http://www.businessday.co.za>.

68 'Arivia.com lands Botswana Government internet deal', *Business Day Online*, 19 July 2004, <http://www.businessday.co.za>.

69 Chadha, for example, demonstrates the technological gains to India from exporting software services, while Feketekuty refers to Singapore, Barbados and Jamaica as countries that have reaped quality improvements through exporting (Chadha R, op cit.; Feketekuty G, 'Telecom policy, trade in services, and economic opportunity', in Atwater Institute, *The Atwater Series on the World Information Economy*. Boulder: Westview Press, 1993).

70 'Still a long, hard road ahead for nascent film industry', *Business Day*, 14 March 2003.

to gain new insights into consumer banking trends in South Africa and the continent.<sup>71</sup>

Together, the literature and these examples indicate five criteria against which the gains from exporting services might be evaluated: employment, complementary exports, foreign exchange, knowledge and skills, and economies of scale. Moreover, the relative economic gain in each of these areas is likely to differ significantly by subsector and by mode.

Consider, for example, the case of Shoprite's exports of retail services, described above. The possible economic gains to South Africa are shown, qualitatively, in Table 1. Shoprite's exports take place through its retail operations abroad or through the movement of consumers to South Africa.

There is, perhaps, some temporary movement of professionals to its foreign operations, but little or no cross-border trade. The employment gains to South Africa arising from Shoprite's commercial presence abroad are low; but these operations absorb significant amounts of complementary trade in goods and generate substantial foreign exchange. The company may gain some understanding of foreign markets from these operations and from the managers deployed to work in them, while the impact of exports on the scale of its extensive South African network is likely to be limited. Large numbers of consumers from neighbouring countries visit South Africa, and this may impact on employment levels and the scale of Shoprite's domestic operations. It would also contribute some foreign exchange.

This illustrative example demonstrates how this framework can be used to identify and evaluate the relative benefits of exporting different kinds of services. In this case, the financial gains from commercial presence are high relative to consumption abroad, though a higher number of jobs might be created by enabling more foreign nationals to shop in South Africa. Similarly, it should be possible to show how the economic gains from exporting other categories of services might differ by mode and region, using this classification matrix.

---

71 According to John Kivitis, the CEO of UK-based Standard Chartered: 'the expansion of our business here [in South Africa] is a significant step in building our African presence. It will give us excellent insight into consumer banking trends in South Africa, from where we will be able to assess our next steps' ('Global players', *op. cit.*).

**Table 1: Relative gains to South Africa from Shoprite's exports of retail services**

	Employment	Complementary exports	Foreign exchange	Knowledge and skills	Economies of scale
Cross-border trade	n/a	n/a	n/a	n/a	n/a
Consumption abroad	Medium	Low	Medium	Low	Medium
Commercial presence	Low	High	High	Medium	Low
Temporary movement of people	Low	Low	Low	Medium	Low

### Identifying the gains from imports

The benefits of service liberalisation can be widespread. Supply should increase, prices should fall and consumer choice should be wider. As with exports, it should be possible to classify and evaluate the different ways in which an economy might gain from improved access to international services.

Relevant criteria are derived from the literature and a number of real examples from South Africa. Like tariffs on goods, regulations or restrictions on services can be expected to have adverse welfare effects. They create a 'wedge' between the domestic price and foreign price of the service. Empirical work<sup>72</sup> and international experience<sup>73</sup> support this contention. But the direct benefits of international competition are not only or always seen in lower prices. In many instances, liberalisation contributes to a wider range of new, better quality or more technologically advanced services, which may or may not be cheaper than the existing domestic supply.

Stephenson provides a number of examples. The introduction of competition in port services in Chile and Mexico contributed to a fall in operating costs, estimated at 5% in Chile and 30% in Mexico. In Singapore, improvements to air express services reduced delivery times by seven days and distribution costs by 15%. And just four years after the break-up of the state-run telecommunications monopoly in Peru, the number of payphones was trebled and the average waiting time for private phones fell from ten years to two months.<sup>74</sup>

72 Mattoo A, R Rathindran & A Subramanian, *op. cit.*

73 Stephenson SM, *op. cit.*

74 *Ibid.*

In many service sectors, new entrants inject significant physical, financial and human capital.<sup>75</sup> Sapir and Lutz highlight the role of telecommunications, transport and financial services in the development of a country's core economic infrastructure.<sup>76</sup> Since 1994, the largest foreign investments into South Africa have been in the banking and telecommunications sectors.<sup>77</sup> These investments contributed substantial foreign capital at a time when South Africa's international reserves were low and the domestic currency under immense pressure. They have also contributed to the improved management and an increase in the scale of these industries in South Africa.

Finally, increased competition from abroad can have a number of spill-over effects. Domestic companies might learn from the techniques or technology of foreign entrants, and new skills may be transferred to local employees and clients.<sup>78</sup> For example, MTN, the South African mobile phone operator, has invested heavily in new technology across the continent.<sup>79</sup> To implement and market this technology, it must utilise knowledge and techniques developed in South Africa and train a substantial number of local employees.

The possible spill-over (knowledge and skills), investment (capital and infrastructure) and competition (price and quality of product) benefits arising from import liberalisation are reflected in the four criteria presented in Table 2. Once again, it is useful to test the application of this framework by using a real world example: telecommunications.

William Melody cites high tariffs, 'outrageous' profits, and service restrictions imposed by South Africa's sole fixed-line telecom provider as a significant constraint to economic development in South Africa.<sup>80</sup> The entrance of a new and foreign fixed-line operator into the South African telecommunications market would contribute significant gains through imported expertise, products and infrastructure. The benefits to South Africa would probably be largest in terms of lower prices and the improved quality of service for all consumers. A different

---

75 Mattoo A, R Rathindran & A Subramanian, op. cit.

76 Sapir A & E Lutz, op. cit.

77 SARB, 'Sixth census of foreign transactions, liabilities and assets, 31 December 2001', *Supplement to the South African Reserve Bank Quarterly Bulletin, September 2003*. Pretoria: SARB, 2003b.

78 Sapir A, op. cit.

79 In Nigeria alone, the company invested \$120 million in the country's first nationwide transmission backbone ('Challenges of expanding in Africa', *Business Day*, 9 December 2003).

80 'Telkom putting a brake on the economy', *Sunday Times*, 7 December 2003.

combination of gains might emerge from imports in the other three modes, but these are not evaluated in this particular example.

**Table 2: Relative gains to South Africa from a new and foreign fixed-line telecoms operator**

Mode of supply	Knowledge and skills	Product		Capital and infrastructure
		Price	Quality	
Cross-border trade	n/a	n/a	n/a	n/a
Consumption abroad	n/a	n/a	n/a	n/a
Commercial presence	Medium	High	High	Medium
Temporary movement of people	n/a	n/a	n/a	n/a

### Evaluating the impact of service liberalisation on the poor

Resistance to trade liberalisation in the service sector is intense, largely because many services are public goods and cannot be adequately provided by the private sector. This gives rise to two main concerns. Firstly, increased competition from imports might undermine public provision. Telkom (South Africa's monopoly fixed-line telephone operator), for example, argues that faster liberalisation would have impaired the roll-out of telecommunications services to poor and rural consumers.<sup>81</sup>

Secondly, increased exports might absorb resources from the public sector for private gain or raise domestic prices. For example, the popularity of South Africa as a film location for foreign films has contributed to a rapid increase in private location fees, particularly in the Western Cape, where costs have risen by over 1 000% in just 10 years.<sup>82</sup> The higher prices accrue to both domestic and foreign producers.

These problems are not unique to services. The same concerns have been voiced in support of subsistence farmers – deemed vulnerable to a reduction in the tariff on the food they produce for domestic consumption. Nor are these concerns necessarily valid. In both the goods and services sectors, the net effect of liberalisation on the poor depends on the extent to which liberalisation will

<sup>81</sup> 'Without the five years of exclusivity granted to Telkom between 1997 and 2002, South Africa would not have the depth and breadth of telecoms infrastructure now in place' ('Not so – we've given voice to most South Africans', *Sunday Times*, 7 December 2003).

<sup>82</sup> 'Credits to roll for Cape Town if filing costs are not cut', *Business Day*, 20 April 2004.



lead to a different allocation of domestic resources and production, i.e. from maize to coffee; or from rural health to hip replacements. The net benefit or loss to the poor also depends on whether this reallocation of resources will lead to a reduction or increase in the consumption of staple foods and basic health care by those who previously depended on the domestic provision of these goods and services.

In both cases, the net result depends partly on whether the exports are additional: countries with good agricultural policies may produce more for both export and domestic consumption; countries with good health policies may use the revenue from health exports to develop resources for public and private hospitals, and raise the standard of domestic care. But the net impact of liberalisation on the poor also depends on the substitutability between exports and imports of the goods and services that the poor consume. If coffee exports are not used to finance imports for domestic consumption, or health professionals cannot be 'imported' into the public sector to replace those who move to private practice, then poor communities might suffer.

There are a number of actions policy makers can take to try and minimise the adverse impact of trade liberalisation on the poor, or maximise the benefits of service liberalisation to poor workers and consumers. Firstly, countries need to take actions to enable the substitution between exports and imports. In the services sector, this often requires liberalisation across other modes of supply – allowing imports through one mode to substitute for exports through another. For example, in the South African health sector, the easing of immigration restrictions on foreign health professionals would help to alleviate shortages in the public sector that might arise from increased trade in private medical services. The gains could be even larger if liberalisation enabled the public sector to access bulk services, such as diagnostic facilities, from more efficient or cheaper foreign providers.

Secondly, government needs to ensure that exports and imports contribute to additional or a better quality service for domestic consumers. This sometimes calls for more direct intervention from government to ensure that the gains from trade accrue to the poor. In India, for example, the government provides free land for the construction of private hospitals in priority areas, in exchange for a certain number of beds for public sector patients.<sup>83</sup> Trade liberalisation may also enable new types of primary health care providers to enter the market (perhaps from other developing countries), or may drive existing South African providers

---

83 UNCTAD, 'International trade in health services: Difficulties and opportunities for developing countries', in Zarrilli S & C Kinnon (eds), *International Trade in Health Services: A Development Perspective*. Geneva: UNCTAD & World Health Organisation, 1998, pp. 3–34.

into this sector. There is already evidence of a strong private presence in even the most remote rural areas of the country.<sup>84</sup>

## BARRIERS TO TRADE IN SERVICES

### Compared to barriers on goods

It is instructive to begin with a comparison with the goods sector and to compare the extent to which barriers on services are similar to or different from those on merchandise trade. Kravis identifies three main categories of barriers to trade in services: those that restrict imports from foreign countries, limitations on establishment and discrimination against foreign firms once established.<sup>85</sup> He argues that these barriers closely resemble those imposed on goods, except that the latter would include many more restrictions on imports. The main dissimilarity is the extent to which service restrictions reflect other social, political and economic objectives beyond mere protectionism.

Hindley takes a different line. He finds that barriers to trade in services differ from impediments to trade in goods in three respects. Firstly, due to the invisible nature of services, non-tariff barriers predominate. Secondly, because service transactions often require some form of market presence, impediments to establishment take on a much greater significance. Such barriers have taken on a lesser significance with recent technological changes, which now make cross-border trade in most services feasible.<sup>86</sup>

Finally, the service industry is more regulated than the goods industry, and regulations typically apply to the producer of the service rather than the final product. As a result, barriers to trade in services are much harder to identify, quantify and monitor, and trade negotiations are much more difficult.

Both Kravis and Hindley are, of course, correct. Some service barriers are very similar to tariffs on goods, and are designed for the same inherent purpose – to protect domestic industries from foreign competition. But these tend to be a relatively small subset of the universe of restrictions on trade in services. Most barriers to trade in services are more complex than simple tariff barriers, and instead resemble non-tariff barriers on merchandise trade. Hufbauer and Warren

84 Soderland N, G Schierhout & A van den Heever, 'Private health care in South Africa', in Health Systems Trust, *South African Health Review 1998*. Durban: Health Systems Trust, 1998.

85 Kravis IB, 'Services in the domestic economy and in world transactions', *National Bureau of Economic Research Working Paper*, No. 1124. Cambridge, Mass.: NBER, 1983.

86 Hindley B, 'Service sector protection: Considerations for developing countries', *World Bank Economic Review*, 2, 2, 1988, pp. 205–24.

compare service barriers to the transport cost of goods. Just as inefficient road and port infrastructure increases the cost of traded goods, high telecommunications charges or infrequent international flights can *constrain or increase* the cost of trade in services.<sup>87</sup>

#### BOX 2: THE GATS AND COMMITMENTS

The GATS has three elements: the main text containing general obligations and disciplines; annexes dealing with rules for specific sectors; and individual countries' specific commitments to provide access to their markets, including indications of where countries are temporarily not applying the 'most-favoured-nation' principle of non-discrimination.

Individual countries' commitments to open markets in specific sectors – and how open those markets will be – are the outcome of negotiations. The commitments appear in 'schedules' that list the sectors being opened, the extent of market access being given in those sectors (e.g. whether there are any restrictions on foreign ownership), and any limitations on national treatment (whether some rights granted to local companies will not be granted to foreign companies). So, for example, if a government commits *itself to allow* foreign banks to operate in its domestic market, that is a market-access commitment. And if the government limits the number of licences it will issue, then that is a market-access limitation. If it also says that foreign banks are only allowed one branch, while domestic banks are allowed numerous branches, then that is an exception to the national treatment principle.

These clearly defined commitments are 'bound': like bound tariffs for trade in goods, they can only be modified after negotiations with affected countries. Because 'unbinding' is difficult, the commitments are virtually guaranteed conditions for foreign exporters and importers of services, and investors.

### The importance and purpose of regulation

Tariffs on trade in goods are almost always introduced to protect domestic industries from foreign competition or to raise government revenues. Restrictions on trade in services usually serve a different purpose. UNCTAD suggests a number of reasons why governments may introduce policies to regulate the service sector: industrial policy, balance of payments, imperfect competition, strategic trade, cultural integrity and national security. These can be consolidated into two broad categories. The first includes various types of prudential regulations, designed to

---

87 Hufbauer G & T Warren, op. cit.

protect consumers from different types of market failures. The second, like tariffs on goods, represents a range of strategic interventions to protect or support the growth of domestic industry.<sup>88</sup>

Where regulations serve prudential purposes, they can divert and even enhance trade.<sup>89</sup> But it is extremely difficult to target regulations efficiently, and efficiency arguments are often used to mask protection: 'In practise, even a well-intentioned government will find it difficult to regulate service industries in ways that do not accidentally discriminate against foreign competitors'.<sup>90</sup> Government regulations often give rise to barriers to trade, which, in turn, increase rather than diminish economic distortions.<sup>91</sup> This is particularly true in the services sector. Services are highly customised and it is extremely difficult to regulate output. Regulations on inputs are much more likely to raise barriers to entry.<sup>92</sup>

The strategic argument for regulating services usually refers to the special case of infant industry protection. In countries that are unable to take advantage of an inherent comparative advantage, it may be appropriate to provide an industry with temporary 'competition-free space' to enable domestic producers to obtain the necessary scale and skills to compete internationally.<sup>93</sup>

But why would domestic producers be unwilling or unable to invest without protection? Hindley and Smith identify (but then dismiss) three possible explanations: 'first-mover disbenefits' exist, whereby the gains from investment (e.g. in research and development) are also captured by later entrants; the private risk of investment exceeds the social risk; or government has better knowledge about the industry than the private sector.<sup>94</sup>

Prudential regulations, and those designed to protect domestic service providers, almost always raise the cost of international trade. In the former case, this cost is sometimes necessary to protect consumers from cheaper, but unscrupulous operators. The argument in favour of strategic restrictions is much weaker. Regardless of the reason for protection, there are a limited number of ways in which governments can regulate trade in services. The form of these

---

88 UNCTAD, 1994, op. cit.

89 Arndt HW, 'Comparative advantage in trade in financial services', *The Globalisation of the World Economy*, 7, 1999, pp. 480–97.

90 Hindley B & A Smith, 'Comparative advantage and trade in services', in Singer H, N Hatti & R Tandon (eds), *Trade in Services*. Delhi: BR Publishing, 1999, p.65.

91 Grimwade N, *International Trade*. London: Routledge, 2000.

92 UNCTAD, 1994, op. cit.

93 Hindley B & A Smith, 1999, op. cit.

94 Ibid.

regulations provides some indication of intent, but this can be misleading. It is therefore useful to review and comment on these different types of barriers in more detail.

### Types of barriers

Hoekman and Braga distinguish among four different types of barriers to trade in services: quantitative restrictions, price-based instruments, licensing or certification requirements, and discriminatory access to distribution networks.<sup>95</sup> There are also a number of general policy measures that impact on trade in this sector. UNCTAD provides a summary of the most common barriers to trade in services within each of these categories.<sup>96</sup> These two contributions are summarised in Table 3, classified according to the most likely policy justification. Moreover, for each barrier to trade in services, real examples are given and an analogous barrier to trade in goods has been provided.

**Table 3: Barriers to trade in services**

Barriers to trade	Example	Policy justification	Goods equivalent
<b>Quantitative restrictions</b>			
Quotas	Bilateral air service agreements	Strategic (industrial policy)	Quotas
Local content	Broadcasting	Strategic (cultural integrity)	Local content
Government procurement	Construction	Strategic (industrial policy)	Government procurement
Prohibitions	Insurance	Prudential (information asymmetry)	Prohibitions
Scope (location and activities)	Investment	Strategic (industrial policy)	Scope (location and activities)
<b>Price-based instruments</b>			
Fees	Visas and permits	Prudential (national security) Strategic (industrial policy)	Tariffs
Taxes	Port taxes	Prudential (imperfect competition)	Tariffs
Tariffs on services embodied in goods	Music CDs	Strategic (industrial policy)	Tariffs

<sup>95</sup> Hoekman B & C Braga, op. cit.

<sup>96</sup> UNCTAD, 1994, op. cit.

Barriers to trade	Example	Policy justification	Goods equivalent
<b>Price-based instruments</b>			
Tariffs on inputs	Computers	Strategic (industrial policy)	Tariffs
Domestic price controls	Electricity	Prudential (imperfect competition)	Price controls
International price controls	Telecommunication	Prudential (imperfect competition)	Price controls
Subsidies	Rail transport	Prudential (imperfect competition)	Subsidies
Incentives	Investment	Strategic (industrial policy)	Incentives
<b>Licensing or certification requirements</b>			
Certification/licensing	Accounting	Prudential (info. asymmetry)	Standards
Environmental standards	Transport	Prudential (info. asymmetry)	Standards
<b>Discriminatory access to networks</b>			
Infrastructure	Telecommunication	Strategic (industrial policy) Prudential (imperfect competition)	Port services
Distribution	Travel agents	Strategic (industrial policy)	Dealer networks
Marketing	Advertising	Prudential (info. asymmetry)	Advertising
<b>General policy measures</b>			
Competition policy Intellectual property rights Exchange controls Property rights Prudential regulations Consumer protection laws Taxation			

Quantitative restrictions are more likely to be introduced for strategic reasons, and are therefore more likely to be discriminatory. Licensing and certification requirements are more likely to be justified on prudential grounds and less likely to be protectionist. Price-based instruments and network restrictions could serve either purpose. By ranking different instruments of protection by economic cost, Hindley shows that as in the goods sector, quantitative restrictions are likely to cause the greatest harm and should be prioritised for liberalisation.<sup>97</sup> UNCTAD agrees, arguing in favour of price-based instruments over quantitative restrictions.<sup>98</sup> Another important dimension to trade in services is that domestic regulations are often more important barriers to trade than border fees or restrictions. In general, such regulations prevent the establishment of new foreign

<sup>97</sup> Hindley B, op. cit.

<sup>98</sup> UNCTAD, 1994, op. cit.

and domestic service providers (e.g. telecommunication licences) or require some form of physical presence for trade to take place (e.g. banking). Hindley argues that the distinction between trade and establishment is only important if the latter translates into higher costs or lower quality. Forcing foreign firms to establish in the domestic market may subject them to the same regulatory and production inefficiencies faced by domestic producers, and will therefore limit the possible gains from trade.<sup>99</sup>

Given the various types of restrictions imposed on services and the fact that these are often encountered in the form of domestic regulations, it is understandably difficult to quantify the size or effect of barriers to trade in services. Consequently, there is little information available on services protection, and that which is available is weak.<sup>100</sup> This limits our ability to understand the impact of policy on trade and investment in services. There are, however, a number of ways in which protection has been estimated, and these are reviewed below.

### Measures of protection

Perhaps the most widely used measure of services protection are the GATS coverage ratios first calculated by Hoekman. By allocating a numerical score to the GATS commitments of member states, Hoekman compares the extent of actual commitments to the total possible number of commitments these countries can make. The resulting ratios provide some indication of the extent of services protection in these countries. He also constructs 'tariff equivalents' from these ratios by comparing the coverage of individual countries to a benchmark guestimate of the tariff equivalent in the most protectionist member country. He concludes that high-income countries have made GATS commitments on about half of the universe of possible commitments, compared to one-sixth for developing countries.<sup>101</sup>

According to Hoekman's calculations, South African 'tariffs' tend to approach or equal the benchmark tariff for the most restrictive case in the more protected service sectors. However, in less protected sectors, South Africa appears relatively progressive, with 'tariffs' well below the benchmark. If correct, Hoekman's analysis suggests that South Africa has successfully identified and liberalised 'soft' service sectors, but has not moved as far in many key sectors such as transport, telecommunication, financial services (particularly insurance) and education.

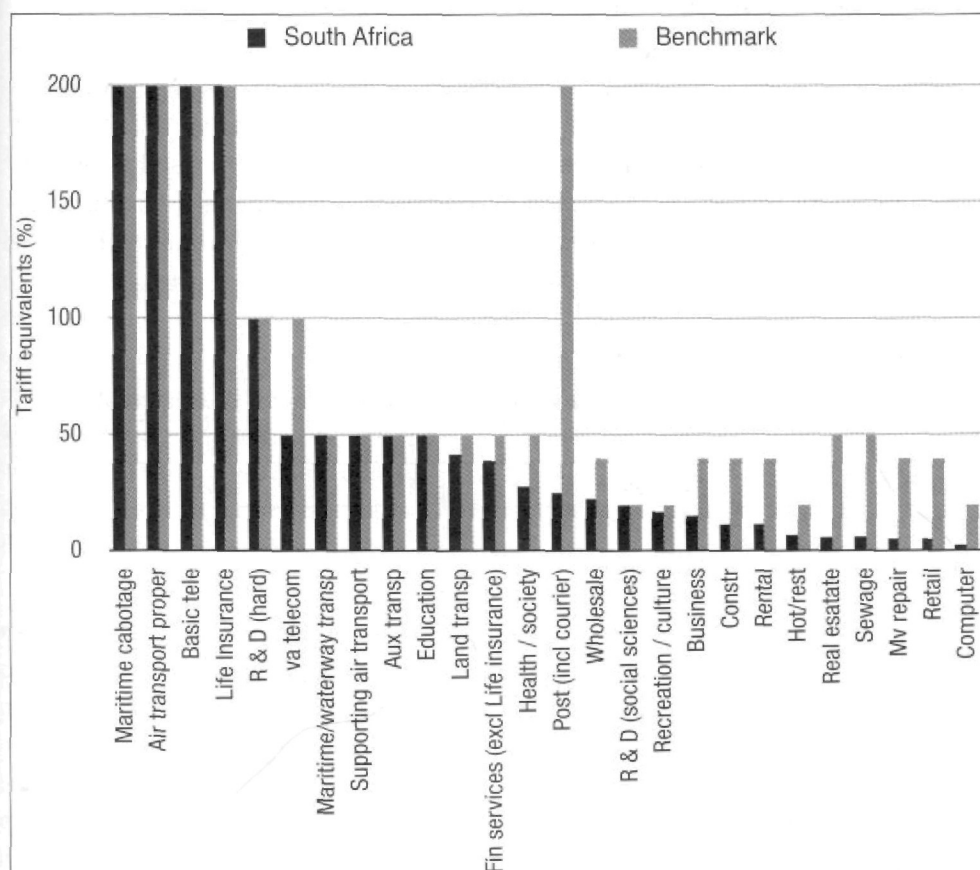
---

<sup>99</sup> Hindley B, op. cit.

<sup>100</sup> Hoekman B & A Mattoo, op. cit.

<sup>101</sup> Hoekman B, 1995, op. cit.

Figure 1: South African service protection (Hoekman)



Source: Hoekman (1995, *op. cit.*)

The Australian Productivity Commission (APC), in collaboration with the Australian National University, adopts a more complex approach. It allocates subjective weights and scores to a number of national regulations and restrictions, in order to calculate domestic and foreign indices of protection in eight different service sectors for up to 136 countries.<sup>102</sup> Hardin and Holmes use a similar approach to show the size of barriers on FDI across mainly Asia-Pacific economic co-operation member countries.<sup>103</sup> They conclude that communications

102 Findlay C & T Warren (eds), *Impediments to Trade in Services: Measurement and Policy Implications*. London: Routledge, 2000.

103 Hardin & Holmes (1997) cited in Chen Z & L Schembri, *Measuring the Barriers to Trade in Services: Literature and Methodologies*. Ottawa: Canadian Department of Foreign Affairs, 2002.



and financial services face the highest barriers to FDI; business, distribution, environmental and recreational services the lowest.

Table 4 provides an indication of the extent of restrictions on foreign firms in South Africa. The APC also calculates an index of domestic restrictions. These results appear to confirm Hoekman's broad conclusion: the financial and communications sectors are relatively protected, though perhaps the level of communications protection calculated by Hoekman is a little high. What is more surprising is that some of South Africa's professional services are among the most open of those countries surveyed by the APC.

**Table 4: South African service protection (APC)**

Sector	South Africa's score	No. of countries	South Africa's rank*
Accountancy	0.4444	34	7
Architecture	0.1105	34	27
Banking	0.1897	38	14
Distribution	0.0680	38	35
Engineering	0.0955	34	28
Telecommunications	0.5867	136	77
* 1 = most restrictive			

Source: Findlay C & T Warren (op. cit.)

The main advantage of the Hoekman approach is its simplicity – it is extremely easy to calculate for all GATS members and for 155 sectors. The APC approach is more carefully specified, but requires many more resources, and has thus far only been applied to six industries or approximately 30% of the sectors covered by Hoekman.<sup>104</sup>

### The cost of protection

Weak protection data makes it difficult to calculate the cost of protection and the benefits of reform. Basic price comparisons suggest that these benefits could be sizeable. Hindley provides some examples of the direct cost of service protection.<sup>105</sup> American laws governing the shipment of agricultural aid require that American ships carry 75% of shipments. Studies of the price differential between goods carried by American and foreign ships show that the protected shipments cost

104 Chen Z & L Schembri, op. cit.

105 Hindley B, op. cit.

double those of the unregulated foreign shipments. Similar analyses of protected shipments of American strategic oil reserves indicate that costs are four times the international rate, and in the aviation industry, fares in heavily regulated European countries are calculated as two to three times higher than in the deregulated American market. From these examples, Hindley deduces that 'the cost to an economy of heavily protecting its service sector may be high'.<sup>106</sup>

Barriers to services not only affect the amount and price of traded services, but also impact on protection and trade in the goods sector. The economy-wide costs are therefore even higher. In particular, where services are key inputs into the production of goods, high levels of services protection can raise the cost of goods production. Bhagwati, for example, compares the effect of protecting intermediate services industries, such as telecommunications, to that of protecting key intermediate goods, such as steel.<sup>107</sup> In both cases, protection imposes a 'tax' on downstream users. Laird warns that unless service liberalisation accompanies goods liberalisation, the cost of key service inputs will remain unchanged, and the net effect on producers may be more severe than anticipated.<sup>108</sup>

Hoekman demonstrates the scale of these effects using the example of Egypt, which at the time was negotiating an FTA with the EU. He shows that unless price wedges in the services sector are reduced by at least 40%, effective rates of protection (ERPs)<sup>109</sup> on manufacturing products will fall to below zero for 16 out of 21 sectors.<sup>110</sup> This is clearly a much greater shift in protection than anticipated by the Egyptian manufacturing industry. Chadha computes ERPs for the Indian manufacturing sector for 1997–98 using Hoekman's tariff equivalent guestimates. In 25 out of 30 sectors, inefficient services lowered the ERP, in some cases significantly. For example, adjusting the ERP on electrical machinery to account for inefficient or high-cost services lowers the ERP from 26% to –6.6%. He concludes that the net effect is similar to that of a large tax on manufacturing.<sup>111</sup>

---

106 Ibid., p. 213.

107 Bhagwati J, 2001, op. cit.

108 Laird S, 'Multilateral access negotiations in goods and services', *CREDIT Research Paper*, No. 00/4. Nottingham: CREDIT, 2000.

