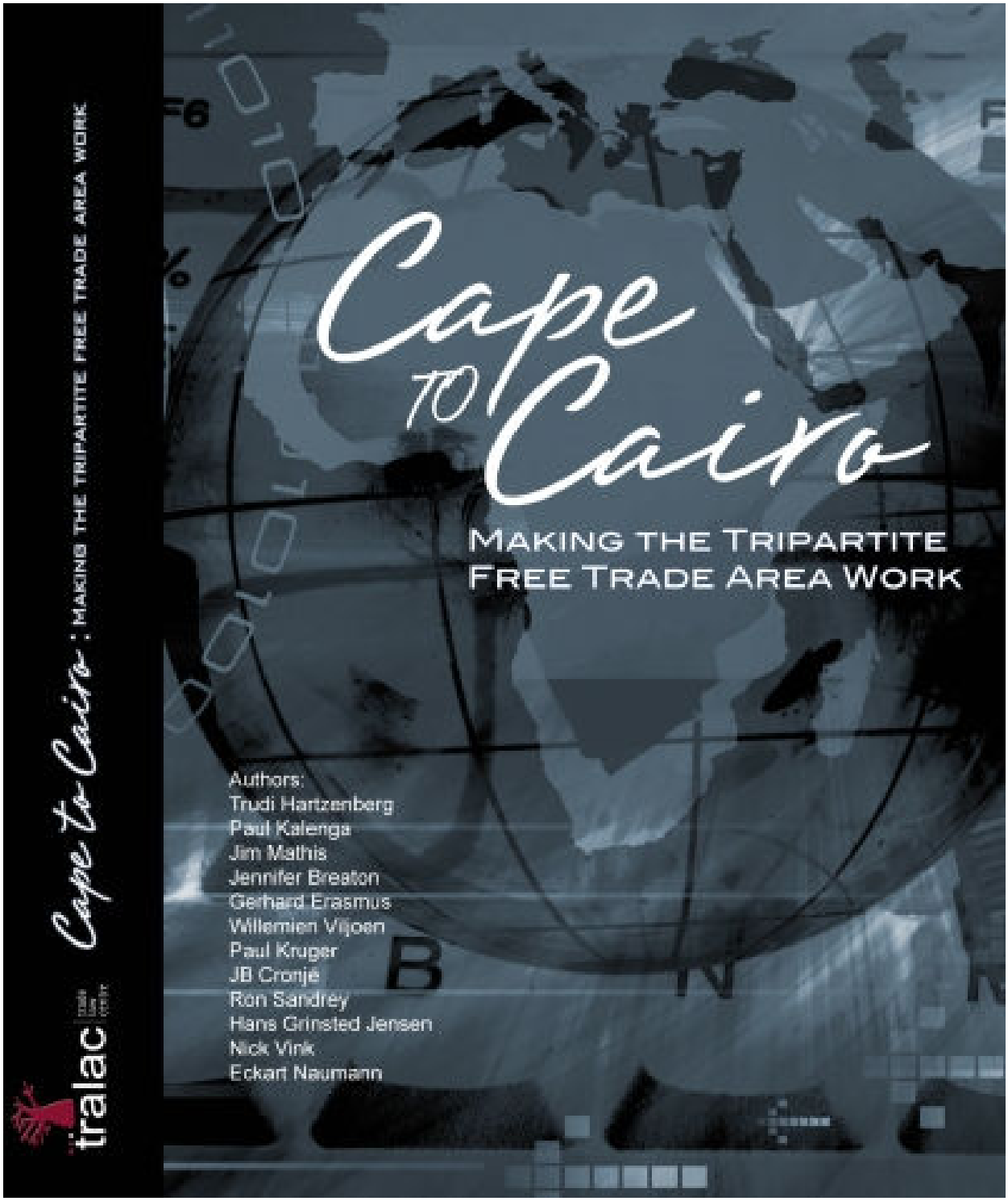

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Introduction

The Heads of State and Government of the 26 member states of the Common Market for East and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) agreed in October 2008 to establish a grand Free Trade Area (FTA) which is now referred to as the Tripartite FTA (T-FTA). This integration initiative has in the (almost) three years since this political decision, followed a course rather different from other regional integration initiatives in Africa. Since October 2008 various task teams of technical experts have been engaged in analytical work and have prepared a Draft Agreement and 14 annexes, dealing with issues, in addition to tariff liberalisation, ranging from Rules of Origin (RoO) to the Movement of Business Persons and Dispute Resolution. The most recent iteration of this technical process has produced drafts of these instruments, dated December 2010. These drafts provide points of reference in many of the chapters of this book. Negotiations, however, were only officially launched at a Summit, held in South Africa, in June 2011. It is, therefore, very important to recognise that the Tripartite FTA does not exist yet and substantive negotiations have not yet begun. The Draft Agreement and the 14 annexes lack official status, yet it is a useful exercise to review these draft instruments and the emerging negotiations process, as member states deliberate negotiating guidelines, and soon start substantive negotiations.

