Liberalisation and regulation of trade in the Southern African Development Community (SADC): A critical analysis of the SADC Trade Protocol's provisions and its implementation

Thesis

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by

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Declaration

Except for references specifically indicated in the text, and such help as I have acknowledged, this thesis is wholly my own work and has not been submitted for degree purposes at any other University.

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Abstract

The Southern African Development Community (SADC) declared a Free Trade Area on 17 August 2008. The Free Trade Area is the ultimate objective of the Trade Protocol on trade cooperation in SADC, signed in 1996. The Protocol is supported and complemented by the ambitious Regional Indicative Strategic Development Plan (RISDP). The idea behind the SADC Trade Protocol was to counter the developmental challenges facing SADC member states and to improve the productive and trade capacity of SADC countries. The implementation of the SADC Free Trade Area has been guided by the WTO/GATT regulatory framework on regional trade agreements, particularly GATT Article XXIV, the Understanding on the Interpretation of GATT Article XXIV, as well as the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause). This research seeks to analyse the SADC Trade Protocol's provisions and the implementation of such provisions. To facilitate an understanding of factors that affect the implementation of the SADC Trade Protocol, SADC's institutional and operational framework is discussed from a legal-historical perspective. The provisions of the Trade Protocol are analysed for compliance with WTO/GATT rules as well as for applicability within the SADC context. The provisions of the WTO/GATT regulatory framework on regional trade agreements are also analysed with a view to determining whether they are applicable in developing country situations such as SADC.

The Free Trade Area is seen as the first step towards regional economic integration in the region and is to be followed by a Customs Union, a Common Market and then eventually an Economic Community with its own central bank and regional currency. It is envisaged that the region will proceed through all these traditional theoretical phases of economic integration between 2008 and 2018. The implementation of the Trade Protocol has been beset with institutional, administrative and infrastructural challenges which pose obstacles to the attainment of the other stages of economic integration in the time frames prescribed in the RISDP. These challenges are assessed for impact on the regional economic integration of SADC by evaluating the progress towards implementing the Trade Protocol provisions and the implementation of measures taken towards the launch of the Free Trade Area. Emerging issues are also identified and analysed for their effect on the Free Trade Area and the general economic agenda of SADC. Of particular note is the Economic Partnership Agreements (EPAs) being negotiated with the European Union where SADC countries are negotiating in four different configurations. An analysis of this EPA situation reveals that it compounds a pre-existing problem: that of overlapping membership of regional trade agreements. Prior to the EPAs and the intensified drive towards the creation of the Customs Union, there was largely no need to rationalise the overlap in regional trade agreement memberships, but it is now a matter of urgency. The overlap in membership has complicated EPA negotiations and places serious doubts on the prospects of complete regional integration in SADC.

This research concludes with observations on South Africa's complicated relationship with her SADC neighbours. South Africa's trade policies, as regards both the SADC region and the world, are discussed. Because of its political and economic dominance, South Africa's policies have a ripple effect on the rest of SADC; hence the need for South Africa to be vigilant in formulating and implementing its trade policies.

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Acronyms

ACM	African Common Market
ACP	African, Caribbean and Pacific
AEC	African Economic Community
AGOA	African Growth and Opportunity Act
ANC	African National Congress
APEC	Asia-Pacific Economic Cooperation
BBEE	Broad-Based Black Economic Empowerment
BLNS	Botswana, Lesotho, Namibia and Swaziland
CAP	Common Agricultural Policy
CEMAC	Economic and Monetary Community of Central Africa
CET	Common External Tariff
COMESA	Common Market of East and Southern Africa
CONSAS	Constellation of Southern African States
CRTA	Committee on Regional Trade Agreements
CU	Customs Union
DRC	Democratic Republic of Congo
DSU	Dispute Settlement Understanding
EAC	East African Community
EC	European Community
EDF	European Development Fund
EPA	Economic Partnership Agreements
EPRD	European Programme for Reconstruction and Development
ESA	Eastern and Southern Africa
ESAP	Economic Structural Adjustment Programme

EU	European Union
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GEAR	Growth, Opportunity and Redistribution
GNP	Gross National Product
GSP	Generalised System of Preferences
IMF	International Monetary Fund
MFN	Most Favoured Nation
MMTZ	Malawi, Mozambique, Tanzania and Zambia
MTS	Multilateral Trading System
NAFTA	North American Free Trade Area
NEPAD	New Economic Partnership and Development
OAU	Organisation of African Unity
RISDP	Regional Indicative Strategic Development Plan
RTA	Regional Trade Agreement
SACP	South African Communist Party
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Co-ordination Conference
SDT	Special and Differential Treatment
SPS	Sanitary and Phyto-sanitary Standards
TDCA	Trade, Development and Cooperation Agreement
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UEMOA	West African Economic Monetary Union
UNCTAD	United Nations Conference on Trade and Development

UNO	United Nations Organisation
USA	United States of America
WTO	World Trade Organisation

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Chapter Three WTO Regulatory Framework on Regional Trade Agreements and the SADC Trade Protocol

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CHAPTER ONE

INTRODUCTION

1.1 The Purpose of Study

When the Southern African Development Coordination Conference (SADCC) was transformed into the Southern African Development Community (SADC) in 1992, the focus of the organisation shifted from development cooperation to regional development integration. Among the reasons for this policy shift were the eminent transition of South Africa from apartheid to black majority rule and the forces of economic globalisation pushing for trade liberalisation. All around the world, particularly after the cessation of tensions between East and West and, hence, the end of the Cold War, regional integration trends shifted from military-political alliances to economic alliances. The opening up of domestic markets has long been touted as the key to economic growth and economic blocs such as the European Union (EU) have achieved great economic and political clout consequent to their economic integration.

The weak economies of the SADC states, however, prescribe that individual SADC member states cannot compete effectively on the world market and so they find themselves marginalised. To counter such marginalisation and avoid further marginalisation on the world markets, SADC participated in the race for regional economic integration. On the face of it SADC stood to gain much from trade liberalisation and economic integration. The need to work towards reducing SADC(C) countries' dependence on and vulnerability to South Africa had fallen away with the demise of apartheid. Economic integration was also necessary if the SADC countries wanted to access South Africa's market, particularly in view of the fact that South Africa's market is the largest and most developed in the region.

SADC activities are regulated by protocols and, pursuant to the stated objective of economic integration; the SADC Trade Protocol on trade cooperation in SADC was signed in 1996. The Trade Protocol only came into effect in 2000, however, after the requisite ratifications had been lodged. Contained in the Trade Protocol is the legal and structural framework for trade liberalisation in SADC as the region moves towards a Free Trade Area. The Free Trade Area was to be declared within 8 years of the entry into force of the Trade Protocol and this was done on 17 August 2008. All the SADC members are also members of the World Trade Organisation (WTO) and both the implementation and operation of the SADC Free Trade Area are regulated by World Trade Organisation/General Agreement on Tariffs and Trade (GATT) law.

The main purpose of this thesis is to investigate the SADC Trade Protocol's provisions and their implementation. This prompts an inquiry into the impending factors to the Trade Protocol that create a disjuncture between what is stated on paper and what is actually happening in practice. The need for economic integration and trade liberalisation has almost become conventional wisdom and the question of SADC would be whether the current WTO regulatory framework adequately addresses the challenges faced by developing countries in trying to achieve economic integration. This is because the liberalisation and regulation of trade in SADC is to be achieved within the context of WTO rules and regulations. All these questions are answered within the framework of a comprehensive analysis of the Trade Protocol.

South Africa is the political and economic powerhouse of the region and the only developed country within SADC. As such, its economic policies would, to a certain appreciable extent, have a bearing on the pace and content of economic integration in SADC. However, one of the biggest potential impediments to SADC economic integration is the Economic Partnership Agreements (EPAs) that African, Caribbean and Pacific (ACP) countries are currently negotiating with the EU. SADC countries are part of the ACP group of countries and are also negotiating EPAs, albeit in four different configurations. The effect of the EPAs needs to be looked at for impact on SADC economic integration. Overall, this research sets out to determine whether the legal mechanisms used by SADC as a vehicle for economic integration are sufficient and effective in supporting SADC regional economic integration.

1.2 Scope of Study

In order fully to appreciate SADC as it is constituted at present, this study starts off with an analysis of SADC in its legal historical perspective. It highlights the significant events and forces that informed its legal, institutional and operational framework. This would be the backdrop to SADC as it is today. With SADC economic integration being pursued under WTO/GATT law, a brief overview and analysis of the WTO rules framework for regional trade agreements is given. This part of the study looks particularly at GATT Article XXIV, the Understanding on the Interpretation of GATT Article XXIV and the Enabling Clause.

A greater part of this research is dedicated to an analysis of the Trade Protocol: the provisions of the Trade Protocol *vis-a-vis* SADC's institutional and operational organisation; how WTO/GATT provisions have been applied and how the Trade Protocol's provisions have been applied by SADC member states. The Trade Protocol is effectively assessed against SADC member states' economic capacity and this is complemented by a study on the progression of the implementation process between 2000 and 2008.

In analysing the implementation of the Trade Protocol, extra-legal factors that impact on the Trade Protocol are also considered. The effects of the multiple Regional Trade Agreement (RTA) memberships by SADC member states have been analysed. The question is mainly on the impact of this overlap in RTA membership on regional integration in SADC and how it can be resolved. The thesis was written with the situation being that there was an overlap in RTA memberships in the region but nothing tangible was being done to remedy the situation. Subsequent events have taken place, however, with the three RTAs in east and southern Africa coming together to hash out a strategy for the creation of an FTA that would effectively create one RTA.[1] I provide a brief comment on these developments in the fourth discursive chapter.

[1] These RTAs are the East African Community (EAC), Common Market for East and Southern Africa (COMESA) and Southern African Development Community (SADC).

Since the expiry of the last Lomè Convention, ACP countries and the European Union (EU) have been trying to hammer out a GATT compliant trading arrangement as per the provisions of the Cotonou Agreement. The deadline was the end of 2007 and interim agreements were signed by some ACP countries, some SADC countries included, by the end of 2007. These agreements only covered trade in goods. Negotiations are still continuing with regard to trade in services and the deadline for the completion of a full EPA is now 31 December 2008. Questions and concerns have been raised over the impact of these EPAs on regional integration in SADC, and EPAs are therefore discussed in this study from that particular angle.

Lastly, South Africa occupies a unique position in that it is the only developed country in SADC. Naturally, when it comes to the implementation of an FTA in such circumstances, other countries would be wary of the ensuing polarisation effects. The study therefore also highlights South Africa's trade policies and its attitude towards the FTA and regional integration in general. The point of departure here is that South Africa's policies play a big role in determining the other SADC countries' commitment to regional economic integration and therefore the FTA.

1.3 Sources and Approach

This study was carried out almost entirely through desktop research. Books and articles written on the SADC FTA as well as regionalisation in world trade were consulted. Treatises and other documents relating to SADC, such as the Trade Protocol, which was used extensively, were mostly obtained from the SADC website or the Trade Law Centre's (TRALAC) website. For some reasons that are probably related to lack of capacity on most SADC member states' part, information on the implementation of the SADC FTA between 2000 and 2008 is very limited and not easily available. Most of the available literature on that aspect relates to the period leading up to the 2004 review of the Trade Protocol. The situation was rescued by the Department of Trade and Industry from where the most recent reports on the implementation of the Trade Protocol were acquired. These reports were particularly helpful in that they were released just shortly before the declaration of the SADC FTA and

therefore provide the basis for a critical analysis of the readiness of the region with regard to the FTA.

On the issue of the WTO/GATT rules framework, particularly GATT Article XXIV and the Enabling Clause, there is plenty of literature available and the WTO website has a database of all its agreements and documents as well as articles and papers on the subject of regionalism in trade. This was used in determining whether the SADC Trade Protocol complies with WTO/GATT rules and also whether such WTO rules accommodate developing countries' capacity to implement them. At some point during the research, consultations were held with staff at the South African Institute of International Affairs (SAIIA) and from whom literature on South Africa's trade policies was obtained. In summation, this research can generally be said to have been carried out through an analysis of the relevant treaties, agreements, documents, books and articles.

It should be noted that this research is based on information and developments up to 20 October 2008. Since the process of regional integration in SADC is ongoing and effort is continuously being made to consolidate the gains, there may have been developments thereafter but such developments do not form part of the subject matter of this thesis.

1.4 Structure of thesis

This thesis comprises of an introduction, five discursive chapters and a conclusion. The first discursive chapter is focused on the institutional history of SADC and explores its legal-historical foundations. This is done with a view to understanding SADC's present legal, institutional and operational framework and the factors that inform such frameworks. Also discussed in this chapter is the concept of regionalisation and whether it is applicable in SADC.

The second discursive chapter explores the WTO/GATT regulatory framework that is applicable to regional trade agreements. This is aimed at establishing the legality of the SADC FTA as envisaged by the Trade Protocol. The chapter then builds up to an in-depth analysis of most of the Trade Protocol's provisions as against the relevant provisions of WTO/GATT, assessing them for consistency with WTO/GATT law.

The third discursive chapter is an extension of the second chapter as it proceeds with the analysis of the SADC Trade Protocol. In this chapter, however, the analysis is projected more at the implementation of the Trade Protocol's provisions, assessing the progress, hurdles and challenges that SADC has encountered on its road to declaring an FTA and those challenges that are still outstanding and need to be dealt with. It is in this context that the Regional Indicative Strategic Development Plan (RISDP) is discussed. The RISDP sets out the stages and processes of economic integration that SADC will go through beyond the FTA as well as the modalities involved. This chapter also briefly probes the viability of the FTA that has since been declared by SADC.

The fourth chapter considers and probes the problematic issue of multiple memberships of regional trade agreements. It highlights the problems that multiple memberships create for SADC in its economic integration objectives and the attendant problems it creates for SADC member states in their individual capacities and in the implementation of their regional trade agreement commitments. The EPAs with the EU are also considered as part of the SADC member states' multiple regional integration agreements. This chapter concludes by giving a few recommendations to resolve and rationalise the overlap in regional trade agreement membership.

The final discursive chapter in this thesis attempts to map the future of SADC after the FTA and after the EPAs. The major question is whether SADC's economic integration objective will be able to withstand the effects of the EPAs and an FTA bedevilled with structural and implementation challenges. With the same question in mind, this chapter also looks at the relationship that South Africa has with its SADC counterparts through the lens of South Africa's trade policies, both regionally and farther afield. The focus on South Africa is

warranted because South Africa is the economically dominant country in the SADC region and hence its policies will always have an impact on the other SADC countries as they look to increased access to South Africa's market. Accordingly, South Africa's Trade, Development and Cooperation Agreement (TDCA) with the EU and the effect of the TDCA on South Africa, the Southern African Customs Union and, ultimately, SADC, is considered.

CHAPTER TWO

REGIONALISM, SADC AND THE PROBLEMS OF ECONOMIC INTEGRATION IN SOUTHERN AFRICA

2.1 Introduction

The Cancun Ministerial Conference was a complete failure. The Doha Round of multilateral trade negotiations, currently underway, appears to be collapsing. However, where multilateral trade efforts seem to be failing, Regional Trade Agreements (RTAs) are flourishing. RTAs have become the byword for trading on the world market and their popularity continues unprecedented. Statistics show that, as of 1 March 2007, there were 194 notified RTAs in force, with 129 notified under GATT Article XXIV, 21 under the Enabling Clause and 44 under GATS Article V.[2] African initiatives have not been left out of the RTA phenomenon and African countries have pursued regional integration relentlessly for the past three decades.[3]

Southern Africa, under the auspices of the Southern African Development Community (SADC), has also ratified a Trade Protocol[4] and has since declared a Free Trade Area (FTA) as per one of the stated objectives of the Trade Protocol.[5] The SADC Trade Protocol and the attendant FTA are particularly fascinating in light of the political and economic history of the SADC region, which has seen the evolution of a unique regional integration strategy in Southern Africa. Of course, RTAs, as will be illustrated by this chapter, are inspired by a variety of factors, and such factors affect the structure and content of such arrangements. These are factors such as politics, social and economic developments as well as international relations.

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[2] World Trade Organisation *World Trade Report 2007* (2007) 304.
[3] Economic Commission for Africa *Assessing Regional Integration in Africa* ECA Policy Research Report (2004) 9.
[4] Trade Protocol on Trade Cooperation in the SADC.
[5] The Free Trade Area was officially declared at the 2008 SADC Summit on 17 August 2008.

This chapter sets the backdrop to the trade developments in Southern Africa, examines the state of regional integration in SADC and determines the root problems to be found within the SADC economies. Such an analysis is necessary for a detailed and comprehensive assessment of the legal instruments of trade liberalisation in SADC and will be useful in determining the extent to which GATT[6] provisions accommodate the developmental challenges facing African economies.

2.2 The Rise of Regionalism in International Trade

The unprecedented proliferation of Regional Trade Agreements[7] (RTAs) from the 1980s right up to the present years has made RTAs one of the defining features of the GATT/WTO[8] system and world trade. This is despite the fact that, by definition, RTAs go against the core principle of the GATT – that of non-discrimination as embodied in Article I.I of GATT, popularly known as the Most Favoured Nation (MFN) Principle as well as Article III of GATT, popularly known as National Treatment Principle. Article I.I of GATT reads as follows:

> "With respect to customs duties and charges of any kind ... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

The provisions of Article III, on the other hand, are an extension of the MFN principle. These Article III provisions can be summed up to mean that foreign products (imports) should be treated equally to *like* products of domestic origin in respect of all laws, regulations, tax and licensing requirements as well as internal quantitative requirements to name but a few. Effectively, once the products from another country cross the border and

[6] General Agreement on Tariffs and Trade 1994.
[7] RTAs are here used in their widest sense to include all trade agreements that can be concluded by states, giving preferential treatment to one another to the exclusion of non-signatories to any such agreement. This would include Preferential Trade Agreements, Free Trade Areas, Customs Unions, Common Markets and Economic Unions.
[8] General Agreement on Tariffs and Trade/World Trade Organisation.

enter the domestic market, there should be no distinction between them and like local products in terms of any additional requirements. The national treatment obligation works to prevent countries from circumventing their tariff obligations by imposing further obligations on foreign products which have the effect of raising the other country's cost of exporting and accordingly the price of the foreign product. Where the MFN principle works to secure unconditional equal treatment for all WTO member states, the national treatment principle secures such equal treatment for like foreign and domestic products inside a WTO member state.

It is obvious from the provision of Article I.I that the pre-eminent objective of the GATT/WTO trading system is trade liberalisation, which involves the opening up of borders for the unrestricted movement of trade across countries. RTAs, on the other hand, constitute the reduction or elimination of trade barriers between two or more countries to the exclusion of non-members. The practice of RTAs is discriminatory and is totally divorced from the MFN principle. The question then arises as to how it has come to be so entrenched in the GATT/WTO trading system. The simple reason is that it is one of the GATT MFN exceptions where Free Trade Areas (FTA)[9] and Customs Unions (CU)[4] are allowed, provided they conform to GATT Article XXIV. They are seen as stepping stones towards the anticipated trade liberalisation of all the world's economies.

Being contrary to the basic idea of the GATT/WTO trading system, the relevant question is whether RTAs complement or contradict the multilateral trading system. However, when properly harnessed and created in conformity with GATT regulation, RTAs can co-exist with the multilateral trading system without one necessarily triumphing the other. Some of the ways in which regionalism in trade promotes multilateral trade include the following:[10]

- "By going beyond the narrow issues of trade and global welfare to measures promoting foreign investment, human capital, technological development, infrastructure development, efficient exploitation of natural resources, and effective responses to environmental challenges.

[9] These are the only RTAs recognised under the current GATT provisions.
[10] Economic Commission for Africa "Assessing Regional Integration in Africa" 15.

- By acting as a restraint that locks in welfare enhancing trade reforms.
- By creating larger political economy units that can bargain more effectively in international forums.
- By building pro-export constituencies to counter domestic protectionist constituencies.
- By increasing competition in domestic markets, lowering prices, improving quality, and making products that are more competitive in global markets."[11]

It is obvious from the debate and controversy surrounding the current acceleration of regionalism among the WTO members that the GATT architects had not anticipated, at the time of drafting the GATT, that RTAs would find as much popularity as they have now. According to Panagariya, this current wave of popularity of RTAs started in the 1980s. Prior to that and at the time of the negotiation and adoption of GATT 1947, RTAs were not very common and were quite ineffectual. This is probably because the earlier RTAs placed more emphasis on border policies and were basically models of shallow agreements aimed at easing the movement of goods at the borders of trading partners. There are only three agreements that deserve mention as being successful during this period and they are SACU,[12] the European Community and European Free Trade Area.[13] The potential of RTAs to permeate the world trading system as they have was never considered. At the inconclusive 1982 GATT Ministerial Meeting, European Community (EC),[14] now known as the European Union (EU), started showing signs of reluctance to the idea of further multilateral trade negotiations. The EU was more concerned with entrenching and enhancing economic integration which prompted the United States of America (USA), to consider entering into preferential trading agreements. The USA had always been an ardent supporter of

[11] These factors are discussed in the report in the context of how regionalism in Africa can promote multilateralism.

[12] Southern African Customs Union.

[13] A Panagariya "The Regionalism Debate: An Overview" (1998) http://www.bsos.umd.edu/econ/Panagariya/overview/overview.pdf(accessed 11 March 2007) 6.

[14] Initially a project aimed at ensuring the economic survival of France in the wake of the creation of the West Germany state, it had evolved to become one of strengthening the economic prospects of Western Europe as against the USA's economic reign. Although not the first RTA to be witnessed by the trading world, the EC warrants mention when discussing the rise of regionalism as the most successful RTA to date and a synonym of regionalism. (S George "The European Union, 1992 and the Fear of 'Fortress Europe' in A Gamble and A Payne (eds) *Regionalism and the World Order* (1996) 21-51). There have been numerous questions as to whether the EC can be used as a template for fledgling RTAs, particularly those in the Third World. While the idea is noble, it has to be dismissed in view of the fact that the EC was born within a vastly different historical, social and economic epoch.

multilateralism and was strongly committed to the MFN principle. The USA then went on to conclude RTAs with Israel in the mid-1980s, with Canada in 1988 and the North American Free Trade Agreement (NAFTA) in 1994.[15] The EU was also in the meantime expanding its periphery, incorporating Greece, Portugal, Spain, Austria, Finland and Sweden during the years 1981 to 1995.[16] The launch of the 1992 project[17] by the EU is said to have accelerated US fears of a "Fortress Europe" and precipitated negotiations towards the conclusion of the North American Free Trade Agreement (NAFTA).[18] The shift towards regionalism in trade motivated a race for economic superiority through the acquisition of prime markets for the EU and USA exports.

The idea of RTAs is fundamentally embedded in the theory of regionalism. Regionalism, as a concept, refers to the "complex of attitudes, loyalties and ideas which concentrates the minds of people/s upon what they perceive to be 'their' region",[19] It is manifested through the co-operation and interaction of states that go beyond normal diplomatic interaction, and joint projects that benefit the co-operating states. The "region" itself has gone beyond being a geopolitical or geostrategic region as traditionally defined, to a rather complex entity that pays no heed to geography[20] as long as it is identifiable as a region. Some of the criteria used to identify a region include social and cultural homogeneity, political attitudes or external behaviour, political institutions, economic interdependence and also, proximity.[21] A region can have all or some of these attributes and these contribute, to a certain extent, to the success or failure of integration within that region.

The British established the system of liberal economics, planted the first seeds of an open trading world and, for a long time before World War I, dominated the trading world. After

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[15] World Trade Organisation "World Trade Report 2003" (2003) 46.
[16] Panagariya "The Regionalism Debate: An Overview" 7.
[17] This was a project aimed at freeing the last of the barriers to trade such as non-tariff barriers and freeing the movement of labour and capital and making a transition to the Economic Union, the EU as it is known today.
[18] S George *Regionalism and the World Order* 21-51.
[19] M Schoeman "From SADCC to SADC and Beyond: The Politics of Economic Integration" http://eh.net/XIIICongress/Papers/Schoeman.pdf (accessed 20 February 2007) 2.
[20] The Democratic Republic of Congo, Mauritius, Madagascar and Seychelles when it was still a member of the Southern African Development Community are examples of countries that fall outside the Southern African region's peripheries as traditionally defined, (BM Russet *International Regions and the International System: A Study in Political Ecology* (1969) 7).
[21] *Ibid.*

World War I there was no recognisable hegemony in world trade and it is only after World War II that the USA emerged as the dominant force.[22] It is during this period that regionalism started gathering momentum, but the states were bound by political ideology where the blocs were military alliances for military-political security rather than anything else. The ideas of free trade were spread across Western Europe and the Third World during the Cold War.[23] With the cessation of tensions between East and West, trade took a dominant role in the politics of regionalism.

Economically, regionalism bears fruit in the sense of reducing trade barriers on a selective basis where it is impossible to remove them across the board. This is known as the theory of "second best".[24] Through RTAs, states may also be able to realise gains from products where they have no comparative advantage and cannot compete internationally. This is because third party competition from efficient suppliers would have been shut out.[25] Also, other countries are simply unwilling to unilaterally liberalise trade, which is the necessary impetus to multilateral trade and, there is only so much integration that may be achieved at a multilateral level. Therefore RTAs allow countries to integrate even deeper and harmonise economic policies and regulations.[26] These are some of the economic considerations that drive the formation of RTAs globally. For some countries, trade regionalism is a defensive necessity: to prevent marginalisation on the world market and maintain preferential conditions of access to markets. It also works to attract foreign direct investment. This is especially true of developing countries when they negotiate RTAs with developed countries and this kind of regionalism has been used to explain the proliferation of RTAs the world over.[27]

There are plenty of political undertones to the creation of regional blocs: economic supremacy is equated with political supremacy. The liberalisation of trade within Western Europe among the EU members buoyed up intra-regional trade and gave the countries more

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[22] S George *Regionalism and the World Order* 21-51.
[23] The Cold War was an ideological war between the West and the East and basically a conflict between capitalism and communism.
[24] World Trade Organisation "*World Trade Report 2003*" 49.
[25] *Ibid.*
[26] *Ibid.*
[27] World Trade Organisation *World Trade Report 2003* 50.

political clout than they would have had individually. This partly explains the political dimension to the African effort at economic integration and would probably explain to some extent why most African initiatives have fallen flat. For most African states, their independence came as a result of procrastinated and bloody wars of liberation and they were unwilling to form alliances which would limit their national sovereignty. It is only in the late 1950s where, under encouragement from the United Nations Organisation (UN), they began to come together, and only because the idea was sold to them as being the only way African countries could counter their continued marginalisation in the world economy. 1980 saw the promulgation of the Lagos Plan of Action whose main purpose was to facilitate the creation of an African Common Market (ACM) by the end of 2001. This time-frame later proved to be unrealistic and the milestone for the ACM was pushed to 2025 at the Organisation of African Unity conference in 1991. At the same conference the Abuja Treaty was signed, and it envisages the creation of an African Economic Community (AEC) through the establishment and strengthening of Regional Economic Communities (RECs). These RECs are expected to improve, evolve and eventually propel the continent towards a Common Market. It is clear that, for the European Union and USA (NAFTA) and now also Japan through Asia-Pacific Economic Co-operation (APEC), the race is for core status within world economics and, by extension, world politics. For Africa, however, it is more of a race for survival on both the political and economic front.

There are concerns that regionalism is plummeting towards a three-bloc trade world which could result in a potential Trans-Atlantic trade war.[28] This is because NAFTA and APEC are already linked through the membership of the USA in both FTAs, and if NAFTA and the EU are to negotiate successfully on an EU-NAFTA FTA, then the world's super blocs will be effectively linked. This will put the non-members of the three trade blocs at a distinct disadvantage as they are mostly developing and least developing countries and cannot compete with these trade blocs. Already, the EU has used its position of superiority to negotiate an FTA with South Africa that is best suited to its own needs and advantages.[29]

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[28] LA Grimmet *Protectionism and Compliance with the GATT Article XXIV in Selected Regional Trade Agreements* (LLM Thesis, Rhodes University, 1999) 7; A Payne and A Gamble "Introduction: The Political Economy of Regionalism and World Order" in A Gamble and A Payne (eds) *Regionalism and World Order* (1996) 1-2.

[29] EU-SA FTA concluded in 1999. This is discussed comprehensively in Chapter 6.

The Lagos Plan of Action was a political reaction to global forces compelling countries in the direction of regionalism. SADC is one of the RECs expected to propel Africa towards a Common Market. Just as Southern African Development Coordination Conference (SADCC) was a regional alliance against the military and economic dominance of South Africa, SADC is one of the building blocks to Africa's alliance against the military and economic dominance of the developed countries. SADC has plotted for itself an ambitious structural framework for trade liberalisation that progresses from an FTA in 2008, a CU in 2010, a Common Market by 2012, a SADC Central Bank and Monetary Union by 2016 and also, a common currency by 2018.[30] The primary vehicle for such developments is the SADC Trade Protocol. The stepping stone to such achievements, the Free Trade Area, was declared on 17 August 2008.

2.3 From SADCC to SADC

2.3.1 The Policy Shift

SADC[31] is, in essence, the rebirth of the Southern African Development Coordination Conference (SADCC),[32] and it was born of the need for Southern Africa to adapt to the winds of change blowing across both regional and global fronts. There are a variety of reasons for the transformation of SADCC into SADC. SADCC was a brainchild of the Frontline States,[33] an economic vehicle which was to be used as a political response to the economic and political dominance of the region by the then apartheid South Africa.[34] The Frontline States also represented a concerted effort to end colonial rule in Southern Africa. By the early 1990s it was apparent to all that South Africa was moving towards a different political ethos and, with all the other Southern African states now independent, there was a need to redefine the

[30] SADC Secretariat "Regional Indicative Strategic Development Plan" (2003) Chapter 4, s10, ss5.
[31] The member states of SADC are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe and Madagascar. Seychelles withdrew from the organisation in 2004 and was replaced by Madagascar.
[32] Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. Namibia only joined the organisation in 1990.
[33] These were Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe.
[34] Schoeman "From SADCC to SADC and Beyond" 2-3.

scope and content of SADCC and map out new and different structures of political and economic co-operation. As Oosthuizen puts it, the political cement binding the SADCC countries gave way with the independence of South Africa and this changed the political landscape of Southern Africa.[35] South Africa had been politically and economically dominant prior to its independence and it was unlikely that this would change after independence. Transforming SADCC into SADC was a means of constraining South Africa so that it would not come in as an automatic leader with a vision to change the system but would be constrained by the organisation's "objectives, rules and mechanisms" that would already be entrenched when it joined.[36]

As mentioned previously, the end of the Cold War shifted the focus from politics to economics, and environmental and societal security.[37] The economics was circumscribed by the policies of trade liberalisation. Southern Africa had to respond to the threat of marginalisation coming from the global rise of regionalism.[38] This was also an acknowledgement of the fact that the small states of Southern Africa could not hold their own within the sphere of international economics, and that their trading patterns as individuals could not make a dent on the world market. It was also the realisation that whatever the dynamics of intra-regional politics and policies, these could not change the "international economic structures encasing"[39] the region and that the region could not survive outside of that structure for long. Far removed from the traditional military-political alliances, the new impetus in international and regional circles was that of economic growth and development that would be firmly grounded in the liberalisation of trade. The creation of SADC was actually a shift from politics to economics in terms of focus. This is not to imply that SADCC as an organisation had no economic objective but rather to say that the economic objectives were highly politicised and not so much aimed at staking a place in world economics but rather at the loosening of apartheid South Africa's hegemony in economic matters. This shift was therefore more involved with the de-politicisation of the economic aspects of SADC and

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[35] GH Oosthuizen *The Southern African Development Community. The Organisation, its Policies and Prospects* (2006) 72.
[36] *Ibid.*
[37] Schoeman "From SADCC to SADC and Beyond" 6.
[38] MC Lee "Development, Cooperation and Integration in the SADC Region" (1999) 2 *Social Sciences & Humanities and Law & Management Research Journal University of Mauritius* 29 at 30-31.
[39] C Thompson "Cooperation for Survival: Western Interests vs. SADCC" (1987) 16 *Issue: A Journal of Opinion* 30 at 30.

giving it an institutional framework. The success of SADCC's Programme of Action in the transport and communications sector, the increased demand for new projects and also the developments that necessitated the creation of new sectors all called for a new approach and strategy to regional development.[40] The sectoral approach made for a highly decentralised organisation and there was a need for a mechanism of streamlining SADCC's activities which meant an overhaul of the whole system.

Another motivation for the transformation of SADC was the member states' uncertainty and fears that the dawn of democracy in South Africa would wither away donor support to the region since the source of donor sympathy, apartheid, was gone, coupled with the expectance of South Africa taking up the role of "regional donor".[41] Western donor support was driven in part by ideological considerations and, with the fall of apartheid, this rationale fell away. This clearly reconfirms South Africa's position within the region, pre- and post-apartheid. It is an indication that SADCC's success at reducing South Africa's superiority was only marginal, if at all appreciable. Understanding the shift from SADCC to SADC, however, can only be reinforced by an understanding of the political economy that nurtured SADCC in its institution and this is necessary for an enhanced understanding of SADC's regional integration strategy and more importantly, the Trade Protocol.

2.3.2 SADCC: Problems and Challenges

A political organisation aimed at the economic liberation of Southern Africa from the control of apartheid South Africa, SADCC is most unique in its conscious decision to move away from market integration and concentrate instead on co-operation with the intention of building up states' capacity for eventual market integration. The reasons for this are two-fold. Firstly, integration would have meant, for the newly-independent states, an intrusion on their most prized possession, that of sovereignty. That the countries had to struggle for

[40] Schoeman "From SADCC to SADC and Beyond" 4.
[41] A Pallotti "SADC: A Development Community without a Development Policy?" (2004) 101 *Review of African Political Economy* 513 at 515; SADCC Report of the Executive Secretary (1991) SADCC/CM/1/91/13 Record of Council of Ministers, Windhoek, Namibia, 28 January.

independence from their colonial masters left them with deeply entrenched ideas of sovereignty and nationality. This was not unique to Southern Africa only; African countries have used regional arrangements as a means of consolidating their sovereignty[42] and for the advancement of their national interests. Regional integration was somehow made synonymous with the broader ideas of pan-Africanism, preaching self-reliance of African states. It was also a form of legitimisation, being recognised by and being part of a grouping of states gave the new states a kind of "formal" identity and acknowledgement of existence as a state. For Southern Africa this integration was limited to mere co-operation and that was the best way of ensuring that the states had no legal obligations to each other that would infringe their sovereignty. Theoretically, such an approach had its advantages in forging and reinforcing the idea of equality among the states based on the idea of sovereignty, as well as forging a "common identity and common responsibility with every member, regardless of size, having a role to play".[43] This is a widely acknowledged strength of SADCC that was even mentioned by SADC in its 1992 Declaration.[44] Secondly, by consciously excluding market integration, SADCC was drawing from the failure of other market integration efforts within Africa.[45] In total neglect of the highly unstable political and economic conditions in most newly-independent states, African leaders scrambled to create trade-based market integration schemes. These schemes were highly aspirational, characterised by lofty integration plans and complemented by complex unworkable institutions. There were other problems as well. According to Nsekela, the diversity of the SADC states was a feeding ground for potential conflict and there were wide variations in the structures and the levels of productive forces. The resource patterns were also diverse, and the development of a common regional infrastructure was impossible as not all activities would be of concern or even a priority to all states. There was plenty of ideological diversity, and priority areas and approaches for co-operation and primary economic partners differed as well.[46] Those driving such schemes failed to take cognisance of the fact that with regard to developing and least developed countries, effective regional integration goes beyond market integration: it is indelibly linked with development, particularly of production structures and infrastructure.[47]

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[42] Schoeman "From SADCC to SADC and Beyond" 9.
[43] Schoeman "From SADCC to SADC and Beyond" 4.
[44] Windhoek Declaration "Towards the Southern African Development Community A Declaration by the Heads of State or Government of Southern African States" 17 August 1992.
[45] C Ng'ong'ola "Regional Integration and Trade Liberalisation in the Southern African Development Community" (2000) *Journal of International Economic Law* 488.
[46] AJ Nsekela (ed) *Southern Africa, Towards Economic Liberation* (1981) 16.
[47] Lee 1999 *Social Sciences & Humanities and Law & Management* 49-50.

The liberalisation of trade is but an aspect of such development. The other failed African trade arrangements had tried to implement market integration among countries of vastly different developmental levels and highly unequal economies which resulted in more trade diversion than trade creation.

In light of this, the SADCC architects realised that regional development based on co-operation was the necessary forerunner to regional integration. They then chose an "integrated model that would induce more equitable development in all countries through co-ordinated and execution of development projects".[48] This explains why SADCC did not demand of its members to withdraw from other regional trade arrangements or to cut their economic ties with South Africa.[49] While this partly reflects the extent of economic dependence on and the relevance still, of South Africa as an economic growth pole within the region, it also reflects political maturity and far-sightedness on the part of SADCC leaders who realised that a complete cut-off from South Africa would be economic suicide. According to the Lusaka Declaration,[50] the objectives of SADCC included the reduction of economic dependence on South Africa, creating a genuine and equitable regional organisation, promoting the implementation of national and regional projects as well as securing international cooperation in achieving SADCC economic liberation.

A Programme of Action was created by SADCC which was to serve as a vehicle for the implementation of the above objectives and each member was assigned a sectoral responsibility. The whole approach was project based and there was no supranational authority to oversee the states' progress on the sectors for which they were responsible. Projects in transport and agricultural research were to be handled by Sectoral Commissions which would be created by Treaty. Other sectors were to be handled by Sector Coordinating

[48] Ng'ong'ola 2000 *JIEL* 488.
[49] BLS countries, (Botswana, Lesotho and Swaziland) remained members of the South Africa-led SACU, Lesotho and Swaziland were also in the Rand Monetary Area and, Zimbabwe still maintained its 1963 Preferential Trade Area with South Africa. (F Gwaradzimba "SADCC and the Future of Southern African Regionalism" (1993) 21 *Issue: A Journal of Opinion* 51 at 52).
[50] SADC Lusaka Declaration "Southern Africa, Towards Economic Liberation" 1 April 1980.

Units composed of the staff of the governmental departments that were responsible for the sector.[51]

The setup and operational framework of SADCC was experimental in its efforts to accommodate the needs of its members in a manner that took stock of and acknowledged its shortcomings. Lambrechts highlights the successes of SADCC from the perspective of the transport and communications sector.[52] The transport and communications sector, allocated to Mozambique, probably because of its strategic position in terms of creating a route for the imports and exports of the region, was given priority. Without the creation of strategic transport and communications systems, successes in other sectors would be negated. Given the landlocked position of the FLS states and the traditional sea routes that had been destroyed by liberation wars, they were dependent on South African ports for almost all of their imports and exports. The Southern African Transport and Communications Commission was created to implement the rehabilitation of, and the building of new transport routes so as to reduce dependence on South Africa. As a sector of immediate and common concern to all states, this sector became the flagship of Southern African cooperation and development. Despite the destabilisation efforts by South Africa, it is today still one of the most successful projects of SADCC. Another success scored was in the Food Security sector which had been allocated to Zimbabwe and through which the region established a regional food security early warning system.[53]

On the whole, the SADCC experiment cannot be said to have been a significant success; nor is it a resounding failure. Its success was limited by the internal and external factors that pervaded the region during its existence. It did manage, though, to create a strong regional identity among its members which, ideally, should have been a strong basis for the success of its successor, SADC. The sector approach had been favoured on the assumption that if a country was given a sector to coordinate that was strategic to its prosperity and development, and then it would discharge its responsibilities more enthusiastically. Being best suited for a particular sector was not a guarantee of efficiency though, partly because of the lack of

[51] Ng'ong'ola 2000 *JIEL* 489.
[52] K Lambrechts "The SADC's Origins" in Institute for Global Dialogue *The IGD Guide to the SADC* (2001) 24.
[53] *Ibid.*

institutional capacity in SADCC countries and the failure to develop such institutions. Choice of sector also came with choice of implementation and some states simply chose to put their sectoral responsibilities in abeyance, in favour of their own national priorities. States failed to make policy decisions in line with SADCC objectives except when, as shown by the accelerated progress of the transport and communications sector, such SADCC objectives were in tune with their national interests and priorities. Ironically, this can be traced back to the ideas of sovereignty that were given sacred reverence by the organisation, one of the foundations on which SADCC was built. This sovereignty had reconstituted itself into a form that was averse to mutual interdependence.

The conflict between national and regional interests, spurred on by what Lambrechts terms "national chauvinism,"[54] reflects the difficulties of trying to reconcile regional interests with national policy. This problematic marriage resulted in the duplication of projects and a waste of resources that could have been better deployed elsewhere and severely undermined the development of a serious and coherent regional programme. Given the general economic malaise within Southern Africa, each state had to source funding individually for its sectoral activities.[55] The 1980 Declaration had anticipated doing this within the framework of Southern Africa's strategy, by implication; on SADCC's terms. The primary method of achieving economic liberalisation was to be done through the mobilisation of the region's own resources.[56]

While the SADC was promoting its programme of cooperation, international economic forces were at the same time lobbying for a *laissez faire* approach to the economy with the liberalisation of markets and privatisation of industry and infrastructure. By moving in an opposite direction to the Western interests, SADCC then became a "new regional arena of struggle against the ideological interests of international capital as well as against the dominance of South Africa".[57] Cooperation that was driven by the region's own perception of its needs and funded by the region itself became an elusive objective as lack of infrastructural and technological capacity; underdevelopment and limited financial resources generally

[54] *Ibid.*
[55] Schoeman "From SADCC to SADC and Beyond" 4.
[56] Gwaradzimba 1993 *IAJO* 52.
[57] Thompson 1987 *IAJO* 30.

forced the organisation to be dependent on overseas aid for the implementation of projects. This severely limited the organisation's bargaining power with regards to where they wanted the donor funds to go. Donor priorities and preferences had to be given preference in view of their critical role. The sectoral approach of the organisation also meant that the states sourced funding not as the SADCC but as individual countries and thus they did not have the persuasive edge that they would have had as an organisation. The SADCC found itself an unwilling prisoner to the conditionalities of international institutions such as the International Monetary Fund, the United States Agency for International Development and the World Bank.[58] It is within the above context that most Southern African countries put in place Economic Structural Adjustment Programmes (ESAP) which generally did not resolve the debt crises of those countries and which distorted their economies even further. Through these countries the organisation was slowly beginning to align itself with conventional economic wisdom that relies largely on trade liberalisation. SADCC had failed to create a viable long-term regional development process.

In its efforts to create a viable transport network, SADCC neglected to push the region towards industrialisation and intra-regional trade was neglected until the late 1980s, which only further consolidated Zimbabwean dominance of the regional grouping as it was the most industrialised state within the grouping. Inevitably, Zimbabwe received most major foreign investment and this severely undermined the organisation. The frantic efforts to ensure sustained donor assistance on the eve of democratisation in South Africa shows that southern Africa was still a long way from self-reliance. Towards the end of the 1980s and in the early 1990s the SADCC had fallen in line with the international approach to economic regionalism.

The emphasis on sovereignty as an inviolable concept left the organisation with a decentralised structure which was the root of most of SADCC's failures. The small and institutionally-weak Secretariat, devoid of any legal powers, was not capable of coordinating SADCC activities. This resulted in mismatched progress on the sectors, with some countries performing better than others, and varying degrees of efficiency and effectiveness, depending on the priority accorded by each state to the sector. The Secretariat could not reprimand or

[58] *Ibid.*

even compel the countries to perform their obligations, as it would "infringe" on their sovereignty. In this way, the SADCC was conceived as "a service organisation rather than a leader of the countries who constitute it".[59] By and large, SADCC failed to reduce economic dependence on South Africa. The strides made in that direction were only significant to the extent that the percentage of imports and exports being handled by South African ports was dramatically reduced due to the success of the transport and communications rehabilitation programme. This modest achievement is somewhat eclipsed, however, by the colonial production structures which had the SADCC states producing the same products, primarily raw materials; exporting them and then importing the beneficiated products of those raw materials at high cost. Economic integration between South Africa and SADCC states also had the same characteristic: South Africa was the hub to the spokes of SADCC and these countries served as service economies to the South African economy.[60] For intra-regional trade to take place, new trade products were needed and this needed new industries; but the industrialisation of SADCC had not been given priority status. Another indication of SADCC's failure in this regard is the fact that economic relations between SADCC states and South Africa actually intensified to a certain extent during the 1980s.[61] SADCC efforts were also undermined by the destabilisation drive undertaken by South Africa against them after the failure of South Africa's Constellation of Southern African States (CONSAS) initiative and this is estimated to have cost the region between US$60 billion and US$90 billion between 1980 and 1988. SADCC incurred defence and rehabilitation costs for which there had been no contingencies in place and South Africa also frustrated peace efforts in both Angola and Mozambique by financing the rebels. The region had to deal with the socio-economic effects of those wars as well, which made them slide back on the progress towards the achievement of their objectives.[62]

All the above provides a rationale for the move to transform SADCC to SADC, a formal legal institution that was expected to achieve cooperation more effectively. The new

[59] T Ostergaad *SADC: A Political and Economic Survey* (1990) 58.
[60] R Gibb "Southern Africa in Transition: Prospects and Problems Facing Regional Integration" (1998) 36 (2) *The Journal of Modern African Studies* 287 at 290.
[61] Botswana collaborated with South African companies in the Sua Pan project. Lesotho and Swaziland, highly dependent on the SA economy through SACU, were canvassing for SA investment in their economies, thus defeating SADCC objectives. The CU also prevented the use of tariffs against SA goods and thus perpetuated the BLS dependence on SA. It also distorted intra-SADCC trade in that SA companies in the BLS states had access to SADCC markets under the blanket of BLS states.
[62] Lambrechts *Guide to the SADC* 7.

organisation formalised the change of economic strategy by the region and made it official, embracing a policy of trade liberalisation in the economic sphere. This transformation can also be seen as an attempt to reign in the economic programmes being implemented by the states to ensure that countries would still work together under a common framework and not completely abandon the objectives of development cooperation. It sought to create strong institutions that were accountable not only to the individual member states as was the case with SADCC, but also to a central authority. Contrary to expectations and not so surprisingly, the new institutional structure did not upset the power relations obtaining between the states and the institutions during SADCC.

2.3.3 SADC

The creation of SADC culminated in an organisation with top-heavy toothless institutions, complex in structure and without much elaboration on role and function, leaving much room for overlap of functions and consequently, disputes. The Declaration[63] that preceded the 1992 treaty was a frank document that chronicled the journey travelled and the difficulties encountered. It mentioned the factors that made the organisation transform. SADCC' failures were detailed and a framework was established upon which the new organisation would carry out its activities. The Declaration made a few critical observations regarding regional integration which the organisation has still not heeded. The states had to improve on their commitment to regional integration, the governments and their people had to be at the forefront of the regional agenda for integration to succeed and the need for the states to relinquish some of their authority to the regional institutions was emphasised. In particular, the Declaration tried to explain the dynamics of sovereignty within the regional integration concept, how the states would not be losing an aspect of their sovereignty but would rather be giving it a different dimension. National interests were to be given a regional dimension as well. It brought in the idea of a development integration approach which was also reflected in the Treaty of Windhoek.