109 The ERP is a standard indicator of protection used in trade policy analysis that accounts for protection on both outputs and inputs. It provides an estimate of the percentage increase (or decrease) in domestic value added in the presence of prevailing protection and incentives relative to what it would be under free trade and in the absence of incentives.

110 Hoekman B, 1995, op. cit.

111 Chadha R, op. cit.

## THE POTENTIAL CONTRIBUTION OF A US-SA FTA

The empirical and qualitative work presented in this chapter suggests that advanced developing countries, such as South Africa, should gain from comprehensive and multilateral service liberalisation. Exports should rise in service sectors in which South Africa has some comparative advantage, and the country should import more of those services in which it does not. This is consistent with conventional trade theory and most of the services literature. The chapter also suggests that barriers to imports of services remain high in some subsectors. Could a preferential trade agreement (PTA) with the US help to address the high cost of service protection?

PTAs are generally scorned by trade economists, because they seldom create new trade. They are much more likely to divert trade flows from one region to another, tempting consumers to purchase lesser quality or more expensive goods and services from producers within the free trade area. To deal with these problems, WTO rules require that FTAs substantially encompass all trade. This is an important hurdle designed to prevent a proliferation of narrow and disruptive international arrangements.

To overcome these economic costs and multilateral hurdles, it is important that FTAs satisfy three main preconditions:

*They must be meaningful.* The more efficient and larger the PTA partner and the greater the existing constraints to trade, the greater the potential economic benefits. Negotiating modest FTAs with small and 'unthreatening' economies is likely to raise the cost of trade, with few economic gains.

**Table 5: Bilateral trade in services, 2000**

	Service imports from South Africa (bilateral BOP), R millions	Share of total South African service exports (SA BOP)	Service exports to South Africa (bilateral BOP), R millions	Share of total South African service imports (SA BOP)
US	5 545	16.4%	9 355	23.6%
UK	5 182	15.3%	9 629	24.3%
Germany	3,891	11.5%	3 059	7.7%
Japan	2 070	6.1%	1 749	4.4%
Total	16 688	49.2%	23 792	60.0%

*Source: Central banks of South Africa, the US, UK, Germany and Japan*

*They must be comprehensive.* The main political advantage of FTAs is that they enable countries to reform problem sectors and relax regulations with a small number of countries, before opening to the rest of the world. This benefit is lost if a large proportion of existing trade or highly protected industries are exempt from the trade agreement.

*They must be accompanied by global reforms.* The purpose of trade liberalisation is to assist countries to integrate and become competitive in the global economy. This can only be achieved if preferential reforms are extended to the rest of the world through ongoing unilateral and multilateral liberalisation.<sup>112</sup>

The first condition requires that South Africa limit PTAs to large and highly competitive countries with which it can expect to import and export substantially more goods and services. As the world's largest economy, the US is an obvious candidate for a meaningful FTA. But is there any evidence to suggest that existing levels of trade in services are artificially low and might be impeded by restrictions or regulations in this sector?

### **Making it meaningful**

The US, UK, Germany and Japan are the world's four largest service exporting and importing countries, and together account for about a third of world trade in services.<sup>113</sup> These four countries would be the most obvious candidates for a meaningful services agreement, but what do we know about bilateral trade with South Africa?

The greatest shortcoming in most analyses of trade in services is the lack of detailed and reliable data. In South Africa, the South African Reserve Bank's (SARB) balance of payments division does survey and report trade in transport and travel services, but all other services trade is captured as such under 'other services'. It is in this 'other services' category that most of the more dynamic service sectors, such as financial, information and professional services, are hidden. The South African balance of payment data (SA BOP) is complemented here by data received from the balance of payments offices of the US, UK, Germany and Japan (bilateral BOP). This should provide some indication of South Africa's trade with these countries, but again, this data should be treated with a high degree of caution.

With reference to Table 5, the US, UK, Germany and Japan absorb about half of South Africa's total services exports, and contribute around 60% of South

---

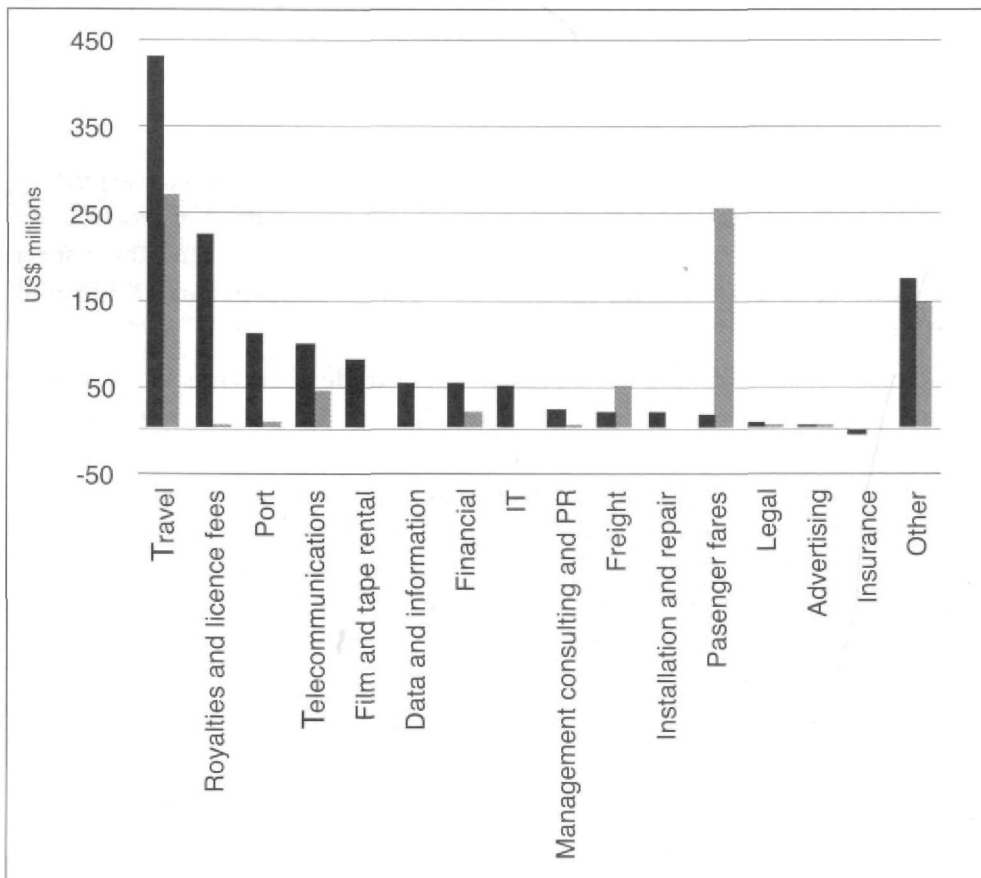
112 Adapted from Humphreys J & A Stoeckel, "Free" trade agreements: Making them better', RIRDC 05/035, Canberra, 2005.

113 WTO, *International Trade Statistics 2004*. Geneva: WTO, 2004.

Africa's services imports. According to this data, the US is South Africa's most important services export destination and the second most important source of services imports.

This apparently high level of bilateral trade is distorted by a single sector. Figure 2 shows that US trade with South Africa is dominated by travel (tourism) and passenger fares. The US also receives a fair number of royalty and licence payments from the sales of US goods and services in South Africa. The only sectors in which the US reports a services deficit is in passenger fares and freight. The former is not surprising, given the fact that the South African Airways is the only airline that offers a direct service between South Africa and the US. There certainly seems to be potential to diversify and possibly raise service trade between these two countries.

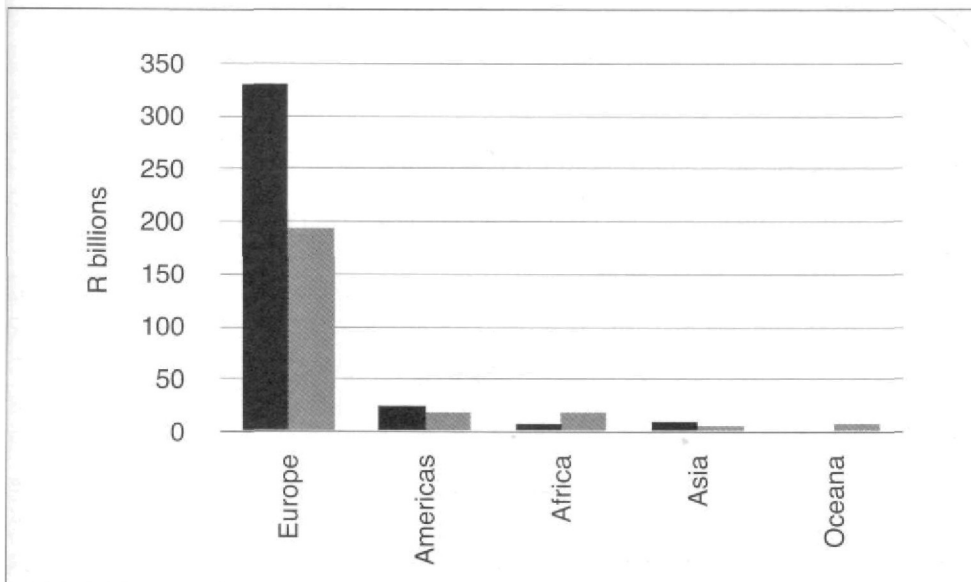
**Figure 2: US service trade with South Africa, 2000**



Source: Bureau of Economic Analysis, 2004, <http://www.bea.gov>

Many services are not traded across borders, but are delivered through direct investment in the export market. One of the potential gains from an FTA is that it might contribute to an improved and more certain regulatory framework for US FDI in South Africa. Here the SARB data is more revealing. Investment in and out of South Africa is dominated by the UK, which constitutes 85% of European FDI in South Africa and 39% of South African FDI in Europe. The US is the third largest source of investment into South Africa, accounting for just 7% of total FDI stock in 2001. The SARB census also provides a sectoral breakdown of FDI into South Africa, but not South African investment abroad. Relative to mining and manufacturing, the services sector contributes the largest share of total direct investment in South Africa (42% of total FDI).

Figure 3: South African investment stock by region, 2001



Source: SARB (2003b, *op. cit.*)

Services trade can also take place through the movement of people between countries. Strictly speaking (according to the GATS), trade in services includes only the temporary movement of people abroad. The export earnings from these people should be captured and reflected in the BOP trade data described above. But for most developing countries, flows of people are permanent. For this reason, it is instructive to consider the migration of people between South Africa and the US.

Whereas the UK remains the most popular country for South African emigrants, the US has become an increasingly attractive destination. From 1994 to 2003 about 30 000 South Africans emigrated to the US (according to US data), of which 6 500 were classified as professionals. On the other hand, the number and profile of immigrants from the US has changed for the worse over this period. The net outflow of skilled South Africans to the US in 2002 was approximately 800 people. This number is not huge, but it is just a partial reflection of the challenge faced by South Africa in retaining and attracting skilled workers.

**Table 6: Migration to South Africa by skill and region**

Region	Year			
	1990	1995	2000	2002
Africa	3 084	1 343	855	2 472
<i>Of which professionals</i>	12%	19%	12%	8%
Americas	839	281	133	244
<i>Of which professionals</i>	22%	18%	15%	11%
Asia	2 837	1 063	1 041	1 841
<i>Of which professionals</i>	12%	11%	9%	12%
Australasia	179	85	33	65
<i>Of which professionals</i>	28%	20%	0%	8%
Europe	7 560	2 272	978	1 847
<i>Of which professionals</i>	13%	15%	9%	9%

Source: Stern M & G Szalontai, 'Immigration policy in South Africa: Does it make economic sense?' *Development Southern Africa*, 23, 1, 2006, pp.123–45

The data presented above is superficial and incomplete – but it does provide strong support for trade talks between the two countries. Current levels of cross-border trade in services are relatively high, but they are restricted to a few services sectors. Flows of FDI are relatively low compared to other bilateral partners, and the movement of skilled workers from the US into South Africa fell sharply over the 1990s. To the extent that existing regulations in South Africa and the US contribute to low or lopsided trade in services, a comprehensive FTA might prove beneficial. At the very least, more analyses and discussions should be encouraged to identify and deal with possible barriers to trade, investment and migration.

## Making it comprehensive

South Africa would expect to achieve some gains in the US market through a comprehensive services agreement, though in reality, export gains are likely to be limited. This is for three main reasons. Firstly, most US services markets are already relatively open and US commitments in the GATS are relatively deep. Secondly, where regulatory restrictions do exist, it is unlikely that the US will make changes to domestic legislation in response to a request from South Africa. And finally, existing patterns of trade suggest that South Africa is unlikely to be a major exporter of services to the US market (outside of the transport and travel sectors).

Instead, most of the gains from a bilateral services agreement will come from increased competition, imports and investment from the US and from the improved regulatory certainty it will provide to both US and local services providers in the South African market. In other words, there are good economic reasons for incorporating substantially all trade and for using this bilateral to take South Africa well beyond its existing GATS commitments. A narrow agreement that excludes sensitive sectors or attempts to maintain a high degree of regulatory flexibility will limit these potential gains. A meaningful and comprehensive agreement would best be achieved through a negative-list approach (see Box 3).

And the experience of other countries is clear – the US is not interested in the kind of partial agreement that is likely to arise from a positive-list approach. In the typical US FTA, the more development-friendly and flexible architecture of GATS is intentionally abandoned (see Box 3). This makes it easier for countries to liberalise (i.e. more difficult to exclude sensitive sectors or subsectors), and reduces the ability of countries to backtrack or implement arbitrary regulations.

It is also clear that liberalisation in services is given special attention by the US (see Annexure A). New innovative ways to ensure higher levels of liberalisation have been employed in virtually all of these agreements. This includes the creation of 'separate chapters with specific disciplines on cross-border trade in services, financial services, air transportation, telecommunications, and the temporary entry for business persons (although not all agreements include chapters on all of these sectors/modes of supply)'.<sup>114</sup> Some agreements, like the US–Chile and US–CAFTA–DR,<sup>115</sup> broaden the scope of liberalisation even further by creating new chapters with specific disciplines on electronic commerce and regulatory transparency.

---

114 [http://www.aeaweb.org/annual\\_mtg\\_papers/2005/0107\\_1015\\_1402.pdf](http://www.aeaweb.org/annual_mtg_papers/2005/0107_1015_1402.pdf).

115 See Annexure A.



### BOX 3: THE POSITIVE- VS NEGATIVE-LIST APPROACH TO SERVICES NEGOTIATIONS

The positive-list approach (also known as the bottom-up approach) refers to the voluntary inclusion of a designated number of sectors in a national schedule indicating what type of access and what type of treatment for each sector and for each mode of supply a country is prepared to contractually offer services suppliers from other countries. Under a positive-list approach, the list of commitments comprises a national schedule and contains all of the commitments, set out by sector, that a party to a trade agreement has chosen to include.

Unlike the positive listing, the negative-list approach (also known as the top-down approach) refers to the comprehensive inclusion of all services sectors, unless otherwise specified in the list of reservations, under the specific disciplines of the services chapter and the general disciplines of the trade agreement. A negative-list approach requires that discriminatory measures affecting all included sectors be liberalised, unless specific measures are set out in the list of reservations. Under a negative-list approach, the list that is found in annexures to a trade agreement contains all of the measures that do not conform to the core disciplines of the relevant chapters that governments nonetheless choose to maintain (exclusion list).

The GATS is based on a positive-list approach, but the US favours a GATS-plus agreement, i.e. it is looking to secure more commitments than it can get through the WTO process. South Africa's Department of Trade and Industry (DTI), on the other hand, prefers the more flexible positive-list approach used in GATS negotiations.

South Africa, like many other developing countries, has been reluctant to adopt a negative-list approach to services, because the cost of errors and omissions might be high. It is argued that it is sometimes difficult for a country to identify and list all possible exclusions to an agreement. This is a poor excuse.

Regardless of whether a country pursues a positive- or negative-list approach, it should be expected to document and evaluate all restrictions to trade. Unnecessary, redundant and costly restrictions should be removed and policy space should be reduced. This is why countries enter trade agreements in the first place!

Another difficulty with a negative-list approach is that all future measures, including sectors that are not known or have not been created, are automatically bound. In essence, this means that the country sacrifices the right to introduce

discriminatory measures that may be necessary in future without fair compensation to affected parties. But such problems can also arise...

under GATS when commitments are open-ended. For example, the US just lost a WTO dispute to Antigua and Barbuda in a ruling over online gambling. The problem arose largely because e-commerce as a reality did not exist in 1994 when the US undertook full commitments on entertainment services.<sup>116</sup>

It would be extremely difficult for South Africa and its partners to convince the US to adopt a positive-list approach in the US-SACU FTA negotiations on services. More importantly, it is not in SACU's own interests to negotiate a narrow services agreement. Whereas most other countries that have concluded such agreements were generally open in most sectors (or looking to open up), it is not clear that SACU is. The evidence presented above suggests that South Africa's multilateral services commitments are modest. Those of the BLNS are even shallower. Namibia has made commitments in just two of the 12 GATS schedules, and Botswana in three. This makes the negotiations more difficult, but the potential benefits that much greater.

### **Making it work**

South Africa's existing GATS commitments are above average for a developing country, but many limitations persist and entire sectors (such as education and health services) have not been scheduled.

More importantly, there is little to suggest in South Africa's current offer to the WTO that further multilateral liberalisation is forthcoming (see Annexure B). At best, South Africa has offered to bind a number of changes to existing laws and regulations. This is important, in that it makes it difficult for South Africa to backtrack or introduce new and discriminatory measures in these specific areas. But it does little to raise access and competitiveness in protected service industries.

The US has indicated that it is seeking much deeper commitments than the GATS in a number of sensitive areas, including FDI in key sectors, regulations on financial services and telecommunications, and work permits pertaining to the movements of business people (see Box 4). By engaging seriously with the US, SACU could use this bilateral FTA as a template and signal for further multilateral

---

116 See Sauve P, *Promise and Pitfalls of the WTO and FTAs: Investment and Trade in Services*, <http://www.rieti.go.jp/en/events/bbl/04110101.html>.

reforms. But for services liberalisation to 'work', SACU must then roll out these reforms to all other countries as soon as possible. Why would SACU want to give the US (or any other individual country) special protection or preferred access to the SACU services sector?

#### BOX 4: US NEGOTIATING OBJECTIVES

In terms of the US TR's 5 November 2002 letter to Congress, the US negotiating objectives on services in the FTA with SACU are to:

- Pursue disciplines to address discriminatory and other barriers to trade in the SACU countries' services markets.
- Pursue an ambitious approach to market access, including enhanced access for U.S. services firms to telecommunications and any other appropriate services sectors in SACU markets.
- Seek improved transparency and predictability of SACU countries' regulatory procedures, specialised disciplines for financial services, and additional disciplines for telecommunications services and other sectors as necessary.
- Seek appropriate provisions to ensure that the SACU countries will facilitate the temporary entry of U.S. business persons into their territories, while ensuring that any commitments by the United States are limited to temporary entry provisions and do not require any changes to U.S. laws and regulations relating to permanent immigration and permanent employment rights.<sup>117</sup>

#### CONCLUSION

Although the focus of this chapter has been on South Africa, by extension it argues in favour of a comprehensive bilateral agreement in services between SACU and the US. Such an agreement would lock in existing reforms and help to determine a longer-term reform agenda within the region, while possibly opening up new opportunities for trade and investment. It would also bring South Africa and the BLNS countries up to speed with the current world trade agenda, and make future regional and multilateral commitments in services much easier. Critically, for such an agreement to be meaningful and 'work', it must include protected sectors, and it must be extended to the rest of the world through ongoing unilateral and multilateral liberalisation.

---

117 See Brown DK, K Kiyota & RM Stern, 'Analysis of the US-SACU FTA negotiations', *Discussion Paper*, No. 545, Research Seminar in International Economics, 2006.

Negotiating such an agreement will not be easy. To do so requires a good database of existing laws and regulations in every sector of the economy and detailed discussions with stakeholders within and outside of government. In particular, the DTI needs to know of all instances where domestic legislation restricts access to the South African services sector for both domestic and foreign firms, and it needs to understand the relative economic costs and benefits of these restrictions. But this is information that the DTI should have on hand, regardless of the state of trade negotiations.

A negative-list approach will force the DTI to do its homework, and is more likely to contribute towards a beneficial outcome. The alternative (positive-list approach) will make it easier to exempt sectors or subsectors where the DTI's knowledge is weakest or lobby groups are fiercest. But this will only diminish the objective and value of any prospective agreement. It will also make a deal with the US highly unlikely. If the South African government is sincerely interested in a meaningful trade agreement with the US, then it needs to be prepared to make hard decisions. It is therefore encouraging that the DTI has taken the initiative to commission a large number of service-sector studies, and further research may be necessary. Resorting to a softer negotiating framework is the wrong way to deal with South Africa's own information or capacity deficiencies.

Most of this paper focuses on South Africa, and neglects the likely impact of a US-SACU bilateral agreement in services on other SACU member countries and the region as a whole. This is an important consideration that probably deserves its own dedicated study. Finding commonality among SACU member countries will be extremely difficult, especially given the low level of service liberalisation within the region and the weak commitments of some member countries at the WTO. But this raises the potential gains of an agreement substantially. Negotiating a meaningful agreement with the US will force SACU to think seriously about its own *regional integration programme*, and will require significant internal reforms. This can only be good for the long-term competitiveness and development of the region.

For all of these reasons, we believe that South Africa should urgently reconsider its largely defensive approach to service negotiations with the US. This bilateral agreement offers South Africa a unique opportunity to deepen economic relations with the world's largest economy while simultaneously reforming constraints to trade and investment at home. At the very least, by refusing to engage with the US on a meaningful services agreement, South Africa has greatly delayed and diminished the likely gains from trade that the two countries might achieve from these negotiations. In addition, there is now a real chance that these negotiations will fall apart or fail as a direct result of South Africa's intransigence on this issue. This bodes badly for South Africa's role and reputation in the global economy.

## ANNEXURE A: THE US APPROACH TO FTAS

### Australia

The US–Australia Free Trade Agreement (US–AUS FTA) came into force on 1 January 2005. The FTA includes provisions on trade and environment, trade and labour issues, electronic commerce and services, intellectual property rights, rules of origin, investment, and government procurement. This agreement uses a negative-list approach to services and investment (GATS mode 3 is covered under the investment chapter). The commitments in services are contained in a chapter on cross-border services, which deals with cross-border supply of services only to the exclusion of commercial presence or investment – commercial presence is covered in the investment chapter of the FTA with its own dispute settlement system. Table 7 shows the liberalisation approach and the coverage of the chapter on cross-border services supply.

**Table 7: Selected provisions of the US–AUS FTA on services**  
**Cross-border trade in services: approach and coverage**

Article	Scope
10.1	Covers GATS modes 1, 2 and 4 and all levels of government (there are exemptions). Excludes financial services, government services, government procurement, air services, subsidies or grants. Market access (10.4), domestic regulation (10.7) and transparency services (10.8) also apply to GATS mode 3. Does not apply to persons seeking employment.
10.2	National treatment – negative list (WTO is positive list).
10.3	Most-favoured-nation treatment – negative list (same as WTO).
10.4	Market access – makes same prohibitions as WTO, but on negative-list basis (there are exclusions).
10.7	Domestic regulation – same criteria to apply as in WTO, plus promise to incorporate any new disciplines negotiated under article VI.4 of GATS.
10.8	Transparency – a bit stronger than in GATS, in that parties must let interested persons (and the other party) comment on, not just respond to requests for specific information.
10.9	Recognition – same as in GATS.

*Source: Adapted from Dee P, 'The Australia–US Free Trade Agreement: An assessment', Pacific Economic Papers, No. 345. Australian National University, 2005.*

Key services sectors like telecommunications and financial services are covered in separate chapters. The agreement is so comprehensive that even the exclusion list is not unqualified. For example, the provisions on health and education,

childcare and social welfare services are listed as exceptions only insofar as they are 'established or maintained for a public purpose.'

## **Morocco**

The US signed an FTA with Morocco in June 2004, which came into force on 1 January 2006. This is the first agreement to be signed under the Middle East FTA initiative, aimed at creating a US–Middle East free trade area by 2013. This agreement provides for more than 95% of bilateral trade in goods to become duty-free from the day it comes into force. It also contains provisions on services and transparency, among other things.

On services, the negative-list approach is used, in terms of which Morocco commits itself to liberalise all its services regimes, except for a few excluded sectors. The agreement covers key services sectors such as audio-visual, express delivery, telecommunications, computer and related services, distribution, and construction and engineering. Apart from providing new market access and national treatment benefits in cross-border trade, the FTA has strong provisions on commercial presence, as well as disciplines on regulatory transparency.

Commitments in services are contained in chapter 11, which deals with cross-border supply of services only, to the exclusion of commercial presence or investment. Commercial presence or GATS mode 3 is covered under investment in chapter 10. Key services sectors such as telecommunications and financial services are covered in special chapters (chapters 13 and 12, respectively). In addition, the agreement includes new issues, such as the regulation of electronic commerce.<sup>118</sup>

## **Chile**

The US–Chile FTA came into force on 1 January 2004. It is the first comprehensive FTA signed between the US and a South American government. The agreement is ground-breaking, as it imposes new commitments that go well beyond the WTO and North American FTA provisions.

The agreement uses the negative-list approach: all services are liberalised except those specifically excluded. The liberalisation commitments assumed under this agreement are far-reaching. The US Coalition on Services Industries (a powerful lobby group) dubbed this agreement a 'milestone' that will set a

---

118 [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Australia\\_FTA/Final\\_Text/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html).

high standard for future trade agreements that seek to liberalise what remains a highly protected and regulated international services sector.<sup>119</sup>

The commitments in services are contained in a chapter on cross-border services, which deals with cross-border supply of services only, to the exclusion of commercial presence or investment (commercial presence is covered in the investment chapter of the FTA). Key services sectors such as telecommunications and financial services are covered in special chapters. In telecommunications, for example, users of the public telecommunications network are guaranteed reasonable and non-discriminatory access to the network.

### CAFTA-DR

The FTA between the US and Central American states (including Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua), plus the Dominican Republic (CAFTA-DR), was signed on 5 August 2004. This agreement provides comprehensive market access and greater regulatory transparency in most services sectors.

The agreement applies a negative-list approach, with very few reservations. It provides new market access opportunities especially for US companies in, among other things, telecommunications, express delivery, computer and related services, tourism, energy, transport, construction and engineering, financial services, insurance, audio-visual and entertainment, professional, environmental, and other sectors.

The chapter on cross-border trade in services covers GATS modes 1 and 2 of services trade, namely cross-border services transactions and consumption abroad. The supply of services through investment, i.e. GATS mode 3, or commercial presence, is covered in a separate chapter (chapter 10 on investment).<sup>120</sup>

---

119 <http://www.freetrade.org/pubs/briefs/tbp-018.pdf>.

120 [http://www.sice.oas.org/TPCStudies/USCAFTACH1\\_e/CompStudy11.htm](http://www.sice.oas.org/TPCStudies/USCAFTACH1_e/CompStudy11.htm).

## ANNEXURE B: SOUTH AFRICA'S OFFER TO THE WTO

South Africa finally tabled its offer to the WTO in terms of the ongoing GATS negotiations in April 2006.<sup>121</sup> The offer, though generally regarded as a mere tabling of the status quo – i.e. the liberalisation that South Africa has done unilaterally – was reportedly well received by other WTO member states.<sup>122</sup> In the following paragraphs we give a brief analysis of what key liberalisation changes, if any, the new offer makes.<sup>123</sup>

### Horizontal commitments<sup>124</sup>

No further liberalisation commitments are made in this area.