The Trade Law Centre (tralac) has already published a book, Cape to Cairo - An Assessment of the Tripartite Free Trade Area, on specific issues related to the Tripartite FTA (available electronically on the tralac website, www.tralac.org) to coincide with the Summit in June 2011. The book focuses on economic analysis, and a broadly focused assessment of the impact of the T-FTA, with particular focus on agriculture and agri-business development.

This second book delves more deeply into a range of issues relevant to a discussion about what will make the T-FTA work. At this early stage of the process, before negotiations begin in earnest, there are important issues to consider that could contribute to making the T-FTA a successful integration arrangement. Thus far, Africa's integration record is marked by grand schemes, weak legal and institutional foundations for a rules-based dispensation of regional integration, and an implementation record that demonstrates very little serious commitment. Can the T-FTA be different? The answer to this question lies not in the draft instruments, but the outcome of the political economy process that will begin as member states negotiate the legal instruments of the T-FTA. However, the analysis in this book can provide an opportunity to reflect on what exists already in terms of regional integration in East and Southern Africa, and what lessons can be learned from this experience.

Specific issues covered include sugar trade, RoO, trade in services, movement of business persons, dispute settlement and trade remedies and safeguards, as well as World Trade Organisation (WTO) rules on regional trade agreements and implications for the T-FTA.

The T-FTA will be anchored on three pillars: market integration, infrastructure development and industrialisation. These pillars appear to capture the key challenges that proscribe the competitiveness of African businesses, and so limit both Africa's own integration achievements and the integration of African economies into the global economy. Many analysts would concur that the key challenge facing African countries, both in African or global integration contexts, is not necessarily market access, but the capacity to produce tradables competitively. Since negotiations have not begun in earnest yet, there is an opportunity to consider carefully the challenges of Africa's integration experience, so that the T-FTA can mark a watershed in African integration.

Market integration initiatives have traditionally been the hallmark of African integration, with infrastructure development (specifically sector development initiatives and cross-border projects) featuring on the regional cooperation agenda. Industrialisation was part of the early post-independence discussion on regional integration as a remedy to continental fragmentation, small economies and small markets with limited scope for economies of scale, but it has in recent years featured less explicitly on the integration agenda. How will these pillars provide for the construction of a rules-based regime for regional integration in East and Southern Africa?

The following are among the issues that merit consideration at this stage of the T-FTA process:

i) Liberalisation of trade in goods could proceed expeditiously, building effectively on the tariff liberalisation that has already been achieved by the constituent regional economic communities (COMESA, EAC and SADC). It is possible however, that such liberalisation could be seriously hampered by extensive lists of sensitive products, and restrictive RoO.

ii) The development of infrastructure (both national and cross-border) is essential to reduce the transaction costs of doing business generally, and of trade specifically. However the effective use of (hard) infrastructure requires appropriate policy and regulatory (soft) infrastructure, which forms part of a services agenda. Trade in services liberalisation has not been embraced as part of a regional integration agenda by many member states in the T-FTA region, yet without serious work on a services liberalisation and regulatory reform agenda, the benefits of the T-FTA are likely to remain elusive, and costs of doing business and trade in region may still hamper global integration initiatives.

iii) A rules-based regime provides certainty, predictability and transparency for regional trade and investment. Explicit undertakings in the legal instruments by member states with effective implementation are integral to a rules-based regime, as is effective dispute resolution. On this score the track record in the region is not impressive, neither with respect to dispute resolution nor with regard to effective implementation of undertakings. The question is how committed the member states are to a rules-based regional integration regime.

iv) African integration has generally been state-driven, with very little input from other stakeholders, especially the private sector. Design and negotiation of regional integration initiatives without effective private sector involvement may well lead to agreements that frustrate business, investment and trade, both in the region and in global markets. An example of an area where private sector input is indispensible is RoO; and SADC's RoO are an example of a regime that expresses protectionist interests and frustrates intra-trade, rather than providing a workable framework for determination of origin to avoid trade deflection.