[63] Windhoek Declaration "Towards the Southern African Development Community, A Declaration by the Heads of State or Government of Southern African States" 17 August 1992.

Regional integration is fraught with gaps between the theory and practice of regional cooperation, development and integration. Economics literature distinguishes between market or economic integration and regional cooperation. Regional integration, on the other hand, is defined as a process where states knock down most trade barriers and give each other free access to their markets, harmonise domestic policies, ensure the promotion of national development and maximise the economic, political social and cultural benefits of their interaction. It is basically integration at all levels and in all spheres.[64] The definition of regional integration has over the years been narrowed down to integration in the economic sphere or the economic aspects of states interaction.[65] Economic integration incorporates both the removal of and the absence of trade barriers between states. Its form follows a linear progression of economic integration starting from a FTA to a customs union, to a common market, to an economic union, to a complete economic integration witnessed by the presence of a regional bank, common currency and common fiscal policies and eventually, a political union of the states with a supranational authority. The reason why market integration is not so easy to achieve in Africa and southern Africa in particular, is that its success is premised on the pre-existence of a number of factors such as the absence of non-tariff barriers, lack of transport costs, unimpeded intra-state flow of capital and labour, intensive equitable intra-regional trade and transparent markets as well as full utilisation of labour that is reflective in the prices of goods.[66] As shown already, the southern African terrain is marked by serious underdevelopment, weak economies, agrarian economies that are not industrialised, economies in which trade is distorted, a huge trade imbalance between South Africa and the rest of southern Africa, and limited intra-regional trade. For these reasons and others, market integration had to be rejected in southern Africa in favour of cooperation – a combined effort by the southern African countries to create, within southern Africa, the conditions conducive for successful and equitable market integration.

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[64] MC Lee "Development, Cooperation and Integration in the SADC Region" (1999) 2 *Social Sciences & Humanities and Law & Management Research Journal University of Mauritius* 29 at 39.

[65] "A regional integration is characterised by establishing at least an FTA. Further steps are a customs union, a common market, a monetary union and ultimately some kind of political union." (R Shams "Regional Integration in Developing Countries: Some Lessons Based on Actual Case Studies" (2003) Discussion Paper 251 *Hamburg Institute of International Economics* 25.).

[66] J Haarlov *Regional Cooperation and Integration Within Industry and Trade in Southern Africa* (1997) 26. For a critical discussion of the conceptual definitions, see the same.

Regional cooperation, on the other hand, is a vague term that comprises all kinds of state activities that could also fall under the definition of regional integration but without an attempt at "formal" integration. Rather, regional cooperation has its thrust on the development of the states. This concept is characterised by the execution of joint projects, technical sector cooperation, common running of services and policy harmonisation, joint development of common natural resources, a joint stand against the rest of the world and also the joint promotion of production.[67] The above activities would be aimed at overcoming the barriers to economic integration and creating a theoretical basis for the smooth creation of a free trade area. This was the approach adopted by SADC. Through cooperation, SADC would create viable economies and infrastructural development as well as harness the region's natural resources to the region's benefit; and all this was intended to build a foundation for future integration. Tentatively, it is possible to trace a certain sequence in southern Africa's integration efforts, from cooperation to market integration to complete regional integration. External and internal pressures, however, changed the strategy to a combination of cooperation and economic integration, identified as development integration and set to fast-track progress to regional integration without undermining development. This was a move conscious of the consequences of market integration within a framework of structural disequilibria. Successfully implemented, such an approach could have positive dual effects, the achievement of "deeper integration" as well as dealing with the problem of incapacity.[68] These allowed for the streamlining of liberal economic thought into SADC activities, justified the Economic Structural Adjustment Programmes (ESAP), and at the same time allowed for the development of production structures. SADC was also simultaneously consolidating cooperation and internal cohesion and had to deal with the problems associated with market integration. However, the institutions it had created however, which were supposed to give credence to the whole approach, were actually contradictory to those objectives.

The institutions created were well suited for cooperation and would have served SADCC well, but were inadequate for the aims of development integration. One of the most salient features of SADC has been its ability to come up with brilliant contingencies that are laudable for foresight and appropriateness to the situation pertaining but failing to come up

[67] Haarlov *Regional Cooperation* 60.
[68] Schoeman "From SADCC to SADC and Beyond" 8.

with working plans and therefore reducing the contingencies to mere rhetoric. Six institutions were created,[69] which were basically a formalisation of the institutions created by the SADCC 1981 Memorandum of Understanding. The only addition was the Tribunal, an adjudicative body that can make binding decisions and which only became functional in 2006. The Summit was to be the supreme policy making institution, responsible for overall policy direction and control of SADC functions and its decisions would be binding. It was given express power to adopt legal instruments for SADC. The Summit would have a Chair and a Deputy, to be elected by the body at its own discretion with regards to election procedure, period of office or "basis of rotation". This gave the Heads of States great leeway in the making of such decisions. The elected chair was responsible, with his deputy, for the appointment of the Chairs and Deputies of other bodies like the Council and the Standing Committee of Officials. This left plenty of room for the politicisation of the whole process. The treaty also expressed its preference for the appointment of ministers responsible for finance or economic planning to the Council of Ministers and this was reflective of the new emphasis on economic development. The powers of the Secretariat were also extended considerably.

Despite the adoption of a treatise, one of the defining features of SADCC was left fully operative despite it being a source of the slow-paced growth for SADCC. The region would still operate on the basis of sectoral responsibility. This approach did not achieve much except in the Transport and Communications sector and this resulted in hobbled and uneven development. The prime reason for sticking to this ineffectual method was again considerations of the states' sovereignty. This also undermined the institutional competence of the organisation and defeated the goals of closer cooperation. This led some analysts to question the very transformation of SADCC into SADC as the political and economic implications of such transformation were not apparent.[70] The rationale, economic and political implications of the transition were not adequately spelt out and were left open to interpretation. The inference from "development community" is that of states coming

[69] SADC "Treaty of the Southern African Development Community" (1993).

[70] Pallotti contends that the Treaty was, "much more concerned with the formal definition of the institutions ... than the detailed statement of its objectives and functions. The political and economic implications of the transformation of the 'conference' into a 'community' were not spelt out ..." (Pallotti 2004 *ROAPE* 515); Ng'ong'ola is of the opinion that "the reconstitution ... was almost as subtle as the dropping of an extra 'c' from the acronym, it was basically a redrawing of the old arrangement into treaty form and an expansion and rationalisation of the areas of cooperation." (Ng'ong'ola 2000 *JIEL*494).

together, either through cooperation or integration, for the purposes of developing the region in all aspects. It is the objectives and institutions of the organisation that determine the exact parameters of such cooperation or integration. The objectives of the new organisation were much more comprehensive than those of SADCC, with more emphasis on the industrialisation of the states, trade and economic development. With the moves towards black majority rule in South Africa, the *raison de'tre* shifted to one of, "achieve(ing) development and economic growth, alleviate(ing) poverty, enhance(ing) the standard and quality of life of the peoples of Southern Africa, and support(ing) the socially disadvantaged through regional integration".[71]

SADC was basically unable to achieve most of its objectives, principally because of the states' failure to put reigns on the increasing number of sectors for development, and their failure to inject funds into the body of the Secretariat, thus incapacitating it in its role of mobilising and coordinating policies and strategies. The role of Sector Coordinating Units (SCUs) was not exclusive to the organisation; these were staff of government departments, also working for their states. There was a tendency to promote national rather than regional projects[72] and possibly confusion also as to which projects were regional in nature. Among the SADC's Treaty objectives was the promotion and defence of peace and security. In the early years of its inception, SADC faced a host of challenges in that arena including political bickering between Zimbabwe and South Africa as the two dominant forces within the region. The growth of tensions between these two countries can actually be traced to trade issues when, in 1992, the 1964 Preferential Trade Agreement between the two countries was terminated and South Africa increased import tariffs on competitive Zimbabwean goods entering the South African market which had an adverse effect on the Zimbabwean economy.[73] The entry of South Africa into SADC had long been anticipated but there had been no formal elaboration on how South Africa was to be accommodated within the organisation. This was particularly important in that the accession of South Africa as the

[71] Article 5 (1) of 1992 SADC Treaty. Other objectives are to evolve common political values, systems and institutions; promote and defend peace and security; promote self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States; achieve complementarity between national and regional strategies and programmes; promote and maximise productive employment and utilisation of resources of the Region; achieve sustainable utilisation of natural resources and effective protection of the environment; strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the Region.

[72] Schoeman "From SADCC to SADC and Beyond" 9.

[73] Oosthuizen *The Southern African Development Community* 76.

logical leader both politically and economically, was going to have a huge impact on SADC and there was no contingency plan in appreciation of such fact. Zimbabwe felt the impact more as it was displaced as the political and economic leader of SADC. President Mugabe's position as the senior statesman was overtaken by South African President Mandela. This created a major political fault-line within the organisation, as evidenced by the dispute over the institutionalisation of the SADC Organ on Politics, Defence and Security, of which Mugabe was chair.[74] The position of this strategic Organ within the organisation was left undefined from its formation in 1996 to 2004, which left open the question of its accountability and relationship with the Summit and the then unestablished Tribunal. It became a source of contention between the two leaders and this political conflict manifested itself in the Democratic Republic of Congo (DRC) question, where the two states were leaders of two opposing camps on the resolution of the political and military conflict in the DRC.[75] Other security challenges faced by the region during that period include the civil disturbances in Lesotho and Swaziland, and the resumption of civil war in Angola.

The region was further challenged by droughts which threatened food security, HIV/AIDS and a huge, unserviceable external debt for countries such as Mozambique, Angola, the DRC, Lesotho, Malawi and Zambia. Regardless of this, the 2001 August summit noted that the region had achieved positive annual economic growth although this was significantly below the percentage required for it to impact on poverty levels.[76]

In the midst of all the above, the SADC Trade Protocol was signed in 1996 and came into force in 2000. It provides the legal and structural framework for trade liberalisation and makes provision for the phased elimination of trade barriers. It constitutes the market integration aspect of development integration and is a form of consolidation of SADC's new economic growth rhetoric. Besides the liberalisation of trade, one of the ideas behind the adoption of the Trade Protocol was to improve intra-regional trade. The region has come to be identified with this Trade Protocol during the implementation period for the FTA, culminating in the declaration of the SADC FTA in August 2008. The hype around the

[74] Pallotti 2004 *ROAPE* 520.
[75] *Ibid.*
[76] Oosthuizen *The Southern African Development Community* 78.

SADC FTA makes the Trade Protocol a potential barometer for measuring the region's success in the economic arena post-2000.

The regional organisation underwent massive reconstruction in 2001 culminating in the amendment of the Treaty and a new beginning for the organisation. Of the greatest concern with the structure of SADC was the decentralised cooperation approach.[77] The system of sectoral cooperation had been dependant on Sectoral Coordinating Units made up of staff of government departments and which were not ideal for furthering regional interests.[78] This national status of the Sector Coordinating Units made it particularly difficult for the Secretariat to coordinate their activities, and resulted in different implementation approaches. The problem of incoherent development remained unresolved.[79] Consistent progress on SADC objectives and projects meant a re-evaluation of the sectoral approach. This concern had already been raised in a 1993 SADC report entitled, "A Framework and Strategy for Building the Community", as well as in a 1994 document entitled, "Management of Regional Cooperation". On the basis of these documents, a committee was set up to oversee the review and rationalisation of the SADC Programme of Action and this culminated in a 1997 report entitled "Review and Rationalisation of the SADC Programme of Action". This report outlined almost the same weaknesses as there had been in the operation of SADCC.[80] This goes to show that the change from SADCC to SADC had been ineffectual as most of its structural deficiencies had been carried over into the new SADC. Following this report, a review committee was established in 2000 and its report was approved at SADC's Extra-ordinary Meeting in Windhoek, Namibia,[81] where a decision to restructure SADC was adopted. The SADC Treaty, amended in August 2001, reflects many of the recommendations that were made by the review committee. The changes to SADC include "the promotion of sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, and the promotion of common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective and, the consolidation and

[77] Oosthuizen *The Southern African Development Community* 100.
[78] Ng'ong'ola 2000 *JIEL*489.
[79] Oosthuizen *The Southern African Development Community* 100.
[80] Oosthuizen *The Southern African Development Community* 101.
[81] *Ibid.*

maintenance of democracy, peace and security".[82] To aid in the attainment of these objectives, the formulation of a Regional Strategic Development Plan (RISDP) was recommended. The RISDP was to elaborate on SADC's priorities as recommended by the review report. The problem of sectoral responsibility was solved through the establishment of four Directorates[83] under the supervision of the Secretariat. These Directorates would house all the previous 21 Sector Coordinating Units. To ensure consistency with national projects, SADC National Committees were created to co-ordinate and implement a domestic level, SADC programmes as set out by the Directorates.

2.4 Problems with Regional Integration in Africa

The history of economic integration in Africa is inundated with problems and failures. SADC attempts its economic integration against this background of dismal performance. The economic conditions pertaining in Africa do not seem conducive for economic integration as that envisaged by SADC. There have been no discernible benefits from integration attempts within Africa, not even within SACU as the longest surviving RTA in Africa. The system used within SACU has left the economies of the BLNS[84] states in a dependence relationship with the South African economy. Being the most developed member of the group, South Africa gets to be the most eligible candidate and the recipient of most major investment. The customs revenue that the BLNS states get from the CU cannot compensate for the huge trade deficit that is four times larger than the revenue received. The common external tariff also forces the states to buy South African goods as the most affordable and thus contributing to South Africa's economic growth. SACU is a prime example of the effects of trade liberalisation among countries of different economic capacities.[85] Other factors also contribute to the failure of integration in Africa, such factors as the African preoccupation with metropolitan centres, failure to link the economies and infrastructure and where linked,

[82] L Kritzinger-van Niekerk and E P Moreira "Regional Integration in Southern Africa. Overview of Recent Developments" (2002) World Bank 2 http://www.sarpn.org.za/documents/d0000329/index.php (accessed 8 October 2007) 95.
[83] These are Trade, Industry, Finance and Investment; Infastrucutre and Services; Food, Agriculture and Natural Resources; and; Social and Human Development and Special Programs.
[84] Botswana, Lesotho, Namibia and Swaziland.
[85] T Ostergaad *SADCC Beyond Transportation: The Challenge of Industrial Cooperation* (1989) 24.

the production structures cannot complement each other thus obviating the need for linkage.[86] The external dependency is another problem and it feeds the further marginalisation of the African economies.[87]

Where states have managed to find a way of overcoming the above problems, such as the development integration approach of the SADC, other problems arise. Among these problems are: a consistent failure by African countries to bring domestic policies in line with their international treaty bindings and an unwillingness to put regional interests ahead of domestic ones;[88] or to give regional institutions the necessary authority needed for them to push forward the regional agenda.[89] In addition to the above, there is also an absence of monitoring and enforcement mechanisms with regard to the treaty obligations. The problem of regional economic integration can also be divided into three categories: economic, legal and political.[90] Africa's economic geography is generally unsuited for integration. In light of that Africa is thus using the inappropriate method of economic integration, a method well suited for the industrialised states of the West.

The liberal trade model of integration is driven by three things, "incrementalism, the use of trade as a driving force of integration, and reliance on market forces as a pertinent integration mechanism".[91] Colonial production structures aimed at stripping and exploiting Africa's resources for the benefit of overseas markets make intra-regional trade impossible, as the states trade in the same products and no impetus exists. Underdevelopment and economic inequity create political tensions as economic power is necessary for political power is to be meaningful. These political tensions manifest themselves in the operations of the institutions created by African states for integration purposes. Secretariats are not ceded enough authority and are thus rendered incompetent. They are generally weak institutions whereas they should be the hub of all activity. There is generally an unwillingness to have any form of

[86] Gwaradzimba 1993 *IAJO* 55.
[87] *Ibid.*
[88] This is a direct product of nationalism, which, in this context, poses a major constraint to regional integration as regional schemes are only relevant and used to the extent that they further domestic interests.
[89] W P Hannun "Economic Integration in Africa" http://www.valt.helsinki.fi/kmi/english/HannunWP.pdf (accessed 26 March 2007) 2.
[90] H Mutai "The Regional Integration Facilitation Forum: A Simple Answer to a Complicated Issue" (2003) Working Paper No3/2003 Trade Law Centre for Southern Africa 22.
[91] Oosthuizen *The Southern African Development Community* 104.

supranational institution exercising authority over the states, however minimal. In SADC, for instance, despite the 2001 restructuring exercise that left the Secretariat more empowered in terms of authority and scope of work, the states still guard their sovereignty jealously to the extent that it negates the objective behind empowering the Secretariat. Trade liberalisation was not on the agenda of priorities in southern Africa in 1980 but was imposed on the region through donor interests and priorities. It was implemented as a means of obtaining loans and funding from the International Monetary Fund (IMF) and the World Bank and the political will for proper implementation of such liberalisation is therefore lacking. The legal intricacies involved pertain to the status of international law within the national arena. Treaty obligations do not pose a legal problem for those countries that follow the monist approach to international law but where the dualist system is followed, implementation can take very long. African trade integration initiatives are also notorious for imposing terms and norms whose legality is highly questionable and thus become unenforceable.[92]

The patterns of trade that have played out in Africa since independence and the fate of most RTAs have led some commentators to conclude that there is no pressing need for economic integration in Africa and the traditional integration theory, based on the *laissez faire* approach, is largely irrelevant to the "actual purposes, processes and problems of Third World economic coordination".[93] Despite this, First World forces still call for the economic integration of Africa. The "neutrality" of such forces is therefore questionable and calls for a closer inspection of the position of Africa as it penetrates the world market.[94] How does the First World account for the failures of the schemes before and how do they justify their encouragement of the creation of such schemes now, bearing in mind that they benefit the most from the trade structures in Africa?

In response to the above question, regional integration could be seen as a protective shield against manipulation by the global economy. This is was the case in post-independent Africa where pan-Africanist sentiment fed the idea of linking the African economies and making them sustainable on their own. Nonetheless, regional integration can also be used to

[92] Mutai "Regional Integration" 24.
[93] Gwaradzimba 1993 *IAJO* 55.
[94] Pallotti 2004 *ROAPE* 514.

"institutionalise openings to the international economy"[95] which is the ideal scenario. Both arguments fail to consider the dynamics of African regional integration and are premised on the idea of regional integration being merely economic integration. The problems associated with African regional integration span across other socio-political considerations, with politics playing a major role. How, then, does southern Africa justify its transformation in 1992 to accommodate economic integration?

Southern Africa has long been toasted as a region of so much potential and the one most likely to succeed with its initiative. During the apartheid era, expectations were that a post-apartheid southern Africa could grow to be a force to reckon with. It is one of the richest regions in the world,[96] which would translate into huge fossil fuel reserves, the most valuable mineral resources in the world and fertile agricultural land. Therefore, in terms of resources, the region has enough potential to build a strong economy. It is true that there is pressure from international economic thought to create a viable institutional mechanism for regional economic integration. However, Africa is not just responding to international economic thought but economic integration is being pursued as part of its goals of economic, social and political development.

The paradox of economic integration in Africa is that it would be the most efficient way of transforming the weak economies, but at the same time the standard strategy would not work for Africa, principally because of low intra-regional trade. One of the most visible successes of southern Africa is the political unity culminating from the liberation struggles for independence. The sense of regional identity born of the states' cooperation during the liberation struggles could be used as a foundation for economic integration.[97] There are other reasons that speak for integration within the region, political instabilities which have a spill-over effect, environmental problems, diplomatic disputes, democracy and constitutionalism; all of these are issues that cut across borders and SADC, being an intergovernmental organisation, needs an institutionalised approach to cooperation.

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[95] Gibb 1998 *JOMAS* 298.
[96] Lee 1999 *Social Sciences & Humanities and Law & Management* 44.
[97] S Amin *et al* (eds) *SADCC: Prospects for Disengagement and Development in Southern Africa* (1987) 148. It must be noted, however, that this political unity and identity has somehow been diluted by the accession into SADC of such states as Mauritius, Seychelles (former member) and Madagascar. These states have no political ties to SADC and found acceptance by virtue of economic considerations.

The trade liberalism approach to regional economic integration neglects to consider that regional integration inevitably "interferes" with the sovereignty of states and their power relations in order for it to work. The only catalogued success of regional integration initiatives like the EU, took place within developed and highly industrialised regions. There is need, therefore, to consider other strategies that are more fitting of the South-South regional integration setup. Also, to date, there is no available all-encompassing strategy for regional integration in both developed and developing countries.[98] In consideration of SADC's initiative, it must be borne in mind that the approach is not pure market based, but is a broader one that encompasses development in all critical sectors. Indications are that trade and economics will however occupy a greater part of the policymakers' attention and the region has basically come to be regarded as a regional economic integration organisation. The Regional Indicative Strategic Plan, which is complementary to the SADC Trade Protocol, all but consolidates that perception. It highlights the sequence of events that is followed under the traditional economic integration theory and practice.

2.5 Conclusion

SADC's road to regional integration is one paved with an illustrious history and plenty of obstacles. It is the best example of developing countries' search for the perfect mode of integration that would put them on the world economic map without fear of marginalisation. There are many challenges to economic integration in southern Africa, principal of them being the cession of power to the regional institutions so as to enable them to push the regional agenda more effectively. The history of economic integration in Africa provides answers and means of overcoming the various obstacles to integration in southern Africa. SADCC was unique in its institution and constitution and could have done a lot more for the region in terms of integration.

Different from other African initiatives, SADCC was designed outside the classical model of integration based on free trade. It was born of the southern African experience and what the

[98] Pallotti 2004 *ROAPE* 514.

southern African countries perceived to be the most appropriate developmental strategy in line with their needs and capacities. Its operation was based on agreement on the sectors in most need of development without being overambitious in goals and objectives. There was a deliberate absence of emphasis on trade issues, with only a vague referral in the 1980 Declaration to the effect that states were involved in various trade initiatives and it was anticipated that in time, states would be able to trade amongst themselves. SADCC did not endeavour to formalise itself but rather remained an informal organisation where states each had an equal stake in the organisation and had no legal obligations. The regional projects were also national projects in the sense that they belonged to the state in which they were implemented and states bore the primary responsibility for the funding of such projects as well as the repayment of loans, if any. The biggest setback to the SADCC experiment, which could otherwise have been successful, was the nationalistic aspirations born of the concept of sovereignty. This later translated into a lack of political will on implementing regional projects. This problem arose partly out of the very problem that SADCC was trying to address: unequal development among the member states. Implementation of projects became a race for faster and more national development for fear of dominance by other SADCC states. This resulted in lack of cohesion in the regional programme and a wasteful duplication of projects that stunted the development of the region. Dependence on donor assistance also proved to be a downfall as these donors had their own ideologies and interests and, because there was no coherence or combined front, donors could impose their own conditionalities that were adverse to the regional agenda.

The transformation to SADC was informed by a number of decisions, most particularly the embrace of contemporary economic thought and the approach of democracy in South Africa. The approach taken by SADC was also novel to the usual regional integration initiatives in Africa and has the potential to improve the region's fortunes if properly harnessed. The biggest problem still remains the issue of sovereignty and political foresight. Gwaradzimba aptly sums it up as follows:[99]

> "Although regionalism has often been perceived as what states do outside their borders, the form and content of regionalism and the capacity of the member states to defer to the collective will are a function of both internal and external political

[99] Gwaradzimba 1993 *IAJO* 59.

dynamics, specifically, the logic of national interests and the regional organisation's capability to forge a programme of action and resource mobilisation strategies that, by and large, meet with the economic and foreign policy goals of participating states and, no less important, that of major donors."

While there are many challenges to the process of economic integration outside of the legal arena, these challenges feed into the legal structure of the Trade Protocol and form the background to the question of adherence to GATT/WTO provisions. An analysis of the Trade Protocol that is divorced from the turbulent history of regional integration in southern Africa is incomplete, as the form and structure as well as content of the Protocol is a product of past challenges and triumphs in the realm of integration. The above forms the context in which the Trade Protocol will be discussed as it is the experience of the southern African countries that motivates the Trade Protocol.

CHAPTER THREE

WTO REGULATORY FRAMEWORK ON REGIONAL TRADE AGREEMENTS AND THE SADC TRADE PROTOCOL

3.1 Introduction

The OAU's 1991 Abuja Treaty aimed to establish an African Economic Community (AEC) and, towards that goal, identified the Southern African Development Community (SADC) as one of the building blocs towards the AEC. Economic integration in the SADC has been on the agenda since 1992 as spelt out in the Declaration "Towards the Southern African Development Community: A Declaration by the Heads of State or Government of Southern African States"[1] that signalled the evolution from Southern African Development Coordination Conference (SADCC) to SADC, and a shift from a strategy of development cooperation to regional integration. The SADC's economic agenda is being driven by the SADC Trade Protocol. The Trade Protocol is essentially a directive to the SADC states to liberalise trade which will create more economic engagement and exchange in goods and services, thus leading to economic integration. It is the main building block of regional economic integration and a successful implementation of the Trade Protocol means a stronger building block for the AEC.

The objectives of the Trade Protocol include the liberalisation of trade, ensuring efficient production within SADC, improving the climate for domestic, cross-border and foreign investment, the enhancement of economic development, diversification and industrialisation

[1] This Declaration was adopted by the SADC Heads of State and Government of Southern African States in Windhoek, Namibia on the 17th of August 1992.

and to establish a Free Trade Area (FTA) by 2008.[2] The FTA has since been implemented.[3] The specific strategies being used to achieve these objectives are the gradual elimination of tariffs, the adoption of common rules of origin, harmonisation of customs rules and procedures, attainment of internationally acceptable standards, quality, accreditation and metrology, harmonisation of sanitary and phyto-sanitary measures, elimination of non-tariff barriers and the liberalisation of trade in services.[4] The SADC strategy of economic integration is in line with World Trade Organisation (WTO) aims and objectives. The WTO is committed to the liberalisation of trade and harmonisation of trade regulation. To that end, the WTO "recognises the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements".[5] Economic integration in the SADC and its most immediate objective, the FTA, are being pursued under GATT/WTO[6] rules. In Article XXIV, the GATT explicitly authorises WTO members to create and be members of Regional Trade Agreements (RTAs) such as is being done by SADC member states.

In this chapter, an exposition of the WTO regulatory framework on RTAs is given, followed by an analysis of the Trade Protocol *vis-a-vis* GATT/WTO provisions. There is an attempt, in the process, to identify and explain the various problems, ambiguities and contradictions that may exist within the GATT regulatory framework as well as the SADC Trade Protocol. An analysis of the GATT provisions and the Trade Protocol will assist in clarifying the legal implications of the SADC Trade Protocol and to some extent explaining the impossibility of compliance in some areas. It will also be determined whether the current WTO regulatory framework adequately covers for the needs of regional blocs that comprise countries at different stages of development.

[2] Article 2 of SADC Trade Protocol.
[3] The FTA was declared on 17 August 2008 at the SADC Summit of Heads of States and Government.
[4] SADC Secretariat "Regional Indicative Strategic Development Plan (RISDP)" Section 3.2.2.1.
[5] Paragraph 4 of the Understanding on the Interpretation of Article XXIV of GATT 1994.
[6] General Agreement on Trade and Tariffs (1994).

3.2 GATT Article XXIV

3.2.1 What is an RTA under GATT/WTO Law?

Only three types of RTAs are recognised in Article XXIV: a Customs Union (CU), Free Trade Area (FTA) and an Interim Agreement[7] for the formation of a CU or FTA. This is so, despite the fact that trade integration takes place on a linear progression of economic events where we have, at the bottom of the rung a Preferential Trading Agreement (PTA),[8] which develops into an FTA, which in turn progresses into a CU and then to a Common Market and Economic Union.[9] Eventually there is complete economic integration.[10] The GATT does not recognise PTAs because they involve the lowering of trade barriers on goods produced within the PTA and thus they only seek selective tariff reduction without moving towards complete tariff liberalisation.[11] These tariff reductions are not extendable to other GATT contracting parties and are thus ultimately trade diverting. On the whole, PTAs do not conform to the general principle behind RTAs.

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[7] The inclusion of Interim Agreements was necessary in appreciation of the fact that the requirements for an FTA and a CU could not be fulfilled overnight as fulfilment would require a substantial readjustment of both the RTA member countries' economies and administrative policies. To avoid chaos, and frankly the most logical option, this change to an FTA or CU had to be gradual. As such, most of the RTAs notified under the GATT 1947 were in actual fact "interim agreements" (U Kumar *Article XXIV of GATT and Regional Arrangements in Southern Africa* (1995) 3).

[8] Perhaps better understood when described as a Partial Scope Agreement, with liberalisation of trade only taking place in a few select sectors of trade.

[9] P Hilpold "Regional Integration According to Article XXIV GATT – Between Law and Politics" (2003) 7 *Max Planck Yearbook of United Nations Law* 219 at 224.

[10] This is the stage whereby economists would say there is deep integration. It also has political implications with member countries ceding to the bloc certain elements of their sovereignty.

[11] This is not entirely accurate, however, because the Agreement on Technical Barriers to Trade (TBTA) in Article 6.3 and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPSA) in Article 4.2 allow and encourage the conclusion of bilateral agreements between countries. It must be noted, though, that these are exceptional arrangements. Article 6.3 of the TBTA reads: "Members are encouraged, at the request of other Members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures. Members may require that such agreements fulfil the criteria of paragraph 1 and give mutual satisfaction regarding their potential for facilitating trade in the products concerned." Article 4.2 of the SPSA reads: "Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures."

On the other hand, common markets and economic unions are not mentioned in Article XXIV, but are nonetheless fully legitimate because in such instances the contracting parties would have gone beyond the basic requirements of Article XXIV. These forms of regional integration are basically an extension of a CU and involve a deeper level of economic integration. The external policy is still the same as that of a CU, with a Common External Tariff that is not higher than the tariff applied in the pre-formation period. Common Markets and Economic Unions are thus compatible with Article XXIV.

The two main criteria that both FTAs and CUs must meet in order to be legitimate and accepted within the GATT/WTO system are:

- Trade barriers should be eliminated on substantially all trade among the contracting parties to the RTA; and
- Trade barriers should be no more restrictive than the policies/tariffs of the individual states prior to the formation of the trading bloc i.e. such barriers cannot on the whole increase after the RTA is created.[12]

Although there are other requirements set out in Article XXIV and the 1994 Understanding on the Interpretation of Article XXIV, these are the two main criteria according to which an analysis of the WTO compatibility of an RTA is undertaken. The idea is to create a parallel system to the GATT/WTO Multilateral Trading System.[13]

[12] Article XXIV: 8 and Article XXIV: 5 of GATT 1994. These two requirements have been further qualified in the literature as the "internal trade requirement" and the "external trade requirement" of RTAs. (M J Trebilcock and R Howse *The Regulation of International Trade* (2005) 199 as well as Dr J H Mathis "A Legal Overview of RTA's Regulatory Provisions: Crossing the Boundaries of GATT Article XXIV?" (14 November 2003) PowerPoint Presentation at the WTO Seminar on "Regional Trade Agreements and the WTO" Session 4 Geneva, http://www.wto.org/english/tratop_e/region_e/sem_nor03_e/mathis_notes_e.doc (accessed 21 May 2007)). Mathis further emphasises that although paragraph 8 is said to be 'internal" and paragraph 5 is "external", these requirements should not automatically be equated with GATT internal requirements and GATT external requirements.

[13] This is a global trade system based on the Most Favoured Nation principle where countries do not discriminate in terms of the trade concessions that they give and thus the trading field is levelled.

RTAs in general are regulated by Article XXIV of GATT 1994 as complemented by the 1994 Understanding and the 1979 Enabling Clause.[14] Needless to say, given the controversy surrounding RTAs, and with the RTAs having generated much academic interest in the fields of law, economics, politics and international relations, the principles and rules pertaining to RTAs are of crucial importance. The above-mentioned provisions set out the requirements and boundaries for RTAs under the WTO system, with the aim of preventing such RTAs from degenerating into self-contained protectionist blocs. It is a way of harnessing them and ensuring that they do not harm the Multilateral Trading System (MTS).

3.2.2 Free Trade Areas

Article XXIV: 8(b) of GATT 1994 defines a Free Trade Area (FTA) as a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories on products originating in such territories.[15] There are three elements to this definition: firstly, the elimination of duties and other restrictive regulations of commerce; secondly, such elimination has to be done on substantially all the trade between the constituent territories; and, thirdly, this elimination must apply to products originating within the territories of the contracting states. Furthermore, the duties and other restrictive trade practices applicable to third countries i.e. non-FTA members, should not be higher or more restrictive than the corresponding duties and other trade regulations obtaining within the same territories prior to the formation of the FTA.[16]

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[14] The Enabling Clause is a product of the Tokyo Round of Agreements (1973—1979) and it is the name for the decision on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" adopted on 28 of November 1979 by GATT contracting parties. Article XXIV and the Enabling Clause are not the only regulatory disciplines on RTAs but are the only ones that deal with trade in goods. There is also Article V of the General Agreement on Trade in Services (GATS) but this provision will only be discussed in passing where necessary. This is because the SADC Trade Protocol does not devote sufficient provisions to trade in services to warrant an analysis based on GATS.

[15] The elimination of trade barriers on substantially all trade is not absolute: states would still be allowed to impose trade restrictions permitted under Articles XI (quantitative restrictions), XII (restrictions to safeguard balance of payments), XIII (non-discriminatory administration of quantitative restrictions), XIV (exceptions to the rule of non-discrimination), XV (exchange arrangements) and XX (general exceptions to GATT obligations) on their FTA partners.

[16] Article XXIV: 5(b) of GATT 1994. This essentially means that parties can actually keep the tariffs at the same rates as were in place before the FTA and, also, this requirement is not indefinite. It only applies at the time of formation of the FTA such that states are at liberty to increase their tariff rates after the FTA has been

This provision also applies to interim agreements leading to the formation of a FTA.[17] Where the RTA is an interim agreement for the formation of an FTA or a CU, such RTA should include a plan and a schedule for the formation of such FTA or CU within a reasonable length of time.[18] Obviously, interim agreements do not fulfil all the legal requirements for an FTA or a CU and the time limit aims to ensure that discriminative trade agreements do not hide under the cover of interim agreements to perpetuity.[19]

Before entering into an FTA, CU or interim agreement leading to an FTA or CU, member states must promptly notify the other GATT contracting parties and also make available to the GATT contracting parties, all relevant or necessary information with regard to the proposed FTA, CU or interim agreement. This is to enable the GATT contracting parties to make a proper assessment of the proposed RTA's compliance with Article XXIV and make such reports and recommendations on the RTA as they deem appropriate.[20] For example, if after examination of the information provided, the GATT contracting parties are not convinced that the agreement would result in the formation of a CU or FTA within the period

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concluded. This would be in accordance with GATT provisions. It is puzzling that states were given such latitude with regard to tariff increases given the general principle contained in Article XXIV:4 that exhorts states party to RTAs, "... not to raise barriers to the trade of other contracting parties with such territories".

[17] It is also the only one that applies exclusively to Interim Agreements for the formation of FTAs; otherwise the discussion that follows on Interim Agreements covers both Interim Agreements for the formation of FTAs as well as CUs.

[18] Article XXIV: 5(c) of GATT 1994. The result of this is that the paragraph 8 requirement that substantially all trade be liberalised and a common external tariff be established for CUs does not have to be effected. All that is needed is a plan and schedule indicating how the RTA will move towards fulfilment of such requirement. Interim agreements will still have to fulfil the requirements of paragraph 5 though (Kumar *Article XXIV of GATT* 3). Article XXIV: 7(c) provides that any changes to the plan and schedule which may likely jeopardise or delay unduly the formation of the CU or FTA must be communicated to the GATT contracting parties. The Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994,provides, in paragraph 9, that all substantial changes in the plan and schedule have to be notified and the Council for Trade in Goods shall examine the changes if so requested.

[19] The question of "reasonable length of time" did stir up controversy as to the determination of reasonability and earlier working parties, tasked with the responsibility of determining compliance with Article XXIV, faced problems in that aspect. This has been brought to rest, by the Understanding, however, which provides, in paragraph 3, that the reasonable length of time should exceed 10 years only in exceptional cases and that States that feel 10 years is insufficient should tender full explanation of why they need a longer period to the Council for Trade in Goods.

[20] Article XXIV: 7(a) of GATT 1994. Whereas before 1996 such notifications were made to the Council for Trade in Goods (CTG) which would then create a Working Party to review the agreement, in February 1996 the WTO created the Committee on Regional Trade Agreements (CRTA) with a twofold mandate to "examine individual regional agreements; and to consider the systemic implications of the agreements for the multilateral trading system and the relationship between them". (World Trade Organisation "Work of the Committee on Regional Trade Agreements" http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (accessed 29 June 2007).) This said, notifications are still made to the CTG but examined by the CRTA, which does that in accordance with the relevant provisions of GATT 1994 and paragraph 1 of the 1994 Understanding as per directions of the 1994 Understanding in paragraph 7, and makes recommendations.

envisaged by the parties, or if they consider the proposed period to be unreasonable, they must recommend modifications of the arrangement.[21] And, where the parties to an Interim Agreement have not included a plan and a schedule, the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1947 provides that the working party (read the Committee on Regional Trade Agreements (CRTA)[22]) shall recommend such a plan and schedule in its report. The contracting parties to the RTA are prohibited from maintaining or putting into force such agreement, whatever the case may be, unless and until they make the necessary modifications as recommended by the CRTA.[23] It should be noted, however, that Article XXIV does not preclude the approval of RTAs that do not comply with its requirements as laid out in paragraphs 5, 6, 7 and 8. The GATT contracting parties may, by two-thirds majority, approve proposals or agreements which do not comply with the requirements, provided that such proposals lead to the formation of a CU or FTA in the sense of the Article.[24]

FTAs and CU are also required to report periodically to the Council for Trade in Goods (CTG) on the operation of their agreement and all significant changes to their groupings should be reported as they occur.[25]

3.2.3 Customs Unions

A Customs Union (CU) is defined as the substitution of a single customs territory for two or more customs territories. For such a group to be acceptable under GATT law, it has to fulfil the following conditions:

[21] Article XXIV: 7(b) of GATT 1994.
[22] Paragraph 10 of the 1994 Understanding.
[23] Article XXXIV: 7 (b) of GATT 1994 and Paragraph 10 of the 1994 Understanding.
[24] Article XXIV: 10 of GATT 1994. Logic would provide that an FTA or CU in the sense of Article XXIV is one which complies with the requirements of Article XXIV. It is not comprehensible, then, how an agreement that does not comply can lead to an RTA that is GATT compliant.
[25] Paragraph 11 of the 1994 Understanding.

- Duties and other restrictive trade regulations must be eliminated on substantively all the trade between the constituent territories of the union. If that cannot be achieved then these trade barriers have to be eliminated at least on substantively all the trade in products originating in such territories.[26]

- Substantially the same duties and other trade regulations must be applied by each of the members of the CU to trade with third countries.[27]

- Also, as in the case with FTAs, the duties and other regulations of commerce adopted and imposed by the CU must not on the whole be higher or more restrictive than the general incidence of duties and regulations of trade applicable in the constituent territories prior to the formation of the Union.[28]

Article XXIV recognizes that the determination and establishment of a Common External Tariff (CET)[29] may involve the increase or decrease of tariff rates by the CU members and this might, in consequence, have negative effects on the trade of third countries. This is especially when the tariffs are being increased contrary to the GATT tariff bindings and third countries will have to be compensated for the increase. Article XXIV: 6 provides that in the

[26] Article XXIV: 8 (a) (i) of GATT 1994. Again, as with FTAs, this is not absolute and CUs members have leeway to impose trade restrictions on other CU members as permitted under GATT Articles XI, XII, XIII, XIV, XV and XX.

[27] Article XXIV: 8(a) (ii) of GATT 1994. This refers to the common external tariff that is applied to imports from outside the CU and is the major point of difference between FTAs and CU. This provision is subject to the provision of paragraph 9 of Article XXIV which states that the preferences referred to in paragraph 2 of Article 1 will not be affected by the formation of a CU or a FTA but may, regardless, be eliminated or adjusted by means of negotiations with the contracting parties affected. These negotiations with affected parties shall particularly apply to the elimination of preferences required to confirm with the provisions of paragraph 8 (a) (i) and 8(b). The paragraph 2 of Article 1 preferences are those resulting from the preferential agreements which were already in existence between the GATT contracting parties prior to the adoption of GATT 1947. The provisions of Article 1 would require that, when a product that has been imported into the territory of a member of a CU or FTA at a preferential rate of duty is re-exported to the territory of another member of CU or FTA, the latter should collect a duty equal to the difference between the duty already paid and any higher duty that would be payable if the product were being imported directly into its territory (Interpretative Note Ad Article XXIV from Annex 1 paragraph 9). The above-mentioned negotiations are based on Article XXVIII procedures.

[28] Article XXIV: 5(a) of GATT 1994. This means that the Common External Tariff must not be higher than the tariff duties applied by the CU members individually before the formation of the CU. Prior to 1994 one of the pertinent questions with regard to this provision was on the calculation of the Common External Tariff itself. Part 2 of the Understanding provides that the calculation shall be based upon an overall assessment of weighted average tariff rates and customs duties collected. The assessment shall be based on import statistics for a previous representative period to be supplied by the CU, on a tariff line basis and in values and quantities broken down by WTO country of origin. The weighted average tariff rates shall be computed by the secretariat in accordance with the Uruguay Round (1986 to 1994) methodology of assessment of tariff offers. The rates of duty to be considered are the "applied" rates as opposed to the bound rates.

[29] The Common External Tariff is the uniform tariff that is applied by all the members of a CU to third party goods entering the CU territory.

event of such increase of tariffs taking place, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the Union.

Article XXIV: 6 thus provides for compensatory adjustment with respect to other products in such instances. This is aimed at reversing the adverse effects of the increased tariffs on third parties and ensuring that the CU is ultimately trade-creating.[30] Article XXIV anticipates that GATT contracting parties would negotiate to maintain "a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement (GATT) prior to such negotiations".[31] Should negotiations fail, the affected parties will be free to withdraw substantially equivalent concessions and this can actually be viewed as a form of reverse negotiation.[32] This withdrawal of concessions is not intended to be discriminatory and thus the MFN principle applies. This in effect has the result that the counter-action affects all other GATT members, including those that are not party to the CU.[33]

Article XXIV is mute on the question of whether failure by a CU to adhere to the Article XXIV procedures would affect a CU's eligibility for automatic exception under the GATT, but indications are that a CU would qualify regardless. Interestingly, a withdrawal of concessions as a consequence of failed Article XXIV: 6 negotiations has yet to occur. This is

[30] Kumar *Article XXIV of GATT* 2. It must be noted that only trade which has taken place on an MFN basis is considered. Non-MFN or preferential trade is considered only if it has ceased to benefit from such preferential treatment and has effectively become MFN rate at the time the Common External Tariff is established (Paragraph 3 of the 1994 Understanding).
[31] Article XXVIII: 2 of GATT 1994.
[32] Article XXVIII: 3 of GATT 1994.
[33] This is explained in the following comment: "The issue of retaliatory duties by the rest of the GATT contracting parties was also raised and the Committee concluded that, '... it is probably not desirable to carry it beyond the stage of the original action and the counter measures. ... if unfairness does result from the practical action of those measures, it will have to be sorted out by the (contracting parties)'" ("Summation by Chairman of the Tariff Agreement Committee" (1947) *EPCT/TAC/PV/18* 44 Geneva.) In a 1990 Award by the Arbitrator on "Canada/European Communities: Article XXVIII Rights", it was noted, in reference to withdrawal of concessions by Canada under Article XXVIII: 3, that, "Should Canada exercise her right to withdraw concessions, she undertakes obligations to compensate third countries having negotiating rights in respect of Canada for the products on which concessions would be withdrawn" (WTO *Guide to GATT Law and Practice: Analytical Index* Vol 2 (1995) 947).

indicative of either a high success rate in the negotiations, or the difficulties in identifying "substantially equivalent" concessions for withdrawal.[34]

Unlike FTAs, once a CU is created, it becomes a GATT/WTO member in its own right and assumes rights and obligations as a distinct territorial entity. Otherwise the notification and other administrative requirements such as periodical reporting remain the same as those of FTAs and Interim Agreements.

3.2.4 Rules of origin

When a product has been manufactured or produced wholly in the territory of an RTA member then there is no question regarding the product's origin. Progressive technological changes as well as globalisation have greatly reduced the possibility of having a single product being wholly produced in one territory. Only agricultural and mining products are still mostly wholly produced in one ascertainable territory. States are now faced with complex manufacturing processes which, coupled with advanced technology and globalisation, result in a product whose stages of production cut across several country boundaries.[35] As individual GATT contracting parties, states apply "MFN rules of origin"[36] but on entering an RTA, they have to apply "preferential rules of origin" in determining the correct import treatment.[37] Preferential rules of origin are particularly necessary for FTAs so as to limit trade deflection where non-FTA members (free-riders) seek to exploit the state with lowest import tariffs to get their goods into the free trade zone. This is not to say rules of origin are irrelevant in the context of CU. They are relevant but serve a less critical purpose than in FTAs because the Common External Tariff eliminates the problem of free-riders. Rules of origin are used in CU to identify and differentiate goods originating from the CU and those originating from third countries where the last stage of production was completed

[34] Kumar *Article XXIV of GATT* 2-3.
[35] A product may be processed in country A, assembled in country B, packaged in country C and exported to country E via country D and thus the determination of its origin becomes a tenuous task.
[36] Contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article 1 of GATT 1994.
[37] WTO "Rules of Origin Regimes in Regional Trade Agreements" (5 April 2002) Restricted *WT/REG/W/45* Paragraph B2.

in a CU member state. Thus said, rules of origin are an essential element of RTAs, but, as yet no comprehensive set of rules governing determinations of rules of origin exists despite the various efforts at harmonisation.[38]

Rules of Origin are defined as those laws, regulations and administrative determinations of general application. These laws, regulations and administrative determinations must not relate to the MFN rules of origin.[39] Some of the disciplines that govern the application of rules of origin in the Agreement on Rules of Origin are as follows:[40]

- Rules of origin are not to be used as instruments to pursue trade objectives directly or indirectly.
- Rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade. They shall not pose unduly strict requirements or require the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin.
- The rules of origin applied to imports and exports are not more stringent than the rules of origin applied to determine whether or not a good is domestic and shall not discriminate between other Members.