### Sector-specific commitments

This is where the bulk of commitments are expected in services trade liberalisation. As already mentioned, South Africa has made no substantial new concessions in this area. Yet the changes introduced are fairly significant in the multilateral negotiations context. Here we look at only those sectors where changes have been made to the original GATS schedule. The offer can be summarised as follows:

#### *Business services*

The new offer binds existing market access and national treatment commitments in legal services (in both foreign and domestic law) in GATS modes 1 and 2.

#### *Communication services*

In telecommunications, the new offer simply registers South Africa's willingness to comply with its scheduled commitment to end Telkom's monopoly (it had

---

121 The offer is contained in a restricted file no. TN/S/O/ZAF, dated 29 March 2006, which was sent to the WTO Council for Trade in Services.

122 <http://wto.tralac.org/scripts/content.php?id=4954>.

123 It should be noted that this offer is strictly conditional, and that South Africa reserves the right to withdraw or modify it.

124 Horizontal commitments stipulate limitations that apply to all of the sectors included in a country's schedule. These often refer to a particular mode of supply, notably commercial presence and the presence of natural persons. As such, any evaluation of sector-specific commitments must therefore take the horizontal entries into account.



promised to introduce a second network operator at least by 31 December 2003). Thus the GATS mode 1 supply of a range of facilities-based and public-switched telecommunications services (voice services, packet-switched data transmission services, etc.) is now to be done through a duopoly. Value-added network services (VANS) providers are still prohibited from bypassing South African facilities for the routing of domestic and international traffic. VANS licensees are not allowed to construct their own facilities.

The resale of telecommunications services is now permitted – this is not a new concession either, as South Africa had previously promised (in its additional commitment schedule) to liberalise in this area between 2000 and 2003.

### *Financial services*

In financial services, a few changes have been made. For instance, in insurance services, South Africa binds market access with respect to reinsurers of life insurance. Whereas all providers of insurance service were required to be incorporated as public companies in South Africa, a reinsurer does not need to be locally incorporated in terms of the new offer. In banking services, South Africa binds market access for companies involved in asset management, collective investment schemes and advisory services. Companies offering these services would no longer need to be locally incorporated as public companies; all that is needed is registration with the supervisory authority.

### *Transport services*

A number of improvements to the original GATS commitments have been made in the new offer. For instance, the new offer includes market access and national treatment commitments on maritime transport; inland waterways; air transport; space transport; rail transport; pipeline transport; and services auxiliary to all modes of transport (cargo handling, storage and warehouse services, etc.). None of these subsectors were part of South Africa's original GATS schedule.

This apparent policy shift in favour of further liberalisation may be a result of the Accelerated and Shared Growth Initiative of South Africa (ASGISA), which seeks to increase average economic growth to about 6% by 2010–2014 in order to be able to effectively fight poverty and unemployment. Among the many identified obstacles to higher economic growth in South Africa is the cost, efficiency and capacity of the national logistics system. According to the ASGISA report,

'[b]lacklogs in infrastructure and investment, and in some cases market structures that do not encourage competition, make the price of moving goods and conveying services over distance higher than it should be. Deficiencies in logistics are keenly felt in a country of South Africa's size, with considerable concentration of production inland, and which is some distance from the major industrial markets.'<sup>125</sup>

The South African government therefore seems to be more than ready to open up this sector to competition, in the hope of reaping supply efficiency gains.

### *Environmental services*

Some significant changes have been made in this sector. The new offer commits South Africa to liberalise regulations to allow temporary movement of people providing consultancy services (GATS mode 4) in the sewage, refuse disposal, sanitation, and noise and vibration abatement and landscape protection services.

Further, South Africa offers to open up its soil remediation, and noise and vibration abatement services sectors to GATS mode 1 supply, where only the service crosses the border, and the commercial presence of a company providing these services (GATS mode 3). However, such liberalisation in GATS mode 3 requires a company to enter into a joint venture with a local service provider, and foreign ownership is limited to 51% in such entities.

The liberalisation of environmental services is a sensitive issue in South Africa. Perhaps in consideration of such sensitivity, the offer does not include services related to the collection, purification and distribution of water for human use.<sup>126</sup> Despite this, some South African civil society groups still regard it, perhaps unfairly so, as 'irresponsible'.<sup>127</sup>

---

125 <http://www.info.gov.za/asgisa/asgisa.htm>.

126 <http://www.ictsd.org/biores/06-06-16/story1.htm>.

127 <http://wto.tralac.org/scripts/content.php?id=4954>.

## ANNEXURE C: GATS COMMITMENTS BY SCHEDULE AND COUNTRY

COUNTRIES	01	02	03	04	05	06	07	08	09	10	11	12	Total
Angola							X		X	X			3
Antigua and Barbuda	X	X					X		X	X	X		6
Argentina	X	X	X	X			X		X				6
Australia	X	X	X	X	X	X	X	X	X	X	X		11
Austria	X	X	X	X	X	X	X	X	X	X	X	X	12
Bahrain							X						1
Bangladesh		X							X				2
Barbados	X	X					X			X			4
Belize	X	X											
Benin	X						X		X		X		4
Bolivia		X						X	X	X			4
Botswana	X	X							X				3
Brazil	X	X	X	X			X		X		X		7
Brunei Darussalam	X	X					X				X		4
Bulgaria	X	X	X	X	X	X	X	X	X	X	X		11
Burkina Faso									X				1
Burundi	X		X	X				X	X				5
Cameroon	X								X				2
Canada	X	X	X	X		X	X		X		X		8
Central African Republic	X	X				X			X	X			5
Chad									X				1
Chile	X	X					X		X		X		5
Colombia	X	X	X				X		X				5
Congo									X	X			2
Congo RP	X	X	X		X				X	X			6
Costa Rica	X				X		X	X	X	X	X		7
Côte d'Ivoire	X	X	X				X		X		X		6
Cuba	X	X	X				X		X	X	X		7
Cyprus	X	X					X						3
Czech Republic	X	X	X	X	X	X	X		X		X		9
Djibouti	X	X							X	X			4
Dominica			X				X		X	X			4

COUNTRIES	01	02	03	04	05	06	07	08	09	10	11	12	Total
Dominican Republic	X	X	X				X	X	X				6
Ecuador	X	X	X	X		X	X	X	X	X	X		10
Egypt			X				X		X		X		4
El Salvador	X	X				X	X		X		X		6
Estonia	X	X	X	X	X	X	X	X	X	X	X		11
European Community	X	X	X	X	X	X	X	X	X	X	X		12
Fiji									X				1
Finland	X	X	X	X		X	X		X	X	X		9
Gabon	X		X				X		X				4
Gambia	X	X	X	X	X	X	X	X	X	X	X		12
Ghana		X	X		X		X		X		X		6
Grenada		X					X		X	X			4
Guatemala	X	X					X		X		X		5
Guinea	X					X		X	X		X		5
Guinea-Bissau									X	X			2
Guyana	X	X					X		X		X		5
Haiti	X		X		X		X		X				5
Honduras	X						X		X		X		4
Hong Kong	X	X	X	X			X		X	X	X		8
Hungary	X	X		X	X	X	X	X	X	X	X		10
Iceland	X	X	X	X		X	X		X	X	X		9
India	X	X	X				X	X	X				6
Indonesia	X	X	X				X		X		X		6
Israel	X	X				X	X						5
Jamaica	X	X			X		X	X	X	X	X		8
Japan	X	X	X	X	X	X	X	X	X	X	X		11
Kenya		X					X		X		X	X	5
Korea RP	X	X	X	X		X	X		X		X		8
Kuwait	X		X	X		X	X	X	X	X			8
Kyrgyz Republic	X	X	X	X	X	X	X	X	X	X	X		11
Latvia	X	X	X	X	X	X	X	X	X	X	X		11
Lesotho	X	X	X	X	X	X	X		X		X	X	10
Liechtenstein	X	X		X	X	X	X		X	X	X		9
Macau	X						X		X				3



COUNTRIES	01	02	03	04	05	06	07	08	09	10	11	12	Total
Singapore	X	X	X		X	X	X	X	X	X	X		7
Slovakian Republic	X	X	X	X	X	X	X		X		X		9
Slovenia	X	X	X	X	X	X	X	X	X	X	X		11
Solomon Islands	X		X				X		X				4
South Africa	X	X	X	X		X	X		X		X	X	9
Sri Lanka		X							X				3
Suriname		X							X		X		3
Swaziland	X							X	X				3
Sweden	X	X	X	X		X	X		X	X	X		9
Switzerland	X	X	X	X	X	X	X		X	X	X		10
Tanzania									X				1
Thailand	X	X	X	X	X	X	X		X	X	X		10
Togo			X						X	X			3
Trinidad and Tobago	X	X	X		X		X	X	X	X	X		9
Tunisia		X					X		X				3
Turkey	X	X	X		X	X	X	X	X		X		9
Uganda		X							X				2
United Arab Emirates	X	X	X			X	X		X				6
Uruguay	X	X					X		X	X	X		6
USA	X	X	X	X	X	X	X	X	X	X	X		11
Venezuela	X	X	X				X		X	X	X	X	8
Zambia	X		X					X	X				4
Zimbabwe		X					X		X				3
<b>TOTAL</b>	<b>90</b>	<b>87</b>	<b>62</b>	<b>39</b>	<b>34</b>	<b>40</b>	<b>95</b>	<b>34</b>	<b>116</b>	<b>51</b>	<b>71</b>	<b>8</b>	<b>727</b>

**Legend**

- 01. Business services
- 02. Communication services
- 03. Construction and related engineering services
- 04. Distribution services
- 05. Educational services
- 06. Environmental services
- 07. Financial services
- 08. Health-related and social services
- 09. Tourism and travel-related services
- 10. Recreational, cultural and sporting services
- 11. Transport services
- 12. Other services not included elsewhere

## **Chapter 4**

### **Intellectual Property Rights and the US-SACU FTA:**

**A good reason to walk away from the deal,  
or cutting off one's nose to spite one's face?**

Marion Hummel<sup>1</sup>

#### **INTRODUCTION: THE PROBLEM**

The 'on again, off again' nature of the FTA negotiations between the SACU and the US since 2003 is due in large part to ideological differences in the approach of the two parties (and even, to some extent, within SACU) to issues of respect for, access to, and the allocation of resources towards basic and/or strengthened protection of intellectual property rights (IPR). In particular, the underlying question is whether IPR are – or, in fact, even ought to be – a priority for developing countries in general, and SACU in particular, given the overriding social welfare imperatives, and the developing and least-developed country (LDC) mix of this region.

The UK commission on IPR, and many others, support the view that in seeking to craft international IPR systems, there should be regard for the economic needs and stages of development of member states:

*Developed countries often proceed on the assumption that what is good for them is likely to be good for developing countries. But, in the case of developing countries, more and stronger protection is not necessarily better. Developing countries should not be encouraged or coerced into adopting stronger IP rights without regard to the impact this has on their development and poor people. They should be allowed to adopt appropriate rights regimes, not necessarily the most protective ones.<sup>2</sup>*

---

<sup>1</sup> B.Com, LLB, LLM (International Trade Law), Attorney of the High Court of South Africa.

<sup>2</sup> Prof. John Barton, Commission Chair, and George Osborne, Professor of Law, Stanford University, as quoted in 'A call to improve intellectual property rights of developing countries', Science in Africa: Africa's First On-Line Science Magazine, <http://www.scienceinafrica.co.za>.

The commission recommends that the 'flexibilities' inherent in the agreement on TRIPS<sup>3</sup> must be taken advantage of by developing countries, and makes some 50 recommendations for the alignment of IP protection with poverty-reduction goals of such developing nations (many of which are discussed below). Primary concerns highlighted by the commission's report relate to the cost-increasing effect of the global IP system on development, and on the delivery of welfare benefits in the areas of agriculture, health, education and information technology. The concern is that the strengthening of IPR will weaken competition and withhold access to information needed to develop improved technologies/medicines.<sup>4</sup>

The solution to the need to balance strong IPR to encourage innovation and development needs proposed by the commission is that '[d]eveloped countries should pay more attention to reconciling their commercial self-interest with the need to reduce poverty in developing countries, which is in everyone's interest'.<sup>5</sup> In addition, it is reported that the commission 'declared the internationally mandated expansion of intellectual property ... rights [are] unlikely to generate significant benefits for most developing countries and likely to impose costs, such as higher priced medicines and seeds. This makes poverty reduction more difficult.'

Nevertheless, the commission admits that had the incentive provided by patents to invest in the discovery and development of medicines by the private sector not existed, then such investments would most likely not have occurred, to the detriment of both developed and developing nations. It then declares that the global IP system 'hardly plays any role in stimulating research on diseases particularly prevalent in developing countries'.<sup>6</sup>

In the general rhetoric that all developing countries should refuse to strengthen TRIPS in the interests of welfare delivery there is little recognition of the caveat expressed in the commission's study: 'For more technologically advanced developing countries [read South Africa], the balance [between the benefits of IP protection and their costs] is finer. Dynamic gains may be achieved through IP protection, but at costs to other industries and consumers'.<sup>7</sup> Additionally, there seems to be no ready solution for the 'unbalancing' effects that continuous and poorly controlled justification of all manner of infringements of IPR for the greater good will have on the incentive to innovate, nor is the fact recognised

---

3 [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm).

4 'A call to improve intellectual property rights of developing countries', op. citop xir.op. cit.

5 Ibid.

6 Ibid.

7 Commission on IPR, 'Integrating intellectual property rights and development policy'. Executive summary of the Report of the Commission on Intellectual Property Rights, 2nd ed. London, November 2002, <http://www.iprcommission.org>.



that, not only the big multinationals (and by analogy, the 'rich' countries'), but, in fact, individual innovators and creators in both the developed and developing world will end up paying for the costs of providing welfare benefits to poor consumers in the developing world, leaving a potentially unsustainable, chaotic and commercially unviable global IPR 'deadlock' in its wake. Surely it cannot be beneficial to anyone to drive innovation underground? In the current debate, there seems to be little if any room available for the rights holders, innovators and creators to choose whether to be altruistic or not, though many innovators already have, and would in future, display altruism, given the choice. The risk is that innovators and creators begin to seek other ways of protecting their knowledge outside of the IPR system, namely through secrecy and selling their knowledge to the highest bidder.

It is often stated that the costs of implementation of TRIPS-compliant legislation and its enforcement are too high for developing countries and LDCs, and thus they need to be assisted by using the flexibilities inherent in TRIPS to delay and avoid these obligations as far as possible. It appears to be anathema that TRIPS-Plus measures in any shape or form be introduced into the local legislature of developing countries or LDCs, even if such measures might in fact assist their own innovative/creative industries in the protection of IPR in the digital age, the massive impact of which is only being contemplated now, more than a decade after TRIPS came into effect.

Furthermore, there seems to be a worrisome lack of involvement and co-ordination by South African and SACU organised business in the IPR debate, many of whom have a tendency to simply refer any query regarding their position on IPR to their IP attorneys. It is becoming increasingly urgent that South African business become familiar with the issues surrounding IPR, not only locally, or with international trading partners such as the US, but even more crucially given that South African firms are some of the more active investors in the region. It is therefore important that the disparities vis-à-vis IPR attitudinal, legislative and enforcement resource allocation and general harmonisation within SACU themselves be discussed and solutions found, leading towards a common goal of encouraging, developing and protecting IPR. South African business interests in IPR have received very little airtime compared to the protagonists of defiance of the IPR and international trade rules in the interests of human rights issues, and certainly little leadership has yet been shown in developing solutions that could potentially satisfy the needs of all stakeholders, including US business interests.

It will be seen in this chapter that more than the wilful destruction of IPR is needed to provide the poor with medicines, access to information and education, and affordable food, and that South Africa has a definite interest in a stable and well-regulated IP system, and thus the latter concepts ought to be the focus of the beginning of a compromise that might allow the IPR clause in a potential US-SACU FTA to move forward. The longer South Africa Inc., through lack of full involvement of all of its stakeholders, sits on the fence and refuses to properly assess, and where necessary address, the IPR direction of this country and the region, the more the local players involved and the international participants make rules to suit themselves.

This is particularly true in the case of South Africa, which, as a more technologically advanced developing country, has much to gain from a stable, strong and well-enforced IPR system, certain current failings of which could be addressed through collaborative technical assistance and financial aid programmes that could conceivably be built into a US-SACU FTA. Thus the fine balance between South Africa's strategic future and its need to address massive welfare delivery concerns means that South Africa Inc. needs to put more, and not less, effort into establishing exactly what the balance between IPR holders and society needs to be.

Unfortunately, this is not happening: it has taken some three years for the national debate on geographical indicators (GIs) to gain small momentum in South Africa since the National Consultative Forum prior to Cancun in 2003. The Trademarks Examination Office is in perpetual disarray, despite ongoing efforts to make the national IPR office Madrid Protocol-compliant (18 months for registration).<sup>8</sup> The Patents Office, in the words of visiting US Professor James Chandler in 2003, would theoretically allow the patenting of the wheel, due to the lack of an examination-based system, which, it is said, is too expensive for a 'little' country like South Africa to implement. There are certain other 'weaknesses' in the South African IPR regime that both South African business and US companies frequently point out, a few of which are listed below:

- First and foremost is the lack of resources committed by government itself to stronger enforcement of IPR. This is a factor of an alleged lack of capacity regarding the management of crime in general, overloaded criminal courts, and insufficient IP expertise in the general criminal courts and among customs officials. Although much has been done over the past few years to train and empower prosecutors, police and customs officials in collaboration with the

---

8 The author is personally aware of trademarks that were lodged in 2001 and have still not been registered.

private sector, the rate of criminal activity such as copyright and trademark theft and piracy increases at a staggering annual rate (e.g. the South African Federation Against Copyright Theft [SAFACT] figures on piracy indicate 6 000 illegal DVDs were confiscated in 2001, while 81 000 were confiscated in 2002<sup>9</sup>).

- Secondly, it takes unreasonably long to register a trademark in South Africa. If one considers this issue from a business viewpoint, this inexplicably slow registration process makes the 'ownership' of the trademark dependent upon common law principles relating to the intended 'owner's' use of it in the South African market. If one understands the type of finance required to successfully develop, brand, market and build a brand or trademark, then it is obvious that the trademark examination delays at the Companies and Intellectual Property Office (CIPRO) are causing unacceptable uncertainty and risk for South African trademark holders, particularly if South Africa intends to be more proactive in building its GIs and other household names to become the multinationals of the future.<sup>10</sup>
- Current levels of fines and penalties for all manner of IPR infringements, together with the practice of acceptance of minor admission of guilt fines in order to prevent backlogs in the courts, are insufficient to act as a deterrent – making piracy one of the highest-profit, lowest-risk 'industries' for organised crime. The low level of deterrence in the South African legislative framework is arguably not TRIPS-compliant.
- It appears that there is some level of policy disconnect in South Africa. The country is generally perceived as being 'soft' on copyright piracy and trademark theft (flagrant examples of which can be seen at most major city intersections, often in full view of Metro Police officials), and thus in this respect it is at odds with its TRIPS obligations to enforce IPR. Yet numerous successes have been and continue to be achieved in collaboration with private sector rights holder associations by the South African Police Service (SAPS), the South African Revenue Service (SARS) and even the National Prosecuting Authority against pirates, which are made public almost daily.<sup>11</sup>
- Furthermore, section 13 of the Copyright Act, which, some business interests have stated is 'poorly expressed and ambiguous', provides for exceptions

---

9 SAFACT statistics, <http://www.safact.co.za>.

10 SACOB (South African Chamber of Business) Working Group on Intellectual Property, *Trademark Sub-group Submissions*, 2003, not for general publication.

11 See SAFACT website, <http://www.safact.co.za>.

for educational and library use, and arguably does not conform to the Berne Convention's three-step test.

- The obstacles to enforcement of copyright by rights holders are myriad and include the difficulties in securing evidence of infringements (search orders are unnecessarily difficult to obtain by rights holders); the lack of specialised IP courts and lack of IPR experience among the judicial officers in the ordinary courts; the lack of certain presumptions vis-à-vis copyright subsistence and ownership; the lack of statutory damages, which reduces the difficult burden of proof of actual damages suffered by the IP owner; and the ineffective penalties and inefficiency in the South African criminal justice system. The latter shortcomings make civil action disproportionately expensive and uncertain, and thus South African copyright legislation has been regarded by the International Intellectual Property Alliance as being TRIPS-incompatible, as it is unnecessarily burdensome on IPR holders, in that it provides a barrier to enforcement of IP rights,<sup>12</sup> resulting in an unbalancing of the copyright regime in South Africa in favour of 'users' of such copyrighted works.
- The above difficulties are compounded by lack of legislation dealing clearly with IP infringements created and facilitated by the Internet and other digital technology. There is an urgent need for digital copyright provisions and more effective notice and take-down capabilities, as well as clear and effective anti-circumvention provisions to assist rights holders in the digital age.
- The lack of an examination system in the South African patent system means that a patent can be challenged in the future, and is thus not necessarily secure. Additionally, the costs of obtaining a patent are generally out of reach for many innovators, and this could be addressed through the capacity-building clause of the potential US-SACU FTA, wherein a petty patent system may be developed. The former shortcoming in the system is not viewed with as much concern by IP practitioners as some of the new amendments to patent law and other legislation having an impact on patent law, for example:
  - The Medicine and Related Substances Control Act and Regulations have been found to be unclear in their formulation. For example, in the case of parallel importation, it is not clear whether the provisions relate to the importation of generics or whether only the importation of patented medicines from other jurisdictions where such medicines have a lower price is referred to. The patent holder is exposed to further legal uncertainty in that there is no provision for notice to be given, either to the patent holder

---

12 SACOB Working Group on Intellectual Property, *op. cit.*

or the Registrar of Patents, during the application or grant of the permit for parallel importation.<sup>13</sup>

- The effect of the overly broad definition of an 'indigenous biological resource' in the National Environmental Management Biodiversity Act, which aims to bring South African legislation into line with the Convention on Biological Diversity, is to prohibit anyone in South Africa from working with any indigenous biological resource unless a permit is obtained. The permit may only be granted once a benefit-sharing agreement has been made between the bioprospecting company and the person or community providing access to the 'indigenous biological resource'. Given the lack of objective proof of 'ownership' by persons or communities of such resources, it is clear that the process of obtaining a permit in this regard could be extremely lengthy; and, moreover, expensive contractual arrangements with entirely the wrong party can easily result.
- The new disclosure requirements relating to genetic or biological resources and traditional knowledge of the Patents Amendment Act have been criticised as unnecessarily burdensome on patent applicants in that the degree of relationship between all material used to substantiate a patent and the origin of such resource is unclear. It will also create substantial and unworkable delays in patent applications, which may well prejudice the applicant. Additionally, it is felt that the validity of a patent ought not to be compromised where any use of genetic resources is not disclosed. Thus, certain South African business interests and IP practitioners echo the sentiment of US business in that they too believe that other mechanisms ought to be used to implement the policy of disclosure, but that the integrity of patents ought not to be compromised in an unfair manner.
- Current delictual damages as a remedy for patent infringement are seen as an insufficient deterrent, as the onus of proof is too great. The alternative of a 'reasonable royalty' is often difficult to quantify. Business would benefit from legislative requirements that facilitate an accounting of the profits made by the infringer and the introduction of punitive damages for wilful infringement, as is being considered internationally.
- The lack of specialised IP courts leads to the unfortunate necessity to come to interim arrangements with alleged patent infringers, which is again seen as an unreasonable burden on the patent holder.<sup>14</sup>

---

13 Ibid.

14 Ibid.

- The Counterfeit Goods Act prohibits importing and dealing in counterfeit goods, and provides for criminal sanctions and wide powers of search and seizure for officials of the SAPS and SARS as 'inspectors' under the Act. In a sense, this Act attempts to deal with the difficulties of search and seizure in respect of copyright infringements; however, the ongoing lack of capacity in these departments means insufficient enforcement can be carried out compared to the rising levels of copyright theft and piracy. This Act has rectified some of the difficulties of copyright holders as described above, as seen by the increased tendency to use mechanisms other than the Copyright Act to enforce IP rights. Certain difficulties still exist, however, as it is not always clear whether procedures relating to counterfeit goods ought to be carried out under the Counterfeit Goods Act or the Criminal Procedure Act, and there is a lack of sufficient goods depots for storage of seized counterfeit goods, which the Department of Trade and Industry (DTI) needs to establish in sufficient quantities and strategic locations in the major import centres.<sup>15</sup>
- The Merchandise Marks Act prohibits the application of false trade descriptions to goods and their sale, and gives the minister of trade and industry the power to prohibit the use of certain marks. It provides for some criminal sanctions lacking in the Trademarks Act, but is lacking in that it does not include services, and thus its scope ought to be extended from the current purview of goods only. While penalties under this Act have attempted to increase the deterrence factor (for the first offence, an increase from R100 to R5 000 maximum fine per article to which the offence relates), it has been held that profits made from infringing trademarks significantly outweigh such fines, and thus these fines ought to be increased even further. The impact of slow registration of trademarks on the efficacy of this Act; the lack of warehousing facilities for storage (the high costs of which the rights holder must bear) of allegedly counterfeit goods until the end of the court case, whereupon they may be disposed of under the direction of the minister of trade and industry; the unnecessarily burdensome and time-consuming requirements relating to the formalities of getting a trademark prohibited under the Act; and lengthy delays between the Trade Marks Office and the signature of the prohibition orders by the minister of trade and industry make resort to this Act less effective for rights holders.<sup>16</sup> The latter time delay is particularly relevant in the context of the application for prohibition of marks in the event of a major

---

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

sponsorship event, and thus the avoidance of 'ambush marketing' may be frustrated.

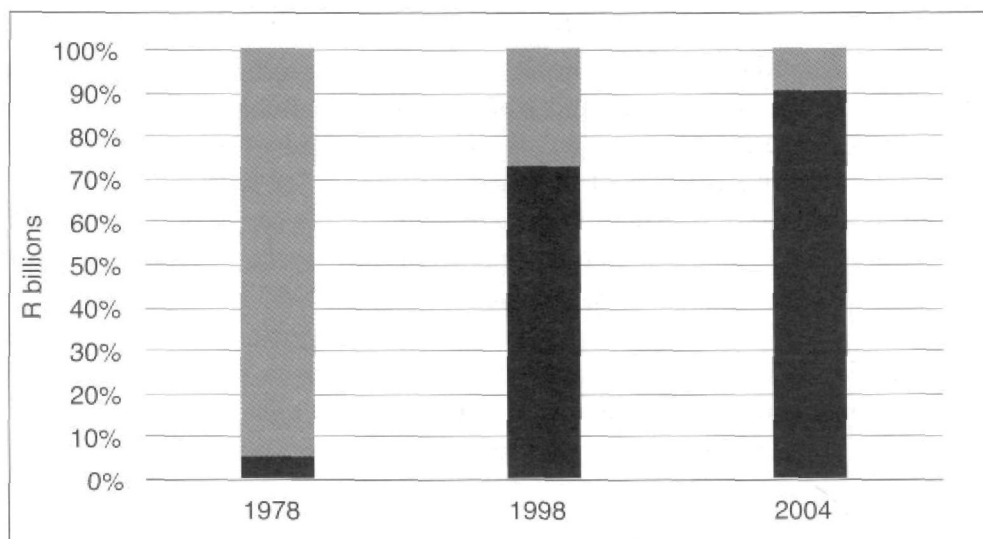
- In general, the lack of proper and sufficient consultation in making amendments to IP legislation and administrative procedures is lamented throughout submissions by business, and this is compounded in the context of the US-SACU FTA negotiations, where the specifics requested by the US are not openly debated, due to the ostensible need for confidentiality.
- The above leaves us with the uncomfortable question: Is South Africa serious about retaining and building upon its innovative leadership on the continent, or does it intend to keep selling commodities until they run out?

It appears through various recent strategic initiatives of government such as the DTI's draft Industrial Strategy and the Department of Science and Technology's Advanced Manufacturing Strategy that the intention is to move beyond mere resource supply, and into value-added industries. Thus the country is steadily being geared towards a 'knowledge economy'. However, for this to become a sustainable and successful transition, its IPR regime must take on a vital role in facilitating, attracting, establishing and protecting all manner of innovation and creation.