There is currently much focus on regional integration, not only in Africa, but globally. Global features of the current wave of regional integration include the development of comprehensive FTA agendas, extending well beyond trade in goods, with strong emphasis on deeper integration. The role of services liberalisation, regional investment governance, competition policy and other behind-the-border issues to promote competitiveness find expression in these deep integration arrangements. The development of robust, efficient and competitive trade and production chains benefits from rules-based governance that extends well beyond border measures such as tariffs. The Asian and East Asian regional trade agreements are setting benchmarks that promote regional clusters of production and trade excellence. Can the T-FTA do the same?

Trudi Hartzenberg
Executive Director, ***tralac***

Acronyms

ACP	African, Caribbean and Pacific
ADA	Anti-Dumping Agreement
AGOA	African Growth and Opportunity ACT
AMAD	Agricultural Market Access Database
ASEAN	Association of South-East Asian Nations
BLNS	Botswana, Lesotho, Namibia and Swaziland
CET	Common External Tariff
CGE	Computer General Equilibrium
CIA	Central Intelligence Agency
CIF	Costs of Freight and Insurance
COMESA	Common Market for East and Southern Africa
CPs	Contracting parties
CPC	Central Product Classification
CRTA	Committee on Regional Trade Agreements
CTD	Committee on Trade and Development
DRC	Democratic Republic of the Congo
EAC	East African Community
EC	European Commission
EPA	Economic Partnership Agreement
EU	European Union
FAO	Food and Agriculture Organisation
FDI	Foreign Direct Investment
FOB	Free on Board
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GNI	Gross National Income
GSP	Generalised System of Preferences
GTAP	Global Trade Analysis Project
HS	Harmonised System
IFPRI	International Food Policy Research Institute
ITAC	International Trade Administration Commission
LDC	Least Developed Country
MERCOSUR	Common Market of the South, Latin American trade organization
MFN	Most Favoured Nation

MPS	Market Price Support
NAMA	Non-Agricultural Market Access
NRA	Nominal rate of assistance
NTBs	Non-Tariff Barriers
NTMs	Non-Tariff Measures
OECD	Organisation for Economic Co-operation and Development
ORC	Other regulations of commerce
ORRC	Other restrictive regulations of commerce
PSE	Producer Support Estimate
PTA	Preferential Trade Agreement
REC	Regional economic community
RTA	Regional Trade Agreement
RoO	Rules of Origin
ROW	Rest of the World
RSA	Republic of South Africa
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
SAT	Substantially all trade
S&D	Special and differential treatment provisions
SCM	Subsidies and Countervailing Measures
SPS	Sanitary and Phytosanitary
SSG	Special Safeguards
STE	State Trading Enterprises
TBT	Technical Barriers to Trade
TNC	Trade Negotiations Committee
T-FTA	Tripartite Free Trade Area
TPR	Trade Policy Review
TRQ	Tariff Rate Quotas
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States (of America)
WTA	World Trade Atlas
WTO	World Trade Organisation

Contents

Chapter 1

Making the Tripartite FTA work

Paul Kalenga

(TradeMark Southern Africa (TMSA) on attachment to the SADC Secretariat as Senior Trade Policy Adviser)

1. Introduction

There is increasing consensus among African policy circles that trade is a powerful engine for economic growth and development. There is also a recognition that increased regional trade cooperation through the removal of intraregional trade restrictions (such as tariffs, quotas and nontariff barriers) is a critical strategy to address the challenges posed by small domestic markets, limited economies of scale and marginalisation of African economies in world trade.

As a result, the formation of regional trade blocs in Africa, aimed at reducing and eliminating regional trade barriers, has proliferated to an extent that most of the countries in eastern and Southern Africa belong to more than one preferential trading arrangements. This has led to the problem of overlapping membership in multiple and often conflicting trade regimes, which has often been cited as undermining effective implementation of trade commitments. It is for this reason that the proposed tripartite Free Trade Agreement (FTA), encompassing 26 countries that belong to the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC), is being hailed as a more realistic strategy going forward. The idea of this wider market integration is viewed by many stakeholders in the region and beyond as a positive development. There is also a body of opinion which believes that this 'grand FTA' strategy could be more realistic than the rush to establish customs unions.