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[38] It seems as though the GATT drafters either underestimated the scope for abuse of content rules and the potential for exploitation of the lowest external tariff wall or were oblivious to it. As such, GATT Article XXIV inherited no multilateral discipline on the use of rules of origin. Rules of origin only find mention in an interpretative note to Article VIII ("Fees and Formalities Connected with Importation and Exportation") which states that "the production of certificates of origin should only be required to the extent that it is strictly indispensable." (GATT, Text of the General Agreement, Annex 1, Notes and Supplementary Provisions, ad Article VIII Paragraph 2, available at http://www.wto.org/English/does_e/legal_e/Havana_e.pdf (K A Chase "Multilateralism Compromised" 23-25)). Besides the Agreement on Rules of Origin, there have been two other previous attempts at harmonising Rules of Origin. GATT contracting parties considered adopting uniform Rules of Origin in 1953 but were defeated by disagreements on the definition of "origin" and the attempt fell through. 1974 saw the adoption of the International Convention on the Simplification and Harmonisation of Customs Procedures by the Customs Cooperation Council but the Convention only gave guidelines and not applicable rules. The shortcomings of the above two were addressed by the Agreement on Rules of Origin, which had its own limitations (MJ Trebilcock and R Howse *Regulation of International Trade* 190).

[39] Article 1(1) of Agreement on Rules of Origin 1994 (MTN/FA 11-AIA-11).

[40] Article 2 of Agreement on Rules of Origin 1994 (MTN/FA 11-AIA-11). These are some of the notable disciplines in application at the present moment seeing as harmonisation of Rules of Origin has not yet been achieved. After harmonisation of the Rules of Origin, the provisions of Article 3 of the Agreement on Rules of Origin will then apply.

- Rules of origin are to be administered in a consistent, uniform, impartial and reasonable manner.

- Rules of origin are to be based on a positive standard. Rules of origin that state what does not confer origin (negative standard) are permissible as part of a clarification of a positive standard or in individual cases where a positive determination of origin is not necessary.

- Laws, regulations, judicial decisions and administrative rulings of general application relating to rules of origin are published as if they were subject to, and in accordance with, the provisions of paragraph 1 of Article X of GATT 1994.

- When introducing changes to rules of origin or new rules of origin, the changes shall not apply retroactively as defined in, and without prejudice to, the laws or regulations.

The Panel in *United States-Rules of Origin for Textile and Apparel Products* made some helpful comments as to the interpretation of the above. It was found that Articles 2(b)-(d), quoted above, prescribe what a state should not do and members may decide for themselves the criteria which confer origin, changing those criteria over time or applying different criteria to different goods.[41] While the virtual free reign given to members and the lack of transparency as regards rules of origin may be construed as promoting protectionism, the scope for abuse is greatly reduced by Article XXIV: 8 which calls for the elimination of duties and other restrictive regulations of commerce. The fact is that with regard to RTAs, rules of origin serve as protectionist tools in the context of escaping the "substantially all trade" requirement and thus charging tariffs on other members of an RTA. The rules of origin then substitute the tariffs lost through the "substantially all trade" requirement. This adversely affects the liberalisation of trade through the formation of RTAs.

The Uruguay Round Agreement on Rules of Origin only deals with rules of origin for non-preferential agreements and while RTAs would be expected to use it as a basis for determining their rules of origin, in essence they have been left to their own devices. Even then, the Agreement on Rules of Origin has not reached its end development. Despite the

[41] MJ Trebilcock and R Howse *Regulation of International Trade* 200.

1996 deadline, the Agreement is still in its transition period and rules of origin are governed by the determined "Disciplines during the Transition Period".[42]

Harmonisation of countries' rules of origin based on a positive standard is yet to be achieved and it is only after such harmonisation that countries will base their determinations of origin on either the country where the product was wholly obtained or the country where the product underwent its last substantial transformation. This would be the most ideal method of determining origin and would do away with the current confusion and complications. Inadequate as it might be, a combined reading of the Agreement on Rules of Origin and GATT Article XXIV: 8 should be sufficient to give guidance to RTAs as to the rules of origin that they should apply within their groupings.

3.3 The Enabling Clause

Developing countries are at different stages of economic, political and social development and their financial and technological capacities vary greatly as compared to developed countries. As such, their trade problems far outweigh those of developed countries. For developing countries, the task of implementing multilateral commitments and obligations such as trade on an MFN basis and liberalisation of trade is made more difficult by balance of payment problems and import substitution policies engaged by most developing states. The above is reflected in the Special and Differential Treatment (SDT) principle that acknowledges that the trade problems of developing countries are "special and different".[43] SDT refers to the totality of rights and privileges extended to developing countries under GATT/WTO law, to the exclusion of developed countries. Developing countries are, in this context, given access to developed country markets and the right to protect their own markets and this takes place under the auspices of Articles XVIII, XXVIII: bis (3), Part IV of the GATT and the 1979 Enabling Clause. Article XVIII signifies the first GATT attempt at accommodating developing country needs and interests and allows developing countries to

[42] These are the rules that are to be observed with regard to rules of origin in the interim period before the implementation of the Agreement on Rules of Origin.
[43] J Whalley "Non-discriminatory Discrimination, Special and Differential Treatment under the GATT for Developing Countries" (December 1990) 100 *The Economic Journal* 1318 at 1318.

renegotiate tariff bindings in order to promote the establishment of a particular industry; it offers a balance of payment escape clause and permits the imposition of quantitative restrictions to promote infant industries.

Article XXVIII: bis (3) provides that, in the negotiations for tariff reductions, the needs of developing countries to use tariffs for economic development and fiscal purposes should be taken into consideration. Part IV of the GATT, added as an amending protocol in 1965, provides for non-reciprocity in trade relations between developed and developing countries and for developed countries to take positive measures to improve the market access of developing countries. Articles XVIII, XXVIII: bis (3) and Part IV have no "self-contained and self activating 'hard' legal obligation" but constitute formal statements on non-reciprocity.[44]

The United Nations Conference on Trade and Development (UNCTAD) adopted the Generalised System of Preferences (GSP) in 1965[45] where developed countries could grant trade preferences to any particular developing country. This was a derogation from the GATT Article I which only recognised preferences based on a past colonial relationship between a developed country and a developing country. The GSP system was, as stated, contrary to the provisions of the MFN principle and a waiver in respect of Article I was then approved by the GATT contracting parties to enable the GSP system.[46] This waiver was replaced in 1979 by a decision adopted at the Tokyo Round, on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", commonly known as the Enabling Clause. It provides a permanent basis for trade preferences granted to developing countries. It can also be said that the Enabling Clause legally concretises the provisions of Articles XVIII, XXVIII: bis (3) and Part IV of the GATT and allows developing countries to discharge their GATT obligations for only as far as their developmental, financial, economic and trade capacities can allow them.

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[44] *Ibid.*
[45] Resolution 21 of 1968.
[46] Article XXV:5 of the GATT 1994 provides that in exceptional circumstances, the GATT contracting parties may waive an obligation imposed by GATT on any member by a two-thirds majority of the votes cast, provided that such majority consists of more half the WTO member countries (Kumar *Article XXIV of GATT* 12).

Paragraph I of the Enabling Clause states that the contracting parties may accord differential and more favourable treatment to developing countries without according such treatment to other countries. This is so "notwithstanding" the provisions of Article I of the GATT. The Enabling Clause thus caters for the specific needs of developing countries and it serves as a vehicle for economic development rather than tariff liberalisation.[47] The paragraph that deals specifically with developing countries in RTAs is paragraph 2(c) which provides that the clause will apply to regional or global arrangements entered into amongst less developed contracting parties. These regional and/or global arrangements will be for the mutual reduction or elimination of tariffs and also the mutual reduction or elimination of non-tariff barriers on products imported from one another. The above provision is, however, subject to the following:[48]

- That the RTAs are designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties.
- That the RTAs shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis.
- That the RTAs shall, in the case of such treatment accorded by developed contracting parties to developing countries, be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

This makes it abundantly clear that the Enabling Clause facilitates the creation of RTAs among developing countries only. While this solves the problem of developing country RTAs failing to satisfy the requirements of GATT Article XXIV, it leaves hanging the question of North-South RTAs where developed countries integrate with developing countries. Article XXIV makes no mention of any developmental issues concerning developing countries in its provisions and it has stricter rules than the Enabling Clause. There is nothing in Article XXIV that prevents mixed RTAs or even developing country RTAs from being entered into under

[47] R Thomas "The Lomè Trade Regime and the World Trade Organisation" in K Lambrechts (ed) *A Post-Lomè Convention Trade Regime: Introducing Reciprocity in the Trade Relations Between the EU and the SADC* (1999) 10.
[48] Article 3 of the Enabling Clause.

its regulation. Article XXIV does not prevent asymmetry in the process of discharge of obligations therein while the RTA is still an "interim agreement" and provided a "plan and a schedule" have been made available to the WTO. However, such kinds of RTAs are only feasible when carried out between developed countries and advanced developing countries.[49] The motivation for integration and the objective for integration among developing countries is not more or less integration but rather the realisation of economic goals. Integration thus becomes a paradigm for industrialisation.[50]

Article XXIV is geared completely towards freedom of trade while the Enabling Clause aims to build and nurture developing country economies as they liberalise. Paragraph 7 of the Enabling Clause, in accordance with the aims of the Enabling Clause, provides that as the capacity of less-developed contracting countries to meet their obligations under GATT improves, they will be expected to participate more fully in the framework of rights and obligations under the GATT. It seems the Enabling Clause has the goal of building up developing states' capacity to participate fully in the world market and once that goal is achieved then differential treatment is withdrawn. The concerned states are then re-integrated into the GATT/WTO system. This is a safety clause that is aimed at preventing the developing countries from benefiting from differential treatment to perpetuity even when they have graduated from the status of "developing country". The only flaw with this provision is that the Enabling Clause does not define "developing country" status. The GATT/WTO utilises a system of self-selection on such issues and the categorisation of states into developed or developing countries is an open question. Consequently, the issue of graduation would also pose serious difficulties. The Uruguay Round efforts at classification only achieved an artificial method of classification where developing countries are further divided into least developed countries (LLDCs) and developing countries (LDCs). The GATT 1994 then further divided these into LLDCs, LDCs whose per capita income is below US$1000 and the rest of the LDCs on the basis of export subsidy qualifications. The aim behind this classification is to limit the application of differential and more favourable treatment.[51]

[49] R Thomas *A Post-Lomè Convention Trade Regime* 13.
[50] R Thomas *A Post Lomè Convention Trade Regime* 14.
[51] R Thomas A *Post Lomè Convention Trade Regime* 6-7.

Questions have been raised as to the relationship between the Enabling Clause and Article XXIV, particularly on whether the Enabling Clause provides developing countries with an alternative to forming regional agreements outside of Article XXIV.[52] It is evident from the language of the Enabling Cause that its strictures are not as tight as those of GATT Article XXIV. An RTA created under the Enabling Clause is not required to satisfy the "substantially all trade" requirement, nor does it require the elimination of duties and other regulations of commerce. There is no requirement for the submission of a plan and a schedule for implementation as is required in Article XXIV.[53] The obvious conclusion is that parties to an RTA formed under the Enabling Clause have to achieve the Article XXIV requirements in their own time and depending on their capacities and capabilities. What is paramount is that they go with the pace of their development. The Enabling Clause is separate from Article XXIV and member states, depending on their development status, have to go with one or the other. There is no provision for Article XXIV objectives to be pursued within the context of the Enabling Clause. It will not have been appropriate for GATT Article XXIV to be interpreted differently depending on whether the RTA was made up of developing countries or not, otherwise it would have been rendered redundant. Perhaps the one greatest weakness of Article XXIV is its lack of a developmental dimension like GATS Article V: 3(a) which provides:[54]

> "Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph b thereof, in accordance with the level of development of the countries concerned both overall and in individual sectors and subsectors."

In addition to being a general exception to Article 1(1) of the GATT, the RTA in the Enabling Clause is also an exception to Article XXIV and is aimed at ensuring that developing countries are not obliged to meet the requirements of Article XXIV.

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[52] U Kumar *Article XXIV of GATT* 11.
[53] P Kruger "The Enabling Clause and the Article XXIV" http://epa.tralac.org/scripts/content.hp?id=4978 (accessed 13 May 2007).
[54] P Kruger "The Enabling Clause and the Article XXIV".

The future of the Enabling Clause is not secure though. Developing countries enjoy lower tariffs under the Generalised System of Preferences but tariff rates are constantly being lowered through the multilateral trade negotiations and this is bridging the gap between the Generalised System of Preferences and the tariff rates negotiated on an MFN basis. As trade becomes freer, the developing countries will have no option but to compete on an equal basis with the developed countries.[55] This is definitely a concern that developing countries should raise at the current Doha Round of multilateral trade negotiations to ensure the long life of special and differential treatment.

3.4 The SADC Protocol on Trade and Trade Co-operation

3.4.1 Overview of the Trade Protocol

The Trade Protocol was signed in 1996 but only came into effect in January 2000 after the requisite ratifications had been lodged. It provides the legal and structural framework for trade liberalisation and makes provision for the phased elimination of trade barriers[56] (tariff and non-tariff), thus moving the region towards the simplest and most basic of RTAs, an FTA. This is to be done within 8 years of the entry into force of the Trade Protocol[57] when the FTA was declared in August 2008. Countries implementing the SADC FTA are Botswana, Lesotho, Madagascar, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Madagascar only acceded to the Trade Protocol in 2006, having obtained membership of the SADC in 2005. Its tariff phase-down offer was accepted, and it only started implementing its tariff reductions in 2007. It is impressive that Madagascar has been able to sign the SADC FTA, Madagascar will only attain the required threshold of liberalisation by 2012 but, in the interim, she will access the

[55] LA Grimmet *Protectionism and Compliance with the GATT Article XXIV in Selected Regional Trade Agreements* (LLM thesis, Rhodes University, 1999) 34.
[56] Trade barriers identified under the trade protocol are import and export duties, quantitative import and export restrictions and non-tariff barriers as are known to and applied by the states. Articles 4 – 8 of the Trade Protocol.
[57] Article 3 (1) of the Trade Protocol.

SADC market duty-free.[58] The only SADC members that are not part of the FTA are Angola, the Democratic Republic of Congo and Malawi. These countries are said to be still addressing the challenges of implementing the Trade Protocol.[59] Angola has yet to finalise its tariff offer and then to embark on negotiations on that tariff offer with the rest of the participating states.[60] The Democratic Republic of Congo is the only SADC member state that has not yet signed the Trade Protocol. Malawi has not yet implemented its 2008 tariff phase-down obligations under the Trade Protocol.[61] The liberalisation of tariffs in preparation for the FTA commenced on 1 September 2000 for SACU countries and Mauritius with the rest of the SADC states commencing their tariff phase-downs in 2001.[62]

Although the major focus of the Trade Protocol is on trade liberalisation, some of its provisions and annexes relate to trade facilitation measures such as customs co-operation,[63] simplification and harmonisation of trade documentation and procedures,[64] transit trade and transit facilities as well as trade development.[65] Although insufficient attention is given to the liberalisation of trade in services,[66] it is the intention of the SADC member states also to liberalise trade in services[67] and the SADC member states are making considerable progress on integrating services trade.[68] Integration of trade in services will make liberalisation in that sector a much easier task.

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[58] United Nations Economic Commission for Africa Southern Africa Office "Issues Paper on Implementation of Protocols in Southern Africa" (May 2008) Draft ECA/SA/SADF/2008/04 17.

[59] Trade Law Centre for Southern Africa "SADC Free Trade Area to Bolster Regional Economic Integration" South African Government Press Release http:www.givegain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=50876 (accessed on 20 August 2008)

[60] United Nations Economic Commission for Africa Southern Africa Office "Issues Paper on Progress and Prospects in the Implementation of Protocols in Southern Africa" (May 2008) Draft, ECA/SA/SADF/2008/04 17.

[61] *Ibid.*

[62] Southern Africa Global Competitiveness Hub (The Services Group) "Audit of the Implementation of the SADC Protocol on Trade" (August 2007) 8.

[63] Annex II.

[64] Annex III.

[65] Annex IV and V.

[66] Trade in services is dealt with in Article 23 of the Trade Protocol and the provision is only just a mere formal recognition of the importance of trade in services for the development of the economies of SADC member states. Article 23 reads, "member states recognise the importance of trade in services for the development of the economies of SADC countries.Member states shall adopt policies and implement measures in accordance with their obligations in terms of the WTO's General Agreement on Trade in Services (GATS), with a view to liberalising their services sector within the Community".

[67] P Kalenga "Implementation of the SADC Trade Protocol: Some Reflections" TRALAC Trade Brief, Johannesburg Nov 2004 www.tralac.org/scripts/content.php?id=3045 (accessed 27 April 2007).

[68] N Khumalo "Services Trade in Southern Africa – A Literature Survey and Overview" (2006) Trade Policy 10, The South African Institute of International Affairs.

The Trade Protocol is divided into five parts and has seven annexes[69] attached to it which elaborate on trade facilitation matters, dispute settlement and trade in sugar. The objectives of the Trade Protocol, as stated in Article 2, are the liberalisation of trade, ensuring efficient production within SADC, improving the climate for domestic, cross-border and foreign investment, enhancing economic development, diversification and industrialisation, and establishing an FTA by 2008. The main objectives that have dominated the discourse on the Trade Protocol are the liberalisation of intra-regional trade in goods and the establishment of an FTA. Services trade has not received much attention, most probably because the mass of the liberalisation effort is on trade in goods. In his paper on regional integration and trade liberalisation, Ng'ong'ola attributes this pre-occupation with trade in goods and the apparent neglect of trade in services to the fact that rules and disciplines on trade-related issues such as services are still unfolding and it is not known what the final product will look like and how it will apply to developing countries.[70] According to Ng'ong'ola, it would thus be unrealistic to expect SADC to lead in the observance of emerging rules and disciplines in new areas of trade regulation. While the reluctance of SADC states to venture into such muddy territory can be understood, particularly in light of its history of complacency and lethargy when it comes to issues of regional importance,[71] it is submitted that it is not justified to lay the blame on the lack of clarity of rules. With the necessary political will and commitment, SADC could easily set up a discipline on services that is unique to the southern African situation (and would therefore deal with services liberalisation in developing countries) and also one that could be used in further unravelling the rules and disciplines on services at WTO level. It would be a perfect opportunity to counter the marginalisation of Africa at WTO level and for Africa to be taken more seriously as useful contributors to multilateral trade negotiations. On that note, SADC member states might want to rethink the Trade Protocol's provisions on trade in services and make it reflect discernible rules and procedures for the liberalisation of trade in services. This will ensure that the end result of the negotiations at GATT level adequately reflects the interest of developing countries. After all, trade in services is becoming more and more relevant to trade in general and the rapid technological growth is making trade in services a commercial reality. At present, negotiations on services trade

[69] The initial Trade Protocol had five annexes and the additional two were inserted by the Amendment Protocol on Trade of 2000.
[70] C Ng'ong'ola "Regional Integration and Trade Liberalisation in the Southern African Development Community" (2000) *Journal of International Economic Law* 485 at 496.
[71] See Chapter 2 for SADC's history on regional integration.

covers six services sectors and all modes of supply.[72] The covered sectors are transport, energy, communications, finance, tourism and construction and in this endeavour, SADC member states envisage some form of "national treatment"[73] with regard to trade in services where each member treats services originating from other members in the same way as "like" services originating from its territory. SADC states have already concluded various services related protocols and have managed to come up with an initial draft annex on services which will form the foundations and framework to the negotiations on trade in services to be concluded before 2015.[74]

3.4.1.1 Elimination of Barriers to Intra-SADC Trade

The elimination of barriers to intra-SADC trade is covered in Part Two of the Trade Protocol. How the phased elimination of tariffs and non-tariff barriers takes place is determined by the Committee of Ministers responsible for trade matters having due regard to:[75]

- Existing preferential arrangements between and among the member states.
- The elimination of trade barriers which shall be achieved within eight years.
- Member states which shall be adversely affected by the elimination of trade barriers and granting them a grace period to afford them additional time upon application to the CMT.
- The divergent tariff lines that may be applied within the agreed time frame for different products, in the process of eliminating trade barriers.
- The process and method of eliminating barriers to intra-SADC trade, and the criteria of listing products for special consideration, which shall be negotiated in the context of the Trade Negotiating Forum.

[72] P Draper, D Halleson and P Alves "From Spaghetti to Cannelloni? SACU, Regional Integration and the Overlap Issue in Southern Africa" (2007) Trade Policy Report 15. The South African Institute of International Affairs (SAIIA) 12-13.
[73] The concept of "national treatment" and how it has been dealt with in the SADC Trade Protocol will be dealt with below.
[74] It could not be ascertained whether this has been achieved.
[75] Article 3 (1) of the SADC Trade Protocol.

Having been agreed upon by the Committee of Ministers responsible for trade, the process and modalities for the elimination of trade barriers shall, upon adoption, be deemed to be an integral part of the Trade Protocol.[76] Attention here is to be directed at the grace period afforded to those member states that are adversely affected by the elimination of tariff and non-tariff barriers to trade. This provision is in deference to the differentiation in economic development among SADC states. In accordance with the provision on differentiated tariff lines to be applied within the agreed time frame for different products in the process of eliminating trade barriers, and also the provision tasking the Tariff Negotiating Forum to come up with the criteria for listing products for special consideration, tariff liberalisation in the SADC is asymmetrical and is carried out on the basis of four categories. SADC member states have been divided into three groups: the SACU[77] group, Mauritius and Zimbabwe as developing countries; and Malawi, Mozambique, Tanzania and Zambia in the third group as less developed countries.

SACU members are supposed to achieve zero tariff rates within five years of the Trade Protocol's adoption for products originating in non-SACU SADC member states. Flatters contends that the BLNS[78] states, despite their economies not being at the same level as South Africa, have to front-load their tariff reductions because of the existence of a Common External Tariff (CET) in SACU. SADC member states were apparently wary of the transhipment of South African goods through the BLNS countries and hence the need to treat the BLNS countries as though they were of the same status as South Africa.[79] Mauritius and Zimbabwe are to implement tariff phase-downs at a faster pace than the other non-SACU SADC member states but at a slower pace than SACU. The remaining less developed countries were allowed to backload their tariff reduction obligations.

Asymmetric tariff reduction is supposed to cushion SADC member states from a huge revenue gap that would result from immediate tariff adjustments. It takes into consideration the economic development levels of SADC member states and is in line with paragraph 7 of

[76] Article 3 (2) of the SADC Trade Protocol.
[77] The SACU group consists of South Africa, Botswana, Lesotho, Namibia and Swaziland.
[78] Botswana, Lesotho, Namibia and Swaziland.
[79] Frank Flatters "The SADC Trade Protocol: Impacts, Issues and the Way Ahead." (2001) USAID/RCSA SADC Trade Protocol Project.

the preamble to the Trade Protocol which seeks to achieve equity in the distribution of the benefits of regional economic integration.[80] On that same note, the principle of asymmetry allows each member state to submit two different tariff phase-down offers – one for South Africa and one for the rest of SADC. This ensures that South Africa does not immediately accrue all the benefits of trade liberalisation, being the strongest and dominant economy in the region. SADC member states have long been apprehensive of opening up their markets to South African goods with which they cannot compete.[81] Differentiating the tariff offers speeds up the tariff liberalisation process and makes SADC states more willing to liberalise without the threat of South African goods flooding their markets. Differentiated tariff offers mean that SADC member states have quicker access to the South African market than South Africa has to their markets. As for the four categories of goods: category A deals with goods that are subject to immediate tariff reduction to zero level, meaning that these goods were to be put on zero tariffs in 2000; category B consists of goods that constitute the bulk of a country's source of customs revenue where immediate tariff reduction would cause a significant injury to a country's economy through the revenue gap created and thus the tariffs are to be reduced gradually over an eight year period, reaching full elimination in 2008; category C deals with sensitive products of which tariff phase-downs will begin in 2008 and end in 2012 and these sensitive products should not exceed 15% of the total intra-SADC trade; and finally, category E deals with excluded products such as firearms and munitions which are not subject to preferential treatment under Article 9 and 10 of the Trade Protocol.

The Tariff Negotiating Forum managed to negotiate special provisions in the sugar and clothing and textile sectors. Under Annex VII of the Trade Protocol, the SADC Sugar Co-operation Agreement was adopted. Under this Agreement, SADC sugar producers have quota-limited, non-reciprocal access to the SACU market at highly preferential prices. The idea is to insulate sugar producers from a highly distorted world sugar market and position them as a force to reckon with in sugar production at a global level. The Sugar Agreement will be in place until 2012 when it will be reviewed with regard to the then prevailing world sugar market conditions. Market access under this Agreement is based on a country's

[80] Paragraph 7 of the preamble to the SADC Trade Protocol reads: "Mindful of the different levels of economic development of the member states of the Community and the need to share equitably the benefits of regional economic integration."

[81] MC Lee "Development, Cooperation and Integration in the SADC Region" (1999) 2 *Social Sciences & Humanities and Law & Management Research Journal University of Mauritius* 29 at 33.

exposure to the world sugar market and not to preferential markets. The ultimate goal of this agreement is the full liberalisation and harmonisation of the sugar sector on a reciprocal basis.

In the clothing and textile sector, the MMTZ[82] – SACU Market Access Arrangement was agreed upon and adopted under Appendix V to Annex 1 of the Trade Protocol. In terms of this Arrangement, the MMTZ countries have conditional duty-free quota-limited access to the SACU market with regard to certain textile products.[83] The quotas are revisited annually based on current production capacity and the whole agreement is based on the following conditions set by the SACU Trade Ministers:[84]

- Instead of the standard SADC rules of origin criteria of double stage transformation, the MMTZ countries can apply a one-stage transformation to the applicable products.
- As a condition for access to the SACU market, the MMTZ countries grant "immediate and unconditional market access for BLNS products of export interest to MMTZ".
- Upon failure by any MMTZ country to live up to the above obligation, SACU can unilaterally suspend the quotas.
- That there are specific procedures for the identification, certification and tracking of the applicable products.

Application of the MMTZ – SACU Market Access Agreement has been extended to 31 December 2009.[85]

In spite of the progress that has been made with regards to sugar and clothing and textiles, there are other sensitive products on which agreement has not yet been reached and no preferential trade is as yet taking place. This is the wheat flour and motor vehicle sectors.

[82] Malawi, Mozambique, Tanzania and Zambia.
[83] Zimbabwe and Mauritius also wanted the same access to the SACU market but it was denied on the basis that they are not least-developed countries.
[84] The Services Group "Audit of the Implementation of the Trade Protocol" 19-20.
[85] The initial arrangement was for the period August 2001 to July 2006 and prior to the current extension; it had been extended to, and was supposed to expire, in March 2007.

Flatters is of the opinion that with regards to wheat flour, whatever arrangement is agreed upon, it will allow for high import barriers and strict rules of origin which will afford effective protection to millers in most member states. As for motor vehicles, the arrangement adopted will be "guided by South Africa's complex incentive scheme to protect domestic producers, encourage high levels of domestic content, and provide special incentives for exports of certain motor vehicle products".[86] This would be highly incompatible with the aims of the Trade Protocol. Once agreements start promoting and encouraging the protection of domestic markets then it defeats the whole spirit and purport of the Trade Protocol. This will certainly not induce a growth of intra-regional trade as envisaged by the Trade Protocol.

3.4.1.2 The Elimination of Import and Export Duties

Import duties on goods originating in member states shall be reduced and eventually eliminated in accordance with the provisions of Article 3 of the Trade Protocol.[87] The phased reduction and eventual elimination of import duties is to be accompanied by an industrialisation strategy to improve the competitiveness of member states.[88] This particular provision on industrialisation is contentious. The compatibility of an industrialisation strategy with trade liberalisation is tenuous. Such marriage of an industrialisation strategy with trade liberalisation has been said to result in strange bedfellows because trade liberalisation translates into the elimination of subsidies and safeguard measures but these measures are necessary for a country's development and industrialisation purposes.[89] This conflict between trade liberalisation and industrialisation means that member states may violate some of the Trade Protocol's provisions and plead compliance with the provision on industrialisation, using it as a counterweight to the Trade Protocol's other provisions.[90] The industrialisation provision was not meant to facilitate the avoidance of some trade liberalisation disciplines as may actually happen, but the problem has more to do with poor draughtsmanship allowing for such inconsistencies.

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[86] Flatters "The SADC Trade Protocol" 4.
[87] Article 4 of the SADC Trade Protocol.
[88] Article 4 (2) of the SADC Trade Protocol.
[89] Ng'ong'ola 2000 *JIEL* 506.
[90] Flatters "The SADC Trade Protocol".

Other RTAs such as the EU have shown that the opening up of markets creates economic growth and there is no reason why, if implemented effectively and driven by political will, the Trade Protocol cannot do the same. This link between the opening up of markets and economic growth is now generally accepted as economic wisdom. While SADC's attempt to marry industrialisation and trade liberalisation may be criticised for impracticality, it must be borne in mind that SADC's schemes have always been experimental in an effort to accommodate the specific needs of its membership and deal with its shortcomings as a regional grouping.[91] The economic growth resulting from trade liberalisation could be used to industrialise and this is much more likely the reason why the industrialisation provision was included. It is suggested that the provision on industrialisation should be read in that particular context otherwise it needs to be revisited and possibly repealed.

On export duties, member states are prohibited from applying any export duties on goods for export to other member states except where it is necessary to prevent the erosion of any prohibitions or restrictions which apply to exports outside the Community. In such cases, no less favourable treatment should be granted to member states than to third countries.[92]

3.4.1.3 Non-Tariff Barriers and Quantitative Restrictions

SADC member states must adopt policies and implement measures aimed at the elimination of all existing forms of non-tariff barriers and to refrain from imposing any new non-tariff barriers.[93] The GATT Uruguay Round resulted in renewed efforts at the tariffication[94] of trade and the elimination of non-tariff barriers as far as is possible.[95] The above provision is in keeping with the WTO move towards tariffication and possibly also because of the realisation that tariffs are more transparent when compared against non-tariff barriers. Non-tariff barriers could be used as protectionist tools and thus negate the effects of trade liberalisation. Technically, non-tariff barriers are any barriers to trade that are not tariffs and

[91] See Chapter 2.
[92] Articles 5 (1) and (2) of the Trade Protocol.
[93] Article 6 of the Trade Protocol.
[94] This refers to the process of replacing non-tariff barriers with the more visible and transparent tariffs.
[95] Grimett *Protectionism and Compliance with the GATT Article XXIV in selected Regional Trade Agreements* 19.

so they could be anything: regulations, border delays, which pose a hurdle to trade. In the WTO sense however, something becomes a non-tariff barrier when it impedes on trade and cannot be properly justified.[96] The prevalent non-tariff barriers in SADC are arbitrary, qualitative and non-transparent. Non-tariff barriers cannot be neatly classified and documented which makes it all the more difficult to eliminate them, especially as all focus is on tariffs. Article 6 on its own is not adequate to deal with the elimination of non-tariff barriers and this will become an urgent issue on SADC trade agenda if not dealt with effectively. SADC needs to come up with a tangible programme as well as rules and procedures applicable to the elimination of non-tariff barriers. The WTO has come up with a few Agreements to deal with the menace of non-tariff barriers and SADC needs to prescribe exactly how these Agreements are to be administered within the SADC context.

Member states are restricted from applying any quantitative restrictions on imports and exports originating in and destined for other SADC member states.[97] With regard to quantitative import restrictions, while no new quantitative restrictions are to be applied and existing ones are to be phased out, member states may still apply a quota system provided that the tariff rate under such quota system is more favourable than the rate applied under the Trade Protocol.[98] In a way, the lower tariffs that the states would be obliged to apply compensates for the imposition of quotas. This is obviously meant to discourage the use of quantitative restrictions. Quantitative export restrictions are given the same treatment as import restrictions in Article 8. Member states are not to apply any quantitative restrictions on exports but may take such measures as are necessary to prevent the erosion of any prohibitions or restrictions which apply to exports outside the Community, provided that no less favourable treatment is granted to member states than to third countries. The differences between Articles 7 and 8 suggest that member states are more concerned with quantitative import restrictions as being more prevalent. However, the use of and the effect of quantitative import/export restrictions on intra-SADC trade are not well documented. This might be an

[96] According to the Imani Report on non-tariff barriers; with the elimination of price controls, foreign currency controls, import licensing and state marketing, which were part of the more identifiable non-tariff barriers, it has become significantly difficult to identify non-tariff barriers in SADC (Imani Development Austral Pty Ltd "Inventory of Regional Non-Tariff Barriers: Synthesis Report (Draft Final Report) (2004) Regional Trade Facilitation Programme). The discussion on non-tariff barriers draws exclusively from this report.
[97] Article 7 and Article 8 of the Trade Protocol.
[98] Article 7 of the Trade Protocol.

indication that quantitative restrictions are not a significant problem within SADC or it might be a result of the current obsessive preoccupation with tariff reductions.

Article 7 and 8 of the Trade Protocol both carry the qualification: "Except where otherwise provided for in this Protocol ...", indicating the presence of exceptions in the Trade Protocol. Article 9 is the general exceptions clause which allows for the continued imposition of quantitative import/export restrictions.[99] This Article finds its roots and inspiration in the general exceptions clause of the GATT.[100] The chapeau of Article 9 of the Trade Protocol is the same as that of GATT Article XX with a few adaptations to make it more SADC compatible. It carries the same conditions for application of the GATT general exceptions clause: that the measures are applied in a manner that would not constitute a means of arbitrary or unjustifiable discrimination between member states and that the measures should not constitute a disguised restriction on trade. Before any measure can be implemented under Article 9 of the SADC Trade Protocol, member states have to first ensure compliance with the above two provisions. In the international arena, Article XX of the GATT has undergone scrutiny with regard to its role in the conflictual relationship between international trade and the protection of the environment.[101] It remains to be seen, as SADC gives more attention to issues of sustainable development and environmental concerns, how SADC states will deal with environmental protection issues at a regional level. GATT jurisprudence demands that countries prove compliance with the Article XX chapeau before the general exceptions can

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[99] Article 9 reads:

> " Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States, or a disguised restriction on intra-SADC trade, nothing in Article 7 and 8 of this Protocol shall be construed as to prevent the adoption or enforcement of any measures by a Member State:
> a) necessary to protect public morals or to maintain public order
> b) necessary to protect human, animal or plant life or health
> c)necessary to secure compliance with laws and regulations which are consistent with the provisions of the WTO
> d)necessary to protect intellectual property rights, or to prevent deceptive trade practices
> f) imposed for the protection of national treasures of artistic, historic or archaeological value
> g) necessary to prevent or relieve critical shortages of foodstuffs in any exporting member state
> h)relating to the conservation of exhaustible natural resources and the environment or
> i) necessary to ensure compliance with existing obligations under international agreements.

[100] Article XX of GATT 1994.

[101] Some of the cases decided on the issue include the following: Appellate Body Report, European Communities — Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001; Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996: I,3; Award of the Arbitrator, EC Measures Concerning Meat and Meat Products (Hormones) — Arbitration under Article 21.3 (c) of the DSU, WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833.

be invoked. In that respect, countries have to exhaust all other available and reasonable means of securing compliance with environmental laws and regulations before invoking the general exceptions clause.

It can therefore be concluded that, having been taken directly from GATT Article XX, the chapeau to Article 9 of the Trade Protocol will also be interpreted according to GATT jurisprudence. Environmental standards have now become tied to technological advancements and, to date, disputes have only arisen between developed countries with the same technological capacity. This will pose a problem for SADC when trading with other regional blocs such as the EU as SADC member states do not have the necessary production infrastructure as well as the technical know-how for them to comply with developed countries' environmental standards. This again raises the issue of the industrialisation strategy being implemented by SADC in the Trade Protocol and its effectiveness. More than ever, technological advancement is becoming a pre-condition for global effectiveness in trade. The most contentious provisions at WTO level have been Article XX (b) and Article XX (g) which find their counterparts in Article 9 (b) and Article 9 (h) of the SADC Trade Protocol. These provisions deal with the protection and preservation of human, animal or plant life or health as well as the conservation of exhaustible natural resources and the environment.[102] What can be seen from South Africa's move to ban asbestos and, complementary to the above-mentioned idea that effective environmental protection has become dependent on technological advancement, is that, within SADC, South Africa is the only country that has the capacity to impose and implement environmental standards at a regional level. This could possibly provide South Africa with a legal platform for protecting its domestic market under the guise of environmental concerns. The idea here is that SADC, as a regional grouping, should decide on its own environmental standards that are cognisant of the ability or inability of the SADC states to implement them.

[102] South Africa has already made use of these provisions with the ban on the use of asbestos. "Deadly Dust Ban" *Mail & Guardian Online* 31 August 2005 http://www.mg.co.za/articlePage.aspx?area=/insight/insight__national/&articleId=255235 (accessed 21 September 2007); "SA to Pass Total Asbestos Ban" *The Mercury* 3 November 2005 http://www.int.ioi.co.za/index.php?set_id=1&click_id=13&art_id=vn20051103080554937C333394 (accessed 21 September 2007).

There are other provisions in the general exceptions clause of the Trade Protocol that warrant mention. Article 9 (c) provides that member states may put in place measures necessary to secure compliance with laws and regulations that are consistent with the provisions of the WTO. This provision could be seen as subjecting WTO rules and provisions to a general exceptions clause which would pose a problem considering that all SADC member states have acceded to GATT 1994 and the WTO and have given primacy to the WTO rules and regulations in the Trade Protocol.[103] On the other hand, it could be interpreted as a cautionary measure designed to secure compliance with WTO rules and provisions of GATT in the event that the SADC Trade Protocol falls short of the GATT compliance requirements. It is not so much an issue of SADC states undermining the WTO rules but an issue of the Trade Protocol correctly giving precedence to WTO rules and provisions, even when they vary such rules to suit the SADC situation. It is a common occurrence for RTA rules and provisions to conflict with WTO provisions and this provision in the Trade Protocol should be lauded as acknowledging the primacy of WTO rules in the event of inconsistencies. It would pose a problem, however, when a GATT provision has been modified as to its application among SADC member states and one of them decides to invoke this provision for protectionist purposes.

The exception on the protection of intellectual property rights and the prevention of deceptive trade practices[104] warrants scrutiny. The WTO has an agreement on intellectual property rights, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), and the SADC Trade Protocol provides elsewhere that member states shall adopt policies and implement measures within the Community for the protection of intellectual property rights, in accordance with the WTO agreement.[105] The general exceptions clause provides exceptions to the provisions of the Trade Protocol and the question arises whether the Article 9 (d) exception also applies to the Article 24 provision. If so, then does it mean that SADC member states are at liberty to protect intellectual property rights outside the realm of the TRIPS Agreement which they have adopted? The rationale and relevance of this particular exception needs to be explained; otherwise this provision ought to be removed as it causes unnecessary confusion.

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[103] Grimmet *Protectionism and Compliance with the GATT Article XXIV in Selected Regional Trade Agreements* 214.
[104] Article 9 (d) of the Trade Protocol.
[105] Article 24 of the Trade Protocol.

Measures necessary to secure compliance with existing obligations under international agreements are also allowed.[106] By virtue of the nature of its provisions, SADC has given priority to the WTO and its agreements which take precedence over SADC Trade Protocol provisions. Article 9 (i) brings the question of the hierarchy of treaties, particularly WTO agreements as against other international agreements. The assumption from this provision is that WTO rules can be subordinated in favour of other international agreements; which effectively renders both the WTO and SADC Trade Protocol provisions redundant. The SADC may as well have caused an insurmountable problem for itself through this provision that can only be resolved by removing the offending provision.[107]

3.4.1.4 National Treatment and the Most Favoured Nation Principle

Member states are to accord the same treatment to goods produced within the SADC as to goods produced within their countries in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.[108] This is a rule of non-discrimination that serves to ensure that the full benefits of trade liberalisation are achieved. The GATT calls for the elimination of duties and other restrictive regulatory barriers in the trade between the contracting parties to an FTA.[109] The national treatment principle in Article 11 of the Trade Protocol ensures that member states do not evade their tariff reduction obligations by discriminating between "like products" on the basis of their national origin. This can be done by imposing internal taxes or other regulations on imported goods that are not applicable to identical domestically produced goods. This would nullify the benefits of tariff reductions at the border. What this means therefore is that once goods from a SADC member state have crossed another member state's border, they are to be treated in the same way as domestic products such that they become a homogenous whole that is only distinguished from goods produced in a third country that is not party to the FTA. Member states must also accord most favoured nation treatment to one another and they may

[106] Article 9 (i) of the Trade Protocol.
[107] Save for a rules regime on the interpretation of treaties (the 1969 Vienna Convention on the Interpretation of Treaties), there is no hierarchy of laws or treaties under international law. It is up to the signatories of each treaty to determine just how binding each treaty is, and subordinate it to other treaties if they so wish.
[108] Article 11 of the Trade Protocol.
[109] Article XXIV: 8 (b) of GATT 1994.

enter into or maintain preferential trade arrangements with third countries, provided that any advantage, concession, privilege or power granted to a third party under such arrangement is extended to other SADC member states.[110] It is not surprising that the SADC Trade Protocol provides for application of the MFN principle as it is one of the most central principles of GATT and the fact that an FTA, by its nature, is an exception to the GATT Article 1 (1) MFN commitment, does not suspend the operation of the MFN principle within SADC. It opens up the SADC market to all member states such that there is equal access and equal opportunities for all member states which, theoretically, should encourage trade creation within the SADC market.

3.4.1.5 Customs procedures

3.4.1.5.1 Rules of Origin

To address the problem of free riders and prevent trade deflection through third parties entering their goods into the FTA through the member state with the lowest tariffs, the formation of any FTA is usually accompanied by rules of origin. As such, the SADC Trade Protocol provides for rules of origin and detailed rules are contained in Annexure 1 of the Amendment Protocol on Trade. The initial rules of origin that were agreed on in 1996 were simple and straightforward, requiring only that goods satisfy one of the following in order to qualify:[111]

- That the goods must have been wholly produced in the exporting member state.
- That the goods have undergone substantial transformation in their production.
- That the imported materials account for no more than 60 % of those used in their production.

[110] Article 28 (1) and Article 28 (2) of the Trade Protocol.
[111] Flatters "The SADC Trade Protocol" 2.

- The value added resulting from their production accounts for at least 35% of factory cost.

- That there is a change of tariff heading resulting from the production or processing of imported (non-originating) materials.

However, in the negotiations subsequent to the signing of the Trade Protocol, matters such as weak customs control, the need to use rules of origin as instruments of regional industrial development, as well as the assumptions that imports for any traded goods were readily available in the region and were cost-effective, resulted in the member states lobbying for a more restrictive rules of origin regime.[112] The rules of origin as they stand currently are complicated, product-specific and constitute a trade barrier as they negate the gains achieved from tariff reductions and limit intra-regional trade. The relevant literature suggests that the current rules of origin were largely backed by South Africa, hence the similarity of SADC rules of origin to the EU—SA trade agreement rules of origin.[113] Although it is not discussed, and bearing in mind also that it was not only in South Africa's interest to have the rules of origin tightened, the fact that SADC eventually adopted rules that have been shown to be viable for developed countries only, points to a potential challenge that SADC might have to deal with in the future: that of South Africa's role in the regional bloc.[114]

Under the new rules of origin, goods are accepted as originating in a member state if they are consigned directly from a member state to a consignee in another member state and have been wholly produced there. Such materials should have undergone sufficient working or processing in any member state.[115] Non-originating materials that fail to satisfy the conditions

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[112] Kalenga "Some Reflections" 5.

[113] P Brenton, F Flatters and P Kalenga "Rules of Origin and SADC: The Case for Change in the Mid-Term Review of the Trade Protocol" (June 2005) Africa Region Working Paper Series No 83 World Bank; F Flatters "SADC Rules of Origin: Undermining Regional Free Trade" TIPS Forum, Johannesburg, South Africa, September 9-11 2002 http://www.tips.org.za/files/570.pdf (accessed 20 April 2007); H Erasmus, F Flatters and R Kirk "Rules of Origin as Tools of Development? Some Lessons from SADC" http://qed.econ.queensu.ca/faculty/flatters/writings/roo&dev_idb_final.pdf (accessed 2 August 2007).

[114] According to Ng'ong'ola, the long period between the signing of the Trade protocol and its being entered into force was partly as a result of South Africa having shelved regional trade issues to facilitate the conclusion of the EU-SA FTA (C Ng'ong'ola "Regional Integration and Trade Liberalisation in the Southern African Development Community" (2000) *Journal of International Economic Law* 495).

[115] Rule 2 of the Amendment to Annex 1 Concerning the Rules of Origin for Products to be Traded between the Member States of the Southern African Development Community. Examples of goods that are "wholly produced" are given in Rule 4. It is not clear whether this list is exhaustive or not but the idea is clear; the product must be fully indigenous and uncorrupted by third country input. The kind of working and processing

set out in Appendix 1 with regard to "working or processing" may be used provided that their total value does not exceed 10% of the ex-works price of the product and this 10% does not exceed the percentage given in the list for the maximum value of non-originating materials.[116] Usually, if the "working or processing" on non-originating input results in a change of tariff classification on a Harmonised System basis, which change is required at tariff heading and sometimes in subheading, then origin is granted.[117] For the purposes of Annex 1, SADC member states shall be considered as one territory and goods whose raw materials are deemed to originate in accordance with Annex 1 and whose working or processing takes place in one or more member states shall be deemed to originate in the member state where the final processing takes place.[118] Originating goods are to be supported by documentary evidence certifying that they have been accepted as originating and member states shall set up authorities for the purpose of facilitating and verifying such documentary evidence.[119]

Where the development of existing industries or the creation of new industries is justified, a member state can make a request to the Committee of Ministers of Trade for derogation from the rules of origin.[120] The requesting member state must furnish the Committee of Ministers of Trade with all the necessary and relevant information as to the reason for the request and the Committee of Ministers of Trade, in its determination, shall consider the justification provided as well as the prospects of serious injury to be caused by such derogation to any established industry in the region.[121] Where such derogation is allowed, it will only be valid for a specific period to be determined by the Committee of Ministers of Trade.[122]

More lenient rules of origin are provided for in Appendix V of Annex 1 for textile products imported into the SACU from the MMTZ countries under the MMTZ – SACU Market Access Arrangement.

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which must be carried out on non-originating materials to confer originating status is laid out in Appendix 1 of the Amendment Annex 1 of the Trade Protocol.

[116] Rule 2 (a) (i) and (ii) Amendment Annex 1 SADC Trade Protocol.

[117] The Services Group "Audit of the Implementation of SADC Protocol on Trade" 28.

[118] Rule 2 (3) Amendment Annex 1 SADC Trade Protocol.

[119] Rule 9 (1) – (6) Amendment Annex 1 SADC Trade Protocol.

[120] Rule 11 (1) and (2) Amendment Annex 1 SADC Trade Protocol.

[121] Rule 11(3) and (4) Amendment Annex 1 SADC Trade Protocol.

[122] Rule 11 (6) Amendment Annex 1 SADC Trade Protocol.