Furthermore, in the context of increasing regionalisation and South-South alignments, South African policy makers and stakeholders need to honestly examine politically awkward issues such as: How safe is South African IP once transferred to other countries, including other developing countries making use of TRIPS flexibilities? How much knowledge are SACU businesses willing to share with the South, let alone within SACU itself, and do SACU's fellow developing country and/or LDC partners take effective steps to protect its IP? Does South Africa, in some instances, not have interests in incorporating TRIPS-Plus measures in its FTAs with other developing countries? Interestingly, in this regard, South Africa itself may wish to impose some greater protection for its intangible assets in the region before committing itself to cross-border transfers of technological innovation.

Additionally, there is currently little recognition by policy makers in the region of the powerful impact that IP assets have on the intrinsic value of business, whether in the developed or developing world. The incredible reversal of the importance of intangible assets (on average at 70% of the total value of the company) versus tangible assets in business over the past ten years is startling (see Figure 1).

**Figure 1: Relative significance of intangible assets compared to their tangible peers in business, 1978, 1998, 2004**



Accordingly, the increasing commercialisation of IPR must be taken into account when debating the effects of the strengthening of the IPR system in any country, and even more so in SACU, where the need to grow the economies of all SACU states is an imperative for improving the lives of so many poor people. It is interesting to note that '[t]oday, licensing – the sharing and distribution of IP assets – rather than litigation, is increasingly the *raison d'être* of patents.'<sup>17</sup>

Thus it must also be recognised that the long-term dilution of the global IPR system through the use of TRIPS flexibilities or any delay in fully implementing TRIPS and/or in some cases, TRIPS-Plus provisions, could potentially result in stagnation and/or diminution of SACU companies' value globally. Considering the amount of losses in terms of counterfeit goods of every description that South African businesses incur through the notoriously 'fluid' SACU borders, and the lack of cost-effective solutions for business to protect its interests in IPR in both the legislative mechanisms and the poor allocation of resources for enforcement throughout the SACU region, it is surprising that so little lobbying has been done to at least commence a process of legislative harmonisation and policy co-ordination on IPR within SACU.

It seems that the IPR debate in this region, and thus the likely position that SACU will adopt vis-à-vis the IPR clause in the US-SACU FTA negotiations, is

<sup>17</sup> Idris K, *Intellectual Property: A Power Tool for Economic Growth – An Overview*, 2<sup>nd</sup> ed. WIPO Publication No. 888.1. Geneva: World Intellectual Property Organisation (WIPO), 2003.



informed first and foremost by the need to provide welfare benefits through a weakening of the IPR system, rather than through a factual scoping of how this will affect business and, consequently, the economy in the region.

SACU, furthermore, still has not moved further in terms of expanding its jurisdiction to include services and IPR, among other things, yet it continues to negotiate full FTAs that impact on more than goods. Rather than accept the usual 'coverall' excuse of a lack of capacity, one is left with the impression that this is a matter of lack of political will owing to the above prioritisation of welfare delivery, evidenced, among other things, by South Africa's alignment with Brazil, Argentina and others in the call for a World Intellectual Property Organisation (WIPO) development agenda – one of the main aims of which is to assist developing countries to make maximum gains from TRIPS flexibilities.<sup>18</sup> However, there are some legitimate concerns regarding the WIPO development agenda for business in SACU, as expressed by international business of both developing and developed countries via the International Chamber of Commerce (ICC):

WIPO already cooperates actively with DngCs [Developing Countries] and LDCs to 'maximize the use and effectiveness of IP as a tool for economic, social, and cultural development' under a so-called 'Cooperation for Development Program', thereby improving their capability to process and make better use of the IP system. Moreover, the existing Permanent Committee on Cooperation for Development Related to Intellectual Property (PCIPD) also seems to be involved in at least some of the issues now raised with respect to the Development aspect of the intellectual property system .... It is therefore clear that WIPO already has a mandate to discuss issues concerning the effect of intellectual property on development and, as noted above, has an active work programme in this regard. Therefore ICC does not see a need to pursue an amendment to WIPO's Convention to continue that work programme. It is also clear that observers from business, academia and civil society are already given an appropriate opportunity to participate in WIPO's discussions.<sup>19</sup>

While the adequate protection of IPR is a necessary precondition for development as a tool to promote innovation, creativity, cultural diversity and technological

---

18 Brazilian submission on WIPO Development Agenda, <http://www.cptech.org/ip/wipo/brazil09302004.html>.

19 ICC (International Chamber of Commerce), 'Preliminary views on a proposal for the establishment of a development agenda for WIPO', ICC Document No. 450/1006, 19 October 2005, p.1, <http://www.iccwbo.org>.

development, additional measures are required by countries to make use of the full potential of such rights.

It is of utmost importance to establish that the TRIPS objective concerning 'the promotion of technological innovation and ... the transfer and dissemination of technology'<sup>20</sup> represents a commitment taken by the governments of member countries, both of developed and developing countries, as well as LDCs. Developing countries are, however, expected to assist developing countries and LDCs in the implementation of TRIPS by means of appropriate co-operation. Governments are invited to look seriously into possible new mechanisms, consistent with TRIPS, to foster the transfer of technology without resorting to simplistic solutions that might inadvertently jeopardise the goal of the IP system to promote innovation and creativity by creating additional burdens on IP owners, e.g. the Brazilian Technological Innovation Bill (since its Trade Policy Review, approved in the Brazilian Congress), which seeks to promote partnership arrangements between universities and enterprises for the development of new products and processes, and to divert more resources from the private sector into R&D. It also aims at increasing patent registrations. It is seen as a key policy instrument to foster the transfer and dissemination of knowledge.<sup>21</sup> Moreover, particular emphasis should be given to compliance with existing IP rules, including, but not limited to, those established by TRIPS.

Apart from adequate IP legislation and an effective enforcement regime, a well-functioning and well-funded IP office is an essential prerequisite for an IP system to work properly. Again,

without a deep involvement of each government in establishing in its own country an appropriate infrastructure to process and make use of IP Rights, nothing practical will result from the discussions that we expect to have as an outcome of the current proposal for a Development Agenda in WIPO.<sup>22</sup>

Nevertheless, it is clear that the predominant strategy is that some developing countries (and this apparently includes South Africa, and thus, by implication, SACU) are seeking assistance in making increasing use of current 'flexibilities'

---

20 TRIPS Article 7: Objectives: 'The protection and enforcement of Intellectual Property Rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.'

21 Brazil, Trade Policy Review document no. WT/TPR/G/140, para. 23.

22 ICC, op. cit, pp. 1, 2.

in the TRIPS regime, specifically in terms of their commitments to enforce and protect IPR, and that this strategy is being pursued through the development agenda now acceded to by WIPO, but which is apparently already struggling to make headway in the same way as the WTO Doha Round.

It is felt that a 'one-size-fits-all approach to intellectual property protection, reflective of extremely high levels of IP Protection such as those under the US law and imposed on all countries, rich and poor, may do more harm than good in developing countries'.<sup>23</sup> However, we need to consider whether the proponents of unlimited and uncompensated free access to medicines, educational materials, food security, and information and communications technology (and it is unlikely that this list will be exhaustive, given that development needs pervade so many more areas in which IPR may be challenged for the greater good) are proposing anything remotely sustainable for business in the long term.

Could it be that the resistance by developing countries to placing proper emphasis on and committing resources to fully implementing TRIPS, despite years of staggered implementation obligations, is more about the need to commit resources to obtain affordable technical access for their own innovators and creators to the benefits of the local and global IPR system rather than a 'uniquely African' resistance to the fundamental concept of a worldwide system of commercial reward for creativity and innovativeness? What of the individual innovators and creators, of which there are many in Africa? Would Africa, and South Africa in particular, truly find no benefit from strengthening IPR in many instances, despite the initial costs?

What is ironic about the IPR debate in general is the conflicting emphasis on interests, which again indicates that, in fact, developing countries are not entirely without interests in IPR. The UK Commission on IPR ...

recommends developed countries respond constructively to the concerns of developing countries about the patenting of their genetic resources and associated traditional knowledge. Patent applicants should be required to disclose the geographic source of the genetic material from which their 'invention' is derived.<sup>24</sup>

And naturally, the communities holding such knowledge need to be fairly compensated for it. Yes, the traditional concept of IPR is individually driven, and yes, African traditional knowledge systems are communally owned, but are

---

23 Aneca C, *What Is OXFAM's Position on TRIPS?* Oxfam America, 2006, <http://www.oxfamamerica.org>.

24 'A call to improve intellectual property rights of developing countries', op. cit.

these reasons to refuse to participate fully in the global system, or can it be an incentive to create and address this difference from within?

Just how clearly will the espoused WIPO development agenda be able to distinguish those instances when it is acceptable to infringe, in the name of the greater good, the IPR of creators and innovators and those who provide the incentives by supporting, marketing and paying for the latter's work (who often become the rights holders), and those when such practices may be deemed common theft, in respect of which businesses may have some recourse?

More and more, this debate seems to be about far more than IPR, and the risk arises that the proponents of a reduction in the strength of the global IPR regime in the name of the 'development of the greater good' will compromise the long-term concept of fair return for innovation and imagination in the name of a short-term, but potentially devastating, unbalancing of interests in favour of the consumers of IPR, without necessarily looking further for long-term innovative solutions to this most complex of problems:

But overall, IP rights are only one factor among many in the development process. Their importance should be recognized, but not overstated. Even the complete absence of IP Rights would not solve the lack of sufficient resources for adequate health facilities, health workers and medicines for all in developing nations.<sup>25</sup>

'In particular, countries need other measures to stimulate development in the interests of poorer people, including increased public funding for health and agricultural research. The IP System is not well suited to encouraging this.'<sup>26</sup>

In essence, then, the US insistence during the potential US-SACU FTA negotiations that SACU look seriously at the question of IPR and what it means for each developing country that makes up its whole is a necessary requirement for the future of SACU and for its relations with other trading nations, whether developed or not. The decision as to how much SACU is willing to accommodate the US in the IPR clause of this agreement is so much more than about IPR – it is also about political alignment and economic ideology. One may say, after digesting what follows in this chapter, that in certain instances, SACU could, in

---

25 Gill Samuels, Commissioner and Senior Director of Science Policy and Scientific Affairs (Europe) at Pfizer Ltd, Sandwich, UK, cited in 'A call to improve intellectual property rights of developing countries', *op. cit.*

26 Prof. John Barton, Commission Chair, and George Osborne, Professor of Law, Stanford University, as quoted in 'A call to improve intellectual property rights of developing countries', *op. cit.*

making the wrong choices here, indeed potentially cut off its nose in order to spite its face.

The question remains as to how the IPR system in this region will look in the future – will innovation, and academic and medical research become state-directed, -controlled and -owned, it being unviable for private enterprise to become involved, since it will not be in a position to recoup its investment and make any returns on that investment, or will SACU encourage dynamic entrepreneurial solutions that will attract creative investment due to predictable commercial reward in an open market? Will SACU be part of a multilateral solution that looks widely at development issues and that incorporates, in a manner that is not destructive of the whole, the production and delivery of viable welfare benefits while balancing the need to encourage and to grow economically from independent innovation and dynamic technology transfer? Can there be a workable mix?

Whether SACU intends merely a limited 'preferential arrangement' or a more all-encompassing FTA with any trading partner, the IPR issue must begin to influence the debate more rigorously than it has done to date – the twenty-first century is the information/knowledge age, and it does developing countries no good to address full involvement in the international IPR system, which makes up a large component of this new age, only when they are 'good and ready'. More than any region in the world, the leaders in SACU have an obligation to act quickly and decisively in creating solutions for this poorest section of the globe, and such solutions ought not to be imposed by any other party, whether developed or not, whether North-South- or South-South-aligned or not. Even more so, SACU is uniquely placed to design its own solutions and then to use its knowledge to begin to benefit its peoples and those of other regions through the economically viable exchange of all types of IPR. SACU is not without creativity and innovativeness, nor is it without immense human capital (both individual and communal) in terms of intellect and traditional knowledge – it is how this talent is nurtured, encouraged and protected in the future that will lead to much-needed solutions to the apparently insurmountable challenges this region faces.

IPR is one of the keys to achieving this, and SACU leadership now have a once-in-a-lifetime opportunity to lead the IPR debate in a direction favourable both economically and socially to the future of the region. Time will tell whether short-term interests that will have a negative impact on the future innovativeness of the region and that will continue the cycle of abject poverty and dependence will prevail, or whether true leadership will emerge to secure the region's long-term success in this world.

Finally, it is worth quoting from the Swedish National Board of Trade on the long-term benefits of strengthening IPR in general:

In the longer term, however, the analysis indicates that an effective intellectual property rights system can have positive economic consequences in the developing countries, particularly in the form of transfer of technology, whether this is done via direct foreign investments or via licensing. However, one important factor in this context is the capacity of each country to absorb new technology. In consideration of this, most analyses propose that developing countries should focus their resources on measures that aim at better governance, educational initiatives, targeted technical incentives and an improved competition policy.<sup>27</sup>

In any event, Article 67 of TRIPS obliges developed nations to provide technical assistance to developing countries and LDCs, including assistance in the preparation of laws and regulations on the protection and enforcement of IPR. The matter of capacity-building assistance by the US in formulating an acceptable IPR clause in the potential US-SACU FTA will thus be paramount. It may be that SACU would wish the US to go TRIPS-Plus in exceeding the obligations of Article 67 in this regard.

While TRIPS does provide flexibilities, these are, and have always been, short-term concessions – for the IPR system to work optimally, all countries in the ‘global village’ need to make preparations to participate fully in this system if they wish to reap its rewards. It might, in fact, even advantage some developing countries to leapfrog other developing countries in instituting stronger IPR systems in order to achieve more quickly their goals of attracting foreign direct investment (FDI) and technology transfer – such steps certainly send a strong message and will likely harvest the rewards of greater technical assistance and funding. The US can be a useful ally in accessing these benefits and in moving this region from a dependence on finding ‘loopholes’ and ‘flexibilities’ in international commitments to attracting the partnerships required to boost growth to an extent where such dependencies can potentially be left behind. However, making the best use of any opportunity, such as obtaining the assistance of a financially and technologically powerful ally as part and parcel of the US-SACU FTA, requires preparation and a clear vision for this region’s future.

Sadly, very little vision seems apparent, hence the ongoing, confused and directionless support for the delay and reversal of all manner of international obligations in the name of increased dependence on the goodwill of the developed

---

27 Swedish National Board of Trade, *Consequences of the WTO-agreements for Developing Countries*, p. 242, cited in ICC, op. cit.

world in all manner of things, including free access to others' IPR. This does not bode well for a dynamic future for this region. The making of any omelette requires the breaking of a few of one's own eggs. The concept of creating a vision away from poverty and dependence for this region similarly requires some painful allocation of its resources towards its own future development. Only then will we finally be in a position to put away the begging bowl.

#### **THE EUROPEAN FREE TRADE ASSOCIATION (EFTA) EXPERIENCE: SACU SAYS 'NO WAY' TO TRIPS-PLUS**

Unfortunately, it appears from the above discussion that South Africa Inc., *sans* serious involvement of organised business, is already very firmly on a path that holds that TRIPS-Plus cannot be accommodated in a bilateral agreement of any nature and that, indeed, increased resources must be allocated to making use of the flexibilities in TRIPS to potentially benefit the development imperatives that overwhelm this region.

Given the loss of face that would no doubt accompany any reversal of this position, is there much that can be said for any accommodation of US interests in increasing the strength of the global IPR system through the inclusion of so-called TRIPS-Plus provisions in the IPR clause of the potential FTA? And if not, does this mean that the US-SACU FTA is doomed?

In answer to these questions, it is important to note that IPR matter very much to the US. It is very aware of the ever increasing value of IP in its industries, and requires others to respect the global IPR system in order to increase, secure and retain its current investments, wealth and hegemony in IPR. It is also more than equipped to offer carrots (incentives in the form of preferential access to the massive US market) and sticks ('Section 301' sanctions) in order to make a persuasive argument.

The South African and SACU position on the extension of IPR to TRIPS-Plus already has a precedent in the SACU-EFTA agreement. Essentially, the stance in this negotiation, similarly to that in the US SACU-FTA negotiations to date, was that anything remotely TRIPS-Plus cannot be accommodated. It is doubtful, prior to forming this position, that any thorough investigation has occurred into whether this might potentially benefit South Africa's own industries. In fact, due to the general lack of preparation on this issue, South Africa seems to prefer to leave out IPR altogether or, at most, to 'negotiate' a clause that goes no further than the country's current obligations in the WTO.

What is not understood is that even a limited preferential trade agreement without IPR provisions is dangerous, in that South African goods would then enter markets without much protection. Several South African companies have had their ideas stolen in this way. So, even a 'safe' limited preferential agreement, entered into with more ease and speed than a full FTA, is not what it seems. South Africa's costly experiences in the port and sherry IPR debate in the South Africa-EU TDCA agreement ought to remain uppermost in our minds.

Yet SACU will come under ongoing pressure to begin to make steps in preparation to include IPR in the economic partnership agreement negotiations and the South Africa-EU TDCA review, among others. Indeed, South African business might well more enthusiastically support FTAs with developing nations of the South-South alignment if some strengthened IPR protection and regulatory certainty is incorporated into such agreements.

In any event, South Africa frequently alleges that it alone, of the SACU members, is TRIPS-compliant, and that the rest of SACU are still struggling to reach at least this initial plane of IP sophistication. Certain sectors of South African business would suggest that even South Africa is not entirely TRIPS-compliant, some aspects of which have already been dealt with in the introduction of this paper. In the meantime, business, government revenue and consumer health and safety in South Africa and SACU flounder under a tide of counterfeits, copyright and trademark piracy on every major street intersection, fraudulent products and an ever increasing organised crime portfolio.

Problems of attracting FDI and formal technology transfer, increasing unemployment, skills shortages and infrastructural deficits cause long-term delivery challenges for a regional economy that should innovate and create locally designed solutions and grow faster than all the other emerging developing world 'giants' simply to absorb and deal with its massive and increasing welfare obligations.

While South Africa has a budding creative industry in many technologies, cultural industries, GIs and medicines, among others, that need strong protection in light of the need to expand this economy at a rate requisite to absorb the many employment seekers currently dependent upon the state, it also has the highest HIV/AIDS figures in the world, and the need to provide access to medicines, food and education is ever increasing.

South Africa is the most powerful economy in Africa – it has the resources and capacity to innovate, and has a history of prominence in scientific 'firsts' in many new technologies. It is also an emerging film industry powerhouse, being both an attractive venue for production, as well as being recently acknowledged,



through the Academy Award-winning best foreign film, *Tsotsi*, as a powerful emerging creative force, though scores of pirated copies of this film hit the streets before it opened in the legitimate local market, seriously affecting profitability and long-term sustainability.

Nevertheless, the South African film industry may in time release revenues for government and the private sector approaching that of the other 'Hollywood' contender, 'Bollywood', as it will have the added benefit of appealing to the huge and relatively untapped African entertainment market, which in turn could lead to new employment opportunities and economic growth outside of the traditional commodities exports, provided that the IPR in the South African entertainment industry can be better protected and enforced than is currently the case. This will require amendments to copyright and trademark legislation; better regulation of Internet-assisted dissemination and digital copying of such materials; generally improved legislation to better equip enforcement officials in the digital and internet age; better and more cost-efficient access to IP registrations of all kinds; the allocation of more resources towards stricter enforcement; and stiffer penalties (including jail time) for pirates and for fraudsters selling harmful medicines, motor vehicle spare parts, etc.

However, as will be seen below, the strengthening of copyright, trademark and patent enforcement mechanisms, for example, is seen to be in conflict with the interests of those wishing to secure free flow of medicines, food security and educational materials for the poor – after all, 'the devil' is all in the detail of the legislation establishing, protecting and enforcing IP systems. Weak protection for one type of copyrighted work in the interests of educational advancement equals weak protection of the South African film and music industry.

However, while the country hesitates to take concrete steps to work out a regional copyright strategy that addresses the needs and concerns of copyright holders and educational imperatives for the poor, for example, certain other developing countries are taking extremely strong action against copyright theft and piracy:

- China recently announced the launch of its 100-day campaign, involving ten ministries and departments, aiming 'to clean up the audio-video and software market and to raise the awareness of both businesses and the public of fighting piracy'.<sup>28</sup> Severe punishments are to be meted out to those involved in the

---

28 'Campaign against piracy in China', <http://timesofindia.indiatimes.com>.

production, sale and rental of pirated audio-video products and computer software.<sup>29</sup>

- El Salvador has brought in new copyright laws, including a mandatory jail sentence for pirates of audio-video discs and software.<sup>30</sup>
- 'Malaysian authorities have crippled two DVD and video CD piracy rings, arresting 30 people and seizing nine duplicating machines worth 36m ringgit (5.4 million pounds).'<sup>31</sup>
- The Indian government has also had to take proactive measures to protect its film industry by strengthening optical disc legislation to assist in managing the piracy threat to its own industry.<sup>32</sup> 'Piracy is posing a serious threat to the film industry.'<sup>33</sup>
- In Australia, '[p]irates steal \$200m a year from Oz filmmakers',<sup>34</sup> and to get a proper perspective on the size of the global threat to the creative industries of all countries, developed or not, by copyright and trademark abuses, it is worth quoting the following brief excerpt from a 'Fight Against Piracy' News Desk article:

Pakistan's illegal capacity doubles every 18 months: When Ameer Riaz, an enterprising young man from Karachi, bought EMI Pakistan from its parent company in England back in 1993, he probably had visions of becoming the country's music guru. Not without reason. With exclusive rights to over 150 000 songs and other compilations, EMI Pakistan had the largest music archive in Pakistan. But within two years, Mr Riaz was forced to shut down and seek an alternative living.<sup>35</sup>

Given the phenomenal losses suffered by copyright industries due to the increasing ease with which digitised copying and distribution enables piracy to be committed, and the commensurate threat to the potential of the SACU local entertainment and cultural industries, an extension to the copyright term of another 20 years, as contained in the US 'Sonny Bono' Copyright Term Extension Act, might seem like a sensible move in order to recover some of those losses,

<sup>29</sup> Ibid.

<sup>30</sup> 'Fight Against Piracy' News Desk, <http://www.dvd.intelligence.com>.

<sup>31</sup> Ibid.

<sup>32</sup> 'Fight Against Piracy' News Desk, 'India to strengthen disc piracy laws', <http://www.dvd.intelligence.com>.

<sup>33</sup> 'Fight Against Piracy' News Desk, 'India considering strengthening anti-piracy legislation', <http://www.dvd.intelligence.com>.

<sup>34</sup> 'Fight Against Piracy' News Desk, <http://www.dvd.intelligence.com>.

<sup>35</sup> Ibid.

after the huge investments these industries and potentially their governments will need to make in order to achieve the potentially attainable goal of being Africa's prime entertainment industry.

There is an ongoing debate that the costs of tightening IPR for developing countries is not commensurate with their development goals, both in terms of such measures resulting in increased costs of essential medicines, and in terms of the diversion of limited resources to fighting IP infringements. However, this is really only an argument suitable for the poorest countries, and certainly appears questionable in the context of South Africa, which is currently tightening up all forms of regulations, e.g. the potentially devastating economic consequences for business in misinterpreting or deliberately infringing the extremely complex Broad-Based Black Economic Empowerment (BBBEE) and Competition Acts.

Yet South Africa's musicians, film production houses, designers, manufacturers, etc. generally obtain better protection for their IPR in other jurisdictions, while their home country refuses to recognise the potential in acting speedily to strengthen current legislation and enforcement capacity in order to encourage its creative industries and make them grow, for fear of the 'policy space' constraints that such a proactive move might create. Surely the increasing strength of regulations that require massive investment in ongoing monitoring, capacity building and enforcement in competition law, consumer law, BBBEE, etc. can and should be matched by an equal strengthening of law surrounding IPR?

Certainly, in the context of copyright piracy, there are massive and internationally co-ordinated efforts financed in large part by the South African private sector (e.g. SAFACT) in collaboration with the South African DTL, SARS, SAPS, and the Department of Arts and Culture, which indicate that in this sphere, at the very least, there is indeed capacity outside of government available to co-ordinate and fund enforcement.

What is needed, however, are ongoing support and active participation and joint problem solving in public-private partnerships. The current joint partnership that exists in respect of the active attempts between the private sector and the South African government relating to the control of piracy will in all probability decline if an active policy of stalling full implementation of our TRIPS obligations is undertaken. In the context of the increasing regulatory burden on South African business, which has regularly been criticised as negatively affecting development and FDI, could it be said that our ongoing 'capacity excuse' vis-

à-vis slow and ineffective IPR implementation and enforcement sends a most unfortunate message?

The World Bank and Oxford University Press discuss components other than IPR as being necessary for development as follows:

The results ... suggest that weak IPRs have a negative effect on the likelihood of investments being made. In addition, the enforcement of IPRs affects the type of investments made: companies tend to avoid investing in local production if IPRs are weak and concentrate rather on distribution facilities. ... These results are consistent with the notion that intellectual property protection stimulates formal technology transfer.<sup>36</sup>

Moreover, it must be emphasized that strong IPRs alone are insufficient for generating strong incentives for firms to invest in a country. ... Seen in the proper policy context, IPRs are an important component of the general regulatory system, including taxes, investment regulations, production incentives, trade policies, and competition rules. As such, it is joint implementation of a pro-competitive business environment that matters overall for FDI.<sup>37</sup>

In this context, South Africa has a responsibility to take steps to fully understand its own innovativeness and interests in IPR (both past, current and potential) and to lead the IP debate in its own interests, and not to merely 'toe the line' in favour of political expediency in showing solidarity with other developing countries and LDCs that have made little investment in the incentives and capacity to innovate and, instead, potentially have a vested interest in infringing South Africa's own innovations. The country must also properly investigate the negative economic effects on its own creative/knowledge industries of the lack of IPR commitment and harmonisation within SACU, and take the necessary steps to encourage TRIPS compliance and capacity building. The US-SACU FTA can be used to assist in this regard.

Does South Africa really have a picture of its own interests, and are these truly protected by the resistance to the full implementation of TRIPS or the installation of certain TRIPS-Plus measures? Too little research has been done in the South African business sector to provide policy makers with a realistic

---

36 World Bank & Oxford University Press, *Intellectual Property and Development: Lessons from Recent Economic Research*. World Bank & Oxford University Press, 2005, p. 8, cited in ICC, *op. cit.*

37 *Ibid.*, p. 54.

sense of South African interests in updating TRIPS in order to assist with the protection of its own innovativeness. It is of concern that South Africa's position in the IPR debate appears to be based upon the insufficiently investigated broad assumption that any position that is supported by the South-South alignment is good for South Africa. It seems to lack the solid objective foundation that the establishment of a national position based on rigorous debate around input from all stakeholders in the economy, and particularly those stakeholders who are the creators and innovators who will secure the country's future, through proper national consultation, would provide.

In any event, it is clear from the above that many of the South-South-aligned countries are indeed taking action to strengthen their IPR systems, particularly when their own industries become the target of infringements. Given the potential negative effects to emerging creative and innovative industries inherent in continually putting off the implementation and 'updating' of TRIPS by developing countries and LDCs in the interests of their development goals, it must be asked what preparations have been or are being made by SACU to ultimately become part of a global imperative that is a defining feature of the twenty-first century?

It must be noted that the use of 'flexibilities' in TRIPS is an indulgence to the developing world to enable some 'catching up' in capacity building in order to begin to understand and to take advantage of the international IPR system. It is not a licence to use ever-widening aspects and types of IPR without compensation to their creators, innovators and holders *ad infinitum* – eventually a choice will have to be made. The alternative is ongoing dependency and the increasing potential that similar actions and strategies by other parties would negatively affect SACU's own emerging creative industries.

Furthermore, the question must be asked: Is South Africa resisting the full implementation of TRIPS or suggested TRIPS-Plus measures in its own interests or in those of the 'weaker' SACU countries? It is well known that 'Botswana, ... Namibia and Swaziland continue to suffer from an influx of pirated product for their local market as well as being transit points for product destined for South Africa.'<sup>38</sup> This has a revenue impact on the state, causes visibly increased tolerance for criminal activity and organised crime, and damages established and nascent creative industries alike, as well as formal employment in the film and entertainment industries. In particular, in regions like SACU, where vastly varying stages of development among the members of this customs union exist,

---

38 'Do You Copy?', *SAFACT Newsletter*, June 2006, <http://www.safact.co.za>.

inappropriate use of TRIPS flexibilities may result in instability and hostility, due to the negative impact this will have on neighbouring industries.