However, it would be unfortunate if this 'grand FTA' is simply a mere merger of the existing three trade regimes. There is near consensus that the existing trade regimes have not yet been successful in making intra-African trade a powerful driver of economic growth and development. Although in recent years the levels of intraregional trade and investment have increased in COMESA, EAC and SADC, the potential has not yet been fully exploited. In fact, intraregional trade and investment continue to be low compared to other regions of the world. South Africa is often the main source of this trade and investment flow.

Realising the potential for increasing intraregional trade flows would require that key trade impediments are significantly addressed. These obstacles are well-known and include, amongst others:

(i) The persistence of trade barriers, particularly non-tariff barriers, as a result of inadequate implementation of agreed commitments, has continued to undermine the gains that could be derived from existing intraregional trade liberalisation schemes.

(ii) Despite preferential tariffs, restrictive rules of origin which are at the heart of any preferential trade regime, have not enhanced cross-border trade. In many instances, such rules have been manipulated to achieve protectionist objectives and promote rentseeking behaviour rather than those of preventing trade deflection or transhipment.

(iii) By exclusively focusing on preferential liberalisation on goods, existing trade regimes have not encouraged regulatory reform necessary to reduce transaction costs and enhance economic efficiency. The existence of a myriad trade-in-services restrictions continues to raise the costs of cross-border trade.

(iv) Existing trade regimes have not adequately addressed barriers to intra-regional investment flows, particularly those related to the services sectors. In addition, restrictive rules of origin have further discouraged competitive investment in regional value-added activities such as in textile and clothing as well as agro-processing sectors, thereby constraining international specialisation of many small and low-income economies.

(v) Tariff liberalisation initiatives have not generated substantial gains due to the persistence of high transport costs, inefficiencies in border crossings and behind-the-border costs, largely on account of inappropriate domestic business and regulatory environments.

The challenge facing tripartite policy makers and their technicians is how to make this envisaged grand FTA work better than the existing trade regimes by addressing such impediments to trade. Trade negotiators should identify the design and implementation pitfalls of the existing regimes and seek to address them. This requires that trade negotiators embrace an appropriate approach to tariff liberalisation and rules of origin which goes

beyond a conventional 'mercantilist' paradigm towards a desire to enhance effective regional market integration in goods. In addition, recent analyses of preferential trade agreements suggest that they have now moved beyond tariffs to include trade in services and other trade-related issues in domestic policy and regulatory frameworks, such as on investment, competition, product standards and intellectual property rights.

This new wave of agreements is often referred to as 'deep' integration. Their objective is to accord non-discriminatory national treatment to goods and firms from all parties to an agreement. It is probably too early to learn more about the effects of these 'new generation' agreements. However, the increasing phenomenon of international production networks in the world economy appears to suggest the need to pay attention to market governance issues. Disciplines that reduce the risks associated with expansion of international production sharing activities are likely to gain prominence (Lawrence, 1996; WTO, 2011).

Theoretical expectations of forming an FTA are largely to be found in its potential dynamic gains. These gains arise from its pro-competitive effect resulting in increased efficiency in resource allocation. Inefficient regional firms will face regional competition. An FTA that is designed to protect inefficient domestic industries is not likely to generate such dynamic gains. The gains can also arise from the so-called 'scale and variety effects' which would lower average costs, reduce consumer prices and enhance factor accumulation. For an FTA to generate such gains it must minimise 'trade diversion' by also lowering Most Favoured Nation (MFN) tariffs, especially on inputs. In fact, there is empirical evidence that suggests that if the spread between MFN tariffs of members are higher, this is likely to lead to restrictive rules of origin, and thereby undermine the benefits of intra-regional tariff reductions. From this perspective, the design of an FTA matters.

Trade facilitation is a relatively new issue in FTAs. The current focus in most trading arrangements has been on customs cooperation provisions. While the devil lies in further details, it is encouraging that current thinking about the Tripartite FTA is unconventional and somewhat innovative, as it seeks to link market integration with infrastructure-related (especially transport facilitation) issues to deliver a trade facilitating outcome. In East Asia, for example, regional integration developments are driven by a search for efficiency and competitiveness with a strategic focus of facilitating and promoting supply-chain linkages

across national borders. This experience can offer useful lessons to the tripartite integration process.