3.4.1.5.2 Other Customs Procedures

Articles 13, 14 and 15, complemented by Annexes II, III and IV respectively, deal with co-operation in customs matters, trade facilitation and transit trade. Member states are to adopt tariffs, nomenclatures and statistical nomenclatures which conform to the Harmonised System[123] as well as harmonise their valuation laws and practice and base them on principles of transparency, equity, uniformity and simplification of application in accordance with the WTO Valuation System.[124] Customs procedures and procedures are to be simplified, harmonised as well as computerised in accordance with internationally accepted standards, recommendations and guidelines.[125] Member states shall ensure the reduction of costs of trade documents, the standardisation of such trade documents and information as well as the facilitation of trade aimed at the simplification and harmonisation of trade documentation and procedures.[126] Annex IV deals with issues of transit trade and transit facilities with regard to licensing of transistors, approval of means of transport, transit documents and procedures so that goods can enjoy freedom of transit. This Annex is supported by Appendices for further clarity.

3.4.1.6 Trade Laws Concerning Unfair Trade Practices

Member states are at liberty to apply anti-dumping measures against each other provided that such measures conform to WTO procedures.[127] This means that the member states have to comply with GATT Article VI on Anti-Dumping as well as the Agreement on the Implementation of Article VI of the GATT 1994, also known as the Anti-Dumping Code. This provision is potentially a godsend for those SADC member states that are worried by the prospect of their domestic markets being flooded by goods from their more developed counterparts. In principle, the GATT does not prohibit dumping but allows retaliatory action

[123] This Harmonized System is defined in Article 1 of Annex II - Concerning Customs Cooperation within the Southern African Development Community.
[124] Article 3 and 4 of Annex II.
[125] Articles 5 and 6 of Annex II.
[126] Articles 3, 4 and 5 of Annex III - Concerning Simplification and Harmonization of Trade Documentation and Procedures.
[127] Article 18 of SADC rade Protocol.

through the imposition of anti-dumping duties to offset the damage being caused to the domestic market or industry by imported goods. Article VI of GATT has been criticised as being protectionist in so far as it uses a "diversion of business" standard for the imposition of anti-dumping duties.[128] This criticism relies on the fact that this "diversion of business" standard allows the imposition of anti-dumping duties whenever the domestic competitors are severely displaced, regardless of whether the relevant goods are sold at a price above their average variable production cost and thus restricting free trade.

The dilemma within SADC is that the domestic industries of the members are weak and would not be able to withstand the external challenge. It would be so easy for the domestic competitors to be put out of business by the imported goods from other SADC members, particularly South Africa. It is particularly important to note that some SADC members are counted among the heaviest users of WTO anti-dumping provisions[129] and the presence of Article 18 in the Trade Protocol is likely to reinforce this trend. Rather than trying to preserve some non-existent competition in the domestic markets through anti-dumping provisions, SADC member states should instead try to strengthen their domestic industries through sound economic policies and an industrialisation drive that seeks to abandon import substitution policies.

Industrialisation is sometimes dependant on subsidies and countervailing measures as provided for in Article 19 of the Trade Protocol. The benefits of trade liberalisation have long been touted but this does not change the fact that free trade between a developed country and a developing country can never have equitable benefits for both countries. Concessions are needed on the part of the developed country and unfair trade practices become necessary on the part of the developing country. Notwithstanding the benefits of free trade, the goals of industrialisation are partly dependant on unfair trade practices such as subsidies. Greater effort should have been made at modifying WTO rules and practices to suit SADC member states instead of rigidly following WTO disciplines. The opening up of SADC borders to

[128] Richard Dale "Anti-Dumping Law in a Liberal Trade Order" (1982) 80 *Michigan Law Review* 4 in "Survey of Books Relating to the Law" (March 1982) 988-991. http://www.jstor.org/view/00262234/ap040630/04a00590/0 (accessed 2 October 2007).

[129] N Jourbet "Managing the challenges of WTO Participation: Case Study 38 – The Reform of South Africa's Anti-Dumping Regime" http://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm (accessed 25 August 2008).

intra-SADC trade will potentially open a floodgate of safeguard measures and anti-dumping duties. Subsidies in one member state will be countered by safeguard measures in another. Basically, these provisions open up too much scope for protectionism within SADC. Politics and narrow producer interests can lead to anti-competitive behaviour and, as has been shown in the discussion above, the weak WTO standards for anti-dumping and safeguards will be weakened much further when implemented in the SADC context.[130]

The WTO makes concessions for developing and least-developing countries with regard to export subsidies. Developing countries whose Gross National Product (GNP) per capita is lower than US$1000 and least developed countries are exempted from the application of WTO provisions on export subsidies.[131] It is not clear how this impacts on intra-SADC trade because the general idea that is evident from the Trade Protocol is that of the uniform application of rules across all member states except where expressly stated. The varying levels of development among the SADC member states are only reflected in the tariff phase-down strategy. By calling for the observance of WTO disciplines with regard to safeguard measures and at the same time creating a variance between the safeguard provisions of Article 20 in the Trade Protocol and the WTO Agreement on Safeguards, the Trade Protocol creates room for contention and lack of transparency in the application of such measures. The WTO Agreement on Safeguard allows developing countries a maximum period of 10 years in which to apply safeguards but the Trade Protocol only allows 8 years. Whether this is deliberate move that is meant to limit somehow the use of safeguards or a mere oversight, one thing is very clear: given the developmental status of SADC industries, it does not make sense. If anything, SADC member states are among those countries that would need more time to apply safeguard measures.

A member state may suspend the application of the provisions of the Trade Protocol so as to protect its infant industries.[132] This suspension will be subject to WTO provisions and can only be sanctioned by the Committee of Ministers of Trade which may impose terms and conditions to minimise the negative effects of such infant industry protection. The Committee

[130] Flatters "SADC Trade Protocol" 5.
[131] Export subsidies are those subsidies that are paid to industries on the basis of export performance and are frowned upon because they give the subsidized industries an unfair advantage in the trade field.
[132] Article 21 (1) of the Trade Protocol.

will also regularly review the protection of infant industries by member states.[133] SADC member states can use this provision to circumvent their obligations under the Trade Protocol and accrue benefits from the Protocol while protecting their industries from import competition. Given the industrialisation objectives of the Trade Protocol which seeks to abandon the age-old import substitution strategy of most SADC countries, member states will have plenty of industries to protect if the industrialisation drive successfully kicks off.

3.4.1.7 Trade Relations among Member States and with Third Countries

Fully conversant with the fact that SADC member states also belong to other regional organisations such as SACU[134] and COMESA,[135] and aware of the prospective need for SADC to work closely with other regional trade arrangements, the drafters of the Trade Protocol included provisions regulating SADC member states relations with third countries. Member states are allowed to maintain preferential trade and other trade arrangements in existence at the time of entry into force of the Trade Protocol.[136] They may enter into new preferential trade arrangements between themselves, contingent upon the arrangements being consistent with the provisions of the Trade Protocol.[137] Of particular interest is the provision which requires member states, notwithstanding the above-mentioned provisions, to "undertake to review the further application of such preferential trade arrangements, with a view to obtaining the objectives of this Protocol".[138] While the above shows a tolerance for other trade arrangements that the member states are party to as well, the Trade Protocol is indirectly given priority over the other trade arrangements. Member states have to review the applications of other trade arrangements with a view to streamlining them in accordance with the objectives of the Trade Protocol. However, failure to put a time limit on this provision so as to lock it in and failure to undertake such a review will render the SADC Trade Protocol

[133] Article 21 (2) and (3) of the Trade Protocol.
[134] Southern African Customs Union.
[135] Common Market of East and Southern Africa.
[136] Although the Trade Protocol was signed in 1996, trade arrangements entered into by SADC member states with third countries between 1996 and 2000 would qualify as "existing" because the Trade Protocol only came into force in 2000 and such arrangements are deferred to accordingly (Ng'ong'ola *JIEL* 502).
[137] Article 27 (1) and (2) of Trade Protocol.
[138] Article 27 (3) of the Trade Protocol.

hierarchically inferior to all the trade arrangements that precede it.[139] It could also mean that the SADC Trade Protocol becomes only as important as the priority accorded to it by a member state in comparison to its other regional or bilateral trade arrangements. A perfect illustration of this would be the composition of the EU-Economic Partnership Agreement negotiating groups where SADC failed to negotiate as one. This is not conducive for the attainment of the Trade Protocol's objectives as the benefits derived from different trade arrangements differ across countries.

Member states are required to accord the Most Favoured Nation (MFN) treatment to one another. They may maintain preferential trade arrangements as long as such arrangements are aligned with the objectives of the Trade Protocol. Any benefits accruing to a third party under such arrangement must be extended to other member states.[140] The MFN treatment does not extend to trade arrangements with third countries even if such arrangements were in force at the time of entry into force of the Protocol.[141] This exclusion means that, "SADC preferences will not immediately be synchronised with preferences under existing arrangements" and thus the liberalisation of trade under the Trade protocol will not be aligned with the most liberal trade arrangements already in existence.[142] This argument has one fundamental flaw to it. Admittedly, the MFN principle is a principle of reciprocity, but, it should be borne in mind that a regional trade arrangement, by its very nature, is an exception to the MFN obligation under GATT law. The MFN principle continues to operate within the regional bloc but to the exclusion of either third countries or other regional trade arrangements. Once the MFN principle is extended to other trade arrangements already obtaining in the region without prior arrangement, such other trade arrangements are not obliged to extend their preferences to SADC. If SADC preferences are extended to other regional trade arrangements, it has to be on a reciprocal basis to the extent that they are creating a trade arrangement. This is not to deny the fact that the exclusion of SADC preferences poses a problem for some of the SADC member states that are party to such other trade arrangements which require them to extend all preferences granted to third countries to them as well. This, however, is a problem that is rooted in the complexities of overlapping memberships of RTAs and can only be solved when a solution is found to the problem of overlapping memberships.

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[139] Ng'ong'ola *JIEL* 502.
[140] Article 28 (1) and (2) of the Trade Protocol.
[141] Article 28 (3) of the Trade Protocol.
[142] Ng'ong'ola *JIEL* 502.

The Trade Protocol also calls for the coordination of trade policies in respect of relations with third countries or groups of third countries or international organisations as provided for in Article 24 of the Treaty establishing the SADC. While not specifically required in the provisions of Article XXIV of the GATT on the requirements for an FTA, this provision rationalises the need for the harmonisation of external policies as well as for pursuing the concept of open and deep regionalisation. In that sense, countries could look at possibly harmonising their external tariffs.[143] Cooperation with third countries or groups of third countries as provided in Article 24 of the Treaty establishing the SADC is provided for in Article 30 of the Trade Protocol so as to facilitate and accelerate the achievement of the objectives of the Trade Protocol. Article 24 (1) of the Treaty establishing SADC calls on the member states to work closely with other states, regional and international organisations so as to achieve SADC objectives. This provision is subject to Article 6 (1) of the Treaty establishing SADC which requires member states to adopt adequate measures to promote the achievement of SADC objectives.[144] SADC objectives are concerned with the development of the region in all its aspects, politically, socially, economically and so forth. Essentially, whatever the agreements with third countries or groups, they must be in the best interests of SADC. The Article 30 provision of the Trade Protocol therefore calls for all necessary agreements needed to complement the Trade Protocol as to achieve its objectives. In that sense it can be said that SADC has attempted to take an all-encompassing view of trade integration as being intertwined with other societal and political aspects of SADC. In Articles 29 and 30 of the Trade Protocol, SADC goes over and beyond the requirements and expectations of Article XXIV of GATT and if implemented as laid out in the Trade Protocol, it will make the transition to a CU much smoother for SADC.

3.4.1.8 Institutional Arrangements and Dispute Settlement

The Committee of Ministers of Trade, Committee of Senior Officials responsible for trade matters, the Tariff Negotiating Forum and the Sector Co-ordinating Unit are the institutional

[143] Kalenga "SADC: Some Reflections".
[144] The SADC objectives are laid out in Article 5 (1) of the Treaty of the Southern African Development Community.

mechanisms for the implementation of the Trade Protocol as provided for in Article 31.[145] However, with the institutional revamp of SADC in 2001, the Sector Coordinating Unit has been replaced by the Trade, Industry, Finance and Investment Directorate in the Secretariat. This Directorate continues with the overall administrative support role of the Sector Coordinating Unit and one of its main functions is to facilitate the implementation of the Trade Protocol. This remedies one of the problems that were presented by the traditional SADC institutional arrangement where the Sector Coordinating Unit would have been the responsibility of the country tasked with the industry, trade and investment sector, namely, Tanzania. This would have compromised the success of the Trade Protocol severely, especially as Tanzania is on the periphery of SADC activities with its central focus more properly on the re-established East African Community.[146] SADC would have had to deal with the implications if at any point Tanzania were to decide that its economic benefits derive more from the East African Community than from SADC and thus devote all its energies to the East African Community, or even pull out of the SADC. The withdrawal of Sector Coordinating Units from countries is a positive improvement for the Trade Protocol and all that is left is for the member states to increase the administrative and authoritative capacity of the Secretariat so as to lock in the benefits of such an improvement.

Article 32 of the Trade Protocol provides that the rules and procedures of Annex VI shall apply to the settlement of disputes between member states concerning their rights and obligations under the Trade Protocol. Any disputes regarding the interpretation of the Trade Protocol shall be settled in accordance with Article 32 of the Treaty.[147] The rules and procedures of Annex VI are applicable to the settlement of disputes between member states concerning their rights and obligations under the Trade Protocol. Member states shall

[145]The Committee of Ministers of Trade is the head organ in this arrangement, responsible for the overall implementation of the Trade Protocol and for overseeing the work of all other bodies working on the Trade Protocol. The Committee of Senior Officials supervises the Sector Coordinating Unit and liaises with the Committee of Ministers and the Sector Coordinating Unit, monitors the implementation of the Trade Protocol and supervises the work of the Tariff Negotiating Forum. The Tariff Negotiating Forum is responsible for trade negotiations, the negotiation of tariff offers and coordinating trade with other areas of sectoral cooperation. The day to day operations of the Trade Protocol as well as the provision of technical and administrative assistance to the Committee on Ministers of Trade, Committee of Senior Officials and the Tariff Negotiating Forum as well as any other additional subsidiary organs created to assist the implementation of the Trade Protocol, are done by the Sector Coordinating Unit (Article 31 (4) of the Trade Protocol).

[146] Ng'ong'ola *JIEL* 503.

[147] Article 4 of the Amendment Trade Protocol. Article 3 of the Amendment Trade Protocol provides for the deletion of subparagraph b) of paragraph 2 of Article 31 of the Trade Protocol. Subparagraph b) was the provision that the Committee of Ministers of Trade would be responsible for the selection of a panel of trade experts to resolve any dispute arising from the application of the Trade Protocol.

cooperate in the interpretation of and application of the Trade Protocol as well as use the rules and procedures of Annex VI to arrive at mutually satisfactory resolutions of disputes.[148]

The first stage in the process is consultation, followed by a panel hearing if the consultation has failed,[149] although parties may use such procedures as good offices, conciliation or mediation, if they so agree.[150] In a panel hearing, the panel shall, after the submissions of the disputing member states, present an initial report which shall include its findings and recommendations for the resolution of the dispute. Disputing member states are given an opportunity to respond to the report[151] and after that the Panel prepares a final report which is passed on to the Committee of Trade Ministers for adoption.[152] If the member state against whom a complaint is raised fails to comply with the recommendations within the stipulated period then it has to enter into negotiations with the complaining member state with a view to developing a mutually satisfactory solution. Should such negotiations fail, the complaining member state may request authorisation from the Committee of Ministers of Trade to suspend equivalent concessions.[153] If the suspended concession creates another dispute, then the matter is referred to arbitration, the result of which is final.

The SADC trade dispute resolution process as outlined above is modelled upon the WTO dispute resolution procedures with a few modifications to make it more applicable to SADC. It is a vast improvement from the Article 32 of the 1996 Trade Protocol before the amendments. It properly indicates rules, procedures as well as the time limits to be observed in the dispute resolution process. Still, the process is not without criticism. The scope of application of Annex VI is laid out in Article 1; but the question arises as to whether trade disputes are restricted to the dispute resolution process of Annex VI only, or whether other platforms such as the SADC Tribunal or the WTO dispute settlement mechanism could also be utilised.[154] There is potential for power-wrangling between the Annex VI panels and the

[148] Article 2 of Annex VI - Concerning the Settlement of Disputes between the Member States of the Southern African Development Community.
[149] Article 3 of Annex VI.
[150] Article 4 (1) of Annex VI.
[151] Article 3 of Annex VI.
[152] Article 15 of Annex VI.
[153] Article 18 (2) of Annex VI.
[154] All the SADC members have acceded to the WTO and, technically, nothing prohibits any single member from using the WTO Dispute Settlement Mechanism (DSM) for their trade disputes if they so wish. On the

Tribunal, with member states potentially taking their grievances to the Tribunal if they are not satisfied with the findings of the panel. The Tribunal could be perceived as having more powers than the panel by virtue of having a broader mandate and could possibly become a forum of appeal by default. Reference may be made to the lack of conflict between the WTO dispute settlement mechanism and the International Court of Justice where the two have never collided in terms of mandate. The two systems of the SADC Panel and the Tribunal could be made to work the same way as the WTO dispute settlement mechanism and the International Court of Justice. This cancels the potential for conflict between the Panel and the Tribunal. However, the Understanding on the Interpretation of Article XXIV of the GATT provides that the WTO Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of the provisions of Article XXIV of the GATT.[155] The SADC Trade Protocol is in accordance with the provisions of Article XXIV of the GATT. On the other hand, Annex VI of the Trade Protocol is not entirely explicit on the issue of whether it is the first forum of dispute resolution or an alternative one. However, the amended Article 32 of the Trade Protocol provides that any disputes regarding the interpretation and application of the Trade Protocol shall be settled in accordance with Article 32 of the SADC Treaty. Article 32 of the SADC Treaty provides that all disputes arising out of the application or interpretation of the Treaty, which cannot be settled amicably, shall be referred to the Tribunal. This means that if a dispute is not resolved amicably at Panel level then it can be referred to the Tribunal. This is an issue that needs to be clarified as it undermines the strength and effectiveness of the SADC trade dispute settlement mechanism. Also, and most importantly, it will result in non-trade specialists having to determine a trade matter which situation is surely to the detriment of the creation of an effective SADC jurisprudence in the area of trade. To build the capacity of the SADC dispute settlement mechanism, any effort to remedy the above-mentioned confusion as to the appropriate platform should categorically nominate the SADC trade dispute settlement mechanism, as the only platform for resolving intra-SADC trade disputes, with the WTO only being used when the disputes involve third countries or groups of third countries.

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other hand, Article 14 of the SADC Tribunal Protocol gives jurisdiction to the Tribunal over, "the interpretation, application or validity of the Protocol, all subsidiary instruments adopted within the framework of the Community and acts of institutions of the Community". Effectively, trade matters are not excluded. (T Bohannes "A Few Reflections on Annex VI to the SADC Trade Protocol" (June 2005) TRALAC Working Paper 3/2005 17).

[155] Paragraph 12 of the Understanding on the Interpretation of Article XXIV of the GATT 1994.

While alternative resolution processes are voluntary and can be done away with, consultations are mandatory as the first step in the dispute resolution process and Article 5 of Annex VI, the member state requesting the establishment of a panel must indicate whether consultations were held. The same Article is however silent on the consequences if a member state decides to skip the consultations and requests a panel instead. Doing away with the consultation process infringes on the procedural rights of the state being complained against but Bohannes is of the opinion that, given the GATT/WTO jurisprudence which fails to respect procedural rights and the SADC countries pre-occupation with sovereignty (both political and economic), panels will be loath to dismiss cases based on procedural deficiencies.[156] Even though it would be much easier to impose stricter disciplines at regional level due to the smaller number of states and closer proximity, the ability to impose such strict disciplines is tied to political maturity, which most SADC countries do not yet possess. It is baffling, therefore, that the SADC trade dispute settlement mechanism has adopted more rigorous rules than the WTO in some instances.

The existence of a reverse consensus rule,[157] the absence of an appeal process and the provisions of Articles 17 and 18 on ensuring compliance all make for a strict and rigorous mechanism.[158] While the lack of an appeal or review procedure could be seen as a weakness, it is countered by the negative consensus rule. The most important consideration, however, is whether SADC member states would willingly adhere to the SADC trade dispute settlement process and whether they would actually seek to make the transgressor member states to comply with the Panel findings. Annex VI is as yet untested. SADC countries have not yet utilised the WTO dispute settlement mechanism to resolve disputes because they are not active participants in global trade, they are not able to carry the financial implications and they are loath in taking other SADC members to the WTO Dispute Settlement Understanding.[159] It would be interesting, therefore, to see how a similar system will be used in the regional context and whether the practical and political considerations will be changed.

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[156] Bohannes "Reflections on Annex VI" 29.
[157] Article 15 (4) provides: "Unless the CMT decides by consensus not to adopt the report, the final report of the panel shall be adopted." The effect of this provision is that unless the member state in whose favour the panel found blocks the adoption of the panel report, the report will be automatically adopted.
[158] Bohannes "Reflections on Annex VI" 43.
[159] With the exception of South Africa which has had a consultation requested at the WTO DSU (M Marongwe "African Countries and the WTO Dispute Settlement System" available at http://www.tralac.org/scripts/content.php?id=4800 (accessed on 22 June 2007)).

Even at a regional level, SADC members still suffer from lack of resources, which is compounded by multiple memberships of trading blocs and have a heavily politicised climate where the institution of dispute settlement proceedings will be regarded as a political slight.[160] The SADC trade dispute settlement mechanism needs to be put to the test through an actual dispute being filed and dealt with. Such dispute will be the yardstick by which to measure, tentatively, the effectiveness of the SADC trade dispute settlement mechanism. It will also help massively if such dispute could involve South Africa as the member state being complained against. If the most powerful member state can bow down to the sanction of the Panel, then it is most likely that other member states will follow suit.

It is very important that the dispute settlement system of the Trade Protocol should be effective because as the member states create an FTA, it likely that many disputes will arise, particularly with regards to the institution of anti-dumping and safeguard measures as well as other protectionist behaviour. A well functioning, strong regional system will ensure that the SADC member states participate more actively in the WTO DSU as they poise themselves to participate more effectively in the multilateral trading system. It will also ensure that SADC states make a meaningful contribution to and help shape WTO jurisprudence in a way that contributes to their differential needs as developing countries.

[160] A good example would be that of the 1964 Preferential Trade Agreement between Zimbabwe and South Africa which was unilaterally terminated by South Africa in 1992. The two countries have continued to clash on matters of regional importance since then, which conflicts can be seen against the background of the trade dispute (G H Oosthuizen *The Southern African Development Community: The Organisation, its Policies and Prospects* (2006) 76; A Pallotti "SADC: A Development Community without a Development Policy?" (2004) 101 *Review of African Political Economy* 513 at 519).

3.5 Conformity Assessment of SADC FTA

3.5.1 Elimination of Trade Barriers

The SADC Trade Protocol makes provision for the phased elimination of trade barriers[161] in the movement towards implementing an FTA in 2008. This is to be done in compliance with the requirements of Article XXIV: 8 (b) of GATT 1994 which provides that an FTA shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV and XX) are eliminated on substantially all trade between the constituent territories in products originating in such territories. The Trade Protocol provides for the exclusion of "sensitive products" from trade liberalisation. This raises the question of compliance with the "substantially all trade" requirement in Article XXIV: 8 (b) of GATT. Also, tariff phase-downs on sensitive products began in 2008 and will end in 2012, effectively giving SADC member states 12 years in which to liberalise trade. In the 8-year period of eliminating tariffs on other products, member states which will be adversely affected by the elimination of trade barriers are afforded a grace period to give them additional time to liberalise trade. The Understanding on the Interpretation of Article XXIV of GATT 1994 sets a maximum time frame of 10 years for the implementation of an FTA. There is no explanation given in the Trade Protocol for the inconsistency.

The exclusion of "sensitive products" in this regard, which involves products which contribute significantly to a country's revenue pool and whose industries are vulnerable to competition, is not in compliance with Article XXIV: 8 (b) of the GATT and would need to be revised. Combined with the grace period given to countries adversely affected by the trade liberalisation process, it falls short of the purposes of Article XXIV: 8 (b) of the GATT. The liberalisation of trade should, at most, take 10 years but the SADC member states have bound themselves to 8 years and, as per the Trade Protocol, the FTA was declared in August 2008, 8 years from the entry into force of the Trade Protocol. This is well within the provisions of the

[161] Article 4-8 of the Trade Protocol.

GATT. However, the liberalisation of "sensitive products" extends the trade liberalisation process to 12 years in total. An extension from 8 years to 12 years is not a problem but if the process should go beyond 10 years then it has to be because of exceptional circumstances and a full explanation should be tendered to the Council for Trade in Goods. This will, however, only raise a serious issue if the anticipated 85% trade liberalisation does not satisfy the "substantially all trade" requirement. The only other explanation would be that SADC expects the amount of liberalised trade between 2000 and 2008 to satisfy the "substantially all trade" requirement. The second phase of trade liberalisation (2008-2012) would then just be a consolidation of trade liberalisation, going beyond the requirements of GATT Article XXIV. So how does the SADC define "substantially all trade" in a way that takes stock of its shortcomings?

The "substantially all trade" requirement has been interpreted in many different ways. Most frequently it is the quantitative as well as the qualitative benchmark that is used.[162] It must be noted, from the onset, that "substantially all trade", gives certain latitude to SADC member states to exclude some trade from liberalisation. WTO jurisprudence on the interpretation of "substantially all trade" calls for the inclusion of both qualitative and quantitative elements in determining the amount of trade to be liberalised.[163] Despite the fact that the two approaches should not be mutually exclusive so as to ensure true liberalisation, it is in SADC's interests to opt for a quantitative benchmark to measure substantially all trade in the SADC FTA. With regard to South Africa, it being a developed country, the benchmark should be both qualitative and quantitative. While it would seem odd to make the "substantially all trade" coverage uneven, an uneven split would reflect the development asymmetries within SADC. The exclusion of "sensitive products" is to the benefit of developing and least developed member states of SADC to exclude the products that yield high revenue and whose industries are vulnerable. This will speed up the development of such industries and SADC can develop a graduation process for liberalisation. Ideally, South Africa should be excluded from excluding "sensitive products" as a larger economy and by allowing optimal access to its

[162] Under the qualitative approach, all sectors of trade are liberalised whereas in the quantitative approach, there is a statistical benchmark that is used, such as a percentage, to indicate compliance with the GATT requirement.
[163] The Turkey – Textiles Panel and Appellate Body determined this in the context of Article XXIV: 8 (a) (i) where the two bodies had to interpret the scope and content of "substantially the same duties and other restrictive regulations of commerce".

markets; South Africa would be championing regional integration and trade liberalisation in SADC.

The elimination of "other restrictive regulations of commerce" would also come under the spotlight for SADC countries. Article XXIV: 8 (b) calls for the elimination of quantitative (import and export) restrictions as "other restrictive regulations of commerce" unless such restrictions fall under the exceptions listed. While the Trade Protocol calls for the elimination of quantitative restrictions among the FTA members, it also subjects such elimination to a general exceptions clause. On face value, the fact that there is provision made for quantitative restrictions could be seen as a violation of Article XXIV: 8 (b). The inquiry here is whether the general exceptions clause in the Trade Protocol is compatible with the provisions of Article XXIV. It is submitted that this question is legally moot. The GATT itself has a general exceptions clause in Article XX. This clause applies to all GATT provisions, including Article XXIV. Article XXIV is therefore not exempted from the application of Article XX; Article XXIV is only just an exception from Article 1 of GATT which is the most-favoured nation provision. This argument is further consolidated by the fact that the general exceptions clause is modelled upon the general exceptions clause of the GATT. Provision has been made in the Trade Protocol for the application of trade remedies such as safeguards and countervailing duties between SADC member states. Whether these trade remedies are permissible within an RTA is still unclear.[164] One factor of vital importance though, when other trade barriers such as tariffs are lifted or reduced, it becomes easier for another country's product to permeate a domestic industry to such an extent that such domestic industry is injured and trade remedies are necessary. Once the borders are opened and trade is liberalised, then there would be a huge surge of exports from other FTA members.[165] Hence the need, as explained above, to exclude "sensitive products" from the application of the "substantially all trade" requirement in the SADC context. If this is done then there would be no need to allow the imposition of trade remedies.

[164] The question of whether the exceptions list provided in Article XXIV: 8 (b) is exhaustive or indicative is a subject of debate.

[165] In SADC, this export deluge would most likely come from South Africa, hence the differentiated tariff reduction schedules. SADC member states were fully aware of this possibility and were protecting their fragile domestic industries by insisting on the inclusion of trade remedies in the Trade Protocol.

It can still be argued that the list of exceptions in Article XXIV: 8 (b) is exhaustive and SADC is not at liberty to impose trade remedies on each other as members of an FTA. In that case it would mean that such remedies are only applicable to the other WTO members who are not party to the SADC Trade Protocol. The major flaw of this argument is that, if, by way of illustration, an injury is being caused to Zambia's domestic industry by imports from Zimbabwe, then Zambia has no remedy by virtue of being involved in an FTA with Zimbabwe. Surely this is not the aim of GATT Article XXIV? The detrimental effect on trade would be that protectionist impulses on Zambia's part would begin to manifest themselves through other means such as non-tariff barriers. It follows therefore that in the interests of just and equitable trade that promotes trade liberalisation and integration worldwide, trade remedies should be allowed within the SADC Trade Protocol or any RTA for that matter, with the only condition that they be applied in accordance with WTO disciplines.[166]

3.5.2 Trade Barriers to Third Parties

GATT Article XXIV: 5 (b) provides that with respect to an FTA or an Interim Agreement leading to the formation of an FTA, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such FTA or Interim Agreement must not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of such FTA or Interim Agreement. SADC member states have undertaken not to raise import duties beyond those in existence at the time of entry into force of the Trade Protocol.[167] With regard to both export duties and quantitative export restrictions, equal treatment shall be given to both SADC member states and third countries.[168]

The Trade Protocol is in compliance with Article XXIV with respect to customs duties. It is the question of "other regulations of commerce" that is blurred, especially as there is no universally accepted definition of such regulations within the WTO framework. It becomes

[166] Anti-dumping measures, countervailing measures and safeguards under the Trade Protocol are to be applied in accordance with WTO disciplines (Articles 18, 19 and 20 of the SADC Trade Protocol).
[167] Article 4 (4) of the Trade Protocol.
[168] Article 5 (2) of the Trade Protocol.

even more imperative to discuss "other regulations of commerce" when one looks at rules of origin. The purpose of rules of origin is to be a safety mechanism against trade deflection and to ensure that the right products benefit from the preferential treatment offered under an FTA. However, rules of origin may end up operating to the detriment of trade liberalisation. This is especially so when it comes to complex, inconsistent and restrictive rules of origin as are being exercised under the Trade Protocol. On the other hand, if rules of origin are deemed to be "other regulations of commerce" in the context of Article XXIV: 5 (b), there is no way of determining the pre-FTA rules of origin from the post-FTA rules. This is because there are no rules of origin and no need for rules of origin in the pre-FTA period. Effectively, that makes rules of origin a regulation of commerce that is unregulated by Article XXIV. SADC rules of origin do not escape GATT scrutiny on this basis, however. Rules of origin must not be used as instruments to pursue trade objectives, they must not themselves create restrictive, distorting or disruptive effects on international trade or impose unduly strict requirements and, rules of origin must be administered in a consistent, uniform, impartial and reasonable manner.[169] SADC rules of origin as they are currently applied are inconsistent with the Agreement on Rules of Origin and need to be modified accordingly.

3.6 Conclusion

With the SADC FTA only having been recently declared, in August 2008, an analysis of the FTA can only be based on the transitional phase of the Trade Protocol. While it is possible to make a judgment on the GATT Article XXIV compliance of the SADC FTA based on projections from the progress on the implementation of the Trade Protocol, the GATT compliancy of the FTA can only be truly analysed when the FTA has been in existence and been operative for a significant period of time. The only real question for analysis is whether the FTA will satisfy the "substantially all trade" requirement, based on the projections on paper and *vis-à-vis* the implementation of the Trade Protocol by the SADC member states. On paper, the SADC Trade Protocol should pass for compliance with GATT disciplines, particularly GATT Article XXIV, although there are a few minor discrepancies. The relevant GATT disciplines themselves were not drawn with enough clarity and thus it is possible to

[169] Article 2 of the Agreement on Rules of Origin 1994 (MTN/FA 11-AIA-11). These are only some of the notable provisions of Article 2 that are especially applicable to the SADC situation.

draw conclusions based on different perspectives and interpretations. The situation on the ground, however, begs a different conclusion as member states are massively cautious on their trade liberalisation and are also lagging behind on compliance with the Trade Protocol. If the projections from the status of implementation up to 2007 are anything to go by, the FTA, even though it has been declared, is not in compliance with GATT Article XXIV. This conclusion is however complicated by the fact that most reports are based on the 2002 and 2003 information, the information leading up to the Mid-Term Review. There also lacks a clear link between the Trade Protocol and intra-SADC trade flows.[170] The one fundamental change needed for SADC member states to achieve compliance is for them to start viewing the Trade Protocol as an "inwards-out" process. The SADC member states expect to see the gains from the FTA before they can liberalise trade instead of liberalising trade so as to gain from the FTA.

[170] SADC Secretariat "Official SADC Trade, Industry and Investment Review 2006" http://www.sadcreview.com/pdfs06/introduction2006.pdf (accessed 24 September 2007).

CHAPTER FOUR

TRADE LIBERALISATION IN SADC

4.1 Introduction

Achieving WTO compatibility by an RTA does not solely depend on whether states have changed their trade policy to reflect the requirements of GATT Article XXIV or the Enabling Clause. An RTA does not operate in legal isolation. It is fed by other factors, such as the economy, political stability, infrastructural development, trade facilitation, investment policies, services availability and capital markets, to mention but a few. As such, any analysis of the SADC Trade Protocol would not be complete without looking at all or some of these factors. These are the factors that determine the region's capacity to create a WTO-compliant FTA. This chapter will seek to assess the challenges and recommend appropriate and effective ways to deal with those challenges, both at SADC and WTO level.

4.2 The Implementation of the Trade Protocol

In order to measure the progress of SADC member states towards achieving the objectives of the SADC Trade Protocol, a review of progress made was found to be necessary and, in 2004, the Mid-Term Review of the Protocol on Trade was carried out.[1] Various implementation issues were identified and recommendations were made. Among these were the complexities and restrictiveness of the SADC rules of origin and the recommendation that they be made simpler, uniform and transparent; the back-loading of tariff cuts where it was suggested that the concerned member states implement their tariff cuts twice a year; the elimination of all tariffs that are below 5%; that states make reductions on the SADC preferential rate that are concomitant with any reduction of the most favoured nation rate; that tariff phase-down schedules for sensitive products be reviewed; and also that the monitoring and communication capacity of the stakeholders on the implementation of the SADC Trade

[1] Southern Africa Global Competitiveness Hub (The Services Group) "Audit of the Implementation of the SADC Protocol on Trade" (August 2007) 4.

Protocol needs to be improved.[2] With the Free Trade Area (FTA) now in place, it is necessary to assess the progress of SADC states in implementing the Trade Protocol and towards declaring the FTA as well as the recommendations of the Mid-Term Review.

4.2.1 Tariff Phase-downs

From the onset most tariff reduction offers were significantly back-loaded, with the bulk of tariff reductions to be implemented during the latter stages of the implementation period. This situation has not been improved by the asymmetry principle in the tariff liberalisation process. The Mid-Term Review revealed that, of all the SADC member states implementing the Trade Protocol, Zimbabwe, Malawi and Zambia were lagging behind on their tariff commitments while Mauritius, Mozambique and SACU were on schedule to meet their targets.[3]

In 2007, seven years after the entry into force of the Trade Protocol, and after the recommendations of the Mid-Term Review, some of the participating member states were not on target. The Services Group report revealed that:[4]

- Malawi had the most significant backlog on tariff reductions with a phase-down having been done only once in 2001 and the second phase-down still awaiting government approval. Malawi had cited budgetary constraints as the primary reason for its difficulties in implementing tariff reductions.
- Mauritius had implemented significant reductions on its tariff lines and was in full compliance with the tariff phase-down offer that it had made.
- Mozambique's tariff phase-down schedule was given block approval by the Mozambican Parliament for the years 2001-2015 and is part of Mozambique's tariff law but this had not resulted in compliance. There was a discrepancy between the gazetted rates and those that were being applied at the borders. Mozambique had also reduced its most favoured

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[2] *Ibid.*
[3] GH Oosthuizen *The Southern African Development Community. The Organisation, its Policies and Prospects* (2006) 254; P Kalenga "Implementation of the SADC Trade Protocol: Some Reflections" TRALAC Trade Brief, Johannesburg Nov 2004 www.tralac.org/scripts/content.php?id=3045 (accessed 27 April 2007) 3.
[4] Southern Africa Global Competitiveness Hub "Audit of the Implementation of SADC Protocol on Trade" 14-17.

tariff rate from 35% to 20% but had failed to make a commensurate reduction on the SADC tariff rates.

- SACU front-loaded[5] its tariff reductions at the very beginning and was on target, with tariff reductions going according to its offer. In 2007, more than 99% of its tariff lines were at 0% for qualifying products.
- Tanzania's tariff reductions were characterised by heavy back-loading[6] and, with the exception of category A tariff lines, tariff reductions were at a standstill. Also, the Common External Tariff of the East African Community, of which Tanzania is a core member, had brought about some changes, including a tariff increase on some products.
- Although Zambia was on target as per its tariff offer, the prediction was that it would experience a heavy tariff gap as it failed to accelerate the reductions on some tariff lines as advised by the Mid-Term Review.
- Zimbabwe had fast-tracked its tariff reductions after the Mid-Term Review through its 2007 tariff reduction schedule. The country was now behind on its 2007 tariff reduction levels only. Notably, Zimbabwe had done away with the differentiated tariff offer system and was instead carrying out the tariff reductions that were originally meant for South Africa in its 2000 schedule. Zimbabwe's contention was that there was no need for a differentiated tariff offer since it trades with the non-SACU member states under COMESA or under bilateral trade agreements. This is despite the fact that Lesotho and Tanzania are neither members of COMESA nor do they have bilateral trade agreements with Zimbabwe. It is also in total disregard of the Mid-Term Review recommendation that Zimbabwe initiate a differentiated offer.[7]

Although it can be said in general that most of the states are on target, the above exposition shows that there are discrepancies between gazetted offers and applied rates which totally negates the effect of the tariff phase down schedule. These discrepancies also distort the effects of the Trade Protocol as there are no clear indications of what trade is being conducted under the Trade Protocol. Countries such as Malawi, Tanzania, Zambia and Zimbabwe, who were behind schedule, are poised for a huge revenue gap from the back-loading of tariff

[5] This means that the bulk of SACU's tariff liberalisation was done during the first stages of the implementation of the Trade Protocol.
[6] This means that the bulk of the tariff reductions were scheduled for the latter stages of the implementation of the Trade Protocol.
[7] SADC Secretariat "Official SADC Trade, Industry and Investment Review 2006" http://www.sadcreview.com/pdfs06/introduction2006.pdf (accessed 24 September 2007).

reductions. This would especially be the case if 2008 phase-down targets are implemented and not just reflected on paper. These countries had to fast-track their tariff phase-downs so as to accede to the FTA. The trends suggest a lack of proactivity by the member states with regard to tariff phase-downs. The result is that the revenue losses and the economic slump that might result might just be blamed on the creation of the FTA. Also, those countries such as Malawi that have a significant backlog on tariff reductions will be benefiting from the FTA without reciprocating the preferential tariffs. The same goes for Madagascar and Angola. Madagascar has signed the FTA but will only reach the required level of tariff liberalisation in 2012, while Angola is still preparing its offer and is yet to negotiate it with the other SADC states who are signatories to the FTA.[8] It is difficult to estimate the amount of trade that is excluded from trade liberalisation by virtue of the tariffs that are supposed to be reduced but have still not been reduced. The Services Group study indicates clearly that it is not unheard of for a country to levy a tariff that is different and much higher than the gazetted tariff.[9]

4.2.2 Rules of Origin

The current rules of origin are more appropriate for developed countries. For SADC member states they constitute a trade barrier. There is no broad regime for rules of origin but rather, rules vary from sector to sector and across products. These rules reflect a protectionist bias among the SADC member states as they are highly restrictive. The rules of origin deny SADC member states access to efficient producers of raw material, limiting them to SADC producers and, in that aspect, are trade diversionary. The Services Group study shows that sometimes the customs officials who are supposed to apply the rules do not have the rules of origin manuals in their possession and where they do, they do not fully understand how the SADC rules of origin are to be applied. The general complaint across most SADC countries is that the rules of origin are too complex and difficult to meet and to apply.[10] It is obvious that it would greatly improve intra-SADC trade if the rules of origin were to be revised and made simpler. The recommendation of the Mid-Term Review for the simplification of the

[8] United Nations Economic Commission for Africa Southern Africa Office "Issues Paper on Progress and Prospects in the Implementation of Protocols in Southern Africa" (May 2008) Draft ECA/SA/SADF/2008/04 17.
[9] Southern Africa Global Competitiveness Hub "Audit of the Implementation of SADC Protocol on Trade" 14-17.
[10] Southern Africa Global Competitiveness Hub "Audit of the Implementation of SADC Protocol on Trade" 28-32.

rules of origin has not been immediately implemented. According to SADC member states, such revision is in process with consensus having been reached on the revision of most tariff lines and the major outstanding area is the clothing and textiles sector.[11] When the Trade Protocol came into force in 2000, the rules of origin had not yet been finalised as rules of origin for sensitive products were still under discussion. It seems as if the same process is playing itself out and the negotiations on revised rules of origin might go on for years with the current rules prevailing during the period of negotiation. Despite the problems being faced with implementing the SADC rules of origin and their diversionary effects on trade, member states are still keen on protecting their industries using rules of origin. Otherwise they could have simply reverted to the 1996 rules of origin which were similar to the COMESA rules and were quite simple.

4.2.3 Non-Tariff Barriers

After the removal of tariff barriers, non-tariff barriers will substitute tariffs as a means of protecting a member state's markets. This is particularly so if action is not taken on non-tariff barriers as a matter of urgency. The SADC Ministers of Trade and Industry have identified the following non-tariff barriers: documentation and customs procedures, import licensing/permits, export licensing/permits, import and export quotas, import bans and prohibitions, services or charges not falling within the definition of import duties, single channel marketing, transit charges, visa requirements and technical regulations.[12] The reality, however, is that non-tariff barriers extend beyond those. Even factors such as corruption, understaffing at border posts and lack of trade information can constitute non-tariff barriers for as long as they slow down or prevent trade. The SADC Industry and Trade Committee of Ministers created, in 2002, a consolidated Matrix of Actions and Notifications to serve as a template for all negotiations and the reduction and elimination of non-tariff barriers.[13] This was a positive development in a coordinated effort to eliminate non-tariff barriers. However, member states only recently agreed to complete the Activity Matrix using recently-revised non-tariff barrier inventory reports compiled for all members except the Democratic Republic

[11] WTO Committee on Regional Trade Agreements "Protocol on Trade in the Southern African Development Community (SADC): Questions and Replies" (2 May 2007) WT/REG176/5 (07-1824) Question 7.
[12] These non-tariff barriers have been pegged for immediate elimination while any other non-tariff barriers are to be eliminated gradually (Imani Development Austral Pty Ltd "Inventory of Regional Non-Tariff Barriers: Synthesis Report" (November 2004) Draft Final Report).
[13] SADC "Non-Tariff Barriers. Matrix of Actions and Notifications" SADC/TNF/23/2002/41 (Imani "Inventory of Regional Non-Tariff Barriers").

of Congo and Madagascar. This is supposed to have been completed shortly after the adoption of the Activity Matrix. As a follow up to the decision to complete the Activity Matrix, the SADC Trade Negotiating Forum approved, in April 2007, a non-tariff barrier mechanism which is the brainchild of a November 2006 workshop for business, trade and customs officials. This non-tariff barrier mechanism was recommended for adoption by the Committee of Ministers of Trade. The Secretariat has been tasked with ensuring that member states follow through with their obligations under the Activity Matrix. The Sub-Committee on Trade facilitation will be tasked with dealing with all non-tariff barrier issues and all arbitration processes will be seen through by the Secretariat.[14] While this is a very significant improvement in the elimination of non-tariff barriers, there is not as much emphasis and vigour as there is for tariff reductions.

The most difficult aspect of dealing with non-tariff barriers is that they cut across every other trade regulation besides tariff bindings and thus have a very extensive scope. As a result it is also difficult to quantify the effects of non-tariff barriers. While a regulation may be totally legitimate under WTO law, it can be utilised as a non-tariff barrier. The most prevalent non-tariff barriers in SADC involve agricultural products where all kinds of standards are demanded by SADC member states on agricultural imports. While developing countries in general lobby for developed countries to free trade in agricultural products and cease protecting their agricultural markets, developing countries still apply such restrictions against each other. Where SADC countries seek to revise rules of origin, and where they seek to harmonise customs procedures and regulations and building capacity in the customs officials, they are making an effort in reducing and eliminating non-tariff barriers. As non-tariff barriers come in all forms, enhancing trade facilitation is one way of dealing with non-tariff barriers.

4.2.4 Intra-SADC Trade

One of the issues that have been under constant discussion is that of the limited scope of intra-SADC trade due to the lack of supportive production structures. Almost all the SADC member states produce primary goods for export and import manufactured goods. The only product complementarities are between South Africa's exports and its imports from the other

[14] WTO "SADC: Questions and Replies" Question 6.