In July 2004 it was stated by the DTI in the TESELICO substructure of the Trade and Industry Chamber of the South African National Economic Development and Labour Council (NEDLAC) that the DTI would resist adoption of US domestic legislation in the SACU region that was perceived to be the outcome of the initial text by the US on the IPR clause of a potential FTA. In addition, it was stated that the rest of SACU, exclusive of South Africa, was not TRIPS-compliant in any event, and that SACU has no harmonised policy framework on IP. Now, two years on, has there been any progress?

The point is, there may be more to gain from improving the global IPR system from within SACU than to stand on the sidelines and complain of the 'costs' of enforcement.

#### **THE US WISH LIST FOR THE IPR CLAUSE IN FTAS**

TRIPS-Plus, in short, means the international agreement, whether bilaterally or regionally, to accept obligations over and above the minimum requirements of TRIPS, the agreement that regulates IP in the multilateral trading system of the WTO.

TRIPS provides for WTO members in varying stages of development to undertake staged improvements to their local legislation in order to reflect commitment to certain minimum IPR standards. In addition, TRIPS requires states to undertake obligations on the enforcement of IPRs in order to ensure that IP systems are compliant with minimum standards of IPR establishment, uniform registration and protection, and are not toothless pieces of legislation. Accordingly, judicial enforcement of TRIPS-compliant legislation is required, though differences in developing country capacities are recognised, and the resources used to provide this minimum level of enforcement are not expected to be above other priorities in law enforcement 'with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general'.<sup>39</sup>

Furthermore, it must be noted that TRIPS was agreed to in 1994, before the impact of the digital and internet age became as pervasive as it is today

---

39 Fink C & P Reichenmiller, 'Tightening TRIPS: The intellectual property provisions of recent US free trade agreements', *Trade Note*, No. 20, International Trade Department, World Bank Group, p. 4.

– the recent WIPO treaties, such as the WIPO Copyright Treaty (WCT) and the WIPO Broadcasting Treaty, are in part designed to reduce the harmful impact of the Internet on rights holders, and thereby take steps to equalise the massive ‘unbalancing of the scale between rights holders and consumers’ caused by the Internet and the ease with which copying and distribution can now be achieved by copyright, trademark and patent infringers.

Losses to copyright holders, the majority of whom are US corporations, though they are by no means the only ones affected (given the losses to South Africa’s own nascent film industry in the piracy of *Tsotsi* and other films), amount to billions of US dollars annually, increasing year by year by incrementally staggering figures, and it is obvious that TRIPS itself would require updating in the circumstances.

Since SACU firms operate in the same digital global environment, they suffer from the same Internet-assisted problems, though to a lesser extent simply due to the smaller size of their IP assets. So, other than considerations of fair use and/or fair dealing for educational materials, access to technology and medicines for the poor (which, arguably, are also policy imperatives of the US government), the interests of SACU firms and US firms are the same in terms of their need to reduce the negative impacts of the digital age for the purposes of their own sustainability. In fact, the introduction of controls that ensure IPR protection over the Internet and other digital facilitators would probably benefit SACU innovators and nascent creative industries more, as they could be shielded from the outset from the damage caused by such abuses.

However, whether the updating of TRIPS in the way that the US seeks to impose on the countries with which it has entered into bilateral/regional trade arrangements is of benefit to its negotiating partners – particularly when these are developing countries or LDCs – or not is a matter of much debate.

Unfortunately, the debate within SACU has not moved to the specifics of this complex issue. It is certainly not cut and dried that TRIPS-Plus will always be harmful to developing countries, nor is it cut and dried that TRIPS as it stands is sufficient to protect the nascent and increasingly IPR-dependent industries of all the developing countries of SACU.

Furthermore, in the context of ever increasing justifications for IPR infringements for the purposes of welfare delivery, the use of TRIPS accommodations to provide access to medicines is clearly the ‘thin edge of the wedge’. Armstrong and Ford provide a discussion on the possibility that the TRIPS flexibilities could conceivably be extended to areas other than public health, such as in the realm of access to education:

Until now, the use of exception provisions in the realm of copyright has primarily been through the 'fair dealing' and 'fair use' provisions in many national copyright laws – exceptions allowing for limited copying, performance, display and distribution of works for educational and personal research uses, as well as for news coverage and criticism. But there is now an emerging view, represented to some extent in the Access to Knowledge (A2K) treaty movement, that says educational materials need to be treated in the same way as 'essential medicines' and that some of the strategies from the essential medicines and generic drug movements need to be applied to production and distribution of educational materials. This view holds that TRIPS exceptions provide the latitude for national governments to practice compulsory licensing and parallel importing strategies for copyrighted materials, such as school texts.<sup>40</sup>

At this juncture one must ask: 'Where will it all end? When is a need for educational material also a need for the latest SACU-produced music video in the interests of 'cultural enrichment', for example? When does the 'need for education' become a 'need' for the latest video game in the interests of 'fine motor development'?

This is no 'victimless crime' – while the individual creators and innovators might be based in a 'rich' country, the effect on individuals in the value chain of any product subject to IP infringements, whether by theft or piracy, or through justifiable compulsory licensing, is equally economically devastating the world over. The effect on emerging innovativeness and creativity in the developing world, given the disproportionate investment in R&D for the small size of the market, will be even more damaging.

In the above context, the position of SACU business would most likely be closer to that of US business in supporting more and not less IPR protection, unless more thought can be given to balancing the free access to copyrighted materials for the legitimate purposes of access to education as proposed above, and the substantial damage suffered on an ongoing basis through illegitimate uses of such materials.

The US considers the IPR system of its trading partners to be vitally important to the establishment and extension of preferential trade relations with any country or regional arrangement. The TPA requires that US trade negotiators ensure the

---

40 Armstrong C & H Ford, *The African Digital Commons: A Participants' Guide*. Collaborative output of the Commons-sense Project (<http://www.common-sense.org>), LINK Centre, Graduate School of Public & Development Management, University of the Witwatersrand, Johannesburg, <http://link.wits.ac.za>.



achievement of IP agreements that 'reflect a standard of protection similar to that found in United States Law.'<sup>41</sup>

Numerous countries, such as Jordan, Singapore, Chile, Morocco and Australia, have already signed FTAs with the US. Other FTA agreements (e.g. US-CAFTA-DR)<sup>42</sup> have been signed, but not yet approved by the US Congress. And finally, work in progress includes the Andean countries, Thailand, Panama, the FTA and SACU. Most of the finalised agreements have acceded to tightening TRIPS in line with the US proposals. Whether this is due to their assessment that access to the US market is paramount, and thus that increased commitments to strengthening IPR are an acceptable cost or *quid pro quo* for such access, is not always readily apparent. They may already be of the view that a generally strong IPR system will intrinsically benefit their own strategy for growth in using the global knowledge industry to secure technology transfer and to encourage and thus boost their own innovators and creators.

Moreover, the benefits of preferential access for agricultural and manufactured goods to the US market have been criticised as being relatively short term, given the ongoing liberalisation of this market and the increasing number of FTAs being signed by the US, while the commitments made by developing countries regarding IPR as a trade-off for such access during the FTA negotiations are long term, irreversible and subject to the most-favoured-nation (MFN) principle of TRIPS.<sup>43</sup>

What is not taken into account in this argument, though, are the inherent benefits of strengthened IPR in those countries that have investigated their interests in IPR industries and made proper provision for their welfare obligations. Accordingly, developing countries need to move beyond the defensive tit-for-tat mentality (the reluctant trade-off of increased IPR commitments for increased access to the US market) that has thus far informed their position on IPR in such negotiations, and to see long-term advances to be gained from acceding to the strengthening of their IPR system as a goal in and of itself. Again, this cannot happen if a region has no real direction in mind.

While each trade agreement is unique, there are clear pointers to assist SACU in determining the main interests in the US position on IPR, and thus where there may be scope for compromise and subsequently movement on this long-

---

41 Fink C & P Reichenmiller, *op. cit.*, p. 1.

42 Central American states (including Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua), plus the Dominican Republic.

43 Fink C & P Reichenmiller, *op. cit.*, p. 8.

stalled FTA negotiation. These are discussed below, with specific categorisations relating to the humanitarian goals of food security and access to medicines and education.

Oxfam America sums up current antipathy towards the US ongoing intentions, via bilateral and regional trade arrangements, to extend certain IP protections to levels higher than those currently offered by TRIPS as follows:

There is already a multilateral WTO Agreement governing intellectual property (TRIPS), which was concluded after much wrangling over how to balance innovators' rights and broader social interests. Seeking to tip the balance in favour of US-based corporations by pressuring poor countries to adopt higher IP protection outside of the multilateral system is unfair, inappropriate, and even immoral in light of the grave public health crises affecting the developing world.<sup>44</sup>

This view notwithstanding, it is clear that we cannot get away from the fact that innovation and ingenuity have become intertwined with commercial progress, and it can be seen the world over that those countries that have freed up their innovators economically by ensuring that they receive appropriate reward for their efforts have seen a commensurate increase in development and reduction in poverty.<sup>45</sup> Countries that ignore the new emphasis and value placed on IPR in international business, and who seek to justify their infringements of IPR on the basis that the now-industrialised nations achieved their industrialisation prior to TRIPS commitments, will potentially damage their own innovative industries and development in the long term. It is a factor of today's IPR-focused global environment that a failure to respect and protect another's IPR can – and most likely will – backfire.

'The absence of [such] an IP culture results in a stagnant or receding economy, a reduction in creativity and inventiveness, and a business climate bereft of FDI, consistency or reliability.'<sup>46</sup> This statement is reflected in current Chinese policy, which, although it has grown and attracted vast amounts of FDI despite having scant regard for IPR in the recent past, is now taking active steps to conform to its international commitments on IPR. It is also important to remember that China and many of the other Asian 'Tigers' are exceptional cases, and these countries have attracted FDI for reasons that, it is submitted, would be difficult to duplicate in SACU.

---

44 Oxfam America, 'TRIPS-Plus provisions', 2006, <http://www.oxfamamerica.org>.

45 Idris K, *op. cit.*, p. 4.

46 *Ibid.*, p. 33.

Furthermore, certain developing nations are becoming critically aware of the need to progress out of the mire of dependency-enhancing rhetoric and to seek their own solutions to accessing the benefits of IPR, through the development of pro-active IP policies:

The Director General of the United Nations' World Intellectual Property Organization (WIPO) in Nigeria, Dr. Geoffrey Onyeama has blamed the nation's economic backwardness on the absence of a systematic law to protect intellectual output in all sectors of the economy. At a press briefing in Abuja yesterday, Dr. Onyeama equally decried the low rate of innovations in the country which was put at only fifty-five in the last twenty-three years. ...

... Nigeria needs an intellectual property value system to grow its economy, our mandate is to co-operate with developing countries to use their products, intellectual property to grow their economies, Agric out-put in Nigeria is low; we are not protecting our trademarks; our businesses, by giving them trademarks like the French have done with their wines and the rest.<sup>47</sup>

There are definite advantages to be gained by an open-minded approach to the thorny issue of a commitment to increasing IPR as a corollary to entering into the US-SACU FTA, and some in fact could be geared more specifically to SACU interests. However, there is insufficient research and debate as to specific solutions tailor-made to this region. If communal ownership is a problem in TRIPS, then surely this FTA negotiation presents an ideal opportunity to increase (i.e. lobby for TRIPS-Plus on SACU's behalf) IPR protection for traditional knowledge in the region's favour. If we require better access to educational materials, medicines and food security, these concerns can realistically be added to the 'negotiation mix'. If the US requires us to allow them to 'claw back' territory for their pharmaceutical companies on the Doha Declaration on TRIPS and public health, through the mechanism of a bilateral trade agreement, then we are more than capable of providing wording that counters the effect that this might have on our policy space in providing access to medicines.

The World Bank and Oxford University Press, study *Intellectual Property and Development, Lessons from Recent Economic Research* states the following with regard to the policy space of governments in relation to TRIPS: 'Although the current international framework for the protection of intellectual property provides for some degree of harmonization of global IPR standards, TRIPS,

---

47 Salem T, 'WIPO boss identifies cause of nation's economic backwardness', 25 August 2006, <http://www.vanguardngr.com/articles/2002/north/nt325082006.html>.

in particular, still leaves important room to adjust IPR norms to domestic needs.<sup>48</sup>

Moreover, it may well be in our interests to use the protections of TRIPS and certain TRIPS-Plus mechanisms to prevent the region from becoming a dumping ground for fraudulent and dangerous IPR infringing medicines, which, given the rate and spread of distribution of pirate products from the entertainment industry, could in the near future be potentially more harmful to public health than the costs of rigorous enforcement and the payment of compensation for access to patented medicines.

Furthermore, if the nascent South African film industry is to begin to recoup the massive investments that have already been and will still need to be made to develop into an internationally competitive industry, it may very well be beneficial to agree to extend the copyright term, as the US has done. South Africa has serious potential in this market, and it may well be advantageous to lengthen the protection offered to copyright holders, particularly in light of the losses suffered annually by this industry due to piracy. At the same time, thought should be given to wording that would accommodate the need to provide access to learning materials and information.

The US is more than alive to its interests in the creation, protection and enforcement of IPR of all descriptions, and takes proactive steps to deal with issues as they arise:

There is good reason why the Founders embraced the concept of intellectual property protection. They realized that if creators cannot gain from their creations, they will not bother to create. And actors and writers and composers and singers cannot gain if their work is stolen. Would any other American industry be able to sustain its operations for long if a third of its sales were lost to theft?<sup>49</sup>

WIPO puts the European Commission's estimate at 5%–7% of total world trade, 'representing EUR200 to 300 billion a year in lost revenue, and the loss of 200 000 jobs worldwide'. The World Customs Organisation and OECD's for Economic Co-operation and Development estimate is around 5% of world trade.<sup>50</sup> This is comparable with the figure of the African continent's contribution to world trade in toto.

---

48 World Bank & Oxford University Press, *op. cit.*

49 Smith L, Texas Congress representative, and Chairman, House of Representatives Subcommittee on Courts, the Internet, and Intellectual Property, quoted in 'International copyright piracy: A growing problem with links to organized crime and terrorism', 13 March 2003, [http://commdocs.house.gov/committees/judiciary/hju85643.000/hju85643\\_0.htm](http://commdocs.house.gov/committees/judiciary/hju85643.000/hju85643_0.htm).

50 Idris K, *op. cit.*, p. 31.

Accordingly, and in the context of these industry-threatening losses, the US generally demands that copyright-strengthening mechanisms be built into US bilaterals, including the following:

- **Obligations to prevent circumvention of technological protection measures, and liability of Internet service providers for facilitating copyright infringements<sup>51</sup>**

The production and dissemination of unauthorised copies of digital works has reached epidemic proportions, threatening the very existence of the creative film and music industries. The creative industries have resorted to all manner of digital rights management techniques to prevent ease of copying. But such is the ingenuity of technology, that there are usually several circumvention methods available almost the moment a new anticopying method is created.

Since these circumvention methods clearly intend to allow unauthorised use of copyrighted material and an exacerbation of the piracy problem, and quite often at substantial financial gain for the illegitimate distributor, some substantial deterrent needed to be put in place. This came in the form of the US Digital Millennium Copyright Act of 1998. Many of the provisions of the latter US local legislation have been incorporated into the bilateral IPR clause in existing US FTAs. This can be of great assistance in controlling copyright piracy and its links to organised crime, and thus enforcement of IPR can be more easily and cost-effectively achieved, though the DTI's concerns that this legislation is too rigid and fails to allow developing countries' flexibilities in terms of TRIPS should be considered and a compromise constructed.

It is highly likely that the majority of South African business in the creative industries would appreciate more cost-effective and efficient mechanisms to be available to protect their copyright assets in a similar way as the Digital Millennium Copyright Act, though there is some conflict of interests that needs to be resolved with the Internet service providers and computer equipment manufacturers, who would carry a large burden in respect of third party infringements of copyright through technology created or facilitated by these companies.

- **Strengthening of the burden of proof in favour of the copyright holder**

Again, this shifting of the burden of proof, which requires that the defending party prove that copyrighted materials disseminated by him/her were already in the public domain, as well as the introduction of presumptions of copyright

---

51 Fink C & P Reichenmiller, op. cit., p. 4.

and copyright ownership as discussed above, are useful tools to assist with enforcement. These are found wanting in facilitating enforcement of copyrights and in the effective control of piracy in South African law. TRIPS does not make any presumptive provision, so the US is in effect strengthening the hand of the copyright holder in incorporating such a requirement into most of its bilaterals thus far.

- **Prevention of parallel importation by contractual means**

The US–Jordan and US–Morocco bilaterals permit the prevention of importation of copyrighted materials through contractual arrangements by copyright holders.

It is clear that if the above provisions affect access to information/educational materials, then provisions need to be made in the wording to allow for policy space considerations to be built into the agreement – see the discussion below on the ‘side letters’ to other US FTA clauses on access to medicines.

There is a clear rationale for the US Copyright Extension Terms Act, and the conspiracy theorists out there ought to take cognisance of the fact that this has more to do with proactive steps to protect and benefit from the country’s huge copyright industry in the face of unprecedented and increasing losses facilitated by the digital age than with the intention to deprive developing states of access to affordable education and information.

Even publishers of academic textbooks may be inclined to produce more cheaply/make material more freely available through digital forms of transmission if protection from outright theft of these works were prioritised in a more rigorous and affordable fashion than occurs at present, thus making access to information, knowledge and education more affordable and more legitimate. Once again, the idea of using flexibilities in TRIPS in order to justify certain infringements of copyright in the interests of education is not a ‘silver bullet’ to ensure access to education – it needs to be undertaken with a long-term view of the effect this may have on the industry. This is a South African business viewpoint on welfare delivery in the copyright field:

If there is to be genuine growth and development for authors and publishers the creation of a culture of respect for creative and intellectual products will need to be accompanied by an effective legislative environment in which creative effort can be rewarded, copyright violations can be curtailed and piracy brought under control. This in turn should lead to greater economies of scale for local publishing and resultant lower prices for consumers. ... Rights owners in developing countries

do not accept arguments for the overriding of copyright laws for the sake of 'the public good'. Rather, they believe that the public good is best served by the fostering of strong local copyright industries and protection for local authors.

Copyright is so central to the industry development that issues of legislation and *infringement* cannot be divorced from development agendas. In developing countries, it is particularly important that legislation does not undermine the local creative industries and that steps taken to protect the right of access to information do not erode the viability of indigenous authors and publishing industries.

In reviewing *copyright and development*, the report contests the arguments being advanced in some international quarters, notably UNESCO and the UK Commission on IPR, that the institution of generous copyright exceptions and differential pricing are the best ways of providing the balance between development needs for knowledge and information consumption and the interests of rights owners. Rather, the report argues for a copyright regime that fosters the growth of local publishing as the best way of ensuring the availability of affordable and relevant knowledge and information products and of promoting cultural diversity in an increasingly globalised world.<sup>52</sup>

Tightening up of regulatory frameworks in the 'fair use/fair dealing' of copyright material in the interests of development goals would be one way in which the parties could work together to achieve sufficient protection to enable growth of both US and SACU's legitimate copyright industries, as well as access to educational materials and information to achieve development goals. The problem is that TRIPS does not provide this certainty, thus the US has devised other means to achieve this in its interests. If SACU is not comfortable with the US proposals, it would be better for the region to become proactive in finding solutions and proposing these ahead of time, rather than resorting to unacceptable capacity constraint excuses.

It is ironic that institutions of higher learning are often guilty of high levels of outright theft of all manner of works that can in no shape or form be justified in the interests of 'a right to education'. It is also ironic that the developing countries that are most vociferous about a 'development agenda' in WIPO are also some of the world's most problematic sources of pirated copyrighted products, and are often on the US 'Section 301' watch list for such infringements.

Even more alarming are the statistics on fraudulent and potentially harmful medicines in worldwide circulation. These numbers will increase as more

---

52 PICC (Print Industries Cluster Council), 'Executive Summary', in *PICC Report on Intellectual Property Rights in the Print Industries Sector*, 2003.

mechanisms open up in which 'copies' can thrive. Accordingly, in this sense, at least, the US pushing for more clarity on the open wording of the Doha Declaration may be useful in protecting the public health from likely abuses of such widely worded freedoms.

So, not all of what the US requires under the IP clause of the potential US-SACU FTA as TRIPS-Plus is beneficial only to US corporations, and indeed, one very important TRIPS-Plus provision has not yet been included in this discussion, namely the establishment of a co-operative development of traditional knowledge and biodiversity, which may be of great interest in the SACU regional arrangement. It must be noted that some developing countries have been proactive and put forward proposals to US negotiators, many of which were accommodated. Unfortunately, this late in the day, it must be noted that in the case of South Africa, let alone SACU, the national debate on IPR is lacking – NEDLAC has an extremely full schedule and very little IPR capacity in all three constituencies.

Thus far, the decisions relating to the nature of any IPR clause in the US-SACU FTA appear to have been made at government level, based on very little information sharing with stakeholders in South Africa as to the exact nature of the US requests, little empirical evidence, even less understanding of the extent of our own commercial interests, and in the context of a general lack of vision as to what South Africa and SACU intend to offer the world 20 years from now. Without this clear sense of direction and teamwork by the stakeholders of South Africa Inc., any bilateral agreement on any topic as complex as IPR will appear threatening, and the temptation will be overwhelming to avoid the 'new' WTO issues *ad infinitum*, while other developing countries make progress on the issue by putting forward positive, workable proposals based on an understanding that co-operation and compromise are quintessential parts of international negotiation. This lack of vision, together with an increasingly uncritical following of the 'conspiracy theorists' that all that the US wants in signing an FTAA with SACU is to ensure that the latter pays inordinately high prices for medicines in order to keep multinational pharmaceutical giants happy, tends to hurt SACU more than it hurts the US. It results in stalling and unnecessary political uncertainty, while the SACU states fail, year upon year, to take the time to properly inform themselves of their own interests in IPR, and to put forward concrete proposals to overcome what they perceive as threats in the interests of finalising a deal with the US for the long-term benefit of the region. Instead, SACU plays cat



and mouse, blaming lack of capacity (instead of poor political will) and regional disorganisation ('can't get all trade ministers of SACU together in time') for its inability to move on what should be a priority for its collective future.

Contrary to Oxfam's statements on the FTAA,<sup>53</sup> TRIPS-Plus does not only favour US corporations, but will also help to provide the 'incentives and rewards' in respect of the investment in time and financial resources of companies in developing countries that are innovators in the same sense that those US multinationals once were. In addition, the developing world has the advantage of tremendous goodwill and significant sums of donor funding for the provision of medicines and for targeted research, from which it could benefit both in terms of access to and advances in medical care and in transferring through economically viable licensing that new knowledge across the globe.

Furthermore, the issue of the appropriate means of protection of traditional knowledge (TK) is outside of the current purview of TRIPS, so it is clear that developing countries, in some instances, would actually favour some 'updating' of TRIPS (i.e. technically, TRIPS-Plus) to accommodate the protection, registration and enforcement of TK, and many would benefit from arranging assistance for the establishment of database schemes for the confidential sharing of TK without the need for direct dealings with communities, ensuring that such communities are given benefits and fair compensation.

It is highly unlikely that communities who control TK that might, for instance, be used to develop an AIDS cure would be as altruistic about parting with their knowledge for the good of humankind without compensation, in the same way as the multinational pharmaceutical companies are currently expected to do. In any event, the protection of TK, and capacity-building initiatives in respect of the building of TK and GI databases for the region, ought to be placed on the list of potentially negotiable outcomes of the US-SACU FTA.

Finally, it must be asked whether all of SACU is expected to introduce TRIPS-Plus as an outcome of the US-SACU FTA, and whether there are benefits or costs for South Africa in this grouping? How will TRIPS-Plus provisions really work in such an unharmonised region, the legal framework of which is without the necessary jurisdiction over IPR in any event?

The question of balance between IPR holders and their users/consumers is primary in the international debate. Developing countries cannot be said to have interests that reflect only the welfare debate, though naturally the welfare policy

---

53 Oxfam America, *op. cit.*

space of government is an overriding imperative. Unfortunately, the overriding emphasis on welfare delivery at the expense of the IPR system presents a rather too narrow, short-term focus. South Africa must innovate to grow and to make its own solutions to its challenges – if it refuses to fully support and assist in the improvement and updating of the global IPR regime, its own interests may well suffer in the medium to long term.

TRIPS is an attempt to achieve this balance – it requires commitment to the principle of the recognition of IPR and an agreement to protect such rights to certain minimum standards, and then provides exceptions on an asymmetrical basis to developing and least developed states. In addition, it needs to be recognised that TRIPS requires updating in any event, not least of all to deal urgently with outstanding TK and prior art issues and the pervasive effects of the Internet on all forms of IPR. While the Doha Round is on its knees, the bilateral route may at least offer some form of progress to pressing matters that currently damage the rights of innovators, knowledge communities and economies of both developed and developing/least developed states.

TRIPS was entered into prior to the Internet age, thus can it be said that TRIPS-Plus proposals are 'all bad', or is this an attempt to modernise IPR in the face of the massive unbalancing of the scales afforded by new technology? Will it be beneficial or harmful in the long run to resist TRIPS-Plus? Can the two WIPO treaties (WCT and WIPO Performances and Phonograms Treaty – WPPT) be considered TRIPS-Plus, and are they, in the context of the Internet challenge posed by the digital age, more harmful or more beneficial to developing-country interests?

It does not help for developing countries like South Africa to avoid the problems of the Internet age – instead, it should move toward rigorous research, debate and analysis on the subject with a minimum of delay. The wealth of the future lies in technological advancement and the knowledge industry – developing countries already are seeing a greater proportion of their economies, quite rightly, diversifying towards the service industries and out of raw commodities. They therefore need to be the leaders in the advancement of IPRs and not the reluctant laggards.

Contrary to the proponents of the access to knowledge debate, the international scale seems grossly tipped in favour of users/society in current levels of Internet and digitally facilitated abuse of copyright.<sup>54</sup> Accordingly, South Africa needs

---

54 Durell KL, 'Canadian copyright on the precipice: Stronger rights and higher fees? Or not?', June 2003, p. 2, <http://www.cipp@mcgill.ca/>.

to review its own creative industries and answer the questions: Are the US TRIPS-Plus provisions a reaction to the unbalancing of the scale due to the vast 'weight' provided by digital technology? Is this 'rebalancing' attempt wrong? Does it only favour developed countries, or would South Africa's interests also be served by TRIPS-Plus? Does the developing world really support a weak IPR regime in which TK or their cultural, creative and musical assets could be widely disseminated over the Internet with no compensation or gain to its knowledge holders?

So, who really stands to gain from tightening up on IPR? Only developed nations? Or nations, including developing nations, that spend resources and prioritise their understanding of the system in order to benefit from the gains that it can yield to all?

Even TRIPS as it stands represents to many developing countries, including some in SACU, an obligation to increase existing holders' rights, even though it outwardly requires only certain minimum standards of IP protection to be applied in the national legislation of member countries.<sup>55</sup> It is SACU's responsibility to know the system to which most member states have already agreed in the Uruguay Round, and if necessary to change it from within by following the development principles espoused at Doha and the proposals relating to the development agenda of WIPO, and making responsible use of developing country advantages in respect of special and differential treatment and TRIPS flexibilities while it lasts, while building and protecting the organisation's own interests and investments in the knowledge age.

## THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

In order to properly understand this compromise agreement between the rights of the patent [holder] vs. the rights of the patient, I believe it is necessary to state its contents verbatim, at the risk of being boring, since too many disagreements exist as to what this declaration contains, depending upon the particular ideology of the person presenting his/her views.

On 14 November 2001, the declaration on the TRIPS agreement and public health was adopted. This is an extremely widely worded document, as follows:

---

55 Ibid.

1. We recognize the gravity of the public health problems afflicting many developing countries and least developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.
2. We stress the need for the WTO agreement on the TRIPS agreement to be part of the wider national and international action to address these problems.
3. *We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effect on prices.* [emphasis added, and the crux of the 'compromise']
4. We agree that the TRIPS agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS agreement, we affirm that the agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS agreement, which provide flexibility for this purpose.