2. Addressing the problem of overlapping trade regimes

Many studies on regional economic integration in Africa have argued that overlapping memberships in regional preferential trading arrangements undermine their effectiveness (ECA 2004). In the sphere of trade, such overlapping arrangements have been blamed as one of the factors that inhibited the full potential of their ability to stimulate intra-regional trade. Resolutions of continental bodies such as the Council of Ministers of the African Union (AU) and discussions held under the auspices of the United Nations Commission for Africa (UNECA) showed near consensus on the need to rationalise the continent's integration process. Yet controversy remained over how to achieve it (ECA 2006).

The East and Southern African region has the most regional integration initiatives, including the East African Community (EAC), the Intergovernmental Authority on Development (IGAD), the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC), the Southern African Customs Union (SACU) and the Indian Ocean Commission (IOC). Matters became complicated by the fact that COMESA, EAC and SADC's integration goals and strategies are quite similar, and in particular, they are all FTAs operating under different rules of origin and trade instruments, countering the objective of facilitating and simplifying regional trade. These three Regional Economic Communities (RECs) have long recognised that duplication of integration efforts was a problem – especially in the programmes related to trade facilitation and market integration. However, for most governments, it proved difficult to make a choice as to which trade regime was optimal. They saw a variety of benefits of belonging to more than one arrangement. Box 1 below provides a brief synopsis of the overlapping problem.

Box 1: State of overlapping membership

The ***Southern African Customs Union* (SACU)** [1] was established in 1910 and its agreement was revised in 1969 and 2002. Swaziland belongs to the Common Market for Eastern and Southern Africa (COMESA) and had continued to seek derogations from granting trade preferences to its partners in COMESA due to its SACU membership - Article 31 of the SACU Agreement.[2]

The ***Common Market for Eastern and Southern Africa* (COMESA)** started as a preferential trade area (PTA) in 1984 and was transformed into a free trade area in 2000.[3] Four COMESA members belong to the East African Economic Community (EAC) and eight belong to the Southern African Development Community (SADC). COMESA formally launched a Customs Union in June 2009 to be implemented over a three-year transitional period. Swaziland, as a party to the already existing SACU regime, is not able to implement two different external trade regimes.

The ***Southern African Development Community* (SADC)** adopted a Protocol on Trade in 1996.[4] A SADC free trade area was effectively launched in August 2008 when 85% of intra-SADC merchandise trade flows reached a duty-free status. SADC consists of 15 countries. Angola, DRC and Seychelles are not implementing the SADC FTA. Five SADC countries are SACU members and eight belong to COMESA. SADC intends to become a customs union. It is likely that not all 15 SADC member states will be able to establish a SADC Customs Union as long as they have committed themselves to a similar trade arrangement elsewhere.

The ***East African Community* (EAC)** is a customs union consisting of four countries that belong to COMESA and one country belonging to SADC.[5] It is also unlikely that these members will be able to implement the agreed COMESA common external tariff (CET) or in the case of Tanzania, join the envisaged SADC Customs Union.

The consolidation of the COMESA, EAC and SADC trade arrangements into a single trade regime is an important strategy to overcome the problem of overlapping membership.

[1] SACU members are Botswana, Lesotho, Namibia, South Africa and Swaziland.
[2] Since the establishment of COMESA FTA in 2004, Swaziland has continuously benefited from a derogation to participate in COMESA as a non-reciprocal member of the FTA. Swazi exporters enjoy non-reciprocal favourable access in COMESA markets while COMESA exporters face trade barriers in Swaziland.
[3] COMESA members are Burundi, Comoros, Djibouti, DRC, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.
[4] SADC members are Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.
[5] EAC members are Burundi, Kenya, Rwanda, Tanzania and Uganda.

However, the envisaged FTA should go beyond this institutional objective to address impediments to the expansion of regional trade inherent in the existing trade regimes.