SADC member states. This drastically reduces the expansion potential of intra-SADC trade.[15] This lack of diversification in the trade products within SADC means that non-SACU SADC member states have been unable to fully benefit from the front-loading of tariff reductions done by the SACU grouping. Studies show that South Africa totally dominates trade in the SADC region. Overall intra-SADC trade seems to have increased slightly since 2000, but it still remains inconclusive whether this trade was carried out under the Trade Protocol and if it should be attributed to the liberalisation of tariffs, or whether this trade was carried under the bilateral agreements that the member states have among themselves.[16] According to the Services Group, contrary to the pre-Trade Protocol trade patterns and the immediate post-Trade Protocol trade patterns, South African imports from SADC grew significantly between 2004 and 2006 when compared to exports from the region. Although this increase has been attributed to clothing exports from Mauritius, SADC tariffs have also played a role in the retardation of South African export levels to SADC.[17]

The trends in the trade patterns show that once the non-SACU SADC member states have reduced their tariffs to zero level, South African exports to the region will outgrow the SADC exports to South Africa. Until the production structures are sufficiently diversified, the trade patterns will always be skewed in South Africa's favour. The situation is also compounded by the level of de-industrialisation going on in the SADC region, particularly in Zimbabwe and Zambia.[18] The lack of product complementarity in the SADC region could also be cured by trade with external actors through increased access to their markets.[19] The SADC member states have committed themselves to linking the liberalisation of trade to a process of viable industrial development.[20] Member states therefore have a duty, to create, within the FTA, an enabling environment for external trade and foreign direct investment to accelerate the benefits of trade liberalisation. Foreign direct investment will still be most likely linked to primary commodities and natural resources, but it is the spill-over effect of such investment

[15] P Khandelwal "COMESA and SADC: Prospects and Challenges for Regional Trade Integration" (December 2004) IMF Working Paper WP/04/227 International Monetary Fund 15-17.
[16] DE Van Seventer and Kalaba M "The Structure and Pattern of SADC Trade: An Analysis Undertaken for the Mid-Term Review of the SADC Trade Protocol" (2006) TIPS; SADC "Trade Industry and Investment Review 2006".
[17] Southern Africa Global Competitiveness Hub "Audit of the Implementation of SADC Protocol on Trade" 32-33.
[18] Section 2.3.2 of the Regional Indicative Strategic Development Plan (RISDP).
[19] South African Institute of International Affairs (SAIIA) *SADC Barometer* 8 (March 2005) 4.
[20] Paragraph 8 of Preamble to the Trade Protocol.

that should be used to diversify production systems.[21] Linking SADC's trade liberalisation to access to foreign markets has been hampered in part by restrictive inward-looking SADC rules of origin which force unsustainable intra-SADC trade. SADC local industries' capacity to respond to import competition from their more dominant intra-SADC trading partners is severely limited by supply-side constraints and this results in the closure of local industries for failure to cope with competition.[22] With increased market access or integration into the global economy, there is increased demand for products and it also attracts foreign direct investment. This will contribute towards the industrialisation of the SADC region and, with time, cure the over-dependence on primary commodities and promote product diversity, thus increasing the scope of intra-regional trade.

4.2.5 Challenges to the Attainment of the Trade Protocol Objectives

Quite a few challenges exist to the attainment of the objectives of the SADC Trade Protocol. Some of the challenges are inherent to the peculiarities of the region's history and some of them are as a result of ill-advised policies as well as protectionist tendencies and a fear of losing sovereignty, both political and economic. The most glaring of these challenges are the rules of origin as they are currently applied, non-tariff barriers, the divergent trade policies and lack of product complementarities in the region, overlapping memberships of other regional trading blocs, harmonisation of fiscal policies, political disharmony and the institutional mechanisms of SADC.

Rules of origin in the SADC region have been discussed *ad nauseum* and still continue to be an issue of active debate. Some commentators on SADC rules of origin agree that these rules need to be revised as they are not conducive to trade and development in SADC. This is supported by both economic theory and empirical evidence to the effect that rules of origin have a significant effect on the competitiveness of domestic producers, overall consumer welfare, and on trade and development.[23] In SADC, rules of origin have been devised mainly for protectionist reasons, despite the wide berth given to member states to protect their

[21] M Qobo "The Challenges of Regional Integration in Africa in the Context of Globalisation and the Prospects for a United States of Africa" (June 2007) 10 Institute for Security Studies ISS Paper 145.
[22] SAIIA 8 March 2005 *SADC Barometer* 5.
[23] Kalenga "SADC: Some Reflections".

industries and markets through the exclusion of "sensitive products" from immediate liberalisation and the adherence to WTO approved trade remedies.[24]

Another important consideration was to encourage the use of domestic inputs in products and thus foster development and support infant industries. The stated conclusion is that the rules of origin regime in SADC goes beyond what is necessary and normally required to avoid trade deflection. Ironically, after SADC had modelled its rules of origin to mirror those of the European Union (EU), the EU has begun to reconsider the appropriateness of its own rules of origin to the EU's developmental objectives. The EU has admitted that its rules of origin have hindered its development goals.[25] Another irony, according to Kalenga, is that SADC member states are complaining about the restrictiveness and unworkability of similar rules of origin in the Cotonou Agreement and are lobbying for a relaxation of the rules of origin in the Economic Partnerships Agreements (EPA) being negotiated with the EU. Because of these rules, SADC states have been unable to utilise fully and benefit from the preferences granted to them by the EU.[26] The cost of restrictive and complex rules of origin is more evident when the Cotonou Agreement rules are contrasted with the liberal rules of the United States of America's African Growth and Opportunity Act (AGOA) of 2000. AGOA offers the eligible SADC countries duty free access to the USA market under liberal rules of origin.[27]

The globalisation of economic activity as well as technological advancement has resulted in the internationalisation of production where the manufacture of a product cuts across country boundaries. Flatters makes an interesting case for why rules of origin cannot be used as instruments of industrial development and how they limit the active participation of SADC member states in the globalised production process. Under the current SADC rules of origin, sourcing low-cost international input for their products would deprive the SADC member

[24] The SADC rules of origin are taken out of the pages of the 1999 Trade, Development and Cooperation Agreement (TDCA) between South Africa and the EU. In the negotiations leading up to the EU-SA TDCA, South Africa learnt that "rules of origin are not only about customs control, but, more importantly, about economic development, jobs and investment". These are some of the values that South Africa imported into the SADC rules of origin (A Pallotti "SADC: A Development Community without a Development Policy?" (2004) 101 *Review of African Political Economy* 513 at 517).

[25] P Brenton, F Flatters and P Kalenga "Rules of Origin and SADC: The Case for Change in the Mid-Term Review of the Trade Protocol" (June 2005) 1 Africa Region Working Paper Series.

[26] Kalenga "SADC: Some Reflections".

[27] A notable example of the stark contrast between the EU and African Growth Opportunity Act (AGOA) regime would be Lesotho which exported $321million worth of goods to the USA in 2002 while exports to the EU for the same year were only 14 million euro. The concerned goods are clothing and Lesotho had duty free access to both markets except that AGOA offered liberal rules of origin while the EU had restrictive rules of origin hence the massive difference in export quantities. (Brenton, Flatters and Kalenga "Rules of Origin and SADC").

states of access to the SADC market. Trade is diverted as they are restricted to inputs from SADC. SADC production bases are not sophisticated nor diversified enough to support the higher levels of production necessary for the international market. In that respect, SADC rules of origin lose production opportunities for the member states. The markets in SADC cannot support internationally-competitive production plants and goods produced in SADC are most likely to be intermediate products rather than final consumer goods, as is the case at present. If production were to be export oriented then it would increase and improve investment as well as expertise and skill in labour-intensive assembly.[28] The GATT is aimed at increasing, liberalising and integrating trade in the world and the SADC Trade Protocol also has the same aims, in addition to improving the livelihood of its peoples as well as industrialisation. Clearly SADC rules of origin are not viable for such objectives as they are a route to an economic dead-end.

International experience points to the pursuance of open regionalism and the outward orientation of Regional Trade Agreements (RTAs). The danger with SADC rules of origin is that they are inward oriented and will always stand in the way of trade liberalisation and development in the region. The effect of the rules of origin is made more serious by the customs procedures which are not sufficiently developed to carry the administrative burden of complex rules of origin.[29] The SADC rules of origin increase the cost of proving origin, which cost negates the gains from the reduction and elimination of tariffs under the Trade Protocol. It is imperative that rules of origin be revised and made simpler as was the case with the initially proposed rules of origin. Restrictive rules can potentially cause the de-industrialisation of the economically weaker member states by encouraging the migration of industry to the larger market economy.[30] Liberal rules will stimulate trade and investment and foster economic integration in SADC.

Non-tariff barriers are often cited as impediments to trade liberalisation and SADC has not escaped the effect of non-tariff barriers on trade. Much attention has been focused on the reduction of tariffs to the neglect of the threat of disguised protection through the use of non-tariff barriers. Given the protectionist tendencies of SADC countries, this is a huge oversight.

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[28] Flatters "The SADC Trade Protocol".
[29] Southern Africa Global Competitiveness Hub "Audit of the Implementation of SADC Protocol on Trade" 28-32.
[30] M Qobo "The Political Economy of Regional Trade Integration in Southern Africa" in P Draper (ed) *Reconfiguring the Compass: South Africa's African Trade Diplomacy* (2005) 66.

It is particularly evident in the findings of the most recent study commissioned by SADC.[31] While the study dwells on most of the SADC's strategies for economic integration *vis-à-vis* the Trade Protocol, no explicit mention is made of non-tariff barriers save for an analysis of the customs administration and customs harmonisation as well as rules of origin. These are not discussed as rules of origin though, giving the distinct impression that they are not really an issue worth considering in the implementation of the FTA. The focus is more on tariffs. The reality, however, is that non-tariff barriers will continue to be more prevalent as tariffs are gradually eliminated. According to the SADC review,[32] there are some policymakers within SADC who have tried to introduce non-tariff barriers in the wake of reduced tariff barriers. The completion of the Activity Matrix by SADC member states will enjoin the Secretariat to deal with any arbitration process dealing with non-tariff barriers and also to sustain the SADC Sub-Committee on Trade Facilitation. This ignores the fact that the present Secretariat is under-capacitated. This is significant, considering that non-tariff barriers cut across other areas that are linked to trade. SADC needs to go beyond the Activity Matrix and institute a formal mechanism that facilitates cooperation among the SADC Secretariat directorates and an effective system for reporting all regulation that might possibly impact on trade. Non-tariff barriers need to be dealt with as a matter of urgency as they are a potentially huge impediment to SADC trade, which would negate the gains from tariff liberalisation.

The preoccupation with tariff reductions appears to be concerned with whether it will lead to any actual difference in the welfare of the region, given the limited scope of intra-SADC trade and lack of product complementarities. Tariff liberalisation in the absence of trade that will benefit from such liberalisation is pointless and trade diversionary. The SADC industries are weak, the economies are small and unstable, and the production structures[33] unsuitable for trade diversification. At best, member states will carry on as before the FTA, and continue to import from the most efficient sources outside the FTA. After all, most of them produce primary commodities for trade with developed countries. The prospect of this being the case is however severely limited by the operation of restrictive rules of origin in the region. Intra-SADC trade has the benefits tipped heavily in South Africa's favour as the largest and most diversified economy in the region. Arguments and recommendations from economic studies on the viability and desirability of a SADC FTA are varied,, but the general view is that the

[31] Southern Africa Global Competitiveness Hub "Audit of the Implementation of the SADC Protocol on Trade".
[32] SADC "Trade Industry and Investment Review 2006".
[33] This refers to the import substitution industrialisation processes adopted by Africa's post-colonial leaders.

FTA would not result in an equitable distribution of gains from economic integration and the benefits would accrue mostly to South Africa.[34]

RTAs are assessed for compliance with paragraphs 5, 6, 7 and 8 of Article XXIV of GATT and only then are they acceptable as being GATT compliant.[35] Nevertheless, Article XXIV: 4 contains a provision that a CU or FTA should facilitate trade between the constituent territories of the CU or FTA. This is the basic principle behind RTAs: that they facilitate trade and create closer integration between the economies of RTA members. In light of this, it would not be too far-fetched to read from Article XXIV: 4 an additional criterion for the SADC FTA, or any other RTA, that it has a positive economic effect for all member states. Given the economic underdevelopment that is prevalent in SADC, if market forces are left to operate undisturbed, the SADC FTA will result in trade diversion and massive polarisation that will have adverse effects on the developing and less-developed SADC member states. Only South Africa will stand to benefit. Trade diversion in the long run will restrict rather than free trade. Unfortunately, an economic requirement or economic viability test for RTAs, in the body of GATT XXIV: 4 has been unequivocally rejected by previous GATT Working Parties.[36] The reasoning is valid: it would be difficult to measure the economic impact of an RTA after notification because then it would be based on projections and predictions as opposed to real-time data. Also, trade creation and trade diversion is based on other non-economic considerations that nonetheless influence economics. As it is, judgments regarding the economic effects of the SADC FTA rely on projections based on trade patterns.

The rejection of an economic viability test for RTAs means that the SADC FTA can pass for perfect compliance with GATT Article XXIV and have trade-diverting effects that are detrimental to the welfare of the majority of the member states. There is no recourse for member states adversely affected by the creation of the SADC FTA, at least not in the provisions of Article XXIV, but the SADC Trade Protocol allows the use of WTO approved

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[34] NS Cattaneo *The Theoretical and Empirical Analysis of Trade Integration among Unequal Partners: Implications for the Southern African Development Community* (MSc Thesis, Rhodes University 1998) 66-79.

[35] Paragraph 1, Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.

[36] Working Party Report on the Treaty of Rome establishing the European Economic Community (adopted 29 November 1957) *L/778*; Working Party Report on "EEC – Association Agreements with African and Malagasy States and Overseas Countries and Territories" (adopted on 4 April 1966) *L/2441* 145/100; Report of the Working Party on "Accession of Portugal and Spain to the European Communities" (adopted 12 November 1991) *L/6405* 385/47. (WTO *Guide to GATT Law and Practice: Analytical Index* Vol 2 (1995)796-797).

trade remedies as well as the suspension of trade liberalisation measures.[37] These are only temporary measures, however; short-term solutions to a long-term problem. The issue of trade diversion and disproportionate gains calls for compensatory measures to ameliorate the negative effects of the SADC FTA on some of the member states. In the SACU grouping, South Africa subsidises the BLNS[38] states in the revenue-sharing formula of the CU. It is unlikely that South Africa will be willing to compensate all the other member states participating in the Trade Protocol in the same way that it does the BLNS states and therefore fiscal compensation can be discounted. As such, other compensatory mechanisms have been suggested, such as the liberalisation of exchange controls to facilitate the smooth movement of investor funds, the free movement of labour, the promotion of regional investments in infrastructure through a regional development fund and the asymmetric phasing in of tariff reductions.[39] There are numerous other studies that have been undertaken and recommendations that have been made on the issue of compensatory mechanisms to mitigate the possible negative effects of a SADC FTA. Surprisingly, only asymmetric tariff phase-downs have been implemented. Other recommendations have largely been ignored save for the idea of the regional development fund that has been under consideration for a long time and plans to integrate regional finance systems.[40] Despite the asymmetric tariff phase-downs, countries significantly back-loaded their tariff reductions such that the major portion of tariff liberalisation was set for 2007 and 2008. This behaviour defeats the whole purpose of asymmetry in tariff reductions as member states will be heavily impacted by a revenue gap which was meant to be bridged by asymmetry.

One of the biggest challenges to tariff liberalisation is the government dependence on trade taxes as an important source of revenue. Most low-income SADC member states are not able to replace the lost customs revenue from other revenue sources.[41] A country with a sound administrative capacity can strengthen its fiscal sustainability through strengthening domestic indirect taxes, broadening the tax base and finding other efficient fundraising initiatives for government.[42] The situation is different for SADC member states who have limited domestic

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[37] Articles 18, 19, 20 and 21 of the Trade Protocol.
[38] Botswana, Lesotho, Namibia and Swaziland.
[39] C Jenkins "Compensatory Mechanisms" in C Jenkins, J Leape and L Thomas (eds) *Gaining from Trade in Southern Africa: Complementary Policies to Underpin the SADC Free Trade Area* (2000) 140-157.
[40] RISDP.
[41] P Khandelwal "COMESA and SADC".
[42] P Walkenhost "Compensating Lost Revenue in Regional Trade Agreements" http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-11268124192 (accessed on 3 August 2007).

sources of taxation due to poor administrative capacities which lead to a weak revenue system. This obviously calls for the implementation of other compensatory initiatives to cover the fiscal gap and also the relaxation of rules of origin to allow for increased extra-SADC trade.

The enhancement of cross-border investment, improvement of the climate for cross-border trade, the adoption of policies and the implementation of measures to promote an open cross-border regime are some of the Trade Protocol's goals.[43] In spite of these provisions, and despite the need for SADC member states to expand their revenue, informal cross-border trade has long been neglected as a source of government revenue as well as a tool for development, diversification and industrialisation. This is a serious oversight. Concentrating all cross-border trade and investment on the formal structures of trade disregards the fact that informal cross-border trade constitutes a significant aspect of socio-economic development. This economic activity is largely carried out by women and plays an important role in poverty alleviation and the economic empowerment of women.[44] Its significance cannot be overemphasized when viewed in the light of the high rates of unemployment in the SADC region.[45] Studies on informal cross-border trade have shown that such trade accounts for more than 30% of the total import and export earnings within SADC. Informal cross border trade has a massive multiplier effect on other sectors beyond trade and the volumes of informal cross border trade may actually exceed trade across formal structures.[46]

The huge potential of informal cross-border trade to contribute to government revenue is marred by its non-recognition and exclusion from policy, both by country governments and the Trade Protocol itself. Informal cross-border trade is not subject to the same preferential trade accorded to "formal" trade, nor do the traders have access to preferential tariff agreements.[47] This makes the cost of trade expensive. It inhibits both the growth of informal trade and the prospect of re-investment. This is probably why informal cross-border trade has

[43] Preamble, Article 2 and Article 22 of the Trade Protocol.
[44] N Khumalo "Facilitating Cross-Border Trade: Challenges in the WTO and Southern Africa" in P Draper (ed) *Reconfiguring the Compass, South Africa's African Trade Diplomacy* (2005) 170-172.
[45] In South Africa, unemployment is estimated to be hovering at 35%, in Zimbabwe it is 75% and it is at 40% and 50% for Malawi and Zambia respectively (Community Organisations Regional Network (CORN) and American Friends Services Network (AFSC) "Sustainable Livelihoods and Economic Development Through Trade" (2004) Information Pack 3).
[46] S Peberdy "Mobile Entrepreneurship: Informal Sector Cross-Border Trade and Street Trade in South Africa" (June 2000) 17 *Development Southern Africa* (2) 37.
[47] Peberdy "Informal Cross Border Trade" 36.

always been associated with illegality and tariff evasions. Tariff evasion then becomes a survivalist economic strategy[48] aimed at increasing profit margins. Other constraints to informal cross-border trade include the inability to obtain finance from the banks due to the informal nature of the trade, so there is limited room for trade expansion and the cumbersome customs visa and other entry requirements. Customs requirements ensure that informal cross-border traders do not qualify for traders' permits and thus they get visitors permits which prohibit them from trading and are not flexible enough for business.[49] Only South Africa has responded to this phenomenon by creating special visas for these informal cross-border traders.[50]

All the above issues concerning informal cross-border trade need to be revisited and the status of informal cross-border trade re-evaluated. Formal recognition of informal cross-border traders, the easing of immigration regulations and visa restrictions all need to be completed as a matter of urgency. Preferential tariff rates for informal cross-border trade that are commensurate with the level and volume of trade must be applied so as to ensure substantial profits for the traders. Policies and regulations have to be instituted to create room for the growth and development of the sector. Making a success of the SADC FTA requires the inclusion and the active participation of all sectors of the economy as well as the encouragement of all potentially profitable economic initiatives. GATT/WTO law does not make provision for informal trade, however prevalent street trade may be across the world. Nonetheless, provisions relating to informal cross-border trade in the Trade Protocol would not be in contravention of GATT 1994. It is hoped that the recent SADC initiative on supporting informal cross-border traders will go a long way towards facilitating such trade. SADC countries held consultations on informal cross-border trade through the International Conference on Poverty and Development Declaration in April 2008.[51]

For all the complaints about the unrepresentativity of GATT 1994 when it comes to developing and under-developed countries and the calls for special and differential treatment for developing countries, SADC member states have to take more responsibility for their own development and be more responsive to trade policy gaps that are unique or consequential to

[48] Khumalo *South Africa's Trade Diplomacy* 170.
[49] *Ibid.*
[50] United Nations Economic Commission "Issues Paper on Progress and Prospects in the Implementation of Protocols" 31.
[51] *Ibid.*

the SADC region. Creating deliberate policies would help the SADC greatly in lobbying for change in the GATT provisions to accommodate developing country interests.

Most importantly, and also central to the ultimate success of the Trade Protocol, is trade facilitation. Even if trade diversification is achieved and the scope of intra-regional trade is increased, it needs to be accompanied by a transformation of customs procedures and a smooth movement of goods across SADC countries. It is also attractive to investors when border measures are not cumbersome. The Trade Protocol provides for customs cooperation and trade facilitation in all aspects to the extent that SADC customs procedures should adhere to WTO and internationally-accepted standards, recommendations and guidelines. Customs cooperation and trade facilitation entails cutting down on bureaucratic red tape, reducing non-tariff barriers to trade, improving from time-consuming manual processes to the computerisation of all customs processes as well as the reduction and elimination of unnecessary compliance demands.[52] Strides have been made at policy level towards improving trade facilitation in the SADC region, from developing the necessary instruments to allow the common interpretation of legal provisions at all SADC border posts, to building capacity through training activities and the development of training modules for customs officials.[53]

Efforts of the Sub-Committee on Customs Cooperation have not been adequate in improving trade facilitation. Countries are still under siege from lack of capacity to administer both WTO agreements and SADC instruments on trade facilitation. There is a massive lack of information on the part of both the customs officials and traders on such trade facilitation instruments. Other constraints are presented by the operation of manual processing systems. All members apply the WTO Valuation System as prescribed by the WTO Customs Valuation Agreement. However, there are problems in some member states in relation to transparency by customs officials in the valuation process and the appeal systems in place are inadequate.[54]

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[52] Khumalo *South Africa's Trade Diplomacy* 139.
[53] SADC "Trade Industry and Investment Review 2006".
[54] Southern Africa Global Competitiveness Hub "Audit of the Implementation of the SADC Protocol on Trade" 44-50.

Although all SADC countries implementing the Trade Protocol are involved in one form or another of capacity building of their customs officials, they should follow it up with an assessment of the progress at the border posts. It follows that a simplified customs clearance process encourages further trade and reduces the costs of doing business. The gains from trade liberalisation will be more tangible when they are not negated by the border costs. Inefficient trade procedures would constitute a non-tariff barrier to trade and would therefore be inconsistent with the aims of both the GATT and the Trade Protocol. Better trade facilitation, on the other hand, sometimes produces better economic gain than tariff liberalisation.[55] The harmonisation of customs procedures and processes by parties to an FTA is not a requirement under Article XXIV of GATT, but it assists tariff liberalisation greatly and contributes to the fulfilment of other WTO requirements on trade facilitation. Trade facilitation complements trade liberalisation. Transport systems have been identified as essential to trade facilitation as they deepen trade integration and also, depending on efficiency, will greatly increase or reduce business costs.[56] The SADC Protocol on Transport, Communications and Meteorology was signed in 1996 and came into effect in 1998. Although aimed at the development of transport infrastructure, the SADC region is still plagued by poor roads and transport facilities, poor border infrastructure logistics as well as lengthy, complicated and non-harmonised customs border procedures.[57] It is therefore highly imperative that SADC countries show more commitment towards this Transport and Communications Protocol so as to improve trade in the region.

One of the biggest problems SADC faces in the creation of an FTA is the protectionist bias among SADC member states. It manifests itself in the lengthy processes and negotiations carried out to bring the Trade Protocol into force. The tariff liberalisation process, despite the lifeline thrown by South Africa through asymmetric tariff reduction to prevent economic shocks from immediate reduction or elimination of tariffs, has not been smooth. In an effort to protect their industries from regional competition for as long as possible, member states significantly back-loaded their tariff reductions until the later stages of the implementation, in 2007 and early 2008. This is so despite the boomerang effect that countries have been warned against, a huge fiscal gap in the first year of operation of the FTA. The category C and E lists, comprising goods whose tariff reductions commence in 2008 and those excluded from tariff

[55] Khumalo *South Africa's Trade Diplomacy* 170.
[56] United Nations Economic Commission "Issues Paper on Progress and Prospects in the Implementation of Protocols" 8-10.
[57] *Ibid.*

liberalisation respectively, although capped at 15% of all intra-SADC trade, have been extensively used. These goods face high tariff and non-tariff barriers which contribute to a significant deviation from the goal of free trade.[58]

This exclusion of "sensitive products" offered by the Trade Protocol leaves much scope for protectionism as countries can claim their money-spinning industries as sensitive. The ramifications of such exclusion *vis-à-vis* GATT Article XXIV cannot be authoritatively discussed because of the uncertainty and controversy surrounding the GATT provisions on the elimination of trade on "substantially all trade". The protection of "sensitive products" can be supported on the principle of special and differential treatment for developed countries as discussed previously. But, it must be noted that the main motivation for such exclusion by SADC countries is protectionism. Not once has any member cited the need for special and differential treatment in that respect. Even South Africa has its own "sensitive products". In their bid to be protectionist, member states are particularly apprehensive of competition from South African products while South Africa itself wants to protect its clothing and textile, automotive, milling and wheat industries.[59]

The very restrictive rules of origin, although other countries wanted them as well, were very much influenced by South Africa, whose position in the whole negotiating process was similar to that of developed countries in their negotiations with developing countries. South Africa's stand was influenced mainly by the EU-SA FTA.[60] The rules of origin currently serve to protect domestic industry in addition to being a barrier to trade.

One issue that is usually ignored in international trade discourse is that of political cohesion among the member states party to an RTA. Political will is the bedrock upon which every other non-political objective is founded. It is easier for states to integrate smoothly and cooperate fully when there is political convergence. The accession of South Africa to SADC displaced Zimbabwe as the political and economic leader in SADC. The DRC conflict and the Lesotho crisis revealed a massive political rift within SADC as states were divided on the appropriate course of action to be taken. The differences of opinion between Zimbabwe and South Africa can be more appropriately termed "power wrangling" and it dates back to the

[58] Flatters "The SADC Trade Protocol".
[59] Qobo *South Africa's African Trade Diplomacy* 60.
[60] Qobo *South Africa's African Trade Diplomacy* 63.

1992 termination by South Africa of their 1964 preferential trading agreement.[61] The two member states have locked horns before on the appropriate status of the SADC Organ on Politics, Defence and Security and this dispute has only served to widen the rift between the two member states. The political ties that bind this regional grouping are very fragile and that is why there has been such a slow progress in the implementation of the Trade Protocol's objectives. The situation is not helped by the trade-diversionary SADC rules of origin. These rules have increased the political isolation of every SADC member state as they scramble to secure the best trade access to the South African market.[62]

SADC member states have long proved to be particularly averse to the idea of redefining the inter-state power relations in the higher interests of the region and cede a certain amount of authority to a supranational body like the Secretariat. They set ambitious agendas such as the Trade Protocol but are not willing to take the necessary steps to effectuate such agendas. The principal executive and administrative body of SADC is the Secretariat. The Secretariat has been tasked with strategic planning, policy analysis and coordination, and harmonisation and execution of all SADC policies and programmes. The 2001 SADC institutional model implies the centralisation of all SADC programmes and activities on the Secretariat and its four directorates which include the Trade, Industry, Finance and Investment Directorate, responsible for the implementation of all economic programmes including the Trade Protocol.[63] The success of the Trade Protocol will also depend on the institutional and organisational capacity of the Secretariat, the extent of its authority as a proactive supranational body and its authority as an implementation and compliance monitor. Enforcing the role of the Secretariat and increasing its capacity will be effective in ensuring that member states comply with the Trade Protocol and it will also be good for the development of linkages between sectors, which is necessary for the effective implementation of the Trade Protocol. The Secretariat needs more power, enforcement and decision-making authority.

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[61] GH Oosthuizen *The Southern African Development Community. The Organisation, its Policies and Prospects* (2006) 76.
[62] Pallotti 2004 *ROAPE* 520.
[63] The other directorates are: Infrastructure and Services, Food, Agriculture and Natural Resources, Social and Human Development and Special Programmes.

SADC member states are involved in a myriad of other regional and bilateral trading arrangements. The Trade Protocol recognises this overlap in trading arrangements and accords deference to all the trade arrangements that pre-exist it. However, member states have to review the application of such other non-SADC trade arrangements *vis-à-vis* the objectives of the Trade Protocol so that there is harmonisation of objectives. Besides the effort to harmonise the COMESA,[64] EAC[65] and SADC policies, on which progress is quite vague,[66] member states have not made any move towards the review of other trade arrangements. With regard to bilateral intra-SADC agreements, SADC proposes that the Trade Protocol has not overridden them but that they will effectively be overridden once the Trade Protocol offers better market access.[67] This complicates the application of the most favoured nation treatment among members as prescribed in Article 28 of the Trade Protocol. Now that the FTA has been declared,[68] the issue of multiple memberships of RTAs has become more real and SADC will be forced to deal with this problem as it will affect the sustainability of the FTA. Multiple memberships of RTAs creates uncertainties and inconsistencies in the application of RTA provisions, it overstretches the resources of member states, creates conflicting objectives for member states to attain and ultimately defeats the whole purpose of trade liberalisation. Granted, the member states want to garner as much benefit as possible from trade liberalisation, but making a single RTA such as SADC requires total devotion to it, especially given the strained resources of SADC and other exogenous factors.

4.2.6 Commentary

Riddled with inconsistencies and sometimes impractical provisions, the SADC Trade Protocol is a very ambitious project. Coupled with and complemented by the Regional Indicative Strategic Development Plan, which takes the SADC FTA through to other stages

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[64] Common Market of East and Southern Africa.
[65] East African Community.
[66] The SADC reports that a formal structure for cooperation among the three groups exists and plans are underway to draw up a plan of action for harmonisation in a number of areas including non-tariff barriers, FTA tariff elimination, rules of origin, treatment of sensitive products, safeguards, trade remedies, Customs Declaration Document, valuation, CU time frames, Common Tariff Nomenclature, Common External Tariff, competition policy, trade in services, SPS and standards. Harmonised programmes are said to be in place already for non-tariff barriers (WTO "SADC: Questions and Replies" Question 3).
[67] *Ibid.*
[68] The SADC Free Trade Area was declared on 17 August 2008 at the SADC Summit of Heads of States and Government in South Africa.

of economic development in its economic intervention priorities, the Trade Protocol is a potentially powerful tool for regional economic development. It will also give SADC states more leverage in the WTO when the member states begin speaking with one voice. This is only possible if SADC can manage to overcome some fundamental challenges and critical shortcomings besetting the Trade Protocol.

Most of these challenges stem from the unique position of the greater majority of SADC member states being developing countries and dependent on import-substitution industries which are not viable for economic growth and ensure the lack of diversification in trade products. The vast majorities of economies are not stable and there is a history of non-effective participation and marginalisation in the multilateral trading system. Under the WTO system, such countries, which would be adversely affected by trade liberalisation, are subject to the Special and Differential Treatment principle. As such, those SADC member states which are developing countries rightly ought to be creating an FTA within the auspices of the Enabling Clause[69] as opposed to GATT Article XXIV. The Enabling Clause applies to regional trade arrangements entered into amongst developing and less developed contracting parties.[70] Article XXIV is a vehicle for trade liberalisation and its goals are narrow in that respect while the Enabling Clause caters for the development needs of states and the realisation of their economic goals.[71] The membership of South Africa in SADC precludes SADC from creating an FTA under the Enabling Clause and the developing member states of SADC are bound to the tight strictures of GATT Article XXIV. The guidelines on RTAs created under the Enabling Clause show clearly that the Enabling Clause does not accommodate developed countries.[72]

The issue of Special and Differential Treatment for developing countries also arises in the SADC context with regard to instances where the Trade Protocol simply prescribes that member states shall resort to WTO Agreements and provisions.[73] There is no mention of how

[69] Decision on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" taken at the 1979 Tokyo Round.
[70] Paragraph 2 (c) of the Enabling Clause.
[71] Paragraph 7 of the Enabling Clause.
[72] Article 3 of the Enabling Clause.
[73] Examples of this include Article 20 of the SADC Trade Protocol on Safeguards Measures where reference is made to the WTO Agreement on Safeguards and yet the Trade Protocol prescribes a time frame different from the one imposed by the WTO Agreement. Member states are also to adopt a system of valuing goods for customs purposes in accordance with the WTO Valuation System (Article 4, Annex II of SADC Trade Protocol – Concerning Customs Co-operation). The WTO Customs Valuation Agreement allows developing countries, in

these differential provisions are to be applied within the SADC context, or whether, by being exempt from the application of the Enabling Clause, developing states are precluded from any other differential treatment afforded by the WTO. Sufficient clarity on this question is needed as the present situation implies that member states can always take shelter in such differential provisions when they fall short of compliance with the Trade Protocol and when they wish to protect their industries. The only evidence of differential treatment of developing countries in SADC is found in the asymmetric tariff reductions aimed at easing the impact of revenue loss from tariff reductions. It has been suggested that such tariff reductions should be complemented by the convergence of external trade policies through the reduction of MFN tariff rates applicable to third countries.[74] Not only will this reduce the impact of tariff liberalisation, but it will also ensure that SADC pursues open regionalism and achieves deeper economic integration in both the region and the world.

4.3 The Regional Indicative Strategic Development Plan (RISDP)

While the SADC Trade Protocol limits itself to the creation of an FTA, the progression of the FTA into a CU and Economic Market is outlined in the Regional Indicative Strategic Development Plan (RISDP). The ultimate objective of the RISDP is to deepen the integration agenda of SADC and provide strategic direction for the attainment of SADC's objectives, both economic and otherwise.[75] One of the RISDP's distinct features is that it is a broad document that is holistic in nature and covers practically every aspect of SADC's agenda.[76]

A number of priority intervention areas have been set out in the RISDP[77] and principal to the Trade Protocol is the area of Trade, Economic Liberalisation and Development which,

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Article 21, to make reservation to continue to use minimum values and allows them five years to delay implementation of its provisions, subject to extensions where necessary (Southern Africa Global Competitiveness Hub "Audit of the Implementation of the SADC Protocol on Trade").

[74] Kalenga "SADC: Some Reflections" 8; Flatters "The SADC Trade Protocol" 33.

[75] Section 1.6 RISDP.

[76] The RISDP has been summed up as a reaffirmation of, "the commitment of SADC member states to good political, economic and corporate governance entrenched in a culture of democracy, full participation by civil society, transparency and respect for the rule of law. In this context, the African Union's NEPAD Programme is embraced as a credible and relevant continental framework, and the RISDP as SADC's regional expression and vehicle for achieving the ideals contained therein. The RISDP emphasizes that good political, economic and corporate governance are pre-requisites for sustainable socio-economic development, and that SADC's quest for poverty eradication and deeper levels of integration will not be realized if these are not in place" (SADC "Trade, Industry and Investment Review 2007/2008" http://www.sadcreview.com/sadc/frsadc.htm (accessed 3 December 2007)).

[77] These priority intervention areas are mostly informed by the United Nations' Millennium Development Goals (Oosthuizen *The Southern African Development Community*).

incidentally, is also one of the two most important priority intervention areas, alongside poverty reduction. The overall goal of this intervention area is the facilitation of trade and financial liberalisation, competitive and diversified industrial development and the increase of investment for deeper regional integration and poverty eradication. This goal will be achieved through the establishment of a SADC Common Market.[78] Areas of focus for this intervention area include:

- Market integration through a SADC FTA, CU and Common Market.
- Macro-economic convergence.
- Monetary co-operation.
- Development of capital markets.
- Increasing levels of investment in SADC.
- Enhancing SADC competitiveness in the global economy.

These areas of focus are supportive of market integration initiatives. Targets have been set for these areas of focus and they are as follows:[79]

- An FTA by 2008.
- A CU by 2010.
- A Common Market in 2015.
- A Monetary Union in 2016.
- A SADC Central Bank in 2016.
- A regional currency in 2018.

The key to the attainment of these targets is the FTA. An FTA that comes into place as a natural consequence of trade liberalisation and proper strategies will serve as a catalyst for the other stages of trade liberalisation and integration within SADC. The launch of the FTA in SADC represents a solid step towards deeper integration in the region as articulated by the RISDP. Deeper integration will mean better integration into the world economy which should translate into economic growth.[80] Most of the targets and areas of focus for the RISDP are not mentioned in the GATT requirements for RTAs. However, they are essential to the smooth

[78] Section 4.10.2 of the RISDP.
[79] Section 4.10.5 of the RISDP.
[80] Section 3.2.1 of the RISDP.

working of RTAs and especially CU where deeper integration is necessary as a result of the Common External Tariff. But the question has to be asked, especially with regard to the economic integration targets set, whether SADC should still rely on the traditional model of economic integration that envisages a linear progression of RTAs.[81] Granted, regional economic integration has to be a gradual process that takes into account the capacity of the states involved and an FTA is the first and easiest level of economic integration that is sanctioned by the WTO. Perhaps the biggest advantage of the RISDP is that it is not a legally-binding document so much that the targets set are flexible enough to be revised. Given the pace of implementation of the SADC Trade Protocol, the RISDP targets are not feasible. On the whole, the RISDP is a strong document that, with the necessary political support from the SADC member states, could reap huge rewards for SADC. Nonetheless, political support is nothing without the necessary infrastructure to support the strategies. The more realistic economic targets at this juncture would be the improvement of trade facilitation measures and infrastructure development.[82] Until capacity has been created, perhaps the RISDP should be kept in abeyance.

4.4 Viability of SADC Free Trade Area

The SADC FTA was declared at the 28th SADC Ordinary Summit of Heads of States and Government in Johannesburg, South Africa on 17 August 2008. Of the 14 SADC members, only 11 have signed their participation in the FTA, with Angola, the Democratic Republic of Congo and Malawi still grappling with implementing the Trade Protocol.[83] Through the launch of the FTA, the chief objective of the Trade Protocol has been achieved. There is plenty of optimism on how the FTA will transform the region economically. The FTA is expected to "create a larger market, releasing potential for trade, economic development and create employment".[84] This neglects the fact that a larger market, without the necessary support structures, does not automatically increase the scope or volume of intra-regional trade. Moreover, the FTA is expected "to serve to facilitate the movement of goods through

[81] T Hartzenberg and G Erasmus "What can we expect from the Extraordinary SADC Summit on Regional Integration? 24 October 2006 http://www.tralac.org/scripts/content.php?=541&print=1 (accessed 20 September 2007).
[82] *Ibid.*
[83] Trade Law Centre for Southern Africa "SADC Free Trade Area to Bolster Regional Economic Integration" South African Government Press Release http: www.givegain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=50876 (accessed on 20 August 2008)
[84] *Ibid.*

the harmonisation of customs procedures and classifications; increased customs cooperation and establishment of one-stop border posts which will cut the time spent at the countries' borders".[85] The Services Group audit has shown that the region is still a long way from achieving such harmonisation of policies and the development of infrastructure is slow.[86] Such optimism on the benefits of the FTA should be tempered by the reality of the situation on the ground. Trade liberalisation and regional integration have been moving at an incredibly slow pace in SADC. There are still many unresolved challenges. Commitments have been made by the SADC member states to fulfil their obligations under the SADC Trade Protocol but the norm has always been to stick to rhetoric while taking little or no positive action.

At the 2007 SADC Extraordinary Summit, it was acknowledged that some SADC member states would need to reduce tariffs by between 50% and 60% in the period leading up to the declaration of an FTA.[87] These are the same states that failed to reduce their tariffs in line with agreed timetables in a period close to eight years. Expecting such states to have achieved that much tariff liberalisation in a period of a year (August 2007 to August 2008) is simply inconceivable. At best, tariffs have been reduced on paper but in reality are still the same. The Economic Commission for Africa report shows that, as of May 2008: Mozambique showed discrepancies between the offered tariff rates and the applied ones, with the applied ones being higher; Tanzania had introduced a 2% levy on goods entering Zanzibar, while Zimbabwe's general and differentiated offers showed some mistakes.[88]

Non-tariff barriers still remain very much relevant due to the insufficient attention that they are being accorded. Despite the asymmetric tariff reduction system in place, meant to allow business and industry gradual adjustment for the new market, the strength of the South African economy still poses a threat to the viability of a SADC FTA. The FTA is expected to transform into a CU in 2010. The challenge of South Africa's economic strength also lies partly in the fact that the bulk of the southern African leaders are caught up in nationalist

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[85] *Ibid.*

[86] United Nations Economic Commission "Issues Paper on Progress and Prospects in the Implementation of Protocols" 8-10.

[87] Thabo Mbeki "Post SADC Summit Media Briefing" 17/08/2007 http://www.polity.org.za/print_version.php?a_id=115371 (accessed 5 September 2007).

[88] United Nations Economic Commission "Issues Paper on Progress and Prospects in the Implementation of Protocols" 16.

politics, grounded in sovereignty and the prioritisation of national interests. Making a success of the SADC FTA raises fears of South Africa's role in the policy-making of a SADC CU as this CU will entail the harmonisation of trade policies and compromise in some instances. Even then, achieving an FTA is not just about tariff liberalisation and the requirements of GATT Article XXIV. The business environment has to support and sustain the WTO/GATT conditions for an FTA. This calls for an increased involvement of the private sector in regional trade issues and deliberations as well as policy-making. Also, the creation of an FTA should not result in trade diversion. SADC has to develop and strengthen its industrial base so as to remedy supply side constraints. A strengthened industrial base would improve the SADC capacity to produce globally-competitive goods and make international market access relevant. However, the region has been weighed down by a power crisis which should affect it capacity to expand its industrial base and activity. For as long as the power crisis is in place, there is a reduced possibility of a strengthened industrial base.

The SADC FTA should be made to move beyond the border and encompass other trade-related issues such as infrastructure development and trade facilitation, as well as the new generation issues of competition issues, investment policies, government procurement etc. This is not to say that the Trade Protocol does not cover some of these issues: most of the emphasis is misguidedly placed on tariff liberalisation. Even then, the use of import tariffs as a policy instrument is, according to Hartzenberg, a challenge that SADC has to deal with. For South Africa, import tariffs are an instrument of industrial policy, used to protect selected industries. For the rest of SADC member states, import tariffs represent an important source of government revenue and the elimination of tariffs poses a very significant threat to fiscal policy.[89] Hartzenberg contends that such challenges as SADC is facing might actually be more important than tariffs in promoting intra-regional trade and integration into the global economy.[90] This view has to be supported because these challenges, as long as they are not dealt with, make the FTA ineffectual. Progress on implementing the SADC FTA was very slow. It seems as though the emphasis partly became achieving an FTA within the desired time frame at all costs. Clearly, from the progress on the ground, the transition period should have been extended. If SADC countries had wanted the transition period to be WTO

[89] T Hartzenberg "Comments on the SADC Free Trade Area to be launched at SADC Summit" Trade Law Centre for Southern Africa http://www.givegain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=50552 (accessed on 20 August 2008).
[90] *Ibid.*

compatible, they could have achieved that. Although the time limit for a transition period is officially ten years, there is an allowance for extension in exceptional circumstances. As the bulk of SADC member states are developing countries, development concerns should be enough to constitute "exceptional circumstances". The FTA has been declared and it is most likely that it was driven more by political concerns than trade and development implications. Declaring an FTA as has been done is perhaps overstretching the capacity and capabilities of the SADC member states. Most interestingly, Zimbabwe is currently undergoing an economic meltdown for which no end is in sight. Yet, Zimbabwe has also signed the FTA. Surely the situation in Zimbabwe adversely affects trade flows in the region? This brings to the fore again, the issue of political cohesion in the region.

4.5 Conclusion

The challenge of creating a fully functional FTA in SADC is a big one. The history of integration in the region is not kind to the prospects of economic integration. Also, the member states of SADC are themselves have not been very enthusiastic about making the FTA happen, as shown by their failure to live up to the obligations contained in the Trade Protocol. Politics play a huge role in the success or failure of the SADC FTA. States should do away with political haggling and accustom themselves to the idea of a SADC whose original objective has changed from development cooperation to development integration. As the integration strategy suggests, deliberate effort should be made to further industrialise and develop the region in support of economic integration. This implies interdependency and supra-national regional institutions. There is no common standard against which to measure success in economic integration as each region in the world is set with its own peculiar dynamics that work to assist or slow integration. Therefore, there is need for SADC member states to go back to the drawing board and analyse whether the economic integration route they have taken is the appropriate one for the region. The same goes for the WTO regulatory framework and SADC member states as well as other regions with similar dynamics need to lobby for a more accommodative regulatory framework on RTAs. Special and Differential Treatment of developing countries is not enough as these privileges seem to be eroded by a developing country's membership of an RTA with a developed country. The targets and strategies contained in the RISDP also need to be revisited and replaced with more pragmatic ones as they assume a region already equipped with the necessary prerequisites for successful

economic integration. Most importantly, member states need to shake off national chauvinism and make decisions with the mindset that the effects will resonate throughout the region. In that vein, multiple memberships of other RTAs in the region needs to be rationalised. If not rationalised, member states need to choose which RTA they want to be part of. Multiple memberships of other RTAs are one of the biggest hurdles to economic integration in the SADC region where states are busy spearheading other regional initiatives different from SADC and to detriment of SADC.

CHAPTER FIVE

OVERLAPPING MEMBERSHIP

5.1 Introduction

Like many other RTAs, SADC has not been immune to the effects of multiple and overlapping memberships in RTAs. Member states of SADC are also involved in a myriad of other regional trade organisations such as COMESA,[1] SACU[2] and EAC.[3] This results in conflicting obligations where, even though the RTAs are pursuing the same trade interests and have the same mandate, they have charted different means of getting there. The complexity and confusion created is further exacerbated by Regional Economic Partnership Agreements (EPAs) being negotiated with the European Union (EU). In eastern and southern Africa, two negotiating groups have been created, the Eastern and Southern African (ESA) grouping and the SADC grouping. Some of the SADC members are negotiating under the ESA grouping. Even at a simple FTA level, the overlap in RTA membership brings about problems which, as recommended by the SADC's RISDP,[4] need an urgent resolution before the SADC can commence with a CU.

5.2 The integration agendas of COMESA, SACU and the EAC

In addition to sharing members, SADC, COMESA and EAC are part of the designated RTAs that will form the basis for the African Economic Community as envisaged by the 1991 Abuja Treaty. With the exception of Mozambique, every SADC member state is party to more than one RTA.[5]

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[1] Common Market of East and Southern Africa.
[2] Southern African Customs Union.
[3] East African Community.
[4] Regional Indicative Strategic Development Programme RISDP).
[5] P Draper, D Halleson and P Alves "From Spaghetti to Cannelloni? SACU, Regional Integration and the Overlap Issue in Southern Africa" (2007) Trade Policy Report 15. South African Institute of International Affairs (SAIIA) 16.

5.2.1 SACU

The Southern African Customs Union (SACU) dates as early back as 1910 and it was an agreement between the Union of South Africa and the three British administrated territories of Bechuanaland (Botswana), Basutholand (Lesotho) and Swaziland. Namibia was a *de facto* member by virtue of being a South African protectorate after the First World War but it became a *de jure* member when it formalised its membership at its independence in 1990.[6] It is one of the oldest surviving trade agreements in the world and the most advanced trade agreement on the African continent. SACU's main objectives were to promote regional integration and to facilitate trade between the members of the CU so as to foster the economic development of its member states.[7] The 1910 agreement was replaced by the 1969 agreement which was renegotiated and replaced by a new agreement in 2002. Under the 1969 agreement South Africa was the sole determinant of trade policies and all proceeds from the CU were paid into South Africa's National Revenue Fund and then shared among the CU members according to a revenue-sharing formula agreed upon. The BLNS[8] states became resentful of South Africa's dominance and started calling for a say in the policymaking as well as for a revenue sharing formula that recognised their status as developing countries. This contributed to the signing of a new agreement in 2000 which came into force in 2004.