5. Accordingly, and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS agreement, we recognize that these flexibilities include:
  - a. In applying the customary rules of interpretation of public international law, each provision of the TRIPS agreement shall be read in the light of the object and purpose of the agreement as expressed, in particular, in its objectives and principles.
  - b. *Each member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.*<sup>56</sup>
  - c. Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
  - d. The effect of the provisions in the TRIPS agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to MFN and national treatment provisions of Articles 3 and 4.

---

<sup>56</sup> Emphasis added.

6. *We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS agreement. We instruct the council for TRIPS to find an expeditious solution to this problem and to report to the general council before the end of 2002.*<sup>57</sup>
7. We reaffirm the commitment of developed country members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country members pursuant to paragraph 66.2. We also agree that the least developed country members will not be obliged, with respect to pharmaceutical products, to implement or apply sections 5 and 7 of Part II of the TRIPS agreement or to enforce rights provided under these sections until 1 January 2016, without prejudice to the right of least developed country members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS agreement. We instruct the Council for TRIPS to take the necessary action to give effect to this pursuant to Article 66.1 of the TRIPS agreement.<sup>58</sup>

In particular, the fact that this was a compromise agreement is often played down by the 'patient rights' debate, which tends to omit the constant reiteration of the members' commitments to the TRIPS agreement as contained in the declaration. It seems, more and more, that 'open season' has been declared on pharmaceutical companies that hold patents.

Certainly, a closer reading of the contents of this incredibly facilitative and permissive document ought to give the far-thinking person a sense of disquiet as to what 'good' will ultimately come of such potentially IP-destructive agreements. Could it be that we in the future, through the mechanism of this declaration, have so thoroughly snuffed out the incentive to do the necessary investment in finances and research that the world shall forever be bound to 'free antiretrovirals' rather than a cure for AIDS, while the much maligned pharmaceutical giants amuse and enrich themselves with the relative frivolities of Viagra? Only time will tell.

It is ironic that the developing nations most in need of advancement in medical care are often the ones who are also the least respectful of others' IP rights of all descriptions, and are on the US watch list for numerous IPR infringements. These

---

<sup>57</sup> The infamous 'paragraph 6 problem'; emphasis added.

<sup>58</sup> WTO Ministerial Conferences, Doha 4th Ministerial, Declaration on the TRIPS agreement and Public Health, <http://www.wto.org>.

are often also the countries vying for the right to supply generics to the rest of the developing world, with potentially serious consequences for the very public health the declaration sought to protect. In addition, it is extremely important to examine more than just IP policy in regard to assessing the true reason for the high costs of medicines. It appears that patents are currently the favoured 'whipping horse' in this debate, though there are numerous other mechanisms that need to be addressed in order to provide a holistic solution to the need for access to affordable and safe medicines:

The IP system is one factor among several that affects poor people's access to health care. Other important constraints are the lack of resources, and the absence of a suitable health infrastructure (including hospitals, clinics, health workers, equipment and an adequate supply of drugs) to administer medicines safely and efficaciously. Moreover, developing countries may adopt other policies, for example, taxes on medicines, which adversely affect access.<sup>59</sup>

Furthermore, 10% of the world's drugs in circulation are dangerous counterfeits. This number will in all likelihood increase incrementally, as has the practice and distribution of counterfeit and fraudulent goods and copyright piracy. It is obvious that in countries (read developing countries making use of the 'flexibilities' of TRIPS to reduce their commitments to regulating and enforcing IPR) where IPR regulation is weak, and even non-TRIPS-compliant, like SACU in many respects, the potential for such practices increases. Even more so, the potential that the resolution of the paragraph 6 problem of the Doha Declaration will be compounded by the parallel importation of counterfeit generic drugs, and the effect this may have on public health, is very real. Furthermore, the potential for these drugs to be recirculated to developed countries is extremely high in countries with 'weak' IPR and other regulatory environments.

Insufficient thought is given to finding workable solutions given to this problem, even in the UK commission on IPR study ('The IP system can help to establish differential pricing mechanisms, which would allow prices for drugs to be lower in developing countries, while higher prices are maintained in developed countries. If differential pricing is to work, then it is necessary to stop low priced drugs leaking back to developed countries'<sup>60</sup>), yet it is the author's submission that herein lies the crux of the US concerns and attempts at more narrowly defining what may be done with the wide freedoms provided by the Doha Declaration, TRIPS flexibilities and paragraph 6 agreements, via the free

---

<sup>59</sup> Commission on IPR, op. cit.

<sup>60</sup> *Ibid.*

trade, bilateral and other preferential trade agreements it seeks to enter into with developing countries and LDCs.

The irony in the above statement on the efficacy of differential pricing mechanisms is that it fails entirely to recognise the poor in developed countries, seeking to ensure that they are excluded from access to cheap medicines, while the fabulously wealthy in developing countries benefit from being conveniently categorised as 'the poor'.

Clearly, far more effective access to medicines for the poor the world over must be achieved, not only by means of unlimited authorised infringement of patents through the Doha Declaration and TRIPS flexibilities, but through proper needs analysis, investigation and responsibility allocation of the true impact of poorly planned and executed government policies on ongoing serious misallocation of resources and the unsustainable reliance upon revenue-generating mechanisms *for the state, to the detriment of affordability. In the circumstances it is of concern* that attacking the global IPR system, despite the tremendous concessions made in respect of IPR in the Doha Declaration on the TRIPS agreement and public health (see below), seems to have become a panacea for curing the ills of poor leadership in the developing world.

Since the provision of public health is one of the fundamental duties of any nation state, one must wonder why it is that the individual creators and innovators and their financial backers must carry this burden alone, to the potential long-term loss of the entire globe? Surely there would have been another mechanism more effective at providing the much needed assistance for these states that would not have such potentially devastating consequences for medical research, and such oddly skewed 'human rights priorities' in the future?

The South African public is extremely emotive about the HIV/AIDS pandemic, though the initial trailblazing by the South African government on this issue seems to have been abandoned. Nevertheless, with regard to the US-SACU agreement, South African trade negotiators are unlikely to be allowed to forget the precedent the country has set thus far:

SA took the lead in assisting and rallying the WTO membership to come up with the DOHA Declaration, despite much resistance from the US. South Africa also led with regard to coming up with the final decision detailing the outcomes from

DOHA. It would therefore be inconsistent if what South Africa managed to achieve at multilateral level, it undermined during bilateral discussions with the US.<sup>61</sup>

So, this must be the starting point from which we examine the possible outcomes of the IPR clause of the potential US-SACU FTA, particularly *vis-à-vis* access to health. Clearly it is in direct and apparently irreconcilable conflict with what the US negotiators are mandated to achieve by Congress.

The World Bank<sup>62</sup> points out certain commonly required provisions relating to the protection of patents and pharmaceutical test data exclusivity, which the US has already achieved in various existing trade agreements, and is likely to insist on achieving in this FTA, most of which have an impact on the access to medicines, and the freedom of developing countries and LDCs to use the Doha Declaration and its implementation agreements effectively:

- **Extension of patent term for delays caused by the regulatory approval process and granting of patents**

South African business interests may well support this type of provision, in the instance of unreasonable delay in the grant of patent applications. Given that trademarks are not as inherently complex as patents, and given that the trademark situation has been prioritised for foreign assistance several times in the past few years and has become worse, not better, it may well be necessary to facilitate some type of extension for delays that are truly unacceptable.

The extension may also assist in effectively defeating corrupt practices. Furthermore, US assistance should be sought in removing once and for all various unacceptable backlogs in CIPRO, and in institutionalising this capacity and knowledge to ensure that the office becomes and remains world class. The possibility of US-facilitated petty patent offices, accessible throughout the country and SACU, could also benefit the region's innovators to gain affordable access and increasing confidence in the advantages of IPR.

- **Extension of patents for new uses of known products**

The US-Australia, US-Morocco and US-Bahrain FTAs make patents available for new uses of known products. However, the UK commission on IPR specifically advises developing countries to 'exclude diagnostic, therapeutic

---

61 Treatment Action Campaign/WITS AIDS Law Project presentation on US-SACU FTA negotiations, NEDLAC TESELICO T&I Chamber Meeting, 4 March 2004.

62 Fink C & P Reichenmiller, *op. cit.*, p. 2.



and surgical methods from patentability, including new uses of known products'.<sup>63</sup>

However, again without a proper investigation of the country's own interests in commercialising new-found uses for the country's own patented inventions, South Africa will be unable to make the hard choices here. Additionally, the need for South Africa to gain some ground in the 'prior art' debate regarding patentability in order to secure its interests in the TK environment is dealt with in more detail below.

- **TRIPS-Plus patent protection for plants and animals**

This is a very important area for the US, as can be gleaned from the fact that all bilaterals thus far have incorporated TRIPS-Plus patent protection for plants and animals. The US-CAFTA-DR agreement is the only one that keeps this obligation to a minimum, though even here, it 'calls for "reasonable" efforts to provide for patentability of plants'.<sup>64</sup>

- **Limitations on the use of compulsory licensing**

Generally, the use of compulsory licensing is limited via bilaterals with the US, unlike the wide provisions of TRIPS and the Doha Declaration, to 'emergency situations, anti-trust remedies, and cases of public non-commercial use'.<sup>65</sup>

- **Prevention of the grant of marketing approval of generics during the patent term without the patent holder's consent**

Most, but not all, existing FTAs with the US require the patent holder's consent prior to obtaining marketing approval for generic drugs during the patent term.<sup>66</sup> This has the effect of delaying the entry of generics into the market once the patent has terminated, and thus South Africa may wish to suggest appropriate wording to allow quicker entry to the market, though with requisite comforts built in to allay legitimate fears of abuse.

- **Test data exclusivity<sup>67</sup>**

TRIPS requires that test data on the safety and efficacy of any drug be protected against 'unfair commercial use'. The US specifically requires 'test

---

63 Commission on IPR, op. cit.

64 Fink C & P Reichenmiller, op. cit., p. 2.

65 Ibid.

66 Ibid.

67 Ibid., p. 3.

data exclusivity' in accordance with its own legislation for a period of five years, during which time this data may not be used to request marketing approval for a drug manufactured by a competitor. Again, intrinsically, the circumvention of this rule could possibly make room for dangerous drugs to enter the market, though more realistically, the five-year period is granted in order that R&D costs can be recovered.

There are also bilateral provisions relating to a three-year data exclusivity period for new clinical information supplied on application for marketing approval to the authorities for new uses for previously registered drugs. This mechanism could conceivably extend the patent or reinstate an expired patent of a registered drug.

In addition, most of the existing bilaterals with the US do not allow competing manufacturers to 'rely on test data submitted to a foreign regulator for seeking own marketing approval at home'.<sup>68</sup> Thus the above constitute many ways in which quick entry of generics into the market might be stalled.

- **Limitation of parallel importation of drugs**

TRIPS is open on the use of parallel importation to place downward pressure on the price of drugs, if these can be obtained at a lower price in a foreign market. Three of the US bilaterals, namely with Morocco, Australia and Singapore permit patent holders to prevent parallel importation through contractual means.

The jury is still out on whether the US-required FTA provisions relating to issues of control of marketing approvals, parallel importation, patent terms and test data exclusivity in fact contravene the right of WTO members to use TRIPS flexibilities to 'promote access to medicines for all',<sup>69</sup> though Fink and Reichenmiller are of the view that 'the provisions of the FTAs in these areas can still be seen as being at odds with the spirit of these multilateral accords, to the extent that they preclude the effective use of compulsory licenses'.<sup>70</sup>

The situation is further complicated by the use by the US of 'side letters', as per the US-CAFTA-DR, US-Morocco and US-Bahrain agreements, which signal that the contracting governments believe that the IPR of FTAs will not affect the ability of the parties to 'take the necessary measures to protect public health by

---

68 Ibid.

69 WTO Ministerial Conferences, *op cit.*, para. 4.

70 Fink C & P Reichenmiller, *op. cit.*, p. 3.

promoting medicines for all' and, as clarified further by the General Counsel of the USTR:

if circumstances ever arise in which a drug is produced under a compulsory license, and it is necessary to approve that drug to protect public health or effectively utilize the TRIPS/health solution, the data protection provision in the FTA would not stand in the way.

Finally, it is easy to follow the populist approach and to refuse to tamper in any way whatsoever with SACU's 'policy space' in considering the implementation of any or a part of the above required IPR provisions by the US, particularly since it appears that the necessary investigation of our own interests in strengthening IPR in this manner has not been done. We can always fall back on the LDCs among us to justify our inability to accommodate any movement here.

However, the outcome of this decision might not become apparent for many years, particularly since South Africa in fact has the possibility of becoming a supplier of generics to the region and would clearly have an interest in ensuring that nothing constrains this potential economic boon. However, the possibilities of less immediately obvious costs of a health crisis of a different kind, namely potential stagnation of research and the influx of counterfeit and potentially dangerous drugs in a deliberately weakened regulatory environment, must be carefully weighed up here.

## ENFORCEMENT AND CAPACITY-BUILDING

The developing world's resistance to strengthening and extending IPR, as evidenced in numerous website discussions, NGO discussions and the positioning of various potential power blocks of developing nations, should first and foremost addressed by providing the capacity, both in terms of access to finance and education, to ensure that each nation can make better use of and access the benefits of a continually improving international IPR system, as embodied in TRIPS and the new WIPO treaties.

The Patent Cooperation Treaty, with a membership of 121 states, has seen a tremendous acceleration in international patent applications – from 18 years for the receipt of 250 000 applications to four years for 500 000. This is due to the simplification, consequent cost reductions and increased public accessibility of technical information relating to inventions created by the treaty. Contrary to much in the development debate that claims that patents in fact cause a decline in innovativeness owing in the main to inaccessibility of information and the

need to secure permissions, often at significant cost, to use patented products in developing new innovations, it is clear that the quid pro quo inherent in the patent system requires inventors to register for public scrutiny all technical details of their invention in return for patent protection of limited duration.

The US-SACU FTA presents a golden opportunity to go TRIPS-Plus on the US obligations as a developed country in providing technical assistance on the development, registration and enforcement of IPR to developing countries. Unfortunately, South Africa has been known to refer US offers to build capacity in IP protection to the other SACU countries, which apparently are far worse off.

However, continuous attempts in South Africa at getting trademark applications up to the acceptable registration period of 18 months in terms of the Madrid Protocol have failed through lack of institutional capacity and permanent skills transfer, and despite the hype of making the CIPRO office into a 'business-orientated unit' trademark registrations have reached a zenith of delay, so it seems South Africa certainly could do with some capacity-building assistance. The training of specialised police and customs officers, and the provision of sufficient warehousing space for counterfeit goods of every description are all areas that have needed urgent and ongoing improvement for years.

The G8 strategy document on the provision of technical assistance by the G8 on capacity building on IPR in 'third world countries' includes the following commitments:

In particular, we will take further concrete steps to: ... work closely with developing country partners to strengthen legislation, and build and help to improve national anti-counterfeiting, anti-piracy and enforcement capacities through shared best practices, training and technical assistance, to help achieve our shared development goals.<sup>71</sup>

The USTR spends significant resources on monitoring IPR in all US trading partners through the 'Special 301' mechanism, and it is willing to assist its industries in areas where infringement may occur – it is clear that the US government values IPR (some might say aggressively), and thus the country's individual creators and innovators are supported throughout the globe. It is important to keep in mind that this mechanism is still available to the US to use in the case of infringements of its IPR, whether or not SACU signs an FTA. However, proactive IPR policy is not the purview of the USTR alone – certain

---

71 G8, 'Reducing IPR piracy and counterfeiting through more effective enforcement.' Statement, Gleneagles, 2005.

developing countries have recognised the increasing relevance and importance of IPR in their economies and even more so, in the future.

Singapore, in addressing its need for a proactive establishment of a strong IPR system, created an IP portal named SurfIP, which enables searches across multiple international patent databases, and provides other technical and business resources. It has educational awareness programmes dedicated to increasing public understanding of IPR, and an effective enforcement arm made up of the specialised Criminal Investigation Department and the Customs and Excise Department. This country has benefited from an attitude that sees the development of IPR as a 'strategic and competitive asset ... for the development of high value-added and creative content industries', which has led to it becoming 'one of the leading nations in terms of patent filings and the creation of other IP assets'.<sup>72</sup>

Most interesting to note is the fact that Uruguay, China, the Republic of Korea, Egypt, Colombia, Thailand and Iran have experienced increases in the number of total patent applications from 1994 to 2000 of no less than 25% at the lowest end of the scale and 260% at the highest.<sup>73</sup> Interestingly, Uruguay leads this increase, and was also the locus of the commencement of the TRIPS agreement in the WTO Uruguay Round.

On enforcement, the US is likely to demand the following provisions relating to the improvement of IPR enforcement in South Africa and the rest of SACU, though the effect of these on the TRIPS flexibilities relating to LDCs, combined with the fluidity of SACU borders, will need to be factored in:<sup>74</sup>

- **The removal of TRIPS flexibility relating to developing country capacity for enforcement**

Several of the existing US agreements specifically state that resource constraints of partner countries may not be used as an excuse for not complying with specific enforcement obligations in the FTA.

- **Creation of additional institutional obligations for enforcement of IPR**

While TRIPS requires customs authorities to stop trade only in imported counterfeit and pirated goods, some of the bilaterals with the US require exports and even transiting goods of this nature to be stopped.

---

72 Juan NS, 'Creating an IP culture in Singapore using pro-active policies', cited in Idris K, *op. cit.*

73 Idris K, *op. cit.*, p. 4.

74 Fink C & P Reichenmiller, *op. cit.*, p. 4.

- **The imposition of stronger deterrents for IPR infringers**

All existing bilaterals require fines to be imposed in cases of copyright piracy and trademark counterfeiting, irrespective of injury to rights holders. Furthermore, criminal sanctions are to be imposed for copyright piracy with a significant aggregate monetary value, but not necessarily for financial gain. Thus certain forms of end-user piracy may be considered a criminal offence – this provides recourse against a worrying nihilist group known as ‘warez’, who digitally distribute copyright works for free apparently purely for the purposes of disrupting commercial gains for the creative industries, and potentially for the purposes of negatively affecting the US economy, given the size of this industry, and its positive effects for the US balance of payments.<sup>75</sup>

#### **HARMONISATION WITH US LAW, AND EFFECTIVE AND EFFICIENT ENFORCEMENT BENEFIT US BUSINESS**

The US clearly has the negotiation strength to ensure that the FTAs it enters into harmonise as far as possible with its laws in order to improve the ease and costs of doing business internationally.

Generally, US FTA partner countries are required to sign, and implement domestically, various international treaties on IPR during the subsistence of the FTA, if they have not already done so. Notable in both the US–Chile and the US–Singapore FTAs are the obligations of the developing country to accede to and/or to ratify the Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite, the International Convention for the Protection of New Varieties of Plants of 1999, the WCT, the WPPT and the WIPO patent cooperation Treaty, the joint recommendation concerning provisions on the protection of well-known marks, the trade mark treaty (Madrid Protocol), the Hague agreement concerning the international registration of industrial designs, the protocol relating to the Madrid agreement concerning the international registration of marks, the Paris Convention for the Protection of Industrial Property and others. It is clear that only once a national strategy on IPR has been formulated will South Africa, let alone SACU, be in a position to decide the desirability or otherwise of accession to these instruments, where they are not yet in place.

---

75 Ibid., p. 3.

While South Africa has acceded to a variety of international IP agreements,<sup>76</sup> it is likely that the US will require uniformity of this commitment within the region. This may in fact be good for South African business. Many South African companies bemoan the import of counterfeit goods through some of the country's partners in SACU, particularly since the size of the South African market makes it the most likely destination for such contraband. Also, the effect within SACU of a lack of harmonisation of IP legislation and attitudes, including the commitment of resources to their enforcement, must be examined, and the benefits of actively working towards such harmonisation made clear.

Then an empirical examination of whether useful harmonisation can realistically be achieved is required, given the unequal development of the SACU states and Lesotho's LDC status, which may give rise to claims for asymmetrical application of the FTA obligations in this regard. In addition, South Africa needs to research whether the US has ratified all international treaties governing and/or impacting on IP that would be in South African and SACU regional interests. It might be interesting to examine the convention on biological diversity in this regard.

Furthermore, clarity on the status of the protection of South Africa and SACU's GIs or appellations of origin should be negotiated as a priority in the FTA with the US, and this agreement might be useful in building the capacity to establish a register of GIs, to promote such names and to protect and register them locally and internationally.

The South African DTI has prepared some initial thoughts on the desirability of acceding to certain international treaties, as follows:

The rationale behind acceding to IP Treaties is based on five main benefits that can accrue to members upon accession. They are:

- For greater economic growth and development
- For cultural and social benefit
- For greater transfer of technology
- For innovation and capacity building; and
- For greater business growth.<sup>77</sup>

<sup>76</sup> Convention establishing the WIPO, Paris Convention for the Protection of Industrial Property, Berne Convention for the Protection of Literary and Artistic Works, Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, Patent Cooperation Treaty, and, as at July 2005, the finalisation of the accession to the Hague Agreement concerning the International Deposit of Industrial Designs and the Madrid Protocol on the International Registration of Marks.

<sup>77</sup> Netshitenzhe M & N Sunker, *Report on Accession to Intellectual Property (IP) Treaties Administered*

It is recognised throughout the DTI document that:

economic growth can be stimulated by the effective utilization of science and technology, as well as copyright and development of cultural industries ... copyright-based goods, due to their intellectual and creative component, social roots, and positive economic impact, are a resource of great economic potential to developing countries, rich in folklore and artistic traditions ... it is critical to effect the transformation of vibrant traditional cultural assets into a resource, leading to the creation of jobs, higher revenues, and development of sustainable tourism .... Genetic resources, and the traditional knowledge associated with using them in a sustainable manner place developing countries at a comparative advantage. South Africa is rich in biodiversity and should participate more effectively in the global marketplace, and therefore should be concerned with the absence of protection mechanisms around this area.<sup>78</sup>

With regard to the attitude of the DTI to accession to the WIPO 'digital treaties', namely the WPPT and the WCT, both of which are designed to bring TRIPS standards in line with the digital age, and the effect this has on copyright, the DTI suggests that the benefits of accession would 'far outweigh the obligations of setting up the systems'. Indeed, it is believed that implementation of the digital treaties by the rest of SACU would not be problematic, with Namibia and Botswana being members or potential members already. However, the DTI states that 'United States legislation in this area is not a good model to follow because it is too restrictive and does not allow for the exceptions suitable for developing and least developed countries'.<sup>79</sup> Unfortunately, the discussion ends with this bald statement – there is little investigation of the conflicting interests that underlie the business rationale for such stringent legislation, which may well be welcomed by South African business for its ability to improve enforcement of copyright in the digital age, and the further conflicting interests and practical difficulties that the use of varying degrees of flexibility of TRIPS obligations in the SACU membership create for business in this region.

As to the Convention relating to the Distribution of Programme-carrying Signals Transmitted by Satellite, the DTI is of the view that these provisions are already incorporated into the current South African Copyright Act, and thus formal accession is not necessary.<sup>80</sup>

---

by WIPO (2005). DTI-CCRD Communication, No. 2, July 2005, p. 4.

78 Ibid., p. 5.

79 Ibid., p. 16.

80 Ibid., p. 17.



## THE INVESTMENT-IPR INTERCONNECTION

The IP system plays an important role in encouraging private investment in R&D – it also attracts FDI. While the writer acknowledges that there is a counter-debate on this topic, it is felt that strong IPR systems will be part of a positive list to be considered in the case, for example, where the intended investment could be made in either of two developing nations, one with such protection, and one without.

Also vital in making this decision is the stage of development of the particular product range of that investor (e.g. whether patents are expiring in any event and where the investor has a large lead in the market already), the prospect of the target country being in a position to copy the IP, the amount already invested in R&D, etc. Fink and Maskus ...

conclude that countries that strengthen their IPRs regime are unlikely to experience a sudden boost in inflows of foreign investment .... At the same time, the empirical evidence does point to a positive role in stimulating cross-border licensing activity, affecting the nature of formal technology transfers.<sup>81</sup>

The positive effects of secure technology transfer arrangements between South Africa and the rest of SACU and technology-intensive investments by South African firms in the rest of SACU, given improved harmonisation of respect for, and establishment, registration and protection of IPR in the region is difficult to quantify, though clearly such transfers will not happen without the necessary guarantees being in place. The situation becomes even more complex when US interests are added, via the proposed FTA.

It will become important to discuss the possible consequences of the inclusion of IPR in the definition of an 'investment' in any investment-related clause of the proposed US-SACU FTA. In this respect, a developing country exposes itself to potential investment disputes in the case of the 'expropriation' of a US company's patent via the compulsory licensing mechanism, particularly if the common investor-to-state dispute settlement clause is inserted. However, it is noted that compulsory licensing has already been specifically excluded in five of the other US FTA investment clauses, provided the obligations of the TRIPS agreement and the specific IPR clause in the FTA are complied with. Careful wording and legal analysis of such a clause will be imperative.

---

81 Cited in Fink C & P Reichenmiller, *op. cit.*, p. 8.

It is noted that although China attracted much FDI despite flagrant IPR infringements, it is now coming under increasing pressure to reform its IPR system, and is indeed taking unilateral active steps now that its own IP interests are coming under threat. In any event, a country where IPR is not respected and given priority would have to offer significant additional compensatory benefits in order to attract FDI. It is doubtful that SACU can fill this criterion.

Interestingly, two of the leaders in the development debate that have championed the charge for a development agenda in WIPO have been cited for their significant gains in attracting FDI through strengthening their IP systems:

A steady increase in the level of FDI in India ... has been evident ever since patent and trademark reform was introduced in the early 1990s. An even more dramatic development took place in Brazil with spectacular growth in FDI following the introduction of a new industrial property law in 1996 (US\$ 4.4 billion in 1995 to US\$32.8 billion in 2000).<sup>82</sup>

Accordingly, it appears that some developing countries are able to move beyond the significant IPR resistance portrayed in much of the development debate, which tends towards holding back progress on the strengthening of knowledge about and the consequent proactive use of the international IPR system.

While concerns over access to affordable medicines, food security and knowledge are of significant concern and must be addressed, the writer is of the opinion, based on an extensive reading of these debates, that much is made of the problem, but that there is little of substance in the way of workable solutions that do not entail and, in many instances, advocate the collapse of the global system of incentive, establishment, transfer and reward inherent in this intangible, growth-inspiring economic asset called IPR, which can and ought to be exploited by all nations of this world. The following quotation, which is in complete contradistinction to the, in the main, overly laconic doomsday rhetoric of the anti-IPR development debate, are pertinent here:

For many years, economists have tried to provide an explanation as to why some economies grow fast while others do not; in other words, why some countries are rich and others are not. It is generally agreed that knowledge and innovation have played an important role in recent economic growth. The renowned economist Paul Romer suggests that the accumulation of knowledge is the driving force behind economic growth. For countries to promote growth, his theory goes, their

---

82 Idris K, *op. cit.*, p. 5.

*economic policies should encourage investment in new research and development (R&D) and subsidize programs that develop human capital.*<sup>83</sup>

What it is hoped will be conveyed here is that while South Africa is a country in the grip of much rhetoric that has the capacity to stagnate its growth and active involvement in the digital age by focusing inherently on the enormous problems it faces in the short term in terms of bringing basic services and human dignity to a multitude of people, it must seek solutions to these problems in a way that also addresses its need to grow, to encourage and provide access to the establishment, protection and enforcement of IPR for its innovators and creators in the long term. To hold up the entire international debate on the so-called 'new generation issues' in favour of 'progress' on agricultural interests that South Africa does not necessarily share with other developing states or even with fellow SACU members is to put off for too long its ability to progress and benefit its peoples from its interests and wholehearted involvement in the future of the global intellectual property regime. It is interesting to note that: 'Today, licensing – the sharing and distribution of IP assets – rather than litigation, is increasingly the *raison d'être* of patents.'<sup>84</sup>

The developing world needs to participate in the above vibrant information-sharing environment; however, it will need to put in place some basic necessities to achieve such participation.