3. Overview of the tripartite economies

Table 1: Tripartite GDP and other relevant economic indicators

#	Country	GDP USD	% Share of Total GDP	Population	%Share of Total Pop.	GDP p.c
1	Angola	75,492,890,278	8.79	18,497,632	3.15	
2	Botswana	11,822,741,858	1.38	1,949,780	0.33	6,064
3	Burundi	1,325,009,348	0.15	8,303,330	1.41	160
4	Comoros	535,336,308	0.06	659,093	0.11	812
5	DRC	10,575,489,480	1.23	71,712,867	12.21	147
6	Djibouti	1,049,054,417	0.12	864,202	0.15	1,214
7	Egypt	188,412,876,658	21.94	82,999,393	14.14	2,270
8	Eritrea	1,873,235,772	0.22	5,073,279	0.86	369
9	Ethiopia	28,526,277,751	3.32	82,824,732	14.11	344
10	Kenya	29,375,775,194	3.42	39,802,015	6.78	738
11	Lesotho	1,578,614,711	0.18	2,066,919	0.35	764
12	Libya	62,360,446,571	7.26	6,419,925	1.09	9,714
13	Madagascar	8,589,541,847	1.00	19,625,030	3.34	438
14	Malawi	4,727,486,011	0.55	15,263,417	2.60	310
15	Mauritius	8,588,729,727	1.00	1,275,323	0.22	6,735
16	Mozambique	9,790,246,565	1.14	22,894,294	3.90	428
17	Namibia	9,264,803,489	1.08	2,171,137	0.37	4,267
18	Rwanda	5,215,852,721	0.61	9,997,614	1.70	522
19	Seychelles	764,296,578	0.09	87,972	0.01	8,688
20	South Africa	285,365,879,676	33.23	49,320,150	8.40	5,786
21	Sudan	54,680,784,788	6.37	42,272,435	7.20	1,294
22	Swaziland	3,000,995,335	0.35	1,184,936	0.20	2,533
23	Tanzania	21,368,198,751	2.49	43,739,051	7.45	489
24	Uganda	16,042,841,225	1.87	32,709,865	5.57	490
25	Zambia	12,805,027,606	1.49	12,935,368	2.20	990
26	Zimbabwe	5,625,000,000	0.66	12,522,784	2.13	449
Total		**858,757,432,665**	**100.00**	**587,172,543**	**100.00**	

Source: World Bank, online: http://data.worldbank.org/indicator, 2011

With a combined population of over 587 million consumers and a gross domestic product (GDP) of just over US$858 billion, the tripartite region is a potential market for traders of goods and services as well as for cross-border and global investors. This is also a diverse

market, ranging from relatively advanced economies, such as South Africa with substantial manufacturing and services industries and accounting for over 33% of the region's GDP, to a number of small economies such as Malawi, Lesotho, Eritrea, Burundi, Djibouti, Seychelles, Comoros, amongst others, whose combined GDP is a mere 1.2% of the region's GDP.

It is often assumed that the more developed economies of South Africa, Egypt and Kenya with a combined share of regional GDP amounting to more than 60% stand to gain more from the envisaged FTA, while others might be confronted with possible economic polarisation. Such generalised assumptions have often led to demands for asymmetrical tariff liberalisation in favour of smaller economies. For example, within the SADC trade regime, less developed countries negotiated a longer tariff liberalisation time frame and longer lists of sensitive products. Whether this has produced any sustainable adjustment gains is debatable. Arguably, such assumptions have often prevented smaller economies from reaping the dynamic gains of market integration and the potential restructuring of inefficient industries that might have resulted.

It is therefore important that concerns over the small size of national economies should not be overstated to the detriment of the promotion of competitiveness and long-term growth of the smaller and poorer economies. Policymakers should largely focus on how to maximise the gains that could be derived from the enlarged regional market and to minimise potential short-term adjustment challenges through policy interventions towards assisting the adjustment of sectors. This would also require that bigger economies should be more ambitious in opening up markets for goods and services and addressing non-tariff barriers to trade, including rules of origin.

The region is also characterised by a large number of small states which are landlocked and poor. As landlocked economies, these countries face special challenges in competing in regional and global markets. They are faced with higher trading costs attributable to inefficiencies in their domestic business environments; high trading costs of border crossings; and poor soft and hard infrastructure of their neighbouring countries. For example, it has been documented that between October and December 2008, it cost just under US$7,000 to ship a twenty-foot container from the port of Durban to Lusaka, including the costs of transport, customs clearance, cargo dues, acquittals and empty container return. This is four to five times the cost of a shipping container from Japan to Durban (World Bank, 2009). This

picture is generally similar throughout the region.

The World Bank's Logistics Performance Index (LPI) 2010 found that the ease of clearing at borders in Southern and East Africa was very poor compared with that of other regions in Africa. East Africa is found to be particularly constrained by infrastructure and customs performance, while Southern Africa lags behind North and West Africa in the ability to deliver shipments on time. The fact that many countries are at the end of long trade corridors has been cited as an impediment (World Bank, 2010).