The 2002 SACU agreement provides for the adoption of common policies and democratises the institutional framework, while its revenue-sharing formula incorporates a development component that caters specifically for the BLNS states.[9] The new SACU agreement calls for common industrial policies, co-operation on agricultural policies, development of a common competition policy, coordination of customs procedures and trade remedies. No specific time frames have been put in place for the achievement of these objectives, though.[10]

All SACU members are also members of SADC. They have signed the SADC Trade Protocol and so are ahead of the race to implement the SADC FTA. However, SADC trade integration

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[6] *Ibid.*
[7] C Jacobeit, T Hartzenberg and N Chalambides "Overlapping Membership in COMESA, SACU and SADC. Trade Policy Options for the Region and for EPA Negotiations" (2005) Federal Ministry for Economic Cooperation and Development.
[8] Botswana, Lesotho, Namibia and Swaziland.
[9] P Kruger "The WTO Trade Policy Review Mechanism. Application and Benefits to SACU" (2005) Tralac Trade Brief 4/2006.
[10] Draper *et al* "From Spaghetti to Cannelloni?" 17.

plans are not just limited to an FTA: the idea is to have a CU in place by 2010. This calls for a rationalisation of the two organisations (SADC and SACU). The SACU members cannot be part of two different CU with different common external tariffs (CET). Swaziland, a SACU member, is simultaneously a member of COMESA. COMESA is also geared towards a CU in 2008. At present, Swaziland receives derogations from the other COMESA members that allow her to export under COMESA preferential rate while maintaining the SACU CU. Swaziland does not have to reciprocate the preferences she gets from COMESA.[11]

5.2.2 COMESA

The Common Market of East and Southern Africa (COMESA) came into being in 1994 and is the successor of the Preferential Trade Area which had been in existence since 1981.[12] With a membership that spans nearly half the continent, COMESA is the largest RTA in Africa[13] and accordingly it is one of the building blocks of the envisaged African Economic Community. The goal of an African Economic Community is even incorporated as one of the objectives of COMESA in its Treaty. In its trade integration strategy, COMESA allows for variable geometry where countries liberalise trade and integrate economically at different speeds. COMESA provides for the imposition of sanctions on states that renege on their commitments *vis-a-vis* trade integration and other programmes.[14] The main objective of COMESA derives from trade and investment, through which regional economic integration will be achieved and benefits are supposed to flow. COMESA has so far managed to implement an FTA which came into operation in 2000. Unfortunately, though, only 11 of the 20 members participate in the FTA.[15] Although the 1994 Treaty establishing COMESA had set the time frame for implementation of a COMESA CU as 2004, this proved unattainable, possibly due to the lack of development in its member states, poor transport and communications infrastructure and inefficient customs systems. COMESA is working on improving the structural deficiencies in its member states and some of the solutions employed include the COMESA Customs Document, to assist with customs procedures. A medium

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[11] G Mandigora "Multiple RTA membership in Southern and East Africa" http://rta.tralac.org/scripts/content.php?id=6244 (accessed 14 January 2008) The WTO compatibility of this arrangement is highly contest and its tenability is uncertain.

[12] COMESA http://ww.africa-union.org/root/au/RECs/comesa.html (accessed 3 February 2008).

[13] Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 12. COMESA has 20 members, which is nearly half of the number of countries in the African continent.

[14] Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 14-15.

[15] Draper *et al* "From Spaghetti to Cannelloni?" 9; Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 15.

term strategic plan for 2007 to 2011 has been drafted. This plan is a review and revision of COMESA's roadmap and economic integration targets.[16] Draper *et al* note that considerable progress is being made towards realising a COMESA CU and plans are underway to develop common policies and regulations in relation to safeguards and trade remedies, customs valuation systems as well as competition policy. The most common forms of tariff barriers such as import licensing, foreign exchange restrictions, import and export quotas as well as cumbersome customs formalities have been singled out for elimination. COMESA's rules of origin, which are relatively simple when compared to SADC's current rules of origin,[17] are undergoing further simplification.[18] Implementation of the Common External Tariff (CET) however, is beset with problems. Revenue loss after adoption of a CET is a concern and countries are apparently not willing to cede the necessary policy space to a regional body. These problems pose an impediment to the realisation of a CU and it is not apparent if the CU is going to be realised in 2008.[19] COMESA has, for a variety of reasons, lost a few countries over the years, namely, Lesotho and Mozambique in 1997, Tanzania in 2000 and Namibia in 2004.[20]

A substantial number of SADC members are also members of COMESA. These are; Angola, the DRC,[21] Malawi, Mauritius, Swaziland, Zambia and Zimbabwe. The COMESA Secretariat is based in Lusaka, Zambia. Swaziland, a member of both SADC and SACU is also a member of COMESA. At the same time, Kenya, Uganda, Rwanda and Burundi, members of COMESA, are also members of the East African Community. Evidently the overlap in COMESA cuts across the four RTAs in the region and all four RTAS (with the exception of SACU and EAC who are already CUs) intend to create CU. The fact that Swaziland cannot reciprocate the preferences it gets from COMESA, because of its SACU membership, is just a minor reflection of the complications brought about by overlapping memberships of RTAs.

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[16] Draper *et al* "From Spaghetti to Cannelloni?" 10.
[17] Efforts are currently underway within the SADC to revise the rules of origin and make them simpler and appropriate for the region.
[18] Draper *et al* "From Spaghetti to Cannelloni?" 10.
[19] *Ibid.*
[20] Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 16.
[21] If the direction of the EPA negotiations is anything to go by, then it is highly probable that the DRC will join CEMAC and further complicate the overlaps.

5.2.3 The East African Community

The East African Community (EAC) is a resuscitation of the original East African Community which was in operation from 1967 to 1977 and comprised Kenya, Uganda and Tanzania. The original EAC did not succeed because of trade polarisation effects arising from the economic dominance of Kenya and the "political, ideological and personal differences between the respective leaders".[22] The reconstitution of the EAC reflects changing attitudes, economic circumstances as well as transformation in the world economic sphere where regionalisation has taken root.[23] The second EAC is unique in that instead of starting off with an FTA, its first stage was a CU which was established in January 2005 and the EAC is pushing hard on its integration agenda. The EAC's agenda on integration goes beyond economic integration to incorporate political integration. However, given the prevalence of trade disputes since the inception of the CU and the history of political instability that plagues Rwanda and Burundi, the possibility of a political federation as envisaged in the founding Treaty is highly doubtful.

The CU is partial in the sense that it is only Tanzania and Uganda that trade freely between themselves and also have duty free access to the Kenyan market. Kenya, on the other hand, faces tariffs from both Tanzania and Uganda. These tariffs are to be phased out over a five year period,[24] probably in recognition of the economic differences among the CU members and to facilitate the gradual adjustment of the Tanzanian and Ugandan markets to the competition from Kenya. It also works to ensure that the EAC does not go the way of its predecessor. Rwanda and Burundi were supposed to join the EAC in November 2006.[25] From the information available on current EPA negotiations, they have acceded to the EAC and are negotiating an Economic Partnership Agreement with the EU under the EAC configuration.[26] Given the developmental status of Rwanda and Burundi, it can be assumed that the terms of trade access that they have are the same as those of Tanzania and Uganda i.e. they have free access to the Kenyan market whilst maintaining barriers against Kenyan exports.

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[22] Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 17.
[23] *Ibid.*
[24] Draper *et al* "From Spaghetti to Cannelloni?" 15.
[25] Draper *et al* "From Spaghetti to Cannelloni?" 10.
[26] "Tanzania – We're negotiating EPA under EAC says Bargainer" *The Citizen (Dar es Salaam)* 18 December 2007 http://allafrica.com/stories/200712180749.html (accessed 28 March 2008).

The overlaps in the EAC stand as follows: Tanzania is also a member of SADC while Kenya, Uganda, Rwanda and Burundi are members of COMESA. This will pose a problem when SADC enters into a CU. The overlaps as they stand necessitate the imposition of controls and rigorous rules of origin to prevent either SADC or COMESA goods from filtering into the CU. There was once an expectation that the EAC would act as a fast-tracking group of COMESA to enable COMESA members to accede to a CU when they became ready to do so. However, this was hampered by the withdrawal of Tanzania from COMESA.[27] Interestingly, Article 37:3 (a) of the EAC Customs Union Protocol provides that the CU members shall create a mechanism to regulate the extraneous relationships that they have with other trading blocs. This was to be done upon signature of the Protocol. It is evident though, from the overlap that still exists, that such regulatory mechanism is yet to be created.[28]

5.3 The Economic Partnership Agreements

The exact points of overlap in membership have been outlined above. The overlap situation does not end there, however. It is further complicated by the Economic Partnership Agreements (EPAs) currently being negotiated between the European Union and the African-Caribbean-Pacific countries. These EPAs succeed the trade regimes of the 2000 Cotonou Agreement,[29] which in turn is the successor of the Lomé Conventions. The Lomé Conventions originate from the 1957 Treaty of Rome that established the European Economic Community.[30] The EU undertook to secure the economic development of their members' colonies but the advent of independence for most of these colonies in the 1960s transformed the relationship into a "negotiated" one.[31] This change in relationship resulted in the two Yaoundé Conventions of 1963 and 1969 between the EU and the then Associated African and Madagascan States (EAMA).[32] When Caribbean and Pacific islands decided to associate with the African states, the result was the African-Caribbean-Pacific (ACP) group

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[27] Jacobeit *et al* "Overlapping membership in COMESA, SACU and SADC" 17.
[28] *Ibid.*
[29] The Cotonou Agreement will be in place until 2020 but the trade preferences that were in place from 2000 ceased to operate by the end of 2007 and were replaced by the EPAs. (C Stephens and J Kennan "What role for South Africa in EPAs and regional economic integration?" Paper prepared for a conference on Regional Integration and Economic Partnership Agreements 10 – 11 November 2005 Institute of Development Studies South Africa).
[30] Now known as the European Union.
[31] A Abass "The Cotonou trade regime and WTO law" (July 2004) 10 *European Law Journal* 439 at 439.
[32] Abass 2004 *ELJ* 440.

and the transformation of Yaoundé Conventions into the first Lomé Convention of 1975.[33] The two Yaoundé Conventions were essentially free trade agreements but the Lomé Convention brought about a new trade regime which was based on non-reciprocal trade preferences granted to the ACP countries by the EU.[34] There were four Lomé Conventions in total, with the fourth Lomé Convention expiring only in 2001.

There are a number of reasons for the abandonment of the Lomé trade regime, including the weakening of political ties between the EU and its former colonies, the changing member configurations in the EU and the ACP as well as "cumbersome and complex instruments for development cooperation and aid disbursement".[35] It has been posited also that the non-reciprocal trading relationship had also become a burden on the EU,[36] but the most compelling reason for the change in trading relationships was the incompatibility of the Lomé Convention with the MFN principle in Article I of GATT and the provisions of Article XXIV of GATT, dealing with regional trade agreements. This incompatibility was highlighted by a GATT Special Group convened for that purpose and was endorsed by the WTO Dispute Settlement Board.[37]

Where the Lomé Conventions provided ACP states with preferential, non-reciprocal trade access to the EU market, the Cotonou Agreement is aimed at reciprocal trade relations that are WTO compatible. A special waiver had to be granted by the WTO Ministerial Conference

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[33] T Bertelsmann-Scott "The impact of Economic Partnership Agreement Negotiations on Southern Africa" in P Draper (ed) *Reconfiguring the Compass, South Africa's African Trade Diplomacy* (2005) 112.

[34] Abass 2004 *ELJ* 440.

[35] Bertelsmann-Scott *South Africa's African Trade Diplomacy* 113.

[36] Bertelsmann-Scott *South Africa's African Trade Diplomacy* 114.

[37] Latin American banana producers (Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela) brought a complaint before the GATT in 1993 on the discrimination afforded by the Lomè Agreement arguing that it was GATT incompatible. This was in response to the EU's banana imports regime which permitted duty free access to ACP banana producers while quotas and tariffs limited the entry of Latin American bananas into the EU market. (Bertelsmann-Scott *South Africa's African Trade Diplomacy* 133-135).The EU argued in response that "(1) if the preferential treatment in question was incompatible with Article 1 of the GATT, then they were nonetheless justifiable on the grounds of Article XXIV, when considered together with Part IV (trade and development); (2) the Lomè preferential trade regimes were based on a FTA that linked them to the ACP states, and are therefore justified by Article XXIV GATT 47" (Abass 2004 *ELJ* 440). The Special Group found the preferential trade access of ACP bananas to be incompatible with Article 1 of GATT, Part IV did not authorise any preferences incompatible with Article 1 and, also, the EU-ACP arrangement under Lomè did not satisfy the definition of an FTA under Article XXIV of GATT. As such, the Lomè Agreement was incompatible with GATT law. This finding could not be adopted for lack of consensus and enforcement guarantee. The same complaint was lodged with the WTO Dispute Settlement Board in 1996 after the creation of the WTO through the 1994 Marrakesh Agreement, this time by Honduras, Guatemala, Ecuador, Mexico and the United States of America. The Lomè Convention was found wanting in terms of its compatibility with WTO/GATT law and the EU had to alter the terms of market access for bananas (Abass 2004 *ELJ* 440; Bertelsmann-Scott *South Africa's African Trade Diplomacy* 133-135).

in November 2001, which was to expire on 31 December 2007. The waiver meant that the EU could maintain its preferential trade regime while phasing in a reciprocal trading relationship with the ACP states.[38]

Although mostly spoken of in its trade and economic context, the Cotonou Agreement covers a broad range of objectives that include "capacity and institution building, the observance of and respect for human rights, gender issues, democratisation, good governance, political cooperation, conflict prevention and resolution and the rule of law".[39] Its overall objective is to "promote and expedite the economic, social and cultural development of the ACP states, with a view to contributing to peace and security and to promoting a stable and democratic environment".[40] Violation of any of the essential elements of the overall objective may result in the imposition of sanctions as directed in Article 96 of the Cotonou Agreement.[41]

The EU seems to have committed itself to promoting regional integration in the ACP countries with the result that, in terms of the provisions of the Cotonou Agreement, EPAs are supposed to build on the RTAs already in existence within the ACP states.[42] Part of the complication of EPAs and overlaps in regional membership arises from the above factor. Countries in east and southern Africa, from whom SADC draws its membership, have shown no inclination towards rationalising their RTA memberships. Decisions on withdrawing from one RTA in favour of another have been avoided. Where such decisions have been made, the countries still remain members of more than one RTA.[43] Technically, if they are held down to negotiating as groups, which they have been, the EPA groupings could force them into a decision, but it is unclear whether SADC countries (and the other countries in the east and southern African region) are conscious of that possibility. The EU does not have the capacity, even with its developed state, to apply more than one EPA to a single country and it has

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[38] Abass 2004 *ELJ* 449.
[39] G H Oosthuizen *The Southern African Development Community. The Organisation, its Policies and Prospects* (2006) 156-158.
[40] *Ibid.*
[41] Zimbabwe has a range of sanctions imposed against it by the EU under the Cotonou Agreement for violation of the espoused principles. These sanctions have been in force since 2002 and the violation of human rights and democratic principles as well as the "breakdown in the rule of law" have been cited as the reasons for the sanctions (Oosthuizen *Southern African Development Community* 157).
[42] Oosthuizen *Southern African Development Community* 157. See also, Articles 35, 36 and 37 of the Cotonou Agreement.
[43] With the exception of Mozambique who is a member of SADC only. The other countries that withdrew from COMESA, Lesotho, Namibia and Tanzania, still belong to two RTAs each.

indicated that such a situation would not be tenable.[44] Therefore, countries have to commit to only one RTA for negotiation purposes as well as for cooperation with the EU in all the other areas that are covered by the Cotonou Agreement. As a result of the above requirement from the EU, SADC has been fragmented by the EPA negotiations.

Two negotiating groups were formed: the Eastern and Southern Africa (ESA) group and the SADC group. The ESA group, composed mainly of COMESA members, can tentatively be called a COMESA group, as it is assisted by the COMESA Secretariat in its negotiations. The same applies to the SADC group, which employs the resources of the SADC secretariat. Some ESA countries — Madagascar, Malawi, Mauritius,[45] Zambia and Zimbabwe — are members of SADC and also members of COMESA. The Democratic Republic of the Congo was negotiating with ESA until 2005 when it joined the Economic and Monetary Community of Central Africa (CEMAC) EPA configuration, even though it is not a member of that RTA.[46]

The SADC group, on the other hand, consists of the BLNS states plus Angola and Mozambique. (Tanzania started off negotiating with the SADC group but decided to abandon the group for the EAC EPA group which was created on 14 November 2007.[47]) South Africa formally became a member of the SADC group in February 2007.[48] It had initially been left out of the EPA negotiation and had been allowed observer status only, because of the 1999 Trade, Development and Co-operation Agreement (TDCA) that it signed with the EU. In a sense, South Africa had already concluded its EPA. Because of the TDCA, the SADC EPA is mostly a renegotiation of the TDCA terms to accommodate the BLNS states and the rest of the SADC EPA group. Such renegotiation is the most logical option; otherwise two EPAs would exist within one group. Conversely, South Africa's status as a developed country means that the EU would not be willing to give it the same terms as it would the other

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[44] CJ Mwebeiha "Reconfiguring the Spaghetti Bowl: Reflection on the Issue of Multiple Memberships in Regional Trade Agreements" (2004) 31 *Legal Issues of Economic Integration* 243 at 250.

[45] In a presentation tabled to the Joint Foreign Affairs and Trade and Industry Hearings, Mauritius was mentioned to be negotiating on her own. Information could not be obtained to validate this. "Briefing Notes on EPA Negotiations" Presentation to Joint Foreign Affairs and Trade and Industry Hearings 27 February 2008 www.thedti.gov.za/parliamentary/epa.pdf (accessed 28 March 2008).

[46] M Meyn "Regional Integration and EPA Configuration in Southern and Eastern Africa. What are the Reasonable Alternatives?" in A Bosl, W Breytenbech, T Hartzenberg, C McCarthy and K Schade (eds) in *Monitoring Regional Integration in Southern Africa* (2006) 144.

[47] "Tanzania – We're negotiating EPA under EAC says Bargainer" *The Citizen (Dar es Salaam)* 18 December 2007 http://allafrica.com/stories/200712180749.html (accessed 28 March 2008).

[48] H Mcleod "Integrating Africa through a SACU and COMESA FTA – Speeding up the Regional Integration Process" (2007) 38 *Trade and Industry Monitor* 5.

members of the SADC EPA group. To all intents and purposes the end result is still the same, except perhaps for the fact that the EPA will serve to preserve the SACU CET.[49]

The EPA negotiations have tested the strength and tenacity of SADC and found them wanting. The negotiations will most likely continue to be a nuisance for as long as countries do not take concerted steps to deal with the issue of multiple memberships. South Africa has refused to initial the interim SADC EPA and thus the situation has reverted to where South Africa was excluded from the SADC group. Tanzania pulled out only just a few days short of the initialling, and there is still a chance that Angola, which is still weighing the benefits of initialling, might decide against the SADC EPA. The SADC member states that are negotiating an EPA under the ESA banner might pull out of SADC if the prediction that the EPA will cement RTA membership is actualised.[50] The EPA groups do not have a formal legal status like their constituent RTAs; they are in principle separate and additional groups to the existing RTAs. This is made more difficult by the absence of a CU negotiating in the same capacity as the EU.[51] The negotiators are not mandated to sign on behalf of all the countries in the group, hence the patched initialling of the interim EPAs. Although both Secretariats of SADC and COMESA (and presumably the EAC Secretariat) do assist with the negotiations, lack of a unified approach within the EPA groups means that ultimately the administration and implementation of the EPA provisions will be a country's individual responsibility. However, each country would still be locked into that group by virtue of the CET negotiated by the group *vis-à-vis* the EU.

Although it is fraught with difficulties, the development component of the EPA is another incentive that would make countries maintain the configurations created by the EPAs. The

[49] The exclusion of South Africa implied the negotiation of a SADC EPA Common External Tariff in relation to the EU which would most likely have been different from the SACU Common External Tariff. This would have meant the employment of stringent border controls within SACU and the application of rules of origin which would, in essence, reduce SACU to an FTA. A CU is defined partly by its Common External Tariff and once countries apply different tariffs then it is no longer a CU.

[50] Mauritius, Zimbabwe and Zambia have already initialled Interim EPAs with the EU as members of the ESA configuration (C Brand "Zim and Three Others Agree Free Trade Pact with EU" http://epa.tralac.org/scripts/content.php?id=7178 (accessed 28 March 2008).

[51] Bertelsmann-Scott *South Africa's African Trade Diplomacy* 121. The SACU CU had been broken up by the presence of the TDCA as well as the developed country status of South Africa. Also the presence of other SADC states meant that even if the situation had been different, they would not be a CU. Information could not be found to determine whether the EAC signed as a CU i.e. with negotiators signing on behalf of the CU or whether the EAC members signed individual EPAs like the other countries in the region. It is highly probable, though, that they agreed on the disciplines to govern the EPA as a group but signed as individual countries.

European Development Fund (EDF) is available only to countries negotiating EPAs[52] and, because of the EDF, it has been argued that it is more beneficial for countries to try and accomplish their trade liberalisation under the EPA umbrella.[53] In theory, the EPAs provide more opportunity for trade liberalisation as the EDF can cushion the countries against the revenue gap that would be caused by the loss of their major source of income. That is only possible, however; if there can be agreement as to the application of the development component in the Cotonou Agreement.[54]

To add on to the complexities, a substantial number of SADC member states are classified as least developing countries.[55] These countries are the recipients of trade preferences granted under the Everything But Arms initiative and they enjoy duty free access to the EU market because of their status. Although they are participating in the EPA talks, there is no inducement, beyond the development component,[56] for them to partake in the negotiations and subsequent reciprocal trade. Reciprocal trade with the EU will make them vulnerable to competition from EU products and possibly be detrimental to their industries. This leads Mwebeiha to suggest that the EPAs should, ideally, enhance the trade of the ACP countries or at least place them in a position comparable to their current one.[57]

The possibility of the least developing countries pulling out of the EPAs should not be ruled out. This is quite possible, should they find their EPA position unsustainable for their domestic markets. There is also an option for developing countries to negotiate as individual if they are not willing to negotiate as a group. These options make the seemingly tight strictures of the EPA groupings more flexible.[58]

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[52] Draper *et al* "From Spaghetti to Cannelloni?" 20.
[53] Mwebeiha 2004 *Legal Issues of Economic Integration* 251.
[54] M Meyn "Economic Partnership Agreements: A 'historic step' towards a 'partnership of equals'?" (2008) Working Paper 288 Overseas Development Institute 3.
[55] Angola, DRC, Lesotho, Malawi, Madagascar, Tanzania, Zambia and Mozambique (Oosthuizen *Southern African Development Community* 158).
[56] Bertelsmann-Scott *South Africa's African Trade Diplomacy* 122. The structure of the Everything But Arms initiative, where it is a unilateral initiative without any contractual bindings, means that the EU can withdraw EBA at any moment if it so wishes. It would be more beneficial for the least developing countries to have a more permanent arrangement with guarantees on market access (Meyn *Regional Integration in Southern Africa* 158).
[57] Article 37 (b) of the Cotonou Agreement.
[58] The possibility of these provisions being invoked is highly contest and indications have been that the EU is unwilling to consider alternatives to EPAs (Mwebeiha 2004 *Legal Issues of Economic Integration* 251; Meyn *Economic Partnership Agreements* 3).

Without the messy overlap in RTA membership, the EPAs would represent nothing more than routine FTAs but because of the overlap, they serve to bring in more fissures to already fragile RTA configurations. Countries within the same RTA are signing up different agreements with the EU which effectively prevents any synchronisation of external or even internal trade policies.[59] This seriously undermines the planned SADC FTA and threatens the preparations for a CU.

5.4 The Dilemma of Multiple Memberships

Jakobeit *et al* assert that overlapping membership of regional blocs is best understood in the context of the political history of Africa. Regional integration in Africa has always been a pan-Africanist project, born of pan-African ideologies but forever at odds with economic and political interests. Regional integration was seen as a threat to state sovereignty and trade liberalisation was seen as a threat to tariffs as the most important source of government income. The only attraction of regional integration was as a perceived source of esteemed standing among other leaders. Added membership of regional integration initiatives was thus a confirmation of pan-Africanism and added to a country's prestige. Regionalisation in Africa has also been a response to the global phenomenon sweeping the world, inspired by a cessation of tensions between East and West and a shift from regional security initiatives to regional economic initiatives.[60] The pan-Africanist element, although sometimes dormant, still contributes to the pull of regional integration. The best example would be the New Economic Partnership and Development (NEPAD) which is motivated by the idea of an African renaissance in the face of globalisation and which has neo-liberal inclinations.[61]

McLeod explains economic integration using standard economic wisdom: the reduction and elimination of trade barriers greatly augments economic growth. Through trade liberalisation, comparative advantage can be utilised for efficient production and resources that would have been wasted through inefficient production are saved.[62] Free trade also means increased access to before-protected markets. It is quite logical to presume that multiple memberships in RTAs are also motivated by the need for increased and cheaper access to markets. Given that African countries have a long history of trade protectionism, they use multiple

[59] Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 21.
[60] Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 26-27.
[61] http://www.nepad.org/2005/files/inbrief.php (accessed 28 March 2008).
[62] McLeod *Trade and Industry Monitor* 2.

memberships to ensure wide market access.[63] The overlap between SADC and either COMESA or SACU can also be explained by the fact that SADC has a much wider mandate that is not almost exclusive to trade and economic integration and countries might want to get the most out of both.[64] A country that is a member of SACU, SADC and COMESA, such as Swaziland, would, theoretically, have free access to the markets of all SACU, SADC and COMESA countries. Nevertheless, the desire for a more integrated and united Africa as well as market access to an increased number of countries cannot override the myriad of problems that overlapping membership of RTAs has created and poses. At the most basic level, the developmental status of the SADC countries does not allow for the stretching of resources which are, at best, limited. The financial and institutional constraints are huge and it is doubtful if countries will be able, in the long run, to sustain the pressure that it induces. Membership of any RTA entails membership fees, attendance of conferences and meetings and needs resources for the implementation of policies.[65] These constraints would effectively cripple the very administration of the RTA before any benefits start flowing. This would impede the pace of integration and prevent the realisation of some goals. Institutions such as a CU demand that countries cede a certain percentage of their economic policymaking to a regional institution. With multiple memberships, it is difficult to render such authority to different institutions in respect of the same issues. Although all RTAs have to comply with WTO requirements as laid out in Article XXIV, the working mechanisms of RTAs will always vary, with different views and strategies towards reaching the same goal. This results in conflicting obligations where, for example, Zambia and Zimbabwe, both members of SADC and COMESA, in trading with each other, are caught between the SADC and COMESA trade regime. Implementation of one would be in conflict with the other. But for the exemption given to Swaziland by COMESA, if Swaziland had applied preferential tariffs with respect to COMESA goods, it would have been in breach of the SACU CET. Mambara gives a neat summation as follows:

> "It leads to costly competition (even for attention and resources); conflict; inconsistencies in policy formulation and implementation; unnecessary duplication of

[63] Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 27.
[64] McLeod *Trade and Industry Monitor* 4.
[65] L Kritzinger-van Niekerk and E P Moreira "Regional Integration in Southern Africa. Overview of Recent Developments" (2002) World Bank 2 http://www.sarpn.org.za/documents/d0000329/index.php (accessed 8 October 2007) 4.

functions and efforts; fragmentation of markets and restriction in the growth potential of the subregion."[66]

SACU is a CU with a CET; EAC is also a CU, whereas COMESA has an FTA and is pursuing the implementation of a CU. SADC, on the other hand, has declared its FTA. Given the overlaps among these RTAs and the trade liberalisation involved, there is significant room for trade deflection. When a product is imported from a member of COMESA by a member of both COMESA and SADC, then it can be preferentially re-exported to a SADC member state.[67] In the case of Zimbabwe, until recently, the pattern of its tariff reductions was not consistent with its SADC Trade Protocol tariff reduction commitment. This conflict arose from the fact that instead of implementing the SADC differentiated offer tariff system, Zimbabwe was offering the same tariff reductions to the rest of the SADC countries as it did to South Africa. Zimbabwe's explanation was that the need for a differentiated tariff was eclipsed since it was already trading with the other non-South Africa SADC members under COMESA or through bilateral agreements.[68] Although Zimbabwe reduced its import tariffs in January 2008 to bring them in line with the SADC Trade Protocol,[69] the incident illustrates the level of conflicts that multiple memberships can bring. This conflict could also expand into a diplomatic conflict. In the Zimbabwean situation, Lesotho and Tanzania were adversely affected by the situation because they are neither members of COMESA nor do they have bilateral trade agreements with Zimbabwe.[70]

A lot still needs to be done in relation to trade facilitation in SADC, including improving the capacity of customs officials. The study on the SADC Trade Protocol confirmed that the administration of trade agreements in most countries is poor. Multiple memberships cause further complications and confusion for customs officials and also for the business sector that does the actual trading. The confusion is further aggravated by bilateral trade agreements in

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[66] J L Mambara "COMESA Customs Union: An Assessment of Progress and Challenges for Eastern and Southern Africa's Poor" (2007). http://www.tradescentre.org.zw/download_documents/COMESA%20Customs%20Union%20final%20final--Mambara%20J.pdf (accessed 12 April 2008).

[67] Kritzinger-van Niekerk and Moreira *Regional Integration in Southern Africa* 3.

[68] Southern Africa Global Competitiveness Hub (The Services Group) "Audit of the Implementation of the SADC Protocol on Trade" (August 2007) 15.

[69] A Kugara "Import Tariffs Cut in Line with SADC Trade Protocol" The Herald http://www.tralac.org/scripts/content.php?id=7248 (accessed 16 February 2008).

[70] Southern Africa Global Competitiveness Hub "Audit of the Implementation of the SADC Protocol on Trade" 15.

place between countries and the advent of EPAs is guaranteed to muddle the situation even more.

As the RTAs poise themselves for further and deeper integration, the unfeasibility of simultaneous involvement in multiple RTAs will manifest itself more clearly. As SADC and COMESA move into a CU, all the members of SACU, EAC, SADC and COMESA will be compelled to make a decision as it is practically impossible to be a member of two different CUs because of the CET. The RTA situation is only just workable and needs urgent attention.

5.5 The WTO Provisions

There are no provisions in the GATT body of rules to regulate multiple memberships of RTAs. The GATT/WTO compatibility of such multiple memberships can only be determined through an analysis of the set requirements for FTAs and CUs. This is because countries, by virtue of their membership of an RTA under GATT law, accrue legal obligations and the question is whether multiple memberships of either FTAs or CUs will cause such legal obligations to conflict.

An FTA is defined as a group of two or more customs territories where the duties and other restrictive regulations of commerce are eliminated on substantially all trade between the constituent territories in goods originating in such territories.[71] The constituent territories of an FTA maintain their own individual tariffs or duties to the trade of third countries. To thwart free-riders who would want to enter their goods into the FTA through the country with the lowest external tariffs and to avoid trade deflection, rules of origin are employed. Rules of origin are used to identify the origin of a product and apply tariffs accordingly. Because rules of origin can be used to distinguish similar products in terms of their country of origin, it makes it possible for countries to belong to more than one FTA.[72] It also helps that each member of an FTA maintains a different external tariff policy. Provided that a country can include a "substantial" portion of its trade in the trade liberalisation programmes of all FTAs it is party to, then multiple membership of FTAs is possible. Nonetheless, despite the above illustration of how multiple memberships of FTAs would be possible and GATT compliant,

[71] Article XXIV: 8 (b) of GATT 1994.
[72] Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 48.

the appropriateness of such multiple memberships for SADC is highly contest. Because most of the SADC countries produce roughly the same goods, the coverage of trade products for liberalisation would most likely be the same across all FTAs. However, regulations of commerce and other policies would be different.[73] A country's participation in multiple FTAs would then entail extra administrative costs at the border and increased transaction costs for traders. The countries cannot afford further financial strain, given the state of their economies. Ultimately, multiple memberships of FTAs, which, in theory, is supposed to increase the arena for free trade, become a form of non-tariff barrier or obstacle to trade. The solution, as articulated by Mangeni, would be for the various RTAs to maintain substantially the same coverage of trade items and the same regulation of commerce so that the FTAs have a substantially common list of products on which trade is to be liberalised.[74] Simply put, the above solution calls for the harmonisation and rationalisation of multiple memberships of FTAs. Given the dynamics of RTAs in east and southern Africa, such a solution has proved elusive, and not even the EPAs could make the RTAs come into harmony. A better solution would be for FTAs to enter into further FTAs among themselves rather than countries being members of two or more different FTAs. Only then can multiple memberships of FTAs be truly beneficial for southern African countries.

A CU, on the other hand, is defined as the substitution of a single customs territory for two or more customs territories where duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the CU members. Substantially the same duties and other regulations of commerce are applied by each of the CU members to the trade of third countries.[75] The CET makes it technically impossible for country to be member of more than one CU. Otherwise it would have to apply two different CETs which would be difficult to implement and would clearly be against GATT provisions. This means that if the southern African countries are to remain within the legal ambit of GATT Article XXIV, they would have to decide which RTA membership they would give up — particularly so because all the RTAs in southern Africa have, as part of their trade agenda, the transition from an FTA to a CU and are busy implementing policies to that effect. However slow the progress, at some point the issue will have to be dealt with. In the long run, the current overlaps

[73] A good example would be the difference between the COMESA and SADC rules of origin.
[74] F Mangeni "Rationalisation of overlapping membership in Africa" http://wwwrta..tralac.org/scripts/content.php?id=6449 (accessed 28 March 2008).
[75] Article XXIV: 8 (a) (i) and (ii) of GATT 1994.

between the EAC and COMESA, SADC and COMESA, SADC and EAC and SACU and SADC will have to be eliminated.[76]

The unique position of Swaziland in its membership of both SACU and COMESA raises the question of whether a country that is a member of a CU can unilaterally conclude an FTA with other non-CU countries.[77] Swaziland gets special treatment from COMESA where it does not have to reciprocate the preferential treatment it gets from COMESA. For COMESA to demand reciprocation of trade preferences would mean Swaziland breaking the SACU CET so as to conform to the requirements of the COMESA FTA. The other SACU members have refused to permit Swaziland to reciprocate the COMESA preferences on the basis that, according to Jakobeit *et al,* once the CET is broken in that way, then it will be easier for COMESA goods to cross into other SACU countries illegally without paying the appropriate duty. Such a situation would force the re-imposition of rules of origin and necessitate strict border controls within SACU. The same goes for the EAC CU where Tanzania is a member of SADC and Kenya, Rwanda, Burundi and Uganda are members of COMESA. The EAC could only establish a partial CU and has had to retain rules of origin as members have to grant preferences to either SADC or COMESA members in terms of the FTAs of the respective RTAs.[78]

The COMESA-Swaziland situation conflicts with the GATT regulations for FTAs. It is required that, in an FTA, all duties and other regulations of commerce be eliminated on substantially all trade between the constituent territories. The "substantially all trade" requirement is breached by the fact that Swaziland does not reciprocate the trade preferences it gets. An RTA under GATT/WTO law is either an FTA or CU or an Interim Agreement leading to the establishment of a CU or FTA.[79] There is no mention of partial CU as has been implemented by EAC and, in any case, for such a partial CU to be sanctioned by the WTO it has to be approved by a two-thirds majority of the GATT contracting parties.[80] When one looks at the GATT requirements for FTAs and CU, breaking a CU's CET and imposing rules

[76] Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 48.
[77] Swaziland's membership of COMESA has to be distinguished from its membership of SADC. In that particular situation, the whole SACU CU is a member of the SADC and negotiates as one entity such that the SACU CET and other policies are not affected.
[78] Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 49.
[79] Article XXIV of GATT 1994.
[80] Article XXIV of GATT 1994. The Article reads: "The contracting parties may, by a two thirds majority, approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or free trade area in the sense of this Article."

of origin in a CU would clearly downgrade it to an FTA. Such a CU with a non-uniform CET and rules of origin and stringent border controls among the members would not be GATT compatible. Its existence would be a violation of WTO law. An argument can be raised that such arrangements, because they do not satisfy GATT law, are only interim arrangements, with the intention that they will be fully harmonised with GATT law at a later stage. However, this argument would also fall flat when considering that Interim Agreements have to lead to the establishment of an FTA or CU within a reasonable length of time and that reasonable length of time should not exceed ten years.[81]

It is therefore obvious that, where multiple memberships of RTAs do not violate WTO law, it is still not tenable for southern African countries and, in the case of CUs, multiple memberships and the overlap created is in violation of WTO law.

5.6 SADC Provisions on Multiple Memberships

The SADC Trade Protocol does recognise the existence of other regional trading blocs as well as bilateral trade agreements among SADC members. Article 27 of the SADC Trade Protocol provides:

> "1. Member states may maintain preferential trade and other trade related arrangements existing at the time of entry into force of this Protocol.
> 2. Member states may enter into new preferential trade arrangements between themselves, provided that such arrangements are not inconsistent with the provisions of this Protocol.
> 3. Member states party to any existing preferential trade arrangements and of other trade related arrangements undertake to review the further application of such preferential trade arrangements, with a view to attaining the objectives of this Protocol."

The article gives deference to all trade-related arrangements that were pre-existing at the time the SADC Trade Protocol entered into force. This deference is qualified, however. Member states are to review the further application of such other regional trade arrangements to ensure

[81] See Article XXIV: 5 (c) and Paragraph 8 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.

that they work to further the objectives of the Trade Protocol. In effect, the Trade Protocol recognises and acknowledges multiple memberships and the RTA overlaps in east and southern Africa. The provision on the review of the extraneous trade arrangements that predate the Trade Protocol is a lame attempt at rationalisation. Article 27 (3) of the Trade Protocol is an ineffectual provision and this is further illustrated by the fact that none of the SADC members party to the Trade Protocol have made any attempt to review their membership of other regional trade arrangements or bilateral trade arrangements. There are no time limits for such review of multiple memberships and the legal consequences of non-compliance are not spelt out. As a result, there is no substantial legal obligation on SADC member states to rationalise their membership. If such review as provided for in Article 27 (3) is to be achieved, the particular provision needs to be strengthened and given integrity. Proper time limits need to be set up and legal consequences laid out for those states that fail to comply. This could possibly expedite the process of harmonisation of RTAs in east and southern Africa and pave the way for the convergence of SADC members' external trade policies in preparation for the CU.

Article 27 (2) attempts to shield SADC from any adverse effects that any new trading arrangements entered into by its member states might bring. Member states are obliged to ensure that such new agreements are compatible with the Trade Protocol. Just how effective this provision is, can be observed through the EPA lens. Despite the existence of this provision, SADC has been split down the middle and members are negotiating with the EU in four different configurations, each with a different negotiating strategy. This is not consistent with the provision.

The application of the MFN treatment is regulated by Article 28 of the Trade Protocol. Paragraph 2 of the Article allows for the granting or maintaining of preferential trade arrangements with trade countries provided that any advantage, concession, privilege or power granted to such third countries is extended to SADC member states.[82] While this provision could dissuade countries from entering into further extraneous trade arrangements as they would have to extend whatever preferences they grant, Article 28 (3) counteracts this by further reinforcing the deference to all trade arrangements that predate the SADC Trade Protocol. In terms of this paragraph, SADC member states are not obliged to extend

[82] Article 28 (2) of SADC Trade Protocol.

preferences granted in terms of their membership of other RTAs if those RTAs predate the Trade Protocol.[83] The only way in which this provision can support the Trade Protocol's objectives would be for it to be read in conjunction with Article 27 (3) of the Trade Protocol. Otherwise this provision should have been qualified so as to find application only in the interim period pending review of RTA memberships by SADC member states.

5.7 Possible RTA Options for East and Southern Africa

In making hard choices for sustaining regional trade integration projects, a few options have been put forward for the east and southern Africa. Jakobeit *et al* highlight three possible options:[84]

- "Option 1 – Status quo option and larger integration project between COMESA and SADC: SACU and EAC remain fast-tracking groups and only comprise of their current members, while SADC and COMESA remain FTAs for the time being with a view to form a larger Eastern and Southern Africa trade zone at a later stage.
- Option 2 – Variable geometry option or SACU+ and EAC+ option: Enlarged SACU and EAC become fully functioning (not just partial) CUs by 2008, and countries not participating in the CUs remain members of SADC and /or COMESA FTA.
- Option3 – Keep forward option: SADC and COMESA become CUs by 2010/2008 and will merge with the current SACU band EAC respectively. All countries take a decision regarding their membership in either the SADC or COMESA CU."

5.7.1 Option 1

As Jakobeit *et al* explain, the status quo option would imply new integration agendas for both COMESA and SADC. Instead of pursuing their trade integration agenda as per set timetables, i.e. CUs by 2010 and 2008 for SADC and COMESA respectively, the two groups remain FTAs and the current CUs, SACU and EAC, would serve as fast-tracking groups that set standards in various areas of economic integration. COMESA and SADC adopt common

[83] Article 28 (3) of SADC Trade Protocol.
[84] Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 145.

trade policies and operate under a more effective regional integration mechanisms. Both COMESA and SADC have been overly ambitious in their trade integration plans and this option is realistic on the readiness of the region for deep integration.[85] However, this effectively means that COMESA and SADC are slowed down in their trade integration targets. While COMESA has always followed a trade-based regional integration agenda from its inception, SADC has had a development approach to integration.[86] Consequently, trade integration is a relatively new area for SADC while it is more basic in COMESA. This conflict in modalities could result in the stagnation of trade integration plans for SADC. A possibility exists that if this option is taken up, then the SADC FTA might just be abandoned. Also, for COMESA and SADC to adopt a common trade policy presupposes a certain level of political cohesion that currently does not exist among the countries.[87]

EPA negotiations under this option would be negotiated on the basis of two regional groups: the current SACU and the rest of the COMESA, SADC and EAC countries. The non-SACU countries would not be able to offer a single trade regime because of their wide numbers and different RTA backgrounds. This would negate their bargaining power when they fail to reach agreement among themselves and it creates more room for disagreement. This option could be improved by maintaining the status quo only in terms of the RTAs in existence, with some changes to the memberships. In all probability, SACU countries would withdraw from SADC; SADC countries would leave COMESA; and EAC countries would pull out of both SADC and COMESA. The EPA negotiations would then follow the four configurations, with more rationalised membership. While this would stretch the negotiating capacity of the EU and possibly negate the gains that it has made thus far within the current negotiating configurations, it would be more beneficial in the long run and the unacceptable overlaps are eliminated.

5.7.2 Option 2

This option would see an increased SACU and EAC membership with those countries falling outside these RTAs remaining in a SADC or COMESA FTA with the possibility of forming a future SADC and/or COMESA CU. Trade arrangements would also be entered into between

[85] Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 27.
[86] Kritzinger-van Niekerk and Moreira "Regional Integration in Southern Africa".
[87] It is not totally impossible though.

the resultant trade blocs or countries could become associate members of the RTAs. The variable geometry offered presents opportunities for countries to join CUs only when they have reached the appropriate capacity to do so. The possibility of a SADC or COMESA CU remains open to cater for countries that would not be willing to accede to a CU whose internal and external trade policies have already been set without their input.[88] Draper *et al* strongly support the idea of variable geometry with SACU and EAC at the core. In their view, the degree of integration already achieved in these two CU justifies such a proposition. In fast-tracking the integration process in SADC and/or COMESA, SACU would absorb members from SADC while EAC would absorb members from COMESA. SACU would have to convince the "COMESA" SADC members, especially Zimbabwe, Zambia, Malawi, Mozambique and possibly Tanzania, to accede to it.[89]

The only difficulty with variable geometry in the integration process is that when adopting set CETs in the CUs they accede to, countries cannot renegotiate such CETs for the benefit of members coming in and, in any case, the CET cannot be raised. Accession to a CU also means adopting that CU's trade agreements with third parties as well as abiding by the provisions therein. Nevertheless, this option does have its attractions: SACU boasts a large and diversified market for SADC exports and it has sources of funding in the regional development banks (the Southern African Development Bank and the Industrial Development Corporation) as well as the South African subsidized revenue sharing formula.[90] On the other hand, EAC is fast-tracking its trade integration project and has set the goal of attaining a Common Market by 2010. An accession procedure was set up in anticipation of future expanded membership to ensure compliance with EAC policies and regulations by new members. Unlike SACU, whose Secretariat is yet to be firmly established, the EAC Secretariat is fully functioning and well equipped to oversee and monitor the trade integration process.[91]

However, if this particular option is adopted, the challenge will be to ensure that the countries that remain outside the expanded CU do not abandon deeper integration plans in SADC or

[88] Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 147. Considering the length of negotiations made on the SADC tariff offers for the FTA, the length and direction of EPA negotiations and the importance attached to sovereignty by African countries, it is possible that the countries that do not accede to SACU or EAC immediately would opt for creating a SADC or COMESA CU.
[89] Draper *et al* "From Spaghetti to Cannelloni?" 26.
[90] Draper *et al* "From Spaghetti to Cannelloni?" 19.
[91] Draper *et al* "From Spaghetti to Cannelloni?" 27.

COMESA.[92] Such deeper integration is likely to be postponed with a view to acceding to the CUs and then countries discover when they attempt such accession, that they are not satisfied with the CU's policies. A particular, critical challenge would be the accession of SADC to SACU, which would need to be sensitively managed. The political history of South Africa *vis-à-vis* the region and its political and economical dominance, compounded by the fact that South Africa controlled policymaking in SACU until 2002 when the new SACU Agreement was signed, makes countries wary of being part of SACU. SADC countries are thus justifiably apprehensive of joining SACU.

On EPA negotiations, SACU would renegotiate the EU-SA TDCA to accommodate the BLNS countries as well as the new entrants to SACU. The ESA group would negotiate differentiated tariff phase-downs: one for the EAC and its new members and individual tariff phase-downs for the rest of the ESA members.[93] This would make the EPA negotiations more complicated for EAC and it is suggested that EPA negotiations would be better served by having the EAC+ group split from the bigger ESA group. This has already happened. Kenya, Uganda, Rwanda and Burundi split from ESA and Tanzania split from SADC so they could negotiate an EAC EPA. Since the EAC group has been taken out of ESA, the remaining countries will then negotiate their own EPA. The remaining countries' membership of either SADC or COMESA would not pose a problem because these countries would most likely all be members of COMESA and be currently negotiating with the ESA group.

5.7.3 Option 3

Option 3 allows SADC and COMESA to proceed with their trade integration plans as scheduled and then merge with SACU and EAC.[94] Countries will inevitably have to decide on RTAs to adopt when SADC and COMESA CU come to fruition because they cannot be members of more than two CU. The mergers will serve to prevent fragmentation in the regional integration process. It is however doubtful that either SADC or COMESA will be able to reach their CU targets on the dates they have set for themselves. Postponement of the

[92] Jacobeit *et al* "Overlapping membership in COMESA, SACU and SADC" 148.
[93] Jacobeit *et al* "Overlapping membership in COMESA, SACU and SADC" 149. This suggestion only makes sense when one considers the current RTA dynamics as well as the country composition of the EPA negotiating groups.
[94] SADC will merge with SACU while COMESA will merge with the EAC.

target dates would therefore be necessary.[95] With the postponement of CU plans, SADC and COMESA have the opportunity to build on "perfect" FTAs; to consolidate regional infrastructural development; to improve services provision; to improve trade facilitation measures and to implement policies that nurture economic development and integration. If specific issues that constrain the further development of an FTA and integration within that framework are dealt with, then concluding a CU would be more appropriate. Mechanisms would need to be put in place to compensate for the revenue lost in trade liberalisation and to prevent the effects of trade polarisation.