## BIODIVERSITY AND TRADITIONAL KNOWLEDGE

Traditional knowledge has come up in a dozen or so free trade agreements (FTAs) over the last couple of years. In numerous cases, specific provisions on traditional knowledge were signed. The pattern at play is simple. When facing the US, trade negotiators concerned about 'biopiracy' try to put limits on when and how researchers and corporations can get patents on biodiversity or traditional knowledge in the United States. When the US is not involved, governments carve out space to define their own legal systems of 'rights' to traditional knowledge. In all cases, however, FTAs are framing traditional knowledge as intellectual property – a commodity to be bought and sold on the global market.<sup>85</sup>

There are many examples of this discussion in FTAs; however, one in particular provides a similar situation to the unilateral AGOA arrangement under which

83 Ibid., p. 4.

84 Idris K, op. cit.

85 GRAIN in collaboration with SR Cervantes, 'FTA's: Trading away traditional knowledge', p. 1, <http://www.grain.org>.

SACU benefits from market access preferences into the US, where three of the five Andean community of nations members (Colombia, Ecuador and Peru) began FTA negotiations with the US in 2003 when advised that the Andean Trade Promotion and Drug Eradication Act would not be renewed when it expired in December 2006

Initially the three countries required the following legal safeguards for the commercialisation (some would say 'biopirating') of their local genetic resources ('biodiversity'), based on two decisions of the Andean community:

- Decision 391 on access to genetic resources, which 'establishes that biodiversity is a "national and regional heritage" and recognizes the traditional knowledge of indigenous peoples related to the use of local genetic resources';<sup>86</sup> and
- Decision 486 on industrial property, which 'rules that the granting of patents on inventions developed on the basis of material obtained from the region's biological heritage or traditional knowledge "shall be subordinated to the acquisition of that material in accordance with international, Andean Community, and National Law"'. Furthermore,

... any such patent will be declared null or void if the applicant fails to submit a copy of the access permit or the certificate of authorization for the use of traditional knowledge belonging to indigenous, Afro-American or local communities in the member states. Quite importantly, Decision 486 also states that plants and animals are not patentable in the Andean Community.<sup>87</sup>

The above approach is indicative of what Cervantes ironically calls 'the magic formula to stop biopiracy in the minds of many governments', and is composed, as she puts it,

of three principles [drawn from the Convention on Biological Diversity (CBD)]: 'Disclosure of origin' [means] patent applicants would have to declare where they obtained biological materials or traditional knowledge involved in their invention. 'Prior informed consent' means they have to show that explicit clearance was given to them to take and use these materials or this knowledge. As to 'benefit sharing', the patent applicant would need to show that some arrangement had been made with the source of the materials or knowledge to give them something in return.<sup>88</sup>

---

86 Ibid.

87 Ibid.

88 Ibid., p. 3.

The slow pace of the US–Andean community FTA negotiations apparently caused the breaking away of Peru, which subsequently signed the US–Peru Trade Promotion Agreement, and in so doing, agreed to irreversibly amend its local laws to accommodate the policy of patenting of animals and plants, and undid the Andean community decisions relating to proof of prior informed consent or disclosure of origin prior to patent grant. The South African local law is in the process of following ‘the magic formula’ in recent amendments to its Patents Act. South Africa is also a member (outside of the SACU arrangement) of the megadiverse droup as from 2002, the purpose of which is to provide a platform for ‘consultation and cooperation to promote [members’] interests and priorities related to the conservation, sustainable use of their biological resources, especially with regard to the fair and equitable sharing of benefits arising out of their use of biodiversity’.<sup>89</sup>

It remains to be seen whether SACU, having made little effort to agree to a harmonised approach to IP in the first instance, will be able to ‘keep it together’ on this one, or whether the carrot of favourable US treatment/access to the US market dangled before any one of the member states, given the frustratingly slow pace of this FTA negotiation, will cause one of them to be the ‘Peru’ of this region and decide to go it alone on this and other IP issues.

Numerous attempts by developing countries at controlling, through the imposition of local access regulations into FTAs, the grant of patents in the US by making the ‘magic formula’ apply to the commercialisation of the use of genetic resources and traditional knowledge from such countries have failed. The US is not a signatory to the CBD and, additionally, its interest in the pharmaceutical and biotechnology industry tends to require rejection of the linkage between disclosure of origin and patent law. The US corporate advisory group on IP has stated as follows regarding the US–AUS FTA:

The United States should take the opportunity of future FTA negotiations to clarify that no disclosure requirements beyond those in Article 29 of TRIPS may be imposed on patent applications. Such a provision would explicitly prohibit countries from imposing special disclosure requirements regarding the origin of genetic resources or comparable grounds that could be used as a basis either to refuse to grant or to invalidate it.<sup>90</sup>

---

<sup>89</sup> <http://www.megadiverse.org>.

<sup>90</sup> Industry Functional Advisory Committee on IPR for Trade Policy Matters, *The US–Australia FTA: The Intellectual Property Provisions. Report*. Washington, DC, 12 March 2004, <http://www.ustr.gov/assets/Trade-Agreements/Bilateral/Australia-FTA>.

So, interestingly, this is one area in which the US clearly would baulk at increasing IPR protection to TRIPS-Plus levels, while its developing and least developed negotiating partners may wish to extend TRIPS protections.

It appears that to include such disclosure requirements in any FTA would provide a dangerous precedent for the US, and thus, while it has previously acceded to including wording on commitments to biodiversity, generally in clauses separate and distinct from the IPR clause, the linkage to the granting of patents through the mechanism allowed in 'the magic formula' is not permitted. Instead, the three principles of the CBD, it was stated in the US-Peru Trade Promotion Agreement, can be accommodated through 'contractual arrangements'. Additionally, through the minimum requirement of the US that 'any bilateral trade agreement entered into by the US reflect a standard of [IP] protection similar to that found in United States Law', a minimum requirement in all FTA negotiations is that countries accede to the Union for the Protection of New Plant Varieties (UPOV) convention, with the corollary that pressure to reverse existing policy on the non-patentability of plants and animals soon follows.

The UK Commission on IPR recommends that

[s]ystems of PVP [plant variety protection] designed for the needs of commercial agriculture in the developed countries (such as provided for in the UPOV Convention) also pose a threat to the practices of many farmers in developing countries of reusing, exchanging and informally selling seeds, and may not be appropriate in developing countries without significant commercial agriculture.

Furthermore, the commission recommends to developing countries that

because of the restrictions patents may place on use of seed by farmers and researchers, developing countries should generally not provide patent protection for plants and animals, as is allowed under TRIPS. Rather they should consider different forms of *sui generis* systems for plant varieties.<sup>91</sup>

Developing countries are also encouraged by the commission to ensure the use of exception language where they have or intend to develop biotechnology-related industries; to restrict the application of patenting in agricultural biotechnology; to allow for poor farmers' reuse, informal sale and saving of seed; to control exclusivity on harvested crops; and to permit access to the protected varieties for further research and breeding. The concentration of the seed industry is found to be problematic, and the commission recommends that steps be taken to finance

---

91 Commission on IPR, op. cit.

## HOW IP BENEFITS DEVELOPING COUNTRIES

Representatives from innovative and creative industries in Brazil, India, Argentina and Egypt told delegates at the WIPO Inter-Sessional Intergovernmental meeting on a Development Agenda for WIPO how IP had helped boost their industries' competitiveness in local and international markets and contribute to the development of the local economy.

Denise Naimara described how *Companhia Vale do Rio Doce*, the biggest diversified mining company in Brazil with operations in 18 countries, acknowledged and rewarded intellectual property contributions by their employees. 'When we license our patented technologies, we know that this contributes to Brazil's economic growth and the creation of jobs. Since we started protecting our intellectual property, our export revenue has increased, helping to contribute to Brazil's sustainable development.'

Peter Bloch, Chief Operating Officer of Light Years IP, an NGO specializing in helping developing countries increase export revenue through IP rights, described how LYIP was helping the Ethiopian government use intellectual property techniques to capture a larger share of the intangible value of its premium Harar coffee. 'The project could add US\$50 million to Ethiopia's export income,' said Peter Bloch. 'We firmly believe that intellectual property has a function in poverty alleviation and can be a significant factor for all countries that are struggling to compete in export markets against the world's most efficient producers and manufacturers.'

Dr P V Venugopal, Director of International Operations at the Medicines for Malaria Venture, a public-private partnership formed to develop drugs against malaria, told WIPO delegates that more than one third of the world's population lacked regular access to essential medicines. 'Patents are not the problem, let's stop arguing about whether patents are necessary or not,' he said. 'Medicines can only be developed if pharmaceutical companies are part of the R&D team and they will only play their role if intellectual property rights are protected and proper contractual terms established.'

Mohammed Ramzy, Chief Executive of El Nasr Film Company in Egypt, made an impassioned plea to WIPO and governments to act against piracy of intellectual property. 'None of my efforts as a creative producer would lead to the successful completion of a film unless I was protected by copyright. To continue to make films that support economic growth and cultural diversity in the Arab world, I need international intellectual property norms that are the same in all the countries where our films may travel.'

For Laura Tesoriero, Chief Executive of EPSA Music, an independent Argentinian record label specializing in tango and folk music, 'Copyright is what enables cultural

creativity in the music industry, not only nationally but also internationally, not only in the physical world but also in the digital one, through the Internet. Artists, interpreters, composers, producers, technicians, we all depend on copyright to enable us to continue to practise our craft.'

ICC organized the panel to stimulate discussion on the role of the intellectual property system in developing countries today. 'ICC's mandate is to foster economic growth in developed and developing countries alike, to better integrate all countries into the world economy,' said Peter Siemsen, Brazilian Vice-Chair of the ICC Commission on Intellectual Property. 'We believe that intellectual property rights are an invaluable tool for growth and progress and are ready to assist governments and intergovernmental organizations, such as WIPO, in helping individuals, communities and businesses in developing countries make better use the intellectual property system to this end (International Chamber of Commerce, <http://www.iccwbo.org>).

public sector research on agriculture 'orientated to the needs of poor farmers, that public sector varieties are available to provide competition for private sector varieties, and that the world's plant genetic resource heritage is maintained'.<sup>92</sup>

Given these considerations, SACU may wish to investigate the possibility that the US-SACU FTA could be used to build capacity and to provide funding for measures to promote farmers' rights, including the protection of TK. However, SACU will need clarity on its own interests, and what it wishes to achieve here:

It may be possible to change the negotiating dynamics in future FTAs, if US trading partners put forward own proposals on new intellectual property rules and related incentive mechanisms. These may pertain to policy areas in which developing countries have offensive interests, such as the protection of biodiversity and traditional knowledge. But they may also consist of alternative mechanisms of addressing the problems new intellectual property rules intend to fix [e.g. instruments other than data exclusivity exist to protect data against unfair commercial use].<sup>93</sup>

Further to the interests of SACU in strengthening the TK aspect of a potential IPR clause is the issue of the US definition of 'prior art' in patentability, and it is recommended that '[c]ountries that only include domestic use in the definition of

---

92 Ibid.

93 Fink C & P Reichenmiller, *op. cit.*, p. 10.



prior art should give equal treatment to users of knowledge in other countries'.<sup>94</sup> The commission then recommends that digital libraries of TK, i.e. potentially 'prior art', currently being accumulated ought to be 'incorporated into the minimum search documentation lists of patent offices therefore ensuring that the data contained within them will be considered during the processing of patent applications' and that 'the principle of equity dictates that a person should not be able to benefit from an IP right based on genetic resources or associated knowledge acquired in contravention of any legislation governing access to that material'.

In order to make rights holders of TK aware of potentially infringing patent applications, the commission goes further to recommend that 'all countries should provide in their legislation for the obligatory disclosure [subject to reasonable exceptions] of information in the patent application of the geographical source of genetic resources from which the invention is derived', and that WIPO or the country concerned with a potential misuse of genetic resources is advised by patent offices performing examinations of its possible interest in such patent applications.

The commission also recommends:

In respect of geographical indications, further research should be undertaken by a competent body, possibly UNCTAD, to assess the benefits and costs to developing countries of the existing provisions under TRIPS, what role they might play in development, and the costs and benefits of various proposals to extend geographical indications and establish a multilateral register.<sup>95</sup>

## CONCLUSION

It appears from the development agenda alignment by South Africa in various international forums that 'the horse has already more than bolted' in regard to whether SACU will be moved in any respect towards the US standard IPR bilateral clauses that require trading partners to strengthen IPR legislation and enforcement through various commitments to align trading partner legislation with US domestic legislation.

Certainly, the need to provide welfare benefits and the fear of giving away policy space in limiting the right to use flexibilities provided through TRIPS to delay its full implementation is uppermost in the minds of South African policy

---

<sup>94</sup> Ibid., p. 2.

<sup>95</sup> Ibid.

makers and in the rest of SACU in their approach to the US request to incorporate certain TRIPS-Plus provisions in the potential US-SACU FTA.

In addition, it appears that SACU policy makers are at this time insufficiently repared on the business impact of the IPR issues pertaining to welfare delivery, and thus they will undoubtedly continue to baulk at making any commitments above their existing TRIPS obligations. It is equally unlikely that the US, given its huge investment and wealth in IPR, and its imperative to increase the strength of rights holders in the digital environment, will be satisfied with TRIPS and nothing but TRIPS in this FTA negotiation. This means that at least as far as the IPR clause is concerned, there is a strong risk that neither side will be in a position to make a significant movement. This would be most unfortunate, given that the two sides have more to offer one another by co-operating to work out unique solutions to an exceptionally thorny problem.

Perhaps, given the above scratching of the surface of this complex issue in this chapter, business in South Africa, which is itself additionally comprised of layers of conflicting interests in IPR, will be motivated to begin investigating the real differences and similarities between its position and that of business in SACU, and then that of the US, and then to attempt to provide workable solutions that will not result in the collapse of the incentive to finance, develop, own and profit from creative works and innovation, while at the same time providing the mechanism by which the laudable humanitarian goals of access to medicines, food and education may be met in a sustainable way that does not affect the ability of local and regional business to make progress in the knowledge age. Business has a crucial and extremely urgent role to play in this regard.

An excerpt from an analysis of the Singapore-US FTA negotiation and its benefits to Singapore one year after implementation, specifically pertaining to IPR, follows:

The intellectual property rights regime that has been created as a result of the USSFTA will make Singapore attractive to companies in the creative industries as well as in knowledge-intensive industries such as the pharmaceutical industry. US companies such as Pfizer, has announced plans to expand their manufacturing and research facilities in Singapore. Lucasfilm Animation will establish its only facility outside the US in Singapore to produce digital animated contact. Non-US companies are also capitalising on the strong regime. An Indian film company is looking to set up its regional headquarters in Singapore and BMW has just set up its design studio in Asia, in Singapore ...

In the end, it is up to each FTA partner to harness opportunities and to minimise the negative consequences of an FTA. One needs to be absolutely clear about one's own interests, the domestic circumstances and likely impact. Especially in the event that FTAs are used to address security gains first rather than economic benefit, without adequate preparation, there is a danger that untenable precedents are set unknowingly.<sup>96</sup>

It now remains to be seen whether at least in the IP clause of a potential US-SACU FTA some compromise and common advantage can be gleaned for both sides. In the first instance, though, SACU must responsibly and unemotionally invest in investigating stakeholders with differing interests in IPR within each member state – their overriding welfare concerns must be balanced as far as is practical in a way that ensures long-term growth and sustainability. It is the author's view that caution must be exercised, and that, in the same way that a blind capitulation to US interests is not desirable, an uncritical dismantling of the IPR system in the interests of policy space and the perception that this alone is a panacea for the provision of welfare gains without regard for its long-term consequences will also cause harm to these fragile economies.

It remains to be seen whether advantages in attracting FDI and technology transfer as listed in the Singaporean example could ever be sufficient to elevate developing countries in this region to a stage where access to medicines and other welfare benefits might possibly become far less of a problem due to the overall economic improvement created by this FTA. Nevertheless, such welfare concerns must be addressed in the short to medium term.

What is certain is that the presently unco-ordinated SACU approach and the crucial lack of a more complete framework governing in an integrated and harmonised way the 'new' issues of international trade, such as services and intellectual property, must be urgently rectified and addressed, as must the ongoing failure of South Africa itself to properly inform and consult with its own stakeholders and to research in depth its own interests (both IP rights holders' and social/welfare issues) in coming to a position on the IPR clause in this FTA. It is interesting to note that the congressional mandate under which the USTR obtains his or her authority to negotiate requires that all FTAs must be cleared through a structure of advisory councils made up of major US corporations.<sup>97</sup> One might in this respect say that South Africa has a 'better' balance of society in

---

96 Li Lin C, *Eight Lessons From The United States-Singapore Free Trade Agreement*, <http://www.twinside.org.sg>.

97 GRAIN, with RS Cervantes, *op. cit.*, p. 3.

the constituency representation at NEDLAC, since not only business interests are represented here. Unfortunately, IPR has generally made very few appearances in this forum to date.

It is important to reiterate the increasing importance of the value of intangible assets in the balance sheet of modern corporations (including those that are based in developing states) as indicated in Figure 1 in the introduction of this paper. A long-term failure to support, expand, protect and enforce IPR (and even to update TRIPS to allow it to deal with new crises caused by virtually instant and low-cost global distribution via the Internet and other digital media, or to allow it to properly reflect the interests of developing nations in TK) through active government commitment and involvement will likely ensure that SACU companies lose value over time, a loss that the region can hardly afford to incur.

The ongoing ambivalence on our IPR strategy is making the US-SACU FTA exceedingly painful for all concerned. It is time to make a difficult decision. If South Africa cannot come some way towards the US on the IPR clause, bearing in mind its need for policy space on welfare delivery in the areas of access to medicines, knowledge and food security, balanced with the interests of SACU and US business in their own emerging and existing IPR, the country ought to face the reality that it is unlikely that a deal can be struck with the US at least on this clause, rather than continually undermining its intellectual capabilities by hiding behind the worn out 'capacity excuse'. Certainly in the case of South Africa, this is outdated and untrue, and after more than three years in discussion, it is necessary to finally agree on mechanisms that can be used to the satisfaction of both parties to provide predictable and irreversible access to one of the country's biggest and most reliable markets.

The aims of the US-SACU FTA include the 'locking in' (and possible expansion) of existing preferential access under AGOA, the likelihood of increased US investment in the region and the consequently increased involvement in and commitment to development.<sup>98</sup> The latter benefits, including, most importantly, a friendly and co-operative relationship with the world's single superpower, are extremely difficult to quantify. However, walking away from this potential deal purely because of the difficulties involved in balancing the rights of IPR holders and consumers, given the mechanisms that are in fact available to ensure that public welfare issues remain within SACU's policy space purview, will potentially

---

98 Maduna C, 'Negotiating IP in FTAs: Preserving and enhancing flexibilities.' Paper presented to the CIEL Workshop, Washington, DC, 2006.

send an extremely negative message, the consequences of which will have to be borne by the region a long way into the future.

Some brief suggestions follow as to what various stakeholders need to do with regard to IPR if SACU/South Africa is to proceed with the potential US-SACU FTA.

- Business needs to thoroughly investigate the benefits that Article 67 of TRIPS can provide in the context of the US-SACU FTA. The article obliges developed nations to provide technical assistance to developing countries and LDCs, including assistance in the preparation of laws and regulations on the protection and enforcement of IPR. The matter of capacity-building assistance by the US in formulating an acceptable IPR clause in the potential US-SACU FTA will thus be paramount. As stated above, it may be that business in SACU would wish the US to go TRIPS-Plus in exceeding the obligations of Article 67 in this regard. Examples of such assistance that could positively build the SACU IPR systems would include:
  - assistance with setting up petty patent offices throughout the region in order to make IPR accessible and affordable to all;
  - specialised crimes courts, specialised IP courts, and IPR training for enforcement and judicial officers;
  - most importantly, assistance with accessing the US Patents Office for South African innovators;
  - assistance with enforcing SACU IPR in the US; and
  - assistance with IPR-directed educational programmes and formal, institutionalised technology transfers, including the formalisation of the targeting of joint venture technology transfer initiatives that meaningfully protect incoming technological advances, while permanently institutionalising knowledge in SACU.
- SACU needs to take steps to incorporate TK and biodiversity protections into the IPR clause of the US-SACU FTA. However, bearing the Andean experience in mind, it will need to bring workable solutions to the table. Many developing nations look at incorporating the TK provisions of their law *sui generis* from their IPR systems, and it may be that the US would be more supportive of this concept. However, it is clear that the US will not support the use of disclosure requirements relating to the use of indigenous biological resources as a means to invalidate patents – there must thus be a process whereby compensation for communities can be claimed in another way. Additionally, the uncertainty as to whom exactly the bioprospector must make an agreement with in respect of the

use of indigenous biological resources must be removed by a formal process of government, or many unnecessary conflicts will arise. International thinking around this relates to the need for governments to establish formal databases and negotiate directly with bioprospectors on behalf of such communities.

- SACU needs to obtain financial and technical assistance to set up website-accessible databases for SACU copyrights, patents, trademarks, GIs and TK (capacity building).
- SACU needs to encourage US medical staff transfers (Chris Hani Baragwanath Hospital is famed for being a top medical trauma training centre) and other mutually beneficial medical personnel exchanges in return for cheaper drugs, including direct HIV/AIDS funding towards permanent institutional capacity for education on prevention and medical research. It should honestly and openly examine the true reasons for high medicine prices in this region, and address them effectively.
- SACU should discuss and formalise other joint ventures that will increase respect for IPR and at the same time provide a win-win situation for social development, such as tax breaks for US publishers of educational materials who donate books to schools in the region. It is worthwhile for SACU negotiators to bear in mind that the US has similar policy space concerns vis-à-vis its own poor.
- SACU should set up collaborative ventures and technology transfer agreements to boost specifically targeted SACU IPR industries, such as IT, film and software development. Such ventures need to build on what is already happening in the South African film industry.
- SACU should attract rather than repel US biotechnology companies, due to its tremendous biological diversity; adopt a 'friendlier' more collaborative approach rather than making continuous references to 'biopiracy' activities of US companies as a reason to stall the strengthening of IPR; learn to protect its assets through active involvement in IPR; and use the opportunity to learn through co-operation with US bioprospectors rather than indulging in name calling and unfortunate alienation tactics. This is the technology of the future; SACU could do worse than learn at the knee of leading companies in this field.
- South Africa should consider the extension of copyright terms as a possible tool to assist the country's film industry to recover losses due to piracy in the future, or alternatively assist organisations financially to make a real impact on rampant piracy. It should consider increasing penalties and imposing

minimum 'jail time' for pirates as a real disincentive for all manner of organised crime. Criminalising counterfeit and piracy activities in a meaningful manner will simultaneously deal with other more serious aspects of criminality in South Africa. The country should make an effort to indicate its firm stance against rampant criminality.

- SACU should effectively and decisively deal with the required updating of IPR legislation for the digital age.
- SACU should deal with 'prior art' in the form of TK, potentially to be 'incorporated into the minimum search documentation lists of patent offices therefore ensuring that the data contained within them will be considered during the processing of patent applications'.
- South Africa should deal more clearly with the wording and definitions of exclusions in the country's legislation that allow the limited use of copyrighted, trademarked and patented ideas for welfare objectives. These are currently too loosely formulated, and certainty in this area would likely provide comfort to all parties, including local business.
- SACU should make real and effective progress on getting CIPRO and other IPR offices in the region up to world class and should request financial and technical assistance to meaningfully and permanently remove unnecessary backlogs.
- All SACU members should view the IPR system as a strategic asset for the knowledge age rather than resist 'new' issues until progress can be made on agriculture: this stance will hurt the region rather than move it forward with the times. Making effective use of the international IPR system and building capacity in the domestic IPR system is not a trade-off for market access – it is a benefit in and of itself and an investment in the future innovativeness of this region.

# Index

## A

ABSA Bank 70  
Accelerated and Shared Growth Initiative for South Africa  
    *see* AsgiSA  
Access to Knowledge (A2K) treaty movement 130  
Africa Growth and Opportunity Act  
    *see* AGOA  
AGOA 1, 3, 5, 8-13, 24, 166  
    *UF Africa Growth and Opportunity Act*  
Andean Trade Promotion and Drug Eradication Act 158  
Angola 69, 101  
    Protea Hotels in 69  
APC 82, 83  
    *UF Australian Productivity Commission*  
        SA service protection 83  
Argentina 101, 115, 161  
    *IP boosted innovative and creative industries in* 161  
Arivia.com 70  
AsgiSA 99, 100  
    *UF Accelerated and Shared Growth Initiative for South Africa*  
assets  
    intangible compared to tangible peers in business, 1978, 1998, 2004, 114  
Australia 20, 26, 28, 31, 33, 42, 51, 63, 101, 148  
    action taken against copyright theft and piracy 124

Australian Productivity Commission (APC) 82  
Australian National University 82  
banking sector 64  
FTAs signed with US 131  
legal system 41  
US approach to FTAs 95-96  
US-Australia FTA 28, 95-96, 146, 159  
Australian Productivity Commission  
    *see* APC  
automotive industry 3, 9-10, 24  
aviation industry 84

## B

Bahrain 101, 146, 148  
balance of payments  
    *see* BOP  
banks, SA  
    foreign revenue earned 69  
barriers to trade in services  
    compared to barriers on goods 76-77  
    cost of protection 83-84  
    importance and purpose of regulation 77-79  
    measures of protection 81-83  
    types of 79-81  
BEE 24, 52  
    *UF black economic empowerment BBBEE and Competition Acts* 125  
    initiatives 27, 36, 51



- preferential procurement policy
  - in terms of 4, 21-22, 51-52, 55
  - regulation in relation to
  - government procurement 51
  - SA's programme 50
  - US companies ignore laws 3
  - US-FTA 52
- BBBEE and Competition Acts 125
  - see also BEE*
- bilateral services agreements
  - between US and SA 60
- bilateral trade
  - between US and SA 85
  - in services, 2000, 85
- biodiversity and traditional knowledge
  - see also traditional knowledge*
  - IPRs of 157-163
- biotechnology industry 159, 160, 167
- BITs
  - UF bilateral investment treaty*
  - South African 55
- black economic empowerment
  - see BEE*
- BLNS 92
  - UF Botswana, Lesotho, Namibia and Swaziland*
  - countries 3, 17, 56, 93
  - members of SACU 22
- BOP 77, 86
  - UF balance of payments*
  - bilateral 85- 86
  - SA 85-86
  - trade data 88
  - US 152
- Botswana 52, 70, 92, 101, 127, 154
- Botswana, Lesotho, Namibia and Swaziland
  - see BLNS*
- Brazil 10, 101, 115, 156, 161
  - Brazilian Technological Innovation Bill 116
  - IP boosted innovative and creative industries in* 161
  - Technological Innovation Bill 116
- business services
  - sector-specific commitments, SA's offer to WTO 98
- C**
- CAFTA-DR 97
  - UF Central American Free Trade Area and Dominican Republic*
  - between US and 26, 28, 31-32, 90, 97, 131, 147-148
  - CBD 111, 153, 158-160
  - UF Convention on Biological Diversity*
- Central American Free Trade Area and Dominican Republic
  - see CAFTA-DR*
  - CGE 66
  - UF computable general equilibrium*
- chemical industry 3, 9, 12, 20, 24
- Chile 26, 28-30, 101, 152
  - cargo restrictions, lifting of 65
  - competition in port services 72
  - FTAs signed with US 131
  - US approach to FTAs 96-97
  - US-Chile FTAs 30-32, 44, 96-97
- China 78, 16, 20, 28, 132, 156
  - action taken against copyright theft and piracy 123-124
  - patent applications, 1994-2000, 151
- Chris Hani Baragwanath Hospital 168
  - CIPRO* 109, 146, 150, 169

*UF Companies and Intellectual Property Office*  
 Colombia 101, 158  
     patent applications, 1994-2000, 151  
 commercial presence  
     GATS mode 3 62  
 communication services  
     sector-specific commitments, SA's offer to WTO 98-99  
 competition  
     spill-over effects from abroad 73  
 competition policy  
     US-SACU FTA 19  
 comprehensive/ness  
     FTAs 11-13, 18, 27  
     *services agreements* 90  
     US-SACU FTA 11-13  
     US-SA FTA 90-92  
 compulsory licensing  
     limitations on use of 147  
 computable general equilibrium  
     *see* CGE  
 consumption abroad  
     GATS mode 2 62  
 Convention on Biological Diversity  
     *see* CBD  
 Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite 152, 154  
 Copyright Act 109, 112, 154  
 copyright holders  
     strengthening burden of proof 135-136  
 copyright industry 124, 136-137  
 copyright-strengthening mechanisms  
     built into US bilaterals 135-141