Despite being least developed landlocked countries, a timely establishment of a trade facilitating Tripartite FTA would render a distinct opportunity for enhancing their competitiveness. As poor and landlocked economies, they lack a diversified manufacturing base to maximise gains from a 'trade in goods' agreement. For this reason, an early harvest on trade facilitation improvements and in specific services (such as transport, tourism, telecommunications, finance, logistics, and professional services) is likely to assist them in maximising gains from the envisaged grand FTA.

4. Trade liberalisation in the three RECs: building on the *acquis*

Trade liberalisation within EAC, COMESA and SADC has been limited to goods, largely focusing on tariffs reduction and elimination. Tariff liberalisation has increased over recent years. As a result, not all 26 countries will need to undertake tariff negotiations with each other. For example, there should be no tariff negotiations among the five EAC and five SADC countries[6] or among the 14 COMESA FTA countries or among the 12 SADC FTA countries that are already trading on FTA terms. Only Angola, the Democratic Republic of the Congo, Eritrea and Ethiopia do not currently participate in any FTA arrangement with any of the tripartite countries. If negotiators adopt an approach that builds on what has already been achieved (*acquis*), combined with a non-mercantilist approach which emphasises the value of effective integration of regional markets, it is possible that tariff negotiations can be concluded within in a short time.

[6] EAC and SACU will negotiate as single customs territories due to being functioning customs unions. Both have already gained experience of negotiating as such through the Economic Partnership Agreement (EPA) negotiations and for SACU through negotiations with the US, Mercado Comun del Sur (MERCUSOR), the European Free Trade Association (EFTA) and SADC.

A critical policy issue for debate is whether a conventional tariff liberalisation approach based on flexibility to exclude certain 'sensitive' sectors or products or delaying their liberalisation is still relevant in this context. It is arguable whether a tariff liberalisation approach that allows for arbitrary designation of 'sensitive' products will lead to better integration outcomes. Are there no other ways that can be explored to deal with traditional worries about the impacts associated with tariff liberalisation? Can safeguard measures be used as a way to deal with unexpected circumstances arising from market integration rather than resorting to long transition periods and the carving-out of sensitive sectors or products? Sensitive products, if not properly dealt with, can undermine the potential gains from market integration.

4.1 COMESA trade liberalisation

The COMESA FTA was launched in October 2000. It replaced a Preferential Trade Area (PTA) which had existed since 1981. Rwanda and Burundi joined the COMESA FTA in 2004 and the Comoros and Libya in 2006. Former COMESA members included Lesotho (up to 1997); Mozambique (up to 1997); Tanzania (up to 2000); Namibia (up to 2004) and Angola (up to 2007).

The COMESA FTA has no *a priori* exclusions or exceptions and no *ex ante* sensitive products, although the COMESA Treaty allows some special dispensation upon application. Currently the following exceptions can be witnessed in the COMESA trade regime:

- Kenya has been granted a dispensation to restrict trade in wheat flour and cane sugar by way of tariff rate quotas. These sub-sectors obtained some protection under the COMESA safeguard provision. It remains to be seen how such exceptions will be treated in the Tripartite FTA. Sugar and wheat flour also generate sensitivities in the SADC FTA.
- When Seychelles applied to the COMESA FTA in 2006, it also applied for a dispensation to exclude a limited number of products from duty-free treatment.
- Swaziland has been derogated for reciprocating against COMESA FTA members due to its membership of SACU.[7] This has allowed Swaziland to establish an important

[7] Swaziland's derogation was extended beyond December 2010 and has been linked to the time frame for establishing the Tripartite FTA.

presence in the COMESA sugar market. Due to the sensitivity of sugar in the SACU and Kenya markets, it remains to be seen how the principle of reciprocity will play itself out.[8]

- Zimbabwe has been given a dispensation which lowered the value-added threshold for conferring origin under the value added criterion from 35% to 25% for selected products.
- There is also an arrangement between Sudan and Egypt, which exempts a few selected products from duty-free treatment on products imported from Egypt.
- Egypt continues to apply a 45% value addition rule of origin with the result that some member states have raised concern that their products were finding it difficult to enter the Egyptian market owing to such a rule of origin when the level applied by other countries remains 35%.
- Eritrea, Uganda and Ethiopia are not part of the COMESA FTA but trade on some preferential terms close to 80% of intra-COMESA trade.