This option makes for the best EPA configurations, both geographically and trade wise, and it is submitted that this is also the best option for dealing with overlapping membership. Seeing as the EPA negotiations are underway already, with agreements having been reached on trade in goods, the option could be made to work from the top down. South Africa and the EU would have to iron out their differences to enable South Africa to initial the SADC EPA, while the DRC has to decide on whether it should leave both SADC and COMESA to join CEMAC. Countries with double membership in SADC and COMESA would have to revisit their EPA configurations as the EPAs will determine which CU they join.

The current SADC EPA configuration does not make much sense. It is more identifiable with SACU than with SADC. In that sense, Angola and Mozambique have no business partnering up with SACU in the EPA negotiations. As it is, they have to settle for a renegotiated TDCA for an EPA.[96] It could have been different if all the SADC-COMESA countries with strategic and economic interests in SADC had chosen to negotiate with the SADC EPA group.[97] SADC countries negotiating under the ESA group and who would be better served negotiating under the SADC group, should consider withdrawing from ESA. EPA negotiations entail a CET for all negotiating groups *vis-à-vis* the EU and, once the CET is locked in, it would be particularly impossible to harmonise that CET on a SADC level if the SADC-COMESA countries maintain the current ESA EPA configurations.[98] Maintaining the

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[95] Jacobeit *et al* "Overlapping Membership in COMESA, SACU and SADC" 151.

[96] It is not known how the EPA would have been approached had all the SADC members decided to negotiate under SADC. It would have been easier, though, for the SADC countries to sanction the use of the TDCA as an EPA template for SADC. The composition of the SADC EPA group makes it more logical to renegotiate the TDCA instead, especially considering that it applies *de facto* to the BLNS countries.

[97] This is particularly true of countries such as Zimbabwe to whom South Africa is an important trading partner as well as export destination (Draper *et al* "From Spaghetti to Cannelloni?" 19).

[98] Article 6:1 of the draft ESA EPA states that "This agreement shall not preclude the maintenance of customs union, free trade areas or other arrangements ... in so far as they do not alter the rights and obligations provided

current EPA configurations weakens the prospects of a consistent SADC integration strategy. The EU-SA TDCA could be panel-beat and renegotiated to accommodate all the other SADC states. South Africa's experience with negotiating the TDCA could come in handy for SADC. There is therefore a strong case for reconsidering the EPA groupings and negotiating from a strictly SADC or COMESA position and thus simultaneously eliminating the overlap problem. When the neat and separate SADC and COMESA groups have been achieved and they have entered into CU, the idea of an FTA between the two groups could be explored. Countries that would have withdrawn from COMESA could still benefit from COMESA preferences without necessarily being members of COMESA. Having two CUs that have an FTA between them will lessen the administrative burden and complexities that come with overlapping membership and would serve to promote deep integration.

5.8 The Plan: One Big Happy Family

SADC, EAC and COMESA have now endorsed a plan to merge into a single trading bloc and create an FTA. Plans for the merger were agreed upon at a meeting convened in Namibia during the month of September 2008[99] and the agreement was signed off at a special tripartite summit that was held in Uganda in October 2008.[100] Successfully implemented, this will create an FTA of 26 countries. The tripartite summit directed the three trading blocs to create a legal and institutional framework for the establishment of the FTA within the next six months.[101] These 26 countries, representing members of SADC, EAC and COMESA, have a combined population of 527 million people, a combined GDP of US$624bn and a combined average GDP per capita of US$1 184.[102] This will provide access to a larger market for all these countries. Some of the benefits of this move include an opportunity to improve the region's competitiveness both regionally and globally, a harmonised regulatory reform, and

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for in this agreement." The implication of this agreement is that it will be impossible for ESA countries to reverse the CET *vis-à-vis* the EU when entering into a SADC CU (Meyn *Monitoring Regional Integration in Southern Africa* 161).

[99] "Small Nations Fear Economic Integration" *The East African* 31 October 2008 http://www.givengain.com/cgi_bin/giga.cgi?cmd=cause_dir_news_item&news_id=55206&search=&cause_id=1694 (accessed 10 November 2008).

[100] T Hartzenberg "Linking up Africa" *Financial Mail* 31 October 2008 http://free.financialmail.co.za/08/1031/opinion/bopinion.htm (accessed 10 November 2008).

[101] "Small Nations Fear Economic Integration" *The East African* 31 October 2008 http://www.givengain.com/cgi_bin/giga.cgi?cmd=cause_dir_news_item&news_id=55206&search=&cause_id=1694 (accessed 10 November 2008).

[102] "EAC, SADC, COMESA Seek to Merge" *Panapress – The African Perspective* 18 October 2008 http://www.panapress.com/freenews.asp?code=eng001117&dte=18/10/2008 (accessed 10 November 2008).

the improvement of barriers to trade such as poor transportation infrastructure, complex customs procedures, poor services and regulatory barriers.[103] The merger will also enhance co-operation among all 26 countries, reduce the costs of doing business and move the continent closer to realising the African Economic Community.[104]

However, there a few concerns that need to be considered. The biggest challenge will be in ensuring that the tripartite summit does not degenerate into a mere talk-shop and that the agreement is actually implemented.[105] This calls for a strong political will from all 26 countries involved. Already, there are reports that the less developed countries are wary of integrating in this manner.[106] Also, the same concerns that apply to the creation of a SADC FTA would apply to this proposed FTA. The countries involved are diverse in terms of economic and structural development as well as cultural affinity. COMESA stretches as far as Egypt and it would be difficult to find commonalities between, for example, Egypt and Zimbabwe. One of the greatest strengths that SADC has is the political and cultural affinity as well as a common history among most of the states involved. Diluting this common bond would not augur well for integration. Despite the commonalities, SADC had massive problems in finding common ground on rules of origin and finding agreement on rules of origin for all 26 countries will not be easy. In addition, these countries have pre-existing rules, protocols and activities as agreed to in their respective RTAs which would need to be harmonised. It will be difficult also to monitor and enforce whatever rules are put up by this new trading bloc. There are also questions on the kind of compensatory mechanisms that would be put in place to avoid countries like South Africa, Kenya and Egypt accruing all the benefits. The polarisation of benefits of the FTA is a concern in SADC, it was also a concern in EAC, and hence the asymmetric tariff reduction that was employed in both RTAs.

Another issue of concern is the dependence on trade taxes for government revenue by most countries in this region. A further reduction on tariffs as a consequence of the proposed FTA

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[103] T Hartzenberg "Linking up Africa" *Financial Mail* 31 October 2008 http://free.financialmail.co.za/08/1031/opinion/bopinion.htm (accessed 10 November 2008).
[104] "COMESA agrees to economic amalgamation with Southern Africa" *Business Daily (Nairobi)* 29 September 2008 http://www.tralac.org/cgi- bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=53425&cat_id =1051 (accessed 10 November 2008).
[105] T Hartzenberg "Linking up Africa" *Financial Mail* 31 October 2008 http://free.financialmail.co.za/08/1031/opinion/bopinion.htm (accessed 10 November 2008).
[106] "Small Nations Fear Economic Integration" *The East African* 31 October 2008 http://www.givengain.com/cgi_bin/giga.cgi?cmd=cause_dir_news_item&news_id=55206&search=&cause_id=1694 (accessed 10 November 2008).

would possibly mean that countries resort to non-tariff barriers to mitigate the effects of the revenue gap that they would experience from further liberalisation. Even then, there is also a need to ensure that liberalisation itself yields benefits.[107] A United Nations Conference on Trade and Development (UNCTAD) report has revealed that trade liberalisation reforms in Kenya and other African countries have weakened the trade balance within the African continent, instead of boosting export performance.[108] The report blames this on the tariff cuts which reduce the preference margins given to other African countries and reduce incentives for intra-regional trade. Whatever framework is created for the implementation of this FTA, it should take into consideration the EPAs that are being negotiated with the EU by these RTAs. EPA negotiations have resulted in the fragmentation of SADC, with members negotiating in four different configurations. This means four different agreements with the EU within SADC alone. Harmonisation of the EPA negotiations as well as of the Interim Agreements already signed should be one of the priorities of the FTA. This will pose a huge challenge, however, the negotiations have been long and protracted and agreements hard to reach among groups of a lesser number of countries. Reaching agreement among 26 countries will be a very complex process. Reaching consensus and achieving harmonisation would essentially be a renegotiation of a new EPA involving all 26 countries. This would require further resources which most of the countries in the region do not have.

While this is clearly an ambitious goal for east and southern Africa, the benefits of which would be enormous, the challenges are proportionally huge. At present the idea is still in its infancy and it remains to be seen how the developments in this arena will unfold. One thing is certain though: a free trade area among these trading blocs would resolve the current problem of overlapping membership of regional trading blocs in east and southern Africa.

5.9 Conclusion

Currently, the biggest threat to the institution of SADC and its regional integration agenda has been the negotiation of EPAs with the EU. The SADC EPA grouping is technically a SACU grouping. The EPA negotiations for this group have basically been a renegotiation of

[107] "COMESA agrees to economic amalgamation with Southern Africa" *Business Daily (Nairobi)* 29 September 2008 http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=53425&cat_id=1051 (accessed 10 November 2008).
[108] *Ibid.*

the EU-SA TDCA to accommodate the needs of the BLNS countries and the other SADC countries in the group who are of developing country status. The EPA threat is compounded by overlapping membership where SADC countries are also part of the other RTAs in the southern African region. As such, when the time came to choose EPA negotiation groupings, SADC found itself split, with members negotiating as part of four different configurations – SADC, COMESA, EAC and CEMAC. Of the greatest concern are the countries that are negotiating with COMESA. Once tariffs are locked *vis-à-vis* the EU, it will make it even more difficult than it already is for SADC countries to negotiate and enter into a CU. It remains to be seen how the SADC FTA will be made to work in the face of the EPA "challenge".

In essence there is no SADC EPA, because, the SADC EPA is technically a SACU EPA. This begs the question: whither SADC after the FTA and after the EPAs? This question cannot be answered without an understanding of the objectives and dynamics that shape the other RTAs in the east and southern African region. The EAC does not really warrant discussion in the above context because only one member, Tanzania, is a member of SADC and its trade patterns are in any way biased towards those of its EAC partners.[109] As for SACU and COMESA, their original objectives were rooted in trade, looking to achieve the benefits of trade liberalisation solely from trade. SACU has been in existence the longest in the continent and, whatever the differences that might arise among the members, the chances of SACU being eclipsed at any point by either SADC or COMESA, while possible, are minute. COMESA is the largest trading bloc in Africa with a membership that is close to half the countries in the continent. It most likely cannot be eclipsed by SADC and nor will the withdrawal of SADC members from it damage its trade integration prospects severely.

The prospect of SACU absorbing SADC countries and becoming the core of the SADC CU has been mooted.[110] If the EPA negotiations do indeed extinguish SADC as a trade bloc, joining SACU is the most probable option for Mozambique and Angola.[111] Such solution would cover for SADC's inherent challenges as regards economic integration.

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[109] C Ng'ong'ola "Regional Integration and Trade Liberalisation in the Southern African Development Community" (2000) *Journal of International Economic Law* 485 at 503.

[110] P Draper, D Halleson and P Alves "From Spaghetti to Cannelloni? SACU, Regional Integration and the Overlap Issue in Southern Africa" (2007) Trade Policy Report 15. South African Institute of International Affairs (SAIIA) 17-19.

[111] As the countries that are at the moment negotiating EPAs with the SADC group. The same would apply to the SADC members that pull out of COMESA and, highly unlikely, pull out of the EAC.

While there is certainly some logic in this, the dynamics currently playing out in SACU do not allow it to carry SADC's trade agenda. SACU is regarded as an apartheid relic that represents South Africa's dominance by some SADC countries.[112] SADC countries are generally wary of South Africa with its political and economic dominance and, while being financially underwritten through the revenue sharing formula might be attractive, SADC countries are not keen on any arrangement that might create financial dependence on South Africa. On the same issue, there are concerns about South Africa's ability to underwrite any new entrants to SACU.[113] In an analysis of a few countries whose trade bloc inclinations have a bearing on the future course of SACU and therefore South Africa, Draper *et al* have found the following:[114]

a) Although Angola is better suited to Western and Central Africa, it would most likely want to retain its SADC membership so as to have access to the southern African region and preserve a potential market for its future exports;
b) Zimbabwe's decisions, especially under the leadership of Mugabe, have so far been based on political alliances and Zimbabwe would be keen to retain its SADC membership as it has the most political support there;
c) While Malawian business would prefer COMESA, the government is inclined towards SADC;
d) Mozambique is the only SADC member without dual membership of RTAS and its inclinations are definitely towards SADC, although, given the level of political and economic cooperation between Mozambique and South Africa, the possibility of Mozambique joining SACU would not be too farfetched;
e) Zambia is difficult to place as it has significant interests in retaining both its SADC and COMESA memberships;
f) Tanzania could go either with the EAC or SADC but it would be in its best interest to stick with EAC.

Additionally, the South African Treasury is reportedly tiring of and reluctant to sustain its current transfer payments to BLNS countries, while Botswana, the only BLNS country not part of the Rand Monetary Area, is tiring of South Africa's dominance and has interests in

[112] Dr M Masiiwa "RECs in Eastern and Southern Africa: Attractive aspects for Zimbabwe" (March 2007) SAIIA Trade Policy Briefing No 14.
[113] Draper *et al* "From Spaghetti to Cannelloni?" 17-19.
[114] *Ibid.*

seeing the success of SADC as a means of counteracting the dominance of South Africa in SACU.[115]

Despite the indications of the EPA configurations, countries still have an interest in retaining their membership of SADC. It is the view here that regional bloc configurations in east and southern Africa are still very much a political process where political concerns take precedence over economic rationale.

[115] Draper *et al* "From Spaghetti to Cannelloni?" 26.

CHAPTER SIX

SOUTH AFRICA AND SADC

6.1 Introduction

Mapping the way forward for SADC is certainly not an easy task; it is replete with uncertainties and mixed possibilities. An FTA has been declared but progression to a CU in 2010 as planned will not be an automatic occurrence because of other considerations such as divergent trade policies, lack of trade capacities and efficient services, political bickering and, currently, the split brought about by the EPA negotiations. This is to mention but a few of the hurdles that SADC continues to face in its quest for deeper integration within WTO approved framework. This chapter discusses the impact of the EPAs on SADC. The role of South Africa as the economic powerhouse, its policies and decisions, as well as the policies of the key states in the SADC region, will be considered; and how it shapes and contributes to regional integration and more importantly, the future of SADC.

6.2 The EPA Negotiations and the Split in SADC

The current EU-ACP EPA negotiations have left SADC fractured. On the one hand, one finds Madagascar, Malawi, Mauritius, Zambia and Zimbabwe negotiating with the Eastern and Southern Africa (ESA) configuration, while, on the other hand, Angola, Botswana, Lesotho, Mozambique, Swaziland and South Africa are negotiating as the SADC EPA configuration. The Democratic Republic of Congo started off negotiating with ESA, but withdrew in 2005 to join the Economic and Monetary Community of Central Africa (CEMAC) EPA, of which it is not even a member.[1] Tanzania withdrew from the SADC EPA group in November 2007

[1] M Meyn "Regional Integration and EPA configuration in southern and eastern Africa. What are the reasonable alternatives?" in A Bosl, W Breytenbech, T Hartzenberg, C McCarthy and K Schade (eds) in *Monitoring Regional Integration in Southern Africa* (2006) 145.

and is now negotiating with the EAC EPA configuration which was formed in the same month.[2]

It is reported that the split in SADC was preceded by acrimonious debate[3] and various theories have been articulated as to the cause for the split. According to Bertelsmann-Scott, South Africa has been saddled with the most blame and most of it stems from the EU-SA TDCA. Even though at the time the negotiations started, South Africa was only going to be an observer and play an advisory role to its SADC counterparts, it was feared that since the TDCA applied *de facto* to the BLNS states through the SACU CET, South Africa would use the EPA negotiations to renegotiate the TDCA and secure further benefits from it. With the other countries unwilling to negotiate an EPA using the TDCA as a blueprint, South Africa would be able to influence the smaller group of countries in the SADC EPA grouping.[4] Oosthuizen echoes the TDCA issue and elaborates that SADC states were wary of "domineering SA and the unavoidable effects of the TDCA".[5] Other possibilities are that perhaps the SADC members in the ESA EPA group trade more with ESA countries than they do with SADC or that the EU, apprehensive of a powerful group with more bargaining power, coordinated the split.[6]

Of all the reasons conceived, the TDCA reason seems most plausible. The South African decision to negotiate a TDCA with the EU clearly played a fundamental role in the split of SADC with regard to the EPA negotiating configuration. There are, in all possibility, other significant reasons for the decisions of SADC countries that chose to negotiate under ESA, but popular sentiment fingers the TDCA. In signing the TDCA, South Africa undermined the SADC Trade Protocol. The Trade Protocol was signed in 1996 and entered into force in 2000. In the interim period between signing and entry, although it is not a legal obligation, one would expect countries to exercise good faith and implement policies and decisions that would further the objectives of the Trade Protocol if they intend signing. Article 27 of the Trade Protocol provides that countries may only enter into trade arrangements with third

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[2] "Tanzania – We're negotiating EPA under EAC says Bargainer" *The Citizen (Dar es Salaam)* 18 December 2007 http://allafrica.com/stories/200712180749.html (accessed 28 March 2008).
[3] GH Oosthuizen *The Southern African Development Community. The Organisation, its Policies and Prospects* (2006) 268.
[4] T Bertelsmann-Scott "The Impact of Economic Partnership Agreement Negotiations on Southern Africa" in P Draper (ed) *Reconfiguring the Compass, South Africa's African Trade Diplomacy* (2005) 128.
[5] Oosthuizen *Southern African Development Community* 268.
[6] *Ibid.*

countries if such trade arrangements are compatible with the aims and objectives of the Trade Protocol. South Africa was also forcing the BLNS states into an agreement they had not negotiated since they are in a CU that has a Common External Tariff (CET). In as much as the TDCA applied *de facto* to the BLNS countries, its existence also implied a *de facto* blueprint for the SADC EPA negotiations. Inevitably, SADC countries would be forced to negotiate the EPA within the TDCA framework and negotiate the accommodation of developing and least developed countries into the TDCA.

In 2005, before South Africa was formally admitted into the SADC EPA group, the South African Minister of Finance, Trevor Manuel, expressed concern that the exclusion of South Africa from the SADC EPA configuration would undermine regional integration in southern Africa. His argument was that the resultant EPA would be different to the TDCA and thus threaten the SACU CET. The only viable solution would be the inclusion of South Africa in the SADC EPA configuration.[7] The point here is not to argue the merits or demerits of using the TDCA as a benchmark for the SADC EPA, but rather to single out the politics it evokes and the implications on regional integration in SADC.[8]

The SADC strategic EPA position had a two-pronged approach whereby South Africa and the BLNS states would renegotiate the TDCA and the non-SACU countries would sign the EPA based on contractually binding duty-free and quota-free access.[9] This effectively takes away the possibility of the SADC EPA having a uniform CET for all SADC member states. While the wisdom of such an approach is understandable and it is easy to appreciate the legalities concerned, particularly with regards to Article 31 of the new SACU Agreement,[10] it cannot strictly be called a "SADC" group. It is rightfully a SACU+ group. It cannot be emphasised enough that SADC members in ESA need to pull out of ESA and negotiate with SADC. If that cannot be achieved, then Mozambique and Angola should perhaps consider

[7] These are sentiments expressed at the Economic Society of South Africa Conference in 2005 (H McLeod "Integrating Africa through a SACU and COMESA FTA – Speeding up the Regional Integration Process" (2007)38 *Trade and Industry Monitor* 5).

[8] On the advantages and disadvantages of the EU – SA TDCA for the SADC region see T Bertelsmann-Scott and P Draper "The TDCA: Perspectives for EU – South and Southern Africa relations" in SAIIA (Jan – Feb 2005) 4 *Trade Negotiation Insights from Doha to Cancun* and M C Lee "The European Union – South Africa Free Trade Agreement: In Whose Interest?" (2002) 20 *Journal of Contemporary African Studies.*

[9] McLeod *Trade and Industry Monitor* 5.

[10] Article 31 of the new SACU agreement calls for approval by all SACU members of all trade agreements entered into by any SACU member with third countries.

either joining ESA or negotiating as individuals.[11] Before the accession, SADC EPA states, true to the SADC tradition of sector co-operation, had allocated to each other specific negotiation coordination responsibilities.[12] The overall coordinating and preparation of the official negotiation position of the SADC EPA group was made the responsibility of Botswana, who would also get support from the SADC Secretariat.[13] There are three levels of negotiation: the member state level; the regional level; and the highest level of senior officials, comprising of Permanent Secretaries of the Ministries of Trade and Industry and the EU negotiators.[14] Kruger contends, however, that despite this elaborate negotiating structure, the whole negotiating process is controlled by political supremacy. This begs the question of South Africa's role in the negotiating process, with the idea that since South Africa's accession to the group, the original strategic negotiating framework was no longer feasible. With its negotiating experience, its developed country status, and its lack of the negotiating capacity constraints found in other SADC countries, South Africa is well suited for and would most likely demand or position itself as, the leader of the group.[15] This might also explain why other SADC countries opted for the ESA grouping and again points to the injudicious nature of the South African decision to sign a TDCA with the EU.

An interim SADC EPA has since been signed with the EU. Not all SADC EPA countries have signed it, however. Only Botswana, Lesotho, Swaziland, Mozambique and Tanzania have signed. Angola, reported to be keen to sign, is still considering and South Africa will in the meantime continue to trade under the TDCA.[16] The agreement only covers trade in goods and the idea was that, given the December 2007 deadline, the partial EPA would put the SADC-EU relationship on a firm legal footing with the WTO. Discussions on services and investment will continue throughout 2008 and the deadline for "full" EPAs is now the 31

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[11] This is more so in the case of Angola seeing as Mozambique is the only country in the SADC region without dual membership in RTAs. Also, the economic and political cooperation between Mozambique and South Africa is well documented (C Alden and M Soko "South Africa's economic relations with Africa: Hegemony and its Discontents" (2005) 43 *Journal of Modern African Studies* 367 at 375).

[12] Angola dealt with agriculture and fisheries, Botswana dealt with SPS and standards, Lesotho with rules of origin, legal provisions, institutional arrangements and database, Mozambique with non-agricultural market access, Namibia dealt with trade facilitation and development cooperation while Swaziland dealt with trade related issues and trade related investment measures. Tanzania, the erstwhile SADC EPA member, dealt with trade in services and the Singapore issues. (Oosthuizen *Southern African Development Community* 270).

[13] Oosthuizen *Southern African Development Community* 270.

[14] P Kruger "The Negotiating Structure of the EPA Negotiations" http://www.tralac.org/scripts/content.php?id=6263 (accessed 28 March 2008).

[15] *Ibid.*

[16] Trade Policy in Practice; Global Europe "Update: Interim Economic Partnership Agreement" http://fesportal.fes.de/pls/portal30/docs/folder/cotonou/downloads/official/acpeu/interim_agreements_11dezember2007.pdf (accessed 3 April 2008).

December 2008.[17] The interim EPA agreed on a Schedule of Trade in Goods, but the EU insisted on a commitment to negotiate the reciprocal liberalisation of trade in services within four years of signing the interim EPA, as well as a commitment to negotiate binding agreements on investment. In addition, the interim EPA comes with arduous customs procedures that exceed WTO provisions because the EU sought to protect itself from multiple duty payment. There is also a requirement to eliminate export taxes which would disrupt the minerals beneficiation strategies of SADC countries, and an MFN clause that requires the extension to the EU of all favourable treatment accorded to all third parties with more than 1% of world trade.[18] In an update given by the EU, the agreement allows for,

> " ... 100% liberalisation by value by the EU as of 1 January 2008 (with transition periods for rice and sugar) and 86% liberalisation by value by Botswana, Lesotho and Swaziland. For about 44 sensitive tariff lines, liberalisation is envisaged by 2015. Three further lines will not be liberalised until 2018. The tariff offer from Mozambique covers 80,5% of trade, most of which is liberalised at entry into force. Some 100 additional tariff lines will be liberalised by 2018. Exclusions focus on agricultural goods and some processed agricultural goods, and are based chiefly on the need to protect infant industries or sensitive products in these countries. A Development Cooperation Charter has been included which covers cooperation on trade in goods, supply-side competitiveness, business-enhancing infrastructure, trade in services, trade related issues, institutional capacity building and fiscal adjustment. Parties agreed to negotiate on competition and Government procurement only when adequate capacity has been built."[19]

Meyn has identified four main pitfalls of the EPA negotiation process: differing interpretations of the development component; lack of improved market access; failure to agree on "WTO plus" commitments; and a failure by the EU to apply the regional component of EPAs.[20]

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[17] Trade Policy in Practice "*Interim Economic Partnership Agreement*".
[18] "Briefing Notes on EPA Negotiations" Presentation to Joint Foreign Affairs and Trade and Industry Hearings 27 February 2008 www.thedti.gov.za/parliamentary/epa.pdf (accessed 28 March 2008).
[19] Trade Policy in Practice "*Interim Economic Partnership Agreement*".
[20] Meyn "Economic Partnership Agreements". The rest of the discussion draws heavily on this article.

Although the EPA comes with a development component, both ACP and EU had different interpretations and expectations. To overcome the chronic supply-side constraints and to ensure product diversification, ACP countries wanted trade liberalisation to be concomitant with development aid. That way there would be no apprehension as to the effects of trade liberalisation, as aid would be guaranteed. The EU, on the other hand, has argued for a separation of EPA negotiations and talks on development aid on the basis that funding has been made available under the 10th European Development Fund for implementation of the EPAs. This EDF funding is limited to 2013, while the implementation of the EPAs will extend beyond 2013 and the full effects of trade liberalisation will only be felt thereafter. The EU's argument is thus unacceptable in that context and amounts to a repudiation on its commitment under the Cotonou Agreement.

On the issue of market access, the EU's offer is considered insufficient. The duty-free and quota-free access offer by the EU was cemented by the enforcement of a Regulation allowing such access as from 1 January 2008. This offers legal certainty to SADC exporters and effectively preserves the market for them.[21] However, this is still insufficient. Rice and sugar exports from ACP countries continue to be restricted for up to seven years. Article 37 (9) of the Cotonou Agreement provides for the use of less stringent rules of origin but the value-added thresholds used in the current rules of origin are much higher than what is normally achieved by ACP countries. The rules of origin as incorporated in EPAs shall be replaced by a new regime within the next 3 to 5 years, "with a view to further simplifying the concepts and methods in the light of developmental needs".[22] This is a rather ambiguous provision whose implementation is not even definite. As for services, only two regions in ACP were willing to negotiate and include services in the EPAs while the rest were reluctant to make binding commitments on the issue. Concerns were also registered by ACP countries over the EU's insistence on discussing binding commitments for public procurement, investment and capital movement, competition policy and intellectual property rights; the new generation issues in the WTO. This constitutes the biggest source of disagreement between the EU and South Africa and because of this, South Africa decided not to initial the interim SADC

[21] G Erasmus "The Interim SADC EPA Agreement, Legal and Technical Issues and Challenges" http://www.tralac.org (accessed 3 April 2008).
[22] As stated in the CARIFORUM EPA Part 11, Title 1, Article 2. (Meyn *Economic Partnership Agreements* 3).

EPA.[23] Agreement on the Singapore issues[24] is not necessary to make the EPAs WTO compatible; they would still be compatible with agreement having been reached on trade in goods only. Making binding commitments on the Singapore issues renders the ACP countries prey to making concessions they would otherwise not have made within the WTO context since no decision has as yet been reached on "Special and Differential Treatment" in relation to new generation issues.[25]

Finally, EPAs are supposed to assist with the ACP regional integration agenda, with economic and trade cooperation building on "regional integration initiatives of ACP states, bearing in mind that regional integration is a key instrument for the integration of ACP states into the world economy".[26] Meyn argues that the EU pressured ACP countries into submitting uniform regional liberalisation offers which, at a minimum, requires countries to have agreed on a common external tariff. This is completely at odds with the provision in the Cotonou Agreement that EPAs shall be negotiated with regions, "which consider themselves in a position to do so *at the level they consider appropriate*".[27] When the EPA negotiations were initiated in 2004, only three regions, SACU, EAC and the West African Economic and Monetary Union (UEMOA), had established or were establishing a CU. The EPA configurations totally ignored this factor however, and distorted the existent regional configurations by either incorporating non-members into existing regional groups or merging sub-regions to create larger entities, as was the case with SACU being incorporated into SADC and EAC into the ESA group.[28] Although, to be fair, the position of SADC and SACU *vis-à-vis* each other is very uncertain. Also, with the exception of the Caribbean, no region was sufficiently integrated to enable it to negotiate collectively.[29] The interim EPAs have further complicated an otherwise complex web of economic integration agreements and, if anything, will inhibit any further regional integration in the short to medium term. Most

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[23] "EU-SADC EPA: Frustration between EU and SA boils to the surface as trade deadline looms" *Engineering News* (South Africa) 29 August 2007 http://www.bilaterals.org/article.php3?id_article=9512&var_recherche=EU (accessed 3 April 2008).

[24] These issues are called the "Singapore issues" because they are the subject matter of the four working groups that were set up during the 1996 Singapore Ministerial Meeting. These issues are trade and investment, competition policy, transparency in government procurement and trade facilitation (WTO "Understanding the WTO: Cross-cutting and New Issues – Investment, Competition, Procurement, Simpler Procedures" http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm (accessed 11 November 2008)).

[25] Bertelsmann-Scott *South Africa's African Trade Diplomacy* 117.

[26] Article 35: 2 of the Cotonou Agreement. (Oosthuizen *Southern African Development Community* 158).

[27] Article 37: 5 of the Cotonou Agreement. (Meyn "Economic Partnership Agreements" 4).

[28] The EAC members have since pulled out of both ESA and SADC to create their own EPA configuration. ("EAC To Negotiate EPAs Jointly" http://www.tralac.org/scripts/content.php?id=6629 (accessed 3 April 2008)).

[29] Meyn "Economic Partnership Agreement" 4.

countries are said to have drawn up the trade liberalisation schedules under pressure, for fear of the looming December 2007 deadline and without due regard and consideration of their neighbours' trade liberalisation schedules. The trade liberalisation schedules offered are thus widely divergent and will be hard to reconcile in the long run.[30]

With regard to SADC, it has lost a significant number of its members to the ESA group, with the result that the SADC EPA negotiating configuration is largely a SACU group. Even SACU itself, as part of the SADC EPA group, has not found common ground with regard to the EPA. Botswana, Lesotho, Swaziland and Mozambique were the first to initial the interim EPA, with South Africa and Namibia abstaining for lack of satisfaction with the interim agreement. Namibia later signed the EPA, just before the deadline, but it signed under protest and entered some reservations upon signature,[31] while South Africa to date has not signed. Consequently, South Africa will continue to trade under its TDCA. This situation obviously spells two different CETs within SACU, and, if the SADC countries scattered across the four different EPA negotiating configurations all sign the interim EPAs, then all kinds of different CETs will apply within the region. As reflected by the draft ESA EPA, once a CET has been locked into an EPA, it will be hard, if not impossible, to modify it in pursuance of a uniform SADC CET, unless this is sanctioned by the EU. There is a strong possibility though, that countries moving from one configuration to another will be able to change their external tariff to bring it in line with that agreed upon by the new configuration that they intend adopting. This is reinforced by Article 67 of the interim SADC EPA which provides that negotiations on the EPA will continue into 2008 to extend the scope of the agreement with the states that have signed. The remaining SADC countries that are outside of the EPA will only be allowed to join the negotiation process on a "similar basis".[32] In effect, negotiations on trade in goods have been closed for both the current signatories and prospective entrants to the SADC EPA group. This is despite the fact that some of the countries signed under pressure for fear of losing the EU market.[33]

One question of practical importance relates to the Namibian concerns which were registered upon signature and which are to be addressed during the rest of the negotiations. Does this

[30] *Ibid.*
[31] "Namibia: Interim EPA Agreement Signed" *Namibia Economist (Windhoek)* 14 December 2007 http://allafrica.com/stories/200712140538.html (accessed 3 April 2008).
[32] Erasmus "The Interim SADC EPA Agreement" 6.
[33] It is reported that Namibian exporters of beef and trade groups stood to lose rather important markets had no transitional arrangement been found (Erasmus *The Interim SADC EPA Agreement* 2).

mean that the terms of the interim EPA on trade in goods can be open for renegotiation for the sake of Namibia only, or will these concerns be addressed in the services negotiations, leaving the terms of the trade in goods agreement as is?[34] It is highly likely that the other SADC EPA members share the same concerns as Namibia and will demand a renegotiation of their terms as well, if that is what addressing Namibia's concerns entails.

SADC countries have obviously failed to find a common negotiating position and thus they will always be in a weaker position in all negotiations with the EU. The EU is a major trading partner with most SADC states,[35] mainly due to the preferences they were getting under the Lomé Agreements. The EPAs are supposed to assist with market diversification so as to spur on trade between the SADC countries themselves as well. It seems, though, that the EPA will reinforce current trade patterns where SADC countries export primary products and import secondary products. The EPAs will also consolidate the traditional dependence on the EU market.

The MFN clause in the interim EPA constrains market diversification. Under this clause all preferential treatment afforded to SADC's trading partners who have a more than 1% share of the world market will have to be extended to the EU. Such likely trading partners are China, India and Brazil and the MFN clause will also prevent South-South trade.[36] This is particularly important in view of the fact that trade diversification is one of the major impediments to intra-SADC trade and constrains regional integration. It should follow, therefore, that SADC countries should be allowed to follow any trade avenues that will encourage further industrialisation and promote trade-diversification. By perpetuating the current trade patterns and structures in SADC, the interim EPA only serves to benefit the trade interests of the EU and, in that way, is bad for the region. The effect of the MFN clause can only be counteracted by a development component of Cotonou that involves physical investment to industrialise SADC countries and diversify their production structures.

As for the legal implications of the EPAs *vis-à-vis* the SADC Trade Protocol, SADC members have been totally oblivious to the provisions of the SADC Trade Protocol and

[34] Erasmus "The Interim SADC EPA Agreement" 5.
[35] P Draper, D Halleson and P Alves "From Spaghetti to Cannelloni? SACU, Regional Integration and the Overlap Issue in Southern Africa" (2007) Trade Policy Report 15. South African Institute of International Affairs (SAIIA) 26.
[36] "Briefing Notes on EPA Negotiations".

blatantly violated the provisions. South Africa is currently trading under its TDCA with the EU while Botswana, Lesotho, Namibia, Swaziland, Mozambique and Angola constitute the SADC EPA group. Tanzania was part of the SADC EPA group and then pulled out in favour of an EAC configuration. Madagascar, Malawi, Zambia, Mauritius[37] and Zimbabwe are negotiating with ESA. EU-ACP talks started in 2002 and negotiations kicked off in 2004, long after signature and ratification of the Trade Protocol.

Part 8 of the Trade Protocol warrants closer scrutiny. Article 28 (2) provides that member states shall not be prohibited from entering into preferential, trading arrangements with third countries, provided that such trade arrangements complement the objectives of the Trade Protocol. Article 29 obligates SADC member states to coordinate their trade policies and to negotiate positions in respect of relations with third countries as provided for in Article 24[38] of the Treaty, and to facilitate and accelerate the achievement of the objectives of the Trade Protocol.

There was and still is no coherent SADC regional strategy on EPAs, at least not one involving all SADC member states. The current SADC EPA grouping can hardly claim to be a SADC grouping as it is more SACU than it is SADC. One needs to look no further than the SADC EPA approach, calling for formal South African involvement in the SADC EPA and also for the renegotiation of the EU-SA TDCA. The above cited Article in the Trade Protocol might as well not exist. The decisions on joining an EPA group are solely a country's prerogative and countries chose to disregard the Trade Protocol. The EPA groups have no legal basis as an entity whereas SADC has.

Although the SADC Secretariat provides support to the EPA group, SADC and the SADC EPA group are two separate entities. This is a major weakness that slows down decision making and undermines regional integration. The EU is itself a regional bloc with legal status to that effect and has a horde of skilled negotiators at its disposal. SADC countries, on the

[37] It could not be ascertained whether Mauritius is still with ESA or has pulled out to negotiate as an individual as is alleged in "Briefing Notes on EPA Negotiations".

[38] Article 24 of the Treaty of the Southern African Development Community reads: "Subject to the provisions of Article 6(1), Member States and SADC shall maintain good working relations and other forms of co-operation, and may enter into agreements with other states, regional and international organisations, whose objectives are compatible with the objectives of SADC and the provisions of this Treaty." Article 6 reads: "Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty."

other hand, and in their respective EPA configurations, have no legal status. Thus SADC countries have a double burden of negotiating with the EU and also negotiating among themselves.[39] As such, an interim EPA was "agreed" upon and initialled without consensus among the SADC EPA members; hence Namibia's delayed signature and South Africa's refusal to sign. That in itself is enough to sow discord.

Prior to the official launch of the SADC FTA in August 2008, SADC countries were running on two tracks, the race to conclude full EPAs by December 2008, and the race to consolidate SADC's trade integration agenda, which stands a real risk of being put in abeyance while countries pursue full EPAs where the negotiating odds are against them.[40] Even then, the launch of the FTA is not an end in itself but rather initiates a process of consolidating regional integration and building up capacity to make the FTA viable and workable. The challenge of EPAs in the SADC region has been aptly summed up as follows:

> "We now meet in the second quarter of 2008, with one ACP region having signed a full EPA and several other regions and individual countries having initialled Interim EPAs. A considerable number of ACP countries, including our own, have however signed neither. Some of these will now trade with the European Union under Everything But Arms (EBA) arrangement applicable to LDCs, some under specific arrangements such as our own Trade, Development and Cooperation Agreement, while yet others will be obliged to trade under far less favourable terms provided for in the EU's General System of Preferences. I would venture to suggest that seldom before in the history of EU-ACP relations, have we seen a measure held out as a mechanism to enhance access to the EU market and strengthen development cooperation between the EU and the ACP, becoming so controversial and divisive."[41]

To conclude, EPAs are threatening the gains made by SADC in achieving regional integration over the years and, indeed, they put the future of SADC as a trading bloc in peril.

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[39] Bertelsmann-Scott *South Africa's African Trade Diplomacy* 119.

[40] Hence the previously-made recommendation in this thesis that countries pursue regional integration and build on their RTA membership on the basis of the EPA negotiations. Technically the SADC EPA grouping would be SADC and the ESA grouping would be COMESA. Whatever compromise is reached among the countries in the race towards full EPAs would then be used as the basis for harmonised policies and an easier transition to a CU. See the discussion on RTA options in Chapter 5.

[41] R Davies (Deputy Minister of Trade and Industry, South Africa) "Welcoming remarks at Commonwealth Secretariat/ACP Secretariat Conference" http://www.thedti.gov.za/article/articleview.asp?current=1&arttypeid=2&artid=1557 (accessed 3 April 2008).

6.3 South Africa's Trade Policies

6.3.1 Introduction

South Africa is in a complicated relationship with its neighbours in SADC. Its position is made special by its developed country status in a region of developing and least developed countries. Inevitably, it has come to be regarded as the regional hegemony, a position that South Africa cannot really escape. The next logical question would be to ask whether South Africa's trade policies, as the region's political and economic powerhouse, support trade integration in SADC and how the FTA will impact on South Africa. According to the "new economic geography" theory, as explained by Draper and Khumalo, trade integration between developing countries should be discouraged as the benefits are most likely to accrue to the most developed of the group. This effect will be exacerbated by agglomeration economies which also promotes industrial relocation to the more developed country. The original East African Community is an excellent example – Kenya, as the most developed country in the group, attracted all investment and industry to the economic detriment of Uganda and Tanzania. The EAC, over time, could not withstand the resultant political tension arising from the uneven distribution of benefits; hence the demise of the EAC.[42] There are plenty of benefits to trade integration in SADC but the fact is that much still remains to be done to prepare the region for complete trade integration and to avoid trade polarisation. Trade facilitation, infrastructure development, investment-friendly trade policies and product diversification are some of the issues that SADC needed to address before entering into an FTA. It is in this context that the implications of South Africa's trade policies on SADC and its integration agenda have to be interrogated.

6.3.2 South Africa's Economic Identity Post-1994

As a market in the world trading area, South Africa is important to African countries, but is otherwise a drop in the ocean at world level. With an estimated gross domestic product of $159 billion (R845 billion), 80 times larger than the GDP of an average African country, and

[42] P Draper and N Khumalo "South Africa: Friend or Foe?" in P Draper (ed) *Reconfiguring the Compass, South Africa's African Trade Diplomacy* (2005) 18.

with a GDP that accounts for approximately 45% of total sub-Saharan African GDP and, further, with a trade growth with Africa of 400%,[43] South Africa is phenomenally huge within SADC. In its trade, South Africa mainly exports value-added goods into the African market and imports commodities, resulting in a huge trade imbalance between South Africa and her trading partners in Africa. Although a founder member of GATT, South Africa is considered a new entrant in international trade. This is principally because of the economic isolation that the apartheid government underwent and the pursuit of import substitution strategies by the apartheid government.[44] Understandably, the apartheid era was characterised by protectionism in trade. For South Africa, trade liberalisation as a policy took root in the Uruguay Round where South Africa simplified and liberalised its complex tariff regime and signed up for the Single Undertaking.[45] The country's re-integration into the world economy started only in 1994 however and Draper *et al* have neatly categorised it into three phases: growth through redistribution in the period 1994-1995; economic orthodoxy in the period 1996-2001; and the Keynesian kick-start from 2002 to the present.[46]

The growth through redistribution phase saw the birth of the "tri-partite alliance", consisting of the Congress of South African Trade Unions (COSATU), African National Congress (ANC) and the South African Communist Party (SACP). Infrastructure investment and redistribution through the tax system was the key to balancing the inequalities of the past. To support and facilitate this bridging of the gap, the Reconstruction and Development Programme was coined. There were widespread labour market reforms to protect the workers as well as the implementation of affirmative action in hiring policies. The Rand crisis of 1996 and the unravelling of the Reconstruction and Development Programme necessitated the abandonment of growth through redistribution in favour of economic orthodoxy where fiscal rectitude was adopted and made to co-exist with labour market reforms. At the core of the economic orthodoxy phase was the aggressive integration of South Africa's capital markets

[43] Draper and Khumalo *South Africa's African Trade Diplomacy* 20.
[44] P Draper "Consultation Dilemmas: Transparency versus Effectiveness in South Africa's Trade Policy" http://www.lse.ac.uk/collections/internationalTradePolicyUnit/Events/May2005/Draper_final.doc (accessed 1 April 2008).
[45] Draper "*Consultation Dilemmas.*" The principle behind the Single Undertaking is that "nothing is agreed until everything is agreed" (http://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm (accessed 10 April 2008)).
[46] P Draper, T Wheeler and P Alves "The Role of South Africa in Global Structural Policy" Discussion Paper 7/2006 German Development Institute 7-9. The whole discussion that follows on the internal trade policies of South Africa is based on this work.

into global financial markets. The "Washington consensus"[47] contributed to the impetus for change in economic policy and inspired the Growth, Employment and Redistribution (GEAR) macro-economic strategy which meant tight controls over state expenditure and inflation targeting. This strategy paid off during the currency crisis of 1998 and it is also during this period that South Africa started implementing its Uruguay Round commitments. FTAs were concluded with the EU and SADC. The liberalisation of tariffs during this period was very enthusiastic and went beyond the requisites of South Africa's GATT bindings. Such trade liberalisation has been identified by COSATU as a direct cause of the high levels of unemployment prevalent in South Africa today.[48] GEAR has been criticised as some form of self-imposed structural adjustment programme similar to the programmes prescribed by the International Monetary Fund and World Bank, which had disastrous effects for most developing countries and left them further marginalised within the world economy.[49]

The South African tariff structure, despite the liberalisation, still remains complex and inefficient and, in essence, protectionist. The Keynesian kick-start period is defined by an attempt to address South Africa's social problems. It is reminiscent of the growth through redistribution period with the crucial difference that labour market reforms are being spearheaded by government and there is a huge emphasis on Broad-based Black Economic Empowerment (BBEE) so as to enable the previously disadvantaged members of society to participate in the economy. The tight controls brought by the Growth, Employment and Redistribution strategy have been discarded in favour of selective welfare expenditures and investment in public infrastructure through state-owned corporations. The phase is thus a combination of demand stimulus and supply-side constraints. It has been hindered, however, by a lack of capacity and a general unwillingness to admit skilled foreign workers into the country, as well the displacement of skilled "white" officials and managers in favour of BBEE appointments. Another factor is the currency swings that the country is undergoing,

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[47] The term refers to "the lowest common denominator of policy advice being addressed by the Washington-based institutions to Latin American countries as of 1989" and which policies were fiscal discipline, redirection of public expenditure priorities toward fields offering both high economic returns and the potential to improve income distribution, such as primary health care, primary education, and infrastructure, tax reform (to lower marginal rates and broaden the tax base), interest rate liberalization, a competitive exchange rate, trade liberalization, liberalization of inflows of foreign direct investment, privatization, deregulation (to abolish barriers to entry and exit) and secure property rights (Centre for International Development, Harvard University "Washington Consensus" http://www.cid.harvard.edu/cidtrade/issues/washington.html (accessed 8 May 2008)).

[48] P Draper, P Alves and M Kalaba "South Africa's International Trade Diplomacy: Implications for Regional Integration" (July 2006) 1 *Monitoring Regional Integration in Southern Africa* 27.

[49] M C Lee "The European Union – South Africa Free Trade Agreement: In Whose Interest?" (2002) 20 *Journal of Contemporary African Studies* 82 at 82-83.

which have become an impediment to both domestic and foreign investment. The current energy crisis is also likely to contribute to the slow-down of economic growth in South Africa.

The above demonstrates that South Africa's trade policy has been determined by events happening within its borders. Economic policies over the three phases have been largely self-serving. To illustrate, South Africa is a member of SACU and there is no evidence that SACU members were consulted or that the needs of the BLNS countries were taken into consideration before the GATT plus tariff liberalisation that took place. On the contrary, with all trade policy and tariff decisions for SACU being made solely by South Africa, BLNS countries were also made to liberalise by virtue of the SACU CET.