Counterfeit Goods Act 112  
 cross-border trade  
     GATS mode 1, 62  
 Criminal Procedure Act 112  
 customs transparency and harmonisation  
     US-SACU FTA 19

## D

Department of Arts and Culture 125  
 Department of Science and Technology  
     Advanced Manufacturing Strategy 113  
 Department of Trade and Industry  
     *see* DTI  
 digital copyright  
     provisions 110  
 dispute settlement  
     investment, compliance of US FTAs with 39-41  
     investment, compliance of US FTAs with SA law 46-50  
 Doha Declaration 138  
     on TRIPS Agreement and public health 141-149  
 drugs  
     limitation of parallel importation of 148  
 DTI 43, 56, 91, 94, 112, 125, 128, 135, 153-154  
     *UF Department of Trade and Industry*  
     attitude of DTI to accession to WIPO 'digital treaties' 154  
     draft Industrial Strategy 113

## E

*EFTA*  
*UF European Free Trade Association*

- intellectual property rights
  - EFTA experience, SACU refuse*
  - TRIPS-Plus* 121-128
  - SACU 53, 54
- Egypt 43, 102,
  - cost of protection 84
  - IP boosted in innovative and creative industries in* 161
  - manufacturing industry 84
  - patent applications, 1994-2000, 151
  - EIA 20
  - UF Environmental Impact Assessment*
- El Salvador
  - action taken against copyright theft and piracy 124
- entertainment industry 5, 123, 125, 134
- Environmental Impact Assessment
  - see EIA*
- environmental protection
  - US-SACU FTA 19-20
- environmental services
  - sector-specific commitments, SA's offer to WTO 100
- ERP 84
- UF effective rates of protection*
  - on electrical machinery 8
  - on manufacturing products 84
- expropriation and nationalization
  - investment, compliance of US FTAs with 37-39
  - investment, compliance of US FTAs with SA law 45-46
- F
- FDI 25, 28, 126, 156
- UF foreign direct investment*
  - attracting, and technology transfer 120, 122
  - Brazil 156
  - China 132, 156
  - effect of absence of an IP culture on 132
  - effect of increasing regulatory burden on 125
  - European in SA 88
  - flows of 89
  - India 156
  - in key sectors 92
  - into developing countries 58
  - IP systems attract 155-156
  - regulation 33
  - SA in Europe 88
  - SARB sensors breakdown of, into SA 88
  - services sector, in developing countries 58
  - Singapore 165
  - size of barriers on 82-83
  - stock in 2001, 88
  - US in SA 1, 88
- film industry 70, 135
  - India 124
  - SA 70, 122-123, 129, 134, 168
- financial services
  - sector-specific commitments, SA's offer to WTO 99
- FTA/s 1, 7-10, 16-17, 24-25, 30, 122, 150, 164
  - see also US-SACU FTA; EFTA; FTAA*
  - UF free trade agreement/s*
    - agreements 27
    - benefits of AGOA through an 10

- benefits/threats for SA business
- people 2
- benefits to SA and SACU on
- conclusions of 4
- comprehensive 27
- comprehensiveness 11-13
- US asked for 18
- with US 11
- data protection provision 149
- disclosure requirements 160
- effects of services 15
- enforcement obligations in 151
- failure of negotiations 27
- inclusion of IPR clause in
- potential FTAs 121, 128
- IPR clause 155
- jewellery production in SA 9
- local access regulations 159
- motor industry 9
- negative consequences of 165
- negotiations 2-3, 5, 17, 26, 131-133, 135, 153, 159, 160, 164
- April 2006, 26
- between US and SACU member countries (2 June 2003) 25, 105
- changing dynamics in future 162
- importance of 24
- SACU, full FTAs 114, 119
- security gains, addressing 165
- US-Andean community FTA 159
- North American (NAFTA) 11
- opportunities presented by 14
- overview of business
- perceptions of benefits/threats 7
- process 2
- proposed by US 26, 155
- provisions 148
- recent US 27
- regional nature of 22-24
- SA incorporating TRIPS-Plus measures in its 113
- to address 25-26
- traditional knowledge in 157-158
- US 3-4, 27, 146
- approach to 95-97
- Australia 95-96
- Chile 96-97
- Morocco 96
- clause on access to medicine 136
- FTA investment clauses* 155
- future negotiations 159
- generic medicine, consent from patent holder 147
- harmonization of 152
- obligations 153
- signed with 131, 146
- Australia 131, 146
- Bahrain 146
- Chile 131
- Jordan 131
- Morocco 131, 146
- Singapore 131, 152, 164
- typical contents of 27
- US Australia 28, 159
- US investment provisions 3-4
- US-SACU 3, 4, 5, 10, 23
- US-SACU negotiations 1
- US-SACU FTA 26-27
- US 'template' 3
- US wish list for IRP Clause in 128-141
- with EU 8
- with Mercosur 8

- with US 8, 9
  - work in progress 131
- FIAA 138-139
  - UF Free Trade Area of the Americas*
- fuel industry 18
- G
  - GATS 4, 34, 83, 88, 90
    - UF General Agreement on Trade in Services*
      - and commitments 77, 90, 92, 93, 99
      - approach to analysing trade in services 62-63
    - Article VI.4 of 95*
      - commitments by schedule and country 101-104
      - commitments of member states 81
      - coverage ratios 81
      - elements of 77
      - establishment of conceptual framework for 61
      - GATS-plus agreement 91
      - mode 1, 61, 95, 97-100
      - mode 2, 61, 95, 97-98
      - mode 3, 61, 67, 93, 95-97, 100
      - mode 4, 61-62, 67, 95, 100
      - negotiations relating to (2002) 59, 64, 91, 98
      - positive-list approach 91
      - preamble of 36
      - SA's commitment to 92
      - schedules 92, 99
      - US commitments in 90
      - XIV 52
- GATT
  - UF General Agreement on Tariffs and Trade*
    - 1984, 60
    - 1994, 34, 35
    - and TRIMS 42
    - XX 52
- GDP
  - service sector's contribution to 58
- General Agreement on Tariffs and Trade
  - see GATT*
- General Agreement on Trade in Services
  - see GATS*
- generalised system of preferences
  - see GSP*
- generic drugs
  - prevention of marketing approval during patent term 147
- geographical indicators
  - see GIs*
- Ghana 43, 102
  - Protea Hotels in 69
- GIs 108
  - UF geographical indicators*
- goods industry 76
- government procurement
  - and BEE 50-52
  - compliance of US FTAs with SA law 50-52
  - investment issues 41-42
  - transparency of, US-SACU FTA 21-22
- GPA 42
  - UF government procurement agreement*
    - limitations and possible exceptions 42

- procurement provisions in
  - WTO 51-52
  - schedules 42
  - US member of 42
- Group Five 69
- GSP 1
  - UF generalised system of preferences*
    - benefits 3
    - benefits to motor industry 10
    - benefits to sugar industry 10
    - threats by US Congress to
      - graduate SA from 3, 5, 24
      - trade preferences 5
    - US 10
- H
  - Hague Agreement 152
  - harmonization
    - US-SACU FTA 18
  - HIV/AIDS 4, 145
    - figures in SA 122
    - funding 168
    - TRIPS agreement and public
      - health declaration 141-142
- I
  - ICSID 30, 31, 50
    - UF International Centre for the Settlement of Investment Disputes*
      - additional facility arbitration
        - 47, 55
      - advantages 40
      - arbitration 39-40
      - arbitration mechanisms 41, 48
      - creation in 1966, 39
      - dispute settlement 39-40, 46
      - dispute settlement processes 39
        - investor-state arbitration for
          - SA investors in other countries
            - 47, 55
          - SA not member 46-47, 55
        - tribunals 40
  - IIPA 110
    - UF International Intellectual Property Alliance*
  - imports
    - identification of gains from
      - 72-74
  - India 8, 10, 58, 62, 69-70, 75, 102, 156, 161
    - action taken against copyright
      - theft and piracy 124
    - film industry 164
    - IP boosted innovative and
      - creative industries in 16
      - manufacturing sector 84
      - potential SACU-India PTA 55
  - indigenous biological resources 111
  - infant industry protection 78
  - intellectual property 2-3, 15
    - UF IP*
      - and US-SACU FTA 105-169
      - benefits to developing countries
        - 161-162
      - implementation of laws in 54
      - in services industry 15
  - intellectual property rights 1, 2, 4, 26, 28, 80, 95
    - UF IPP*
      - and US-SACU FTA 105-169
      - EFTA experience, SACU refuse*
      - TRIPS-Plus* 121-128
        - benefits to US business 152-154
        - biodiversity and traditional
          - knowledge 157-163

- DOHA Declaration on TRIPS Agreement and public health 141-149
  - effective and efficient enforcement 152-154
  - enforcement and capacity-building 149-152
  - harmonization with US law 152-154
  - investment-IPR interconnection 155-157
  - US wish list for IPR Clause in FTAs 128-141
- International Chamber of Commerce (ICC) 115
  - International Convention for the Protection of New Varieties of Plants of 1999, 152
- International Intellectual Property Alliance
  - see IIPA*
- international law
  - investment, compliance of US FTAs with 33-41
    - dispute settlement 39-41
    - expropriation and nationalization 37-39
    - minimum standard of treatment 36-37
    - national and MFN treatment of foreign investors/investments 35-36
    - performance requirements 37
- Internet service providers
  - protection of copyright* 135
- investment
  - compliance of US FTAs with international law 33-41
  - dispute settlement 39-41
  - expropriation and nationalization 37-39
  - minimum standard of treatment 36-37
  - national and MFN treatment of foreign investors/investments 35-36
  - performance requirements 37
  - compliance of US FTAs with SA law 43-50
  - dispute settlement 46-50
  - expropriation and nationalization 45-46
  - minimum standard of treatment 44-45
  - national and MFN treatment of foreign investors/investments 44
  - performance requirements 45
  - recent US FTAs concluded in terms of 2002 TPA 28-32
- investment issues
  - US-SACU FTA 25-56
- IP*
  - see intellectual property*
- IPR*
  - see intellectual property rights*
- Iran
  - patent applications, 1994-2000, 151
- J**
  - Jordan 136
    - FTAs signed with US 131
- K**
  - knowledge industry 126, 131, 140
  - Korea 47, 58, 102

- patent applications, 1994-2000, 151
- L**
- labour
  - US-SACU FTA 21
- LDCs 105, 107, 113, 127, 129, 146, 149, 153
  - UF least-developed countries
- least-developed countries
  - see LDCs
- M**
- Madrid Protocol 150, 152
- MAI 33, 38
  - UF Multilateral Agreement on Investment
    - agreement 37
    - concept of 33
    - failed 37
- Malaysia 103
  - action taken against copyright theft and piracy 124
- manufacturing industry 84
- Medicine and Related Substances Control Act and Regulations 110
- Merchandise Marks Act 112
- Mexico 103
  - competition in port services 72
- MFN 27
  - UF most favoured nation and national treatment provisions 48, 142
  - principle of non-discrimination 77
  - principle of TRIPS 131
  - requirements in US FTAs 44
  - standards 36
  - treatment 29
- treatment of foreign investors and investments 36, 44
  - treatment principles 44
  - treatment provisions 44
- MIDP 10
  - UF Motor Industry Development Programme
- Morocco 26, 28-31, 37, 103, 136, 146, 148
  - FTAs signed with US 131
  - US approach to FTAs 96
- motor industry 9-10, 12
- MTN 73
  - foreign revenue earned 69
- Multilateral Agreement on Investment
  - see MAI
- minimum standard of treatment
  - investment, compliance of US FTAs with 36-37
  - investment, compliance of US FTAs with SA law 44-45
- music industry 123, 135, 162
- N**
- NAFTA 11, 30
  - UF North American Free Trade Agreement
    - agreement 37
    - Chapter 11, 41
    - member countries 37
    - tribunal 38
- National Economic Development and Labour Council
  - see NEDLAC
- National Environmental Management Biodiversity Act 111
- National Prosecuting Authority 109
- NEDLAC 128, 138, 166



- UF National Economic Development and Labour Council*
  - TESELICO substructure of 128
- Nigeria 1, 103
  - intellectual property protection 133
- non-tariff barriers
  - see* NTBs
- North American Free Trade Agreement
  - see* NAFTA
- NTBs 1, 17-18, 25, 76
  - UF non-tariff barriers*
  - US-SACU FTA 17-18
- O**
  - OECD 16, 33, 134
    - UF Organisation for Economic Co-operation and Development*
      - countries 63
  - oil industry 17
  - Organisation for Economic Co-operation and Development
    - see* OECD
- P**
  - Pakistan 103
    - copyright theft and piracy 124
  - Paris Convention for the Protection of Industrial Property 152
  - Patent Cooperation Treaty 149
  - Patents Amendment Act 111
  - performance requirements
    - investment, compliance of US FTAs with 37
    - investment, compliance of US FTAs with SA law 45
  - Permanent Committee on Cooperation for Development Related to Intellectual Property (PCIPD) 115
  - Peru 72, 103, 158-160
    - US-Peru Trade Promotion Agreement 160
  - pharmaceutical industry 16, 142, 159, 164
    - companies 133, 143, 161
    - maligned companies 143
    - multinational companies 138-139
    - patent 4
    - products 143
    - test data protection 146
  - Plan One 69
  - Protea Hotels
    - in Angola 69
    - in Ghana 69
  - preferential trade agreement
    - see* PTA
  - procurement
    - recent US FTAs concluded in terms of 2002 TPA 32-33
    - PTA85, 122, 144
    - UF preferential trade agreement*
  - public-private partnerships 125
- Q**
  - QUAD 11
    - UF Canada, EU, Japan, US*
- R**
  - regional nature of
    - US-SACU FTA 22-24
- S**
  - SACU 1, 105, 107, 114-115, 119-120, 141, 152, 156, 162, 165, 167-169

- UF Southern African Customs Union*
  - attraction of US biotechnology companies 168
  - benefits from market access
  - preferences into US 158
  - borders 114, 151
  - capacity to negotiate on/and comply with terms of US FTAs 52-54
  - collaborative ventures and technology transfer agreements 168
  - companies 114, 129-130, 166
  - databases to protect intellectual property 168
  - deal with 'prior art' in form of TK 169
  - economies of states 114
  - encourage US medical staff transfers 168
  - implementation of digital treaties 154
  - IPR-dependent industries of all developing countries 129
  - IPR systems 167
  - joint ventures that will increase respect for IPR 168
  - knowledge sharing by SACU businesses 113-114
  - leadership 119
  - legitimate copyright industries 137
  - needs to obtain financial and technical assistance 168
  - negotiations between US and, since 2003, 105
  - policy makers 164
  - policy space 149, 166
  - protection of GIs or appellations of origin 153
  - relations with other trading countries 118
  - states/countries 138, 150, 153
  - says no to TRIPS-Plus 121-128
  - technology-intensive investments by SA firms in 155
  - updating of IPR legislation 169
  - US wants to sign an FTAA with 138
  - work in progress 131
- SAPS 109, 112, 125
  - UF South African Police Services*
  - SARB 86
  - UF South African Reserve Bank*
- SARS 109, 112, 125
  - UF South African Revenue Services*
- seed industry 106, 160
- services
  - barriers to trade in 76-84
  - compared to barriers on goods 76-77
  - cost of protection 83-84
  - importance and purpose of regulation 77-79
  - measures of protection 81-83
  - types of 79-81
  - economics of trade in 60-66
- services agreement
  - comprehensiveness 90
  - with US, from theory to practice 57-104
- services industry* 13-15, 58, 76, 78, 84, 92, 140
- services liberation
  - economic effects of 65

- evaluation of impact on poor 74-76
  - gains from 66-76
  - gains from exports
  - identification 68-72
  - identification of gains from exports 68-72
  - identification of gains from imports 72-74
  - understanding 67-68
- services markets
  - economics of trade in services 60-66
  - empirical analysis 64-66
  - theory and concepts 61-64
  - gains from services
  - liberalisation 66-76
  - US-SACU FTA 13-15
- services negotiations
  - positive vs negative approach to 91
- services trade
  - US with SA, 2000, 87
- Shoprite
  - exports of retail services 71
  - foreign revenue earned 69
  - relative gains to SA from exports of retail services 72
- Singapore 21, 33, 70, 104, 148, 160
  - air express services, improvements to 72
  - FTAs signed with US* 131
  - SurfIP* 150-151
  - US-Singapore FTAs 152, 164, 165
- Singapore-US FTA 164-165
- South Africa
  - investment stock by region, 2001, 88
  - migration by skill and region 89
- South Africa Federation Against Copyright Theft (SAFACT) 109
- Special 301 mechanism 150
- sugar industry 10, 12
- Swedish National Board of Trade 120
- T
- TDCA
  - UF Trade, Development and Co-operation Agreement*
    - EU-SA 1, 11-13, 24
- technology transfer
  - US-SACU FTA 15-17
- telecommunications industry 73-74, 80-81, 83-84
  - Argentina 65
  - Peru 73
- telecommunications operators
  - relative gains to SA from new and foreign 74
- telecommunications services 73-74, 81, 63-84, 90, 92-93, 95, 97-99
- Telkom 74
- temporary movement of natural persons
  - GATS mode 4, 63
- test data exclusivity 147-148
- Thailand 104, 131
  - patent applications, 1994-2000, 151
- TIDCA 2, 5, 26, 54
  - UF Trade Investment Co-operation Agreement*
    - US-SACU FTA being 'demoted' to 26
- TISA 43, 44
  - UF Trade and Investment South Africa*

- TK
  - see traditional knowledge*
- TPA 130
  - UF Trade Promotion Authority*
    - recent US-SACU FTAs
    - concluded in terms of 2002 TPA 28-33
    - investment 28-32
    - procurement 32-33
- trade barriers
  - compared to barriers on goods 76-77
  - cost of protection 83-84
  - importance and purpose of regulation 77-79
  - in services 76-84
  - measures of protection 81-83
  - types of 79-81
- trade in services
  - barriers to 76-84
  - compared to barriers on goods 76-77
  - cost of protection 83-84
  - importance and purpose of regulation 77-79
  - measures of protection 81-83
  - types of barriers 79-81
- trade liberalisation
  - impact on poor* 74-76
- Trademarks Act 112
- Trade Marks Office 112
- Trade Promotion Authority
  - see TPA*
- trade talks
  - awareness of US-SACU FTA 23-24
- traditional knowledge 119, 154, 158
  - UF TK*
    - African 117
    - and biodiversity
    - IPRs of 157-163
    - commercialisation of 159
    - concerns of developing countries re patenting of 117
    - of indigenous peoples 158
    - of Patents Amendment Act 111
    - protection of 139, 162
- transparency of government procurement
  - US-SACU FTA 21-22
- transport services
  - sector-specific commitments; SA's offer to WTO 99-100
- TRIMS 35, 37, 42
  - UF trade-related investment measures*
    - agreement of WTO 33-34
    - national treatment provisions 42
    - provisions of 45
- TRIPS 106-107, 114, 116-117, 122, 128-129, 131-133, 136-137, 139-142, 151, 163-164
  - UF trade-related intellectual property rights*
  - see also TRIPS-Plus*
    - accommodations to provide access to medicines 129
    - agreement 142-143
    - Article 29, 159
    - Article 67, 120, 167
    - commitments 132
    - communal ownership, problem of 133
    - compliance 126, 128
    - costs of implementation of TRIPS-compliant legislation 107
    - Council for 143
    - digital environment 164

- DOHA Declaration on TRIPS Agreement and public health 141-149
  - EFTA experience, SACU refuse TRIPS-Plus 121-128
  - exceptions 130
  - flexibilities inherent in 107, 113-115, 120-121, 127, 129, 135-136, 141, 144-145, 148, 151, 163
  - health solution 149
  - implementation of 116-117, 125-126
  - IP rules 116
  - minimum requirements of 128
  - most-favoured-nation (MFN) principle of 131
  - new WIPO treaties, and 149
  - obligations to enforce IPR 91, 128, 132, 154-155, 164
  - parallel importation of drugs 148
  - patent protection 160
  - principle of 131
  - protections 160
  - public health, and 133, 141, 143, 145
  - SACU says no to TRIPS-Plus* 121-128
  - standards* 154
  - strengthen, in interests of welfare delivery* 106
  - updating* 126-127, 129, 140, 166
  - TRIPS-Plus 107, 121, 128, 133, 138-139, 160
  - see also* TRIPS
    - and developing countries 129
    - IPR extension to 121
    - measures in SA's FTAs 113, 126-127
    - mechanisms 134
    - opportunity US-SACU FTA presents 150
    - patent protection for plants and animals 147
    - proposals 140
    - provisions* 114, 121, 138-140, 164
    - resistance to 140
    - SACU's refusal of 121, 139
    - SA's interests 141
    - US to go 120, 167
- U**
- UNCITRAL 40-41
    - UIF United Nations Commission on International Trade Law*
      - arbitration rules 31, 40-41, 46
      - establishment 40
      - model law 48
  - UNCTAD 34, 43, 64, 80, 163
    - UIF United Nations Conference on Trade and Development*
      - commission on investment, technology and related financial issues 36
      - most common barriers to trade in services 79
      - reasons why governments may introduce policies to regulate service sector 77
  - Union for the Protection of New Plant Varieties
    - see* UPOV
  - UPOV
    - UIF Union for the Protection of New Plant Varieties*
      - Convention 160
  - Uruguay 104

- patent applications, 1994-2000, 151
- Uruguay Round of the GATT 60
- Uruguay Round of the WTO 13, 151
- US
  - UF United States*
    - approach to FTAs 95-97
    - Australia 95-96
    - Chile 96-97
    - Morocco 96
    - Copyright Extension Terms Act 136
    - Digital Millennium Copyright Act of 1998, 135
    - negotiating objectives on services 93
  - US-AUS FTA 95-96, 159
    - extension of patents for new uses of known products 146
  - US-Bahrain FTAs
    - extension of patents for new uses of known products 146
  - US-CAFTA-DR FTAs 97, 146
    - dispute resolution measures 30
  - US-Chile FTAs 96-97, 152
    - dispute resolution measures 30
  - US Coalition on Services Industries 96
  - US-FTAs
    - Morocco 30
    - provisions on SA business and government initiatives 27
    - recent, concluded in terms of 2002 TPA 28-33
    - recently concluded 28
    - template 28
  - US-Jordan
    - prevention of parallel importation by contractual means 136
  - US-Morocco FTAs 96
    - dispute resolution measures 30
    - extension of patents for new uses of known products 146
    - prevention of parallel importation by contractual means 136
  - US-Peru Trade Promotion Agreement 159-160
  - US-SA FTA
    - comprehensiveness of 90-92
    - making it work 92-93
    - meaningfulness of a 86-89
    - potential contribution of a 85-93
  - US-SACU FTAs 26
    - capacity of SACU to negotiate on/and comply with terms of 52-54
    - competition policy 19
    - compliance of, with SA law 43-52
    - investments 43-50
    - comprehensiveness of 11-13
    - customs transparency and harmonisation 19
    - environmental protection 19-20
    - from theory to practice, services agreement 57-104
    - individual benefits and threats 7-11
    - intellectual property rights and 105-169
    - benefits to US business 152-154
    - biodiversity and traditional knowledge 157-163
    - DOHA Declaration on TRIPS Agreement and public health 141-149

- effective and efficient enforcement 152-54
  - EFTA experience, SACU refuse TRIPS-Plus 121-128
  - enforcement and capacity-building 149-152
  - harmonization with US law 152-154
  - investment-IPR 155-157
  - IP benefits to developing countries 161-162
  - problem of 105-121
  - US wish list for IPR Clause in FTAs 128-141
  - investment issues 25-56
  - labour 21
  - negotiations, future of 54-56
  - new issues and harmonization 18
  - non-tariff barriers 17-18
  - recent, concluded in terms of 2002 TPA 28-33
  - regional nature 22-24
  - services 13-15
  - survey of SA business perceptions of a 7-25
  - technology transfer 15-17
  - trade talks 23-24
  - transparency of government procurement 21-22
- US-Singapore FTAs 152, 164, 165
- USTR 26, 56, 150, 165
  - Uf United States Trade Representative
      - authority to negotiate 165
      - General Counsel of 148
      - monitoring IPR in all US trading partners through 'Special 301' mechanism 150
- V
- VANS
  - Uf value-added network services licensees 99
    - providers 99
- Vodacom
  - foreign revenue earned 69
- W
- WCT 152
- WIPO 58, 115, 152, 161-163
  - Uf World Intellectual Property Organisation
      - Broadcasting Treaty 128
      - Convention 115
      - Copyright Treaty (WTC) 128
      - development agenda for business 115-118, 141, 156, 161
      - digital treaties 154
      - Inter-Sessional Intergovernmental meeting 161
      - Patent Cooperation Treaty 152
      - Performances and Phonograms Treaty 140
      - standards 5
      - treaties 128, 140, 149
  - World Intellectual Property Organisation
    - see WIPO
- WPPT 152
- WTO 5, 21, 36, 64, 85, 96
  - Uf World Trade Organisation
      - agreement on TRIPS agreement 142
      - agreements 36
      - bilateral trade discussions 60
      - creation in 1995, 33
      - defining service sectors 64
      - dispute settlement body 54

- dispute settlement unit panel 31
- Doha Declaration 145
- Doha ministerial declaration
  - relating to investment 36
- Doha Round 33, 117
- global IP body 15
- GPA and US FTAs 51-52
- mandate to eliminate trade distortions 41
- member states 34, 52, 94, 98, 128, 142, 148
- multilateral liberalization 92
- multilateral trading system 128
- multilateral WTO Agreement 132
- multilateral WTO trade rules 41
- negotiations 1, 59
- 'new' WTO issues *ad infinitum* 138
- plurilateral agreement 21
- process* 91
- provisions* 17
- SA 121
- SA, *founding member* 45
- SA's *offer to* 98-100
  - horizontal commitments 98
  - sector-specific commitments 98-100
  - business services 98
  - communication services 98-99
  - environmental services 100
  - financial services 99
  - transport services 99-10
- TRIMS agreement 33
- Uruguay Round of 13, 151
- US lost WTO dispute 92



The achievement of a free trade agreement (FTA) between the Southern African Customs Union (SACU) and the United States of America (US) is now a longer-term goal than was intended in 2003, when the negotiations were launched. A significant divergence in views between the two parties led to the realisation that a comprehensive FTA would not be reached before the expiry of the US Trade Promotion Authority in 2007. Both parties instead decided to lower their ambitions and work on establishing a Trade, Investment, Development and Cooperation Agreement (TIDCA) as an initial step.

The TIDCA framework represents a change in method, not in objective. In terms of the new approach, the parties aim to conclude memoranda of understanding on trade facilitation and on certain other areas typically included in FTA-like customs cooperation agreements. They will even be engaging over challenging issues such as intellectual property, and investment promotion and protection. The parties hope to resume actual FTA talks as soon as critical differences have been ironed out.

This volume is part of a larger effort to raise awareness among members of the South African business community of the importance to their own interests of the issues at stake in an FTA negotiation, and of the possibilities inherent in compromise. It seeks to assist negotiators and other critical stakeholders beyond government on both sides – especially those Southern African and American businesses that stand to benefit from the opportunities created by a successful agreement – to become active participants in both the TIDCA and the eventual FTA negotiating process.

To that end, and with a comprehensive FTA in mind, the book shares some invaluable research-based insights into what SACU and the US can realistically achieve on thorny 'new generation' negotiating issues, such as investment, services, and intellectual property. It also examines the views of South African business people on the potential threats and opportunities, for their firms, of a fully fledged FTA.

**SALIA wishes to acknowledge the generous support of Business Unity South Africa and Business Leadership South Africa in sponsoring this publication.**



ISBN: 1-919969-02-2

The South African Institute of International Affairs (SAIIA)

PO Box 31596, Braamfontein 2017, South Africa

Jan Smuts House, East Campus

University of the Witwatersrand, Johannesburg

Tel: 27-11-339-2021

Fax: 27-11-339-2154

www.saiia.org.za

e-mail: info@saiia.org.za