The COMESA FTA covers trade in goods only. A Trade in Services Committee has been established to start the services liberalisation programme. Four priority sectors – communications, transport, finance and tourism – have been agreed upon. Negotiations on trade in services have not commenced, although some member states have submitted their General Agreement on Trade in Services (GATS) templates. However, the 2010 Council of Ministers have agreed that services liberalisation of COMESA would be guided by the tripartite framework.

With the exception of Seychelles and Ethiopia, other COMESA members belong to the World Trade Organisation (WTO). The COMESA FTA was notified to the WTO under the Enabling Clause on 4 May 1995.

[8] During the period 2005 – 2006, Swaziland was the fifth largest exporter (by value) within the COMESA region, exporting mainly sugar-based drink concentrates, raw cane sugar, combined refrigerator/freezers and slide fasteners.

4.2 EAC trade liberalisation

Intra-EAC trade liberalizstion is the most advanced among the three RECs. EAC countries started trading on duty-free and quota-free terms from January 2005. However, there was an asymmetrical dispensation for five years up to December 2009 with respect to exports from Kenya to Uganda and Tanzania, which were charged duty on an annually progressively reducing basis. Burundi and Rwanda joined the EAC in 2004 and applied a duty-free and quota-free regime at the onset.

Today, intra-EAC trade is completely duty-free, with no *a priori* exclusions or quantitative restrictions. Under SADC, Tanzania grants duty-free access (on a reciprocal basis) on mostly capital goods and equipment from other SADC members. Kenya applies a preferential tariff quota to sugar imports from other COMESA members. Membership in overlapping preferential trading arrangements (SADC, COMESA and the EAC Customs Union) makes their trade regimes complex. Therefore their membership to the Tripartite FTA is likely to make the situation easier for economic operators.

EAC members are all original WTO members. The EAC trade regime was notified to the WTO under the Enabling Clause on 9 October 2000.

4.3 SADC trade liberalisation

The SADC FTA came into force in 2000. Intra-SADC trade liberalisation has generally been cautious and slower than COMESA and EAC. A phased programme of tariff reductions commenced in 2001, resulting in the attainment of minimum conditions for the FTA in 2008 when 85% of intra-regional trade amongst participating countries attained zero duty. Maximum tariff liberalisation would be attained in January 2012 when the tariff phase-down process for sensitive products will be completed. For SACU countries, this process was completed in January 2007, whilst for Mozambique the process will be completed in 2015 in respect of imports from South Africa. The negotiating process appeared to have been dominated by fears of liberalisation as evidenced by the delayed or back-loaded adjustment, lists of sensitive products and restrictive rules of origin, in order to protect domestic industries and maintain revenue streams from customs duties.

As a result, the SADC FTA is relatively different from the COMESA and EAC trade regimes.

The SADC Trade Protocol recognises differences in economic size and levels of development among its members to such an extent that least developed countries (LDCs) were granted a longer tariff phase-down period than the developed ones. Each non-SACU SADC member of the protocol submitted two tariff offers: one applicable to all SADC members except to South Africa and the other applicable to South Africa. SACU members submitted a single offer to non-SACU SADC members.

The SADC trade regime also recognises the designation of sensitive products. Products were designated as sensitive because of their customs revenue sensitivities, perceived competitive pressures on import-competing domestic industries, and infant industry protection considerations. Sensitive products include sugar, dairy products, textiles and garments, footwear, motor vehicles, amongst others. The quick-to-be-liberalised products were those with very low MFN rates and insignificant or non-existent volumes of intra-SADC trade. As a result, such an approach did not offer real market access benefits during the early trade liberalisation phase. Those that offered potential for effective market access were shielded from immediate or early liberalisation.

Most countries delayed tariff reductions on sensitive products towards the end of the tariff elimination period (back-loading). Such delayed liberalisation has proved quite challenging as the expected fast pace of liberalisation at the end of the transitional period (2009 to 2012) became unbearable, for example in the case of Malawi and Zimbabwe. For these countries, the situation became complicated by the marked increase of sensitive imports from the region (mainly from South Africa) towards the end of the agreed tariff phase-down period. Thus, the perceived loss of tariff revenue became significantly pronounced towards the end of the transitional period.

Maiketso and Sekolokwane (2007) found that Malawi's tariff revenue from intra-SADC imports of its sensitive products recorded a significant increase in 2006, thus raising its level of revenue dependence on sensitive products. This SADC experience should provide useful lessons for the design of the Tripartite