6.3.3 South Africa's Global Trade Policy

As previously mentioned, South Africa's trade policy on the global level was jumpstarted by the multilateral trade liberalisation that South Africa committed to and implemented during the Uruguay Round. This was complemented by further liberalisation in tariffs by the South African government after the Rand crisis in 1996. The aim behind the tariff liberalisation was to gain international competitiveness and to consolidate South Africa's reintegration into the world economy.[50] Since the tariff liberalisation the focus has been on bilateral and regional trade liberalisation with further multilateral liberalisation being left to the decision of the Doha Round of multilateral negotiations which are still underway. According to Draper *et al*[51] South Africa's priority in the Doha Round is to deal with the agricultural subsidies issue and thus it chose to align itself with the G20 alliance. The G20 alliance has both an aggressive and defensive thrust on agricultural liberalisation and is thus most likely to reach an equitable agricultural liberalisation commitment from the major agricultural protectionists in the developed world. This is distinct from the G90 alliance of which the Africa group forms part. Where the G20 stands to gain from reductions in developed country subsidies through less price increases and price distortions, the G90 stands to lose out through reduced margins for some of its African agricultural exports. This will be a result of market shifts in

[50] It is interesting to note, though, that the massive tariff liberalisation undertaken by South Africa was accompanied by a drastic increase in the use of anti-dumping as an instrument of trade protection (Draper *et al Monitoring Regional Integration in Southern Africa* 28).
[51] Draper and Khumalo *South Africa's African Trade Diplomacy* 72.

favour of more competitive producers, most likely the Australian-led Cairns group of which South Africa is a member. Several African states in the G90 are also dependant on EU-subsidised food imports and the export subsidies ensure lower prices for the African states' food imports.[52]

South Africa's interests in relation to agricultural reform are clearly at odds with those of the other countries in sub-Saharan Africa. Nonetheless, Draper and Khumalo contend that some African countries do recognise the benefits of subsidy reductions in agriculture by developed countries, such as the promotion of long term competitive advantage in agricultural production; they are just not willing to deal with the difficulties they would face in the short term immediately after the liberalisation of the agricultural sector.[53] The removal of agricultural subsidies would also remove the distortions in global agricultural pricing mechanisms and provide the right incentive structures for agricultural production in African economies.[54]

With regard to the Doha Round, South Africa has a huge interest in securing market access for its intermediate manufacturing exports as well as the liberalisation of service sectors in African markets.[55] Again, in this instance, South Africa's interests are at variance with those of the G90 countries, who seek to preserve the trade preferences they get from developed countries, maintaining special and differential treatment for themselves as well as pursuing the implementation agenda.[56]

There has been a substantial interest in the WTO's new generation issues, commonly known as the Singapore issues. At the failed Cancun ministerial meeting, South Africa advocated against the negotiation of a government procurement and competition policy. The reasons, as argued, are that a state should be allowed to discriminate on developmental grounds in awarding tenders and contracts to companies. This is in line with the South African government's current emphasis on the widely-supported Broad Based Economic Empowerment (BBEE) initiative. On the issue of investment, South Africa "sought to balance its substantial outward investment position with the need for developing country

[52] Draper and Khumalo *South Africa's African Trade Diplomacy* 72.
[53] Draper and Khumalo *South Africa's African Trade Diplomacy* 13.
[54] Draper and Khumalo *South Africa's African Trade Diplomacy* 12.
[55] Draper *et al Monitoring Regional Integration in Southern Africa* 29. South Africa's products are not competitive enough on the global market and it relies on the African market to dispose of its products.
[56] Draper *et al Monitoring Regional Integration in Southern Africa* 9.

solidarity" in addition to a wide network of bilateral investment treaties.[57] These are the same issues that created an impasse between the EU and South Africa in the SADC EPA negotiations.[58]

While African countries managed to keep the Singapore issues out of the Doha Round, they have not been able to keep the issues out of the EPA negotiations, given the EU's WTO plus approach. The Singapore issues were kept out of the TDCA but were on the agenda for the SADC EPA and South Africa refuses to compromise on the Singapore issues. The argument at the Cancun Ministerial meeting for the exclusion of government procurement and competition policy was that there was no guarantee of a developmental aspect to any agreement reached on these issues and, for as long as the USA and the EU cannot guarantee the liberalisation of the agricultural market, developing nations would do well to oppose negotiations on these issues.[59]

Interestingly enough, Brazil and India, who lead the G20 grouping, still maintain an import substitution industrialisation development strategy and are thus protectionist in that sense. Although South Africa has ditched the import substitution strategy, it is still protectionist to a certain extent.[60] Such protectionism could be exemplified by the very liberal use of anti-dumping legislation by South Africa soon after its GATT plus tariff liberalisation.[61] The impression given by Draper and Khumalo is that while there is no fundamental difference in the approach to development between the G20 and G90 strategy, the modalities differ and the G20 has more negotiating clout than the G90.[62]

South Africa has not been very active with regard to WTO General Agreement on Trade in Services (GATS) negotiations and bilateral services trade negotiations, principally because it has no offensive globally in that aspect. Nonetheless, South Africa has a huge interest in

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[57] Draper *et al Monitoring Regional Integration in Southern Africa* 29. See also L E Peterson "South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights" (November 2006) Dialogue on Globalisation Occasional Paper No 26.

[58] "EU-SADC EPA: Frustration between EU and SA boils to the surface as trade deadline looms" *Engineering News* (South Africa) 29 August 2007 http://www.bilaterals.org/article.php3?id_article=9512&var_recherche=EU (accessed 3 April 2008).

[59] Draper *et al Monitoring Regional Integration in Southern Africa* 29.

[60] Draper and Khumalo *South Africa's African Trade Diplomacy* 16.

[61] Draper *et al Monitoring Regional Integration in Southern Africa* 27.

[62] *Ibid.*

getting the SADC countries to open up their services trade.[63] This implies that South Africa has a services offensive in the SADC region and would probably explain the inroads that have been made with regard to services sector liberalisation in SADC, although not on the basis of binding commitments.

What is discernible from the above is that South Africa's trade interests on the global stage are at variance with those of other African countries, particularly the SADC member states.

6.3.4 The EU-SA Trade, Development and Cooperation Agreement

South Africa's international isolation during the apartheid era meant that South Africa had no trade agreements with any country after independence in 1994 and only accessed countries' markets under MFN conditions. One of the more urgent priorities for the democratic government was the re-integration of South Africa into the world economy as well as other spheres; and this included concluding FTAs with other countries and RTAs in the world trading arena.[64]

Given the importance of the EU market as an export destination for South African products,[65] South Africa sought to acquire better market access to the EU than it was getting under the MFN status, where it was trading on the same terms as USA, Canada and Japan.[66] In September 1994, South Africa was proffered trade access under the Generalised System of Preferences (GSP) which is only a level higher than MFN and did not significantly improve South Africa's access to the EU market.[67] Thereafter, in November 1994, the South African government made its initial moves towards applying for full Lomé membership.[68] The

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[63] Draper *et al* "Monitoring Regional Integration in Southern Africa" 28.
[64] R Gibb "Globalisation and Africa's Economic Recovery: A Case Study of the European Union – South Africa Post Apartheid Trading Regime" (Dec 2003) 29 (4) *Journal of Southern African Studies* 885 at 887.
[65] Draper *et al Monitoring Regional Integration in Southern Africa* 29.
[66] Gibb 2003 *JSAS* 887.
[67] The Generalised System of Preferences excludes a wide range of products, classified as "very sensitive", "sensitive" and "semi-sensitive", from preferential trade. Agricultural trade is more restricted with products such as flowers, fruit, vegetables, vegetable products, wine and juices on the exclusions list. Only non-sensitive products have duty-free access to the EU market and GSP preferences can be unilaterally withdrawn by the EU (Gibb 2003 *JSAS* 887-888).
[68] Lomè being the non-reciprocal trade regime under which ACP countries used to trade before 31 December 2007. In the Lomè setup, ACP countries could maintain tariff barriers against the EU exports while they received duty-free access to the EU market. Upon challenge by other developing and least developing countries not falling under the ACP realm, the discrimination afforded by the Lomè Convention was found to be GATT

application for full Lomé membership was motivated by three key reasons:[69] it would provide the highest level of trade preferences which, in turn, would support South Africa's Reconstruction and Development Programme; it would place South Africa at the same level as the other SADC states and facilitate intra-regional trade and investment; and Lomé membership would be a transitional measure to support South Africa's democratic and economic transformation.

Despite these compelling reasons, South Africa's endeavour was ultimately unsuccessful. Nevertheless, Gibbs provides a comprehensive analysis of the dynamics shaping the EU's decision to withhold Lomé membership for South Africa. At the core of the issue was the impending renegotiation of the Lomé Convention in 2000.[70] Although the EU decision was primarily based on the contention that South Africa's economy is more developed than developing, three key arguments for the denial of membership were advanced:[71] South Africa's membership of Lomé would threaten the whole Convention if challenged at WTO level and such possibility of challenge was seen as "inevitable"; full Lomé membership for South Africa would negate economic growth in South Africa by slowing down the pace of trade liberalisation and discouraging foreign investors;[72] and by way of example, in 1995, South Africa's total exports to the EU amounted to more than a third of ACP countries' exports combined and therefore, South Africa's membership of Lomé would erode the benefits of the existing ACP states and also threaten some of the EU's industrial and agricultural sectors.[73]

It is against the above background that the TDCA was negotiated. It explains South Africa's actions in signing the TDCA without consultation — neither with the SACU countries nor with due regard for the SADC Trade Protocol. South Africa could not afford trading under the GSP as the GSP is at the bottom of the EU's trade preferences and South Africa needed better market access. Although in April 1997, South Africa acceded to the Lomé Convention,

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incompatible. The Lomè Convention was therefore replaced by the Cotonou Agreement which envisages a reciprocal trading relationship between the EU and ACP countries from the beginning of 2008.

[69] Gibb 2003 *JSAS* 889.

[70] The EU and ACP had only just obtained a WTO waiver for the discriminatory trade preferences contained in the Lomè Convention in favour of ACP states over other developing and least developed countries. This waiver expired in 2007.

[71] Gibb 2003 *JSAS* 889-890.

[72] One might pose to ask if the Lomé Convention did not have this same effect for the other ACP countries and if so, how come the EU allowed such preferences then. Although essentially an economic question, it provokes thought on the effect of the dependence on preferences by developing countries.

[73] Gibb 2003 *JSAS* 889 -890.

the market access was limited as it was not full membership. The only benefit from this token membership was that South Africa could compete for EU-funded tenders for development projects in ACP countries and also participate in Lomé discussions. No real benefits would accrue to South Africa through participation in the Lomé discussions except perhaps that it would serve to ensure consistency between South Africa's trade policies and those of the other SADC countries taking part in Lomé. This was probably necessary since trade relations with the EU are a key element of trade policy for most African states. Needless to say, though, because of the prevalence of the protectionist element in the EU and hence the export subsidies and liberal use of trade defences, the EU's refusal to admit South Africa under the Lomé Convention betrays self-interest, protectionism and a desire to make South Africa an experimental post-Lomé Convention model.[74]

The TDCA negotiations began in June 1995 and ended in March 1999 and there were 24 rounds of negotiations before the TDCA was concluded. It would be difficult to argue that the two negotiating parties met on an equal level, since the EU is South Africa's biggest trading partner but the reverse is not true of their relationship. South Africa was desperate for a better trade regime than MFN or GSP and so the EU had the upper hand in the negotiations. Equating South Africa to a beggar in the whole process would not be too far-fetched. It is important to note also, as is already highlighted in this paper, that the TDCA was negotiated to the exclusion of the BLNS countries. The BLNS states had and still have a stake in the TDCA by virtue of being SACU members. According to Draper *et al*, the decision to exclude the BLNS states from the TDCA negotiations came from the EU.[75] This cements the contention that the EU and South Africa were unequal negotiating partners. The situation could have been handled differently, though. South Africa's transition from apartheid to majority rule put it under international spotlight and it received many overtures — trade and otherwise — from governments and international organisations to assist with South Africa's integration into the world economy. Also, with South Africa, the EU was seeking to "further solidify its dominant political, trade and investment position in South Africa over that of the United States and Japan, display the EU's commitment to provide stability to emerging markets, expedite the creation of a SADC free trade zone and provide a positive model for a post-Lomè agreement".[76] South Africa could have better read the political circumstances and

[74] Lee 2002 *JCAS* 86.
[75] Draper *et al Monitoring Regional Integration in Southern Africa* 30.
[76] Lee 2002 *JCAS* 81-82.

used the above as leverage and at least demand the inclusion of the BLNS states as the tariff reductions would affect them also.

6.3.5 The Impact of the TDCA

The Trade, Development and Cooperation Agreement (TDCA) between the EU and SA was signed by the Council of Ministers, ratified by the South African Parliament in October 1999 and came into effect on 1 January 2000.[77] The TDCA has two components to it: the creation of an FTA between the EU and South Africa; and financial aid to South Africa under the European Programme for Reconstruction and Development (EPRD), which encompasses support for basic social services, private sector development, good governance, democratisation, human rights and regional integration.[78] Under the FTA, the tariff liberalisation schedule is asymmetrical to cater for the different levels of development in South Africa and the EU. The EU is to eliminate tariffs on 95% of its traded goods over a ten-year period while South Africa eliminates tariffs on 86% of its traded goods over a twelve-year period. Automobile and clothing and textiles sectors were identified as "sensitive" by South Africa and therefore automobiles and components were placed on the reserve list, not subject to tariff reduction or elimination. Clothing and textiles, on the other hand, are subject to a slower tariff phase-down, giving the South African industry just enough time to adjust to EU competition.[79] Agriculture is one sector in which negotiations were "acrimonious and sensitive", with South Africa focusing on the developmental ramifications of liberalisation and the EU prioritising Community preference and Common Agricultural Policy (CAP) protectionism.[80] With agriculture, asymmetry seems to have operated in reverse; South Africa liberalises more products at a higher speed than the EU which liberalises over a longer period of time with some of the tariff phase-downs having been back-loaded. The only concession that South Africa got from the EU was a reduction in the number of excluded products and the elimination of export refunds on the products whose tariff liberalisation is frontloaded by South Africa.[81] Without doubt there is no developmental aspect to this arrangement; it only

[77] Gibb 2003 *JSAS 899*.
[78] Lee 2002 *JCAS 81*.
[79] Lee 2002 *JCAS* 88-89.
[80] Gibb 2003 *JSAS* 899.
[81] Gibb 2003 *JSAS* 899; Lee 2002 *JCAS* 89-90.

facilitates the dumping of EU agricultural products in South Africa while protecting the EU market from competitive South African agricultural products.[82]

The one biggest advantage that South Africa has in the TDCA is being able to conduct trade with its biggest trading partner at a preferential rate, which was the whole idea to begin with. The developmental aspect of the TDCA should be used to develop South Africa's industries and ensure the production of goods that are competitive even at a world level. Developed countries are well known for their complicated sanitary and phyto-sanitary standards (SPS), and cooperation with the EU would enable South Africa to meet the exacting requirements in its products. It would also be interesting to see how the aid under the European Programme for Reconstruction and Development is manifested.

Based on a number of studies, Lee gives an exposition of the anticipated gains from the TDCA.[83] South Africa should be able to increase her exports to the EU by 5.3%, particularly in sectors that had been protected prior to the conclusion of the TDCA, such as fruit and vegetables and food processing. This will lead to a 0.44% increase in real GDP for South Africa. Such benefits will however only manifest themselves over time. Conversely, the EU also stands to gain through a 4.3% increase in exports to South Africa, especially with regard to the export of grains, food processing and apparel.[84] Despite the above, however, EU exports were reported as having a disastrous impact on South Africa even prior to the conclusion of the TDCA. Specific examples would include the impact of the heavily subsidised EU canned tomatoes on the South African canned tomato industry. This the South African government tried to counter by increasing the import duty on canned tomatoes from 23% to 30% in January 1998, but the European exporters were still cushioned by the subsidies so much that the increase did not have an effect at all. The result of this was the closure of the major canning plant of South Africa's largest food processing food processing company and the loss of 2500 jobs.[85] The milling industry also cannot cope with the heavily subsidised EU flour that is flooding the country and the same could be said for the beef

[82] It should be kept in mind that South Africa is a member of the Cairns group of agricultural exporting countries.
[83] Lee 2002 *JCAS* 92-93.
[84] *Ibid.*
[85] Lee 2002 *JCAS* 94.

industry, particularly canned meat production. In 1998, the beef was being sold at a fourth of its market value in the EU.[86]

Although South Africa has theoretically more duty-free access to the EU market than the EU has to the South African market, it is the EU that stands to gain more from the TDCA. Opening up the South African market to EU exports will threaten the South African economy and create a current account deficit for South Africa. As for the European investment that is expected to flow, it might just result in the acquisition of domestically-owned capacity as domestic producers fail to cope with the European competition.[87]

There are concerns on the effect of the TDCA on regional integration in both SACU and SADC. The TDCA has been blamed for the fracturing of SADC in the EPAs as it is seen as a symbol of South African dominance in the region, particularly as the BLNS countries were not consulted and due regard was not given to the Trade Protocol. The following discussion will concentrate on the effects for SACU first before tackling the impact on SADC. Most of the criticism has been levelled at South Africa's failure to consult the BLNS countries and bring their needs and concerns into account before signing a trade deal with the EU. If it had been concluded after 2002, the TDCA would have been regulated by Article 31 of the 2002 SACU Agreement which forbids any member of SACU from entering into a trade arrangement with third parties without the express consent of all SACU members. In 1999, however, the regulatory mechanism for that kind of situation was Article 19 of the 1969 SACU Agreement which allowed the levying of lower duties for non-member states provided that the other SACU members agreed and that the third country goods would not be re-exported to the other members without the full duty being collected.[88] South Africa did not consult the BLNS countries and no systems were put in place to ensure that full duty was paid on EU goods exported into South Africa and re-exported into the South African countries. The CU makes the TDCA *de facto* apply to the BLNS countries. The TDCA does, however, provide for the continued preferential access of the BLNS states to the EU markets under the beef and sugar protocols and there is a safeguard clause for the protection of infant industries.

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[86] *Ibid.*
[87] Lee 2002 *JCAS* 95.
[88] LA Grimett *Protectionism and Compliance with the GATT Article XXIV in Selected Regional Trade Arrangements* (LLM Thesis , Rhodes University, 1999) 244.

The biggest impact that the TDCA has had on SACU is with regard to revenue losses. The dynamics of a CU dictate the application of a CET on goods imported into the CU to create a common revenue pool from which the CET is distributed among the member countries. The TDCA implies a reduction on the CET in relation to EU imports and a subsequent reduction on the CET in relation to EU imports and a subsequent reduction of revenue in the revenue pool. The BLNS countries, particularly Swaziland and Lesotho, are heavily dependent on the CU for their government revenue.[89] Prior to the TDCA, EU imports accounted for 40% of the goods imported into SACU, which means that that there is a significant reduction in revenue from the conclusion of the TDCA. These revenue losses could result in the BLNS countries lagging behind in their developmental aspirations as there is reduced government income and therefore reduced government capacity to build the necessary infrastructure to support economic growth. There is also the fact of BLNS countries competing with cheap EU imports in the South African market which could result in a reduction in profits for BLNS producers. A worst-case scenario would have the BLNS producers being elbowed out of business completely. This would increase the unemployment rate through job losses as well as further job losses through down-stream linkages with other sectors. The above, coupled with the fact that the BLNS states remain a captive market for South Africa's globally non-competitive industrial products, will ensure that the BLNS countries will remain underdeveloped with a dependency on foreign aid.[90] The irony of the situation is that South Africa will not be able to escape the effects of the TDCA on its SACU partners. As a consequence of the economic destabilisation of the BLNS countries, South Africa will have to deal with hordes of BLNS nationals seeking greener employment pastures in South Africa, as well as illegal immigrants.[91]

Benefits to the SADC will almost be negligible in terms of GDP increases, but the TDCA will enable SADC producers to have access to cheaper inputs, thereby increasing turnover and tax revenues, increased competition resulting in enhanced competitive edge of businesses as well as cheaper consumer goods.[92] Further arguments have been put forward in favour of the TDCA and calling for South Africa to conclude even more FTAs with possibly the North American Free Trade Agreement (NAFTA), East Asia and Australasia. The idea is that the

[89] The dependence is such that Swaziland gets 50% of her government revenue from the CU, Lesotho gets about 50 to 60%, while Namibia gets 28% and Botswana is less dependent on 17%. (Lee 2002 *JCAS* 96).
[90] Lee 2002 *JCAS* 97-98.
[91] Lee 2002 *JCAS* 98. It is probably with this in mind that the 2002 SACU Agreement contains a revised revenue sharing formula which favours the BLNS states through its development component.
[92] Lee 2002 *JCAS* 93.

economic benefits flowing from the TDCA are limited and South Africa needs to augment these by concluding other FTAs so as to enhance its economic growth. There would be spin-off effects from South Africa's economic growth which would benefit the region.[93] This is only true, however, if South Africa implements a viable development strategy to support such openness to trade. It is evident from South Africa's aggressive trade liberalisation agenda post-1994 that it has linked trade liberalisation with economic growth and development. Even though South Africa is considerably developed when compared to other SADC members, it is clear that the international isolation during apartheid constrained its economic growth. In addition to opening up trade, South Africa should also be focusing on strengthening its infrastructure and industries to make its products more competitive; otherwise such trade openness without the necessary support will damage the growth of South Africa's industries and stunt its economic growth. An expanded South African economy can generate employment opportunities for regional job-seekers.

The question of trade polarisation in SADC could be worsened by the TDCA. As the economic powerhouse of the region, the availability of cheap industrial imports from the EU will lead to increased domestic and foreign investment in South Africa. As SADC countries compete with cheap EU exports for the South African market, regional capacities will decline and production activities will concentrate in South Africa and thereby creating divestment in the SADC region.[94]

The above also points to the trade diversion effects of the TDCA as producers will have cheap access to EU imports in South Africa which are, in any event, more competitive than similar products from SADC countries. This is particularly evident in the agricultural sector where the EU's Common Agricultural Policy (CAP), which distorts prices in agricultural products and results in overproduction and huge stock surpluses by the EU which are then disposed of through international markets.[95] The trade diversion also creates unemployment and an increase in socio-economic problems and thus creates political pressures. When such products get dumped on South Africa, the regional producers lose their market share. This will lead to an increase in the trade imbalance currently existing between South Africa and

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[93] *Ibid.*
[94] N Kitikiti "The EU – SA FTA: Implications for SADC" in Hartzenberg T (ed) *SADC – EU Trade Relations.* (2000) 83-84.
[95] Kitikiti *SADC – EU Trade Relations* 82.

her fellow SADC members. It will also severely undermine the region's agricultural sector, including that of South Africa.[96]

The most adverse effect of the TDCA has been on regional integration as it prevented the formation of a single, unified SADC EPA configuration. SADC countries were wary of how the TDCA would impact on a potential EPA, as seen by the negotiation of the TDCA for the current SADC EPA countries. As a result, but not entirely the only reason, SADC countries are negotiating EPAs in four different configurations. There is little hope of reaching a convergence of external policies after the conclusion of EPAs.

6.3.6 South Africa's Southern African Trade Agenda

South Africa's global trade strategy of reintegration into the world economy after 1994 was complemented by South Africa's economic penetration of Africa. This has been encouraged by South Africa's relative competitive advantage over other African states. This encompasses advantages such as the availability of investible capital, South Africa's advanced infrastructure, marketing and technological advances as well as the availability of the necessary human capital.[97] Orthodox trade theory was also pushing for trade liberalisation and South African companies were taken advantage of the opened up markets. This has bred considerable rewards for the African countries in which South African companies have invested. Such benefits include job creation, upgrading of existing and building of new infrastructure, including investment in backbone services, technology transfer through human resource development, increased tax revenues, increased consumer choice and the boosting of general investor confidence in the host countries.[98] This is clear evidence of South Africa's efforts at being the continental leader in all spheres as envisaged by the Department of Trade and Industry's "butterfly strategy" for South-South cooperation where South Africa is the head and the rest of Africa constitutes the body.[99] South Africa's African strategy is also guided by the African vision as embodied in the African Union and the New Partnership for Africa's Development (NEPAD). NEPAD is the brainchild of former South African President Thabo Mbeki and is an initiative that seeks to "recapture the rhetoric and energy of the pan-

[96] Lee 2002 *JCAS* 98 – 99.
[97] C Alden and M Soko "South Africa's economic relations with Africa: hegemony and its discontents" (2005) 43 *Journal of Modern African Studies* 367 at 369.
[98] Draper *et al Monitoring Regional Integration in Southern Africa* 23.
[99] Alden and Soko 2005 *JMAS* 369.

Africanist impulse but marry it to a neo-liberal agenda".[100] South Africa's economic advancement into Africa is partly to create trade partnerships and promote investment and the development of infrastructure in the spirit of NEPAD.

With respect to southern Africa, the negotiation of a SADC FTA was the second priority after the conclusion of an FTA with the EU. The idea was to lock in South Africa's market as SADC absorbs about a third of South Africa's exports.[101] Also, the bulk of South Africa's Foreign Direct Investment (FDI) goes into SADC and in 2000 it exceeded US$5,4 billion while in 2001 it was pegged at R14,8 billion, surpassing that of the United Kingdom at R3,98 million.[102] This points also to the level of economic disparity within the region. The strategic options for the region as proposed by the Department of Trade and Industry include:[103]

- the unilateral extension of bilateral preferences, possibly linked to import substitution schemes, supported by tailored financial assistance packages;
- based on this, an understanding that recipients would reciprocate after a given transitional period, thus creating a network of bilateral FTAs;
- individual country accessions to existing regional arrangements; and
- reciprocal exchanges of preferences on a trade bloc to bloc basis. Such a process could be led by regional leaders, and could form the building blocs for an all-Africa FTA, as envisaged by the 1991 Abuja Treaty and carried over into the AU."

It can be concluded from these strategies that South Africa has interests in the development of the region. Proof of this is in the project-based approach that has seen the Industrial Development Corporation and the Development Bank of Southern Africa undertake investment projects in Mozambique as well as infrastructure development linked to Spatial Development Initiatives. The Maputo Development Corridor is one good example of such initiatives.[104] These infrastructural initiatives are based on the realisation that the current trade imbalance is not healthy for regional integration. Although South Africa will benefit in the short run through the accumulation of all benefits of trade liberalisation, the collapse of

[100] Alden and Soko 2005 *JMAS* 383.
[101] Draper *et al Monitoring Regional Integration in Southern Africa* 34.
[102] Alden and Soko 2005 *JMAS* 374.
[103] Draper and Khumalo *South Africa's African Trade Diplomacy* 25.
[104] Alden and Soko 2005 *JMAS* 375.

industry and divestment that the rest of SADC will experience will come back to affect South Africa in the long run. As a thriving economy, there will be an increased number of job seekers from within the region expanding the already high levels of unemployment in South Africa.[105] It will also breed political tensions that will not bode well for regional integration. Such a result is undesirable especially as South Africa is trying to prove its commitment to the development of the region given the suspicion surrounding its trade activities.

While the investment commitments of South Africa in SADC are commendable, it has been alleged that in some instances it has "led to the displacement of local business and put local manufacturing capacity under pressure".[106] South Africa would do well to invest in areas that would lead to export diversification and promote regional integration. The precept of regional integration among developing countries prescribes intra-regional trade which, in the case of SADC, is impossible to achieve when South Africa is the only country with the necessary product complementarities to the rest of the region.[107] Certainly, self-serving interests on the part of South Africa are at play in relation to its SADC trade diplomacy. In the negotiations towards the Trade Protocol, South Africa undertook to front-load its tariff liberalisation schedule in view of its advanced economy status in relation to SADC. The good intentions were however negated by South Africa's insistence on arduous rules of origin so as to protect some of its sectors.[108] Tariff reductions in the Uruguay Round reduced preferential tariff margins and if the Doha Round brings about further tariff reductions then the preferences of the other SADC countries will be eroded. It is therefore in the best interests of SADC countries to liberalise trade just as is being advocated by South Africa. Nevertheless, such trade liberalisation needs to be supported by a development strategy. South Africa's interests in this matter are divergent to those of other SADC countries and South Africa stands to benefit the most from such trade liberalisation, at least in the short run, as SADC is part of its export market. Without the necessary support therefore, trade liberalisation in SADC will only benefit South Africa and cause further trade polarisation.[109]

The Department of Trade and Industry's "Global Economic Strategy" envisages the negotiation and conclusion of bilateral trade agreements with the United States of America,

[105] Grimett *Protectionism and Compliance with the GATT Article XXIV* 259.
[106] Alden and Soko 2005 *JMAS* 576.
[107] Draper and Khumalo *South Africa's African Trade Diplomacy* 23.
[108] F Flatters "SADC Rules of Origin: Undermining Regional Free Trade" TIPS Forum, Johannesburg, South Africa, September 9-11 2002 http://www.tips.org.za/files/570.pdf (accessed 20 April 2007).
[109] Draper and Khumalo *South Africa's African Trade Diplomacy* 20-23.

European Free Trade Area, Mercosur, India, China, Singapore/ASEAN, Japan, South Korea, Nigeria and Kenya.[110] It is possible that the energy and effort put into negotiating such trade agreements will divert South Africa's attention and resources away from SADC. Furthermore, once the South African market is opened up to the above countries and trade blocs, it will be increasingly difficult for SADC countries to compete in South Africa's market and would thus undermine all prospects for both development and regional economic integration in the SADC region.[111]

It remains to be seen how South Africa's domestic problems will affect the pace and content of regional integration. South Africa is bedevilled by unemployment, poverty and the government has failed to improve the socio-economic status of the previously disadvantaged.[112] Trade liberalisation has wrought job losses in sensitive sectors such as textiles and clothing which has resulted in disagreement within the tri-partite alliance, with COSATU blaming the government for the rising levels of unemployment. The political and economic unravelling of its neighbour Zimbabwe has also contributed to the social ills with plenty of illegal immigrants seeking greener pastures in South Africa. To maintain stability and retain the support of the masses, South Africa would have interests in maintaining a certain level of protectionism in its trade. In pursuit of the protectionist objective, South Africa has occasionally resorted to a "mercantilist policy" with regard to other SADC countries where trade liberalisation comes in the form of concessions and not as a necessary policy for development.[113] Put simply, domestic interests are in favour of protectionism and South Africa could hide behind SACU when it wants to protect its market on the basis of the developmental status of the SACU countries and the fact that a reduction of the CET affects them adversely as developing countries.[114]

[110] Draper *et al Monitoring Regional Integration in Southern Africa* 30.
[111] Draper and Khumalo *South Africa's African Trade Diplomacy* 26.
[112] Alden and Soko 2005 *JMAS* 378; Lee 2002 *JCAS* 101.
[113] Alden and Soko 2005 *JMAS* 378.
[114] Draper and Khumalo *South Africa's African Trade Diplomacy* 22-23.

6.4 Conclusion

South Africa's decision to conclude a TDCA, however motivated by a desire to gain better market access, has clearly had a direct adverse impact on regional integration in SADC. The resultant fragmentation of SADC in EPAs negotiations with the EU does not augur well for regional economic integration. At the same time, the lack of unity among SADC countries makes SADC countries vulnerable to being "managed" by the EU. As long as the EU has the upper hand, then SADC countries will give in to whatever they put on the table. This has already been manifested in the signing of the interim EPAs where SADC EPA countries signed for fear of losing the EU market despite having reservations about the provisions in the interim EPA.

South Africa, on the other hand, needs to carefully manage its economic affairs. South Africa's economic expansion into southern Africa through investment, while it is positive for the region's development, could be seen as a consolidation of South Africa's economic dominance and SADC countries might resent that. In the same vein, South African companies should be careful not to push host industries out of business. Any investment that is done within SADC should be channelled towards infrastructural development so as to cure the structural deficiencies within SADC economies. South Africa's political and economic dominance cannot be escaped and as such, South Africa needs to show good leadership in its trade policies. Such issues as South Africa protecting its market from SADC producers should be investigated and effort should be made to try as much as possible to merge the interests of South Africa with those of Africa at a global level. The domestic problems that South Africa is facing should be looked into and dealt with because, in the long run, they will affect South Africa's trade policies as they affect SADC and stand in the way of a very fragile regional integration process.

The question of EPAs and how they affect the future relevance of SADC in the trading sphere is still very much relevant. The EPAs need to be reconciled so as to ensure a consistent SADC trade agenda. This is an issue that warrants urgent attention to ensure the future sustainability of trade integration in SADC.

CHAPTER SEVEN

CONCLUSION

Progress in economic integration in SADC has been very slow. Although the SADC FTA has finally been declared, the impediments to real economic integration have still not been adequately dealt with. This is not for lack of motivation to create an FTA. Among the many reasons why SADC countries should integrate economically, the most important impetus for regional economic integration can be found in its objectives, which include the achievement of development and economic growth for the region and the enhancement of the standard of life of the people of the region and the promotion of self-sustaining development on the basis of collective self-reliance and the inter-dependence of SADC member states. Also very important, is the fact that SADC has been identified as one of the building blocs for the African Common Market as envisaged by the Lagos Plan of Action.

The sectoral approach to development adopted by SADC's predecessor, SADCC, left the region with hobbled and uneven development patterns. Due to the political history of SADCC, this approach was the most viable as it allowed states to achieve their objectives without creating any legal obligations for themselves and also without ceding any part of their sovereignty, economic or otherwise. The biggest problem with such an approach was that SADCC member states constantly found themselves in a state of conflict as to finding a balance between domestic interests and regional interests. More often than not domestic interests were prioritised at the expense of the regional agenda. Nonetheless, the sectoral development approach reinforced the idea of equality among the states, regardless of size, encouraged political unity and forged a sense of common identity for SADCC member states. The exclusion of economic integration objectives in SADCC was partly informed by the failure of other economic integration initiatives elsewhere in Africa. It was a conscious appreciation of the problems and a realisation that effective regional integration is tied to development and hence the emphasis on development cooperation. This would later turn out to be both strength and weakness. The region failed to develop a consistent and coherent programme and there was plenty of duplication of programmes which derailed the whole

development cooperation strategy. The political unity created in the region, however, was unparalleled elsewhere.

The transformation of SADCC and its regional agenda gave rise to SADC. Whereas the previous SADCC had operated without any legal framework and was essentially an informal association of states, SADC is a regional organisation with legal status. In seeking to cure the institutional deficiencies of SADCC, SADC found itself heavily-laden with top heavy toothless institutions. The idea had been to reign in the sectoral programmes and make them to work under a common framework, accountable to a central authority and ensure even and coherent development. SADC states failed to give the necessary power and authority to the institutions it created and therefore these institutions failed to be effective. This is the same problem that still plagues SADC even after its restructuring in 2001 which saw the phasing out of the sectoral responsibility strategy. The Secretariat has been further capacitated and empowered to oversee all SADC projects and operations. Post-2001 though, SADC has come to be identified with its economic integration initiative where regional integration of the region is being driven by trade, through the Trade Protocol. What can be ascertained, however, is that the emphasis on states leading their own projects through the sectoral approach has severely stalled the institutional development of SADC. States refuse to let go of their economic and political sovereignty to enable a regional institution to lead the process of economic integration.

The implementation period of the Trade Protocol, between 2000 and 2008, should be regarded as the time of an Interim Agreement leading up to the formation of an FTA. Most of the literature has analysed this as an FTA, however, in reality this was never an FTA and so, strictly speaking, that evaluation was inappropriate. However, since it was an FTA in the making, it is useful to compare the work in progress to see whether that measured up to FTA standards and this is what has been done in this thesis. Interim Agreements do not need to fulfil all the requirements of an FTA but should show that it would lead to the establishment of an FTA within a reasonable time. The SADC FTA as projected by the Trade Protocol can be comprehensively analysed for GATT compliance. The question should mostly be whether, based on the happenings in practice, the FTA satisfies GATT requirements. On that basis, it is submitted that since the FTA has only been recently declared, it is difficult to assess it for GATT compliance.

Even then, the assessment of the Trade Protocol's provisions for GATT compliance is made difficult by the ambiguity of the GATT provisions themselves. With much clarity on GATT provisions, it is hard to make definite conclusions on compliance, especially since different interpretations can be used for the same provisions. However, using the most commonly used interpretations for GATT provisions on RTAs, the provisions of the Trade Protocol pass for compliance with a few minor discrepancies. This is also one of the weaknesses of the Trade Protocol. Too much effort and emphasis has been put on making the Trade Protocol's provisions mirror those of GATT. The reality of the SADC member states economic geography and hence it capacity to discharge some of the onerous obligations of GATT has been overlooked.

On some provisions, the intentions of the Trade Protocol seem contradictory and these particular provisions present strength as well as weakness. Particular examples would be the protection of sensitive sectors from trade liberalisation and the provision on industrialisation where trade liberalisation is to be accompanied by an industrialisation strategy. These two, sensitive products and the industrialisation drive, can also be said to be connected. Sensitive products involve products whose industries are vulnerable to competition and this could possibly cover infant industries as well. While industrial policy implies industrial policy, there is tendency to use trade policy to achieve industrialisation. Such use of trade policy to achieve the objectives of industrialisation would imply the use of high levels of trade protectionism and restrictive rules of origin. In that instance, there is no compatibility with the objectives of the Trade Protocol.

The attempt to mirror WTO/GATT provisions as far as possible has also resulted in too many general provisions that do not have much clarity where reference is made to WTO provisions. WTO rules and the provisions for GATT are notorious for ambiguity and uncertainty and, in some instances, the disciplines are still unfolding. Where SADC could have used the opportunity to vary from WTO and further develop the disciplines, especially with regard to their application to developing countries, they have shied away from such a bold move. The only variation made was in the application of asymmetric tariff reductions to reflect the differences in development and therefore the economic capacity to implement the Trade Protocol. In such areas as services liberalisation and the regulation of sanitary and phyto-sanitary standards the Trade Protocol seems to rely on WTO provisions. On some provisions, an attempt has been made to adapt WTO provisions to suit SADC but this has mostly resulted

in confusing provisions. For instance, some of the Article 9 exceptions of the Trade Protocol seem to subject WTO law to other treaties and agreements. The Trade Protocol provisions on safeguards are subjected to the WTO Agreement on Safeguards, but, for some incomprehensible reason, where SADC provisions would be expected to be more relaxed than WTO ones, the Trade Protocol subjects the developing countries of SADC to more stringent provisions. Annex VI of the Trade Protocol, on dispute settlement, has boldly sought to be stricter than the WTO provisions. The existence of the reverse consensus rule, lack of appeal procedures as well as the compliance provisions raise questions as to whether this dispute settlement system will really work or if it is an overambitious move on the part of SADC. Although largely in line with WTO/GATT regulations, in an effort to be WTO/GATT compliant and yet be accommodative of the capacity constraints of the SADC member countries, the Trade Protocol is at times inconsistent.

In implementing the Trade Protocol, a considerable number of issues and challenges have come up. The realisation of the benefits of the Trade Protocol is dependent on other issues. The extent of the dependence of the SADC economies on the regional market, the type of product that SADC economies produce and are dependent on, the level of intra-SADC trade and its potential for expansion are some of the issues that warrant special attention. These issues determine the structure of competitiveness in the SADC market and this has implications for South Africa as the dominant economy. Ideally, the SADC FTA should be able to increase the market size for industries and products. With the reduction and elimination of trade barriers as per the requirements of GATT Article XXIV, trade should be enhanced and competition increased. Such benefits should also attract foreign direct investment into the region. However, these benefits will be made hard to realise by product uncomplementarity, dependence on primary products for export earnings and the low levels of intra-SADC trade. Rather than boost industrialisation in the region, the SADC FTA may intensify specialisation and constrain trade diversification.

The process of the implementation of the Trade Protocol in the move towards the FTA revealed a very significant back-loading of tariff reductions where countries concentrated the bulk of their trade liberalisation for the end of 2007 and early 2008. There was also a definite lack of proactiveness on the part of SADC countries to ensure the observance and implementation of gazetted tariffs such that there is a disjuncture between gazetted and applied tariffs. There is also the disturbing proliferation of non-tariff barriers in the wake of

tariff liberalisation. It does not help that the region is also plagued by lack of infrastructure development, inadequate transport facilities, capacity constraint as well as the dependence on trade revenue for the bulk of government revenue. To make this worse, there is no comprehensive policy on mitigating the adjustment costs for SADC countries as they enter into an FTA.

SADC countries should deal with the divergent trade policies and ensure that individual country policies allow regulatory cooperation and policy harmonisation across the region. Political will plays a very significant role in achieving the objectives of the Trade Protocol and economic integration in general and it is highly imperative that SADC countries seek to establish political coherence and get rid of political rivalry. Efforts have to be made to address supply-side constraints and diversify trade products and achieve product complementarity. Most importantly, as countries begin to realise the importance of small to medium enterprises (SMEs) and their contribution to the economy and poverty reduction, more attention should be paid to informal cross-border trade. Regional support and regulatory structures need to be set up to develop informal cross-border trade.

One of the biggest challenges to the SADC FTA and regional economic integration is the overlapping membership of RTAs by SADC members and the negotiation of EPAs with the EU. SADC countries have failed to respect the provisions of the Trade Protocol which allow countries to conclude trade arrangements with third countries only to the extent that they further the objectives of the Trade Protocol. Where such trade agreements predate the Trade Protocol, countries are expected to review such agreements with a view to making them compatible with the objectives of the Trade Protocol. Such multiple memberships of RTAs have been found to burden SADC member states as they involve a waste of scarce resources through the duplication of projects and they create conflicting obligations for the countries. Rationalisation of these multiple memberships is needed as a matter of urgency as it has, in essence, led to the failure of a strong, united voice in negotiating EPAs with the EU. Technically, there is no SADC EPA grouping. By all means and purposes, the current SADC EPA group is a SACU+ group. In rationalising the multiple memberships; the idea of using SACU as a core and fast tracking group for SADC seems attractive. However, the dynamics, economic and political, shaping the workings of SACU make this a very difficult thing to do and not very viable. Despite their failure to observe the commitments made under the Trade Protocol and the seemingly complacent behaviour of countries when it comes to SADC

objectives on economic integration, SADC member states are interested in seeing the success of SADC. It would seem like they are keen on seeing the benefits of the SADF FTA first before committing themselves to it and, in the meantime, they will liberalise with other RTAs with a strictly trade foundation. Rationalising multiple memberships in SADC would entail SADC members also in COMESA pulling out of COMESA and concentrating on SADC, especially if their strategic trade interests lie with SADC. SADC could then merge with SACU. To maintain preferential market access for the previous COMESA members, SADC and COMESA could enter into an FTA between the two of them. Although interim EPAs with the EU have already been signed, such a solution to the problem of RTA overlaps would have made for the best EPA configurations.

It is anticipated that the current situation with regard to RTAS in the region and EPAs will in the near future disrupt SADC's regional economic integration process, especially its plans to enter into a CU. Once a CET has been established *vis-a-vis* SADC countries in their different EPA configurations and the EU, then it would be difficult for SADC to negotiate a CET of its own as countries cannot apply more than one CET. The signing of EPAs has not been to the best interests of SADC countries. Signing EPAs has essentially been a race to preserve the EU market for SADC countries exports at preferential rates. Also, divided, countries in the SADC region did not have much negotiating clout and lacked a common negotiating standpoint.

In mapping the way forward for SADC, the biggest threat to its future sustainability seems to emanate from EPAs. In addition to the fragmentation it has caused in SADC, EPAs represent a raw deal for SADC countries. Duty-free and quota-free into the EU market has restrictions when it comes to "sensitive" products such as rice and sugar exports as well as agricultural products. The rules of origin to be observed in the EPAs use a higher threshold than what SADC countries would normally be able to achieve. Most importantly, the lack of agreement on the scope, content and meaning of the developmental component of the EPAs is very worrying. Generally, the EPAs will serve to provide a dumping ground for EU products while the EU has protected from any competitive products that SADC countries have to offer. As for South Africa, the TDCA it signed with the EU seems to have had an adverse impact on the prospects and progress of regional economic integration in SADC. The TDCA has partly contributed to the fragmentation among SADC countries when it comes to negotiating and signing EPAs. On the other hand, South Africa's unique position as a developed country in

SADC warrants that it manage its economic affairs with sensitivity to avoid resentment by the other SADC member states. Economic expansion into southern Africa by South African companies should focus more on infrastructural development than creating monopolies and elbowing domestic industries out of business. Also, by virtue of its dominant political and economical position, South Africa's domestic problems, particularly unemployment, have a direct impact on its trade policies and promote protectionism in some sectors of the economy. These issues South Africa needs to investigate and find means of merging South Africa's interests with those of its fellow SADC members.

Overall, the most striking conclusion to be made from this research is that while the legal framework supporting regional economic integration is generally good, its fundamental deficiency is in the lack of a compliance mechanism to ensure that SADC countries go through with the commitments made. Such a conclusion calls for the tightening of the provisions in the Trade Protocol and the RISDP. The RISDP would need to be amended to reflect a more realistic process of regional integration that takes stock of the current legal and structural deficiencies. As it stands, the RISDP is too ambitious and quite frankly, the goals stated therein would be impossible to achieve under the current SADC circumstances. Once amended as such, the RISDP would need to be made a formally binding legal document, especially seeing as the ultimate goal of the Trade Protocol, the Free Trade Area, has been achieved. The RISDP could serve as a vehicle for the achievement of other deeper forms of economic integration. Creating an element of compulsion in the Trade Protocol and other SADC legal documents is highly dependent on the SADC member states willingness to give effect to the institutional changes effected in 2001. This implies ceding a certain amount of policy space to the Secretariat or any other regional institution that needs to effect and implement policy for the region. A certain degree of political and economic sovereignty needs to be ceded to a regional institution. As it stands, even though the Secretariat is responsible for the overall implementation of the FTA and guiding the progress and process into other stages of regional integration, it does not have enough teeth or authority to marshal the SADC member states. SADC states have simply refused to give it adequate capacity.

South Africa has a very significant role to play in the region. However, by failing to be consistent in its commitment towards regional economic integration, South Africa has failed to show effective leadership. While the idea of South Africa's leadership in the region may not go down well with other SADC member states, it is submitted that there is no sense in

being politically correct when, in terms of its economy, South Africa is the most advanced. Pragmatic considerations demand that it lead the region towards economic development. By pursuing an aggressive trade liberalisation agenda and in the same breath a rigorous protectionist strategy; South Africa is failing in its role. South Africa, in the grouping of SACU, has led the trade liberalisation effort under the Trade Protocol, always on schedule with its tariff reductions. Nonetheless, South Africa has also been the champion of the complicated, unworkable and inherently protectionist SADC rules of origin and its clothing and textiles sector is one of the highly protected sectors in its economy. If the natural polarisation effects of the SADC FTA are to be considered, then it makes sense that the other SADC member states are unwilling liberalisers. South Africa would have the most to gain from the SADC FTA. In appreciating the role and influence of the trade unions in South Africa, it is more crucial that South Africa find a balance between its domestic interests and SADC interests. A significant aspect of the region's progress in economic integration would be achieved through South Africa's effective leadership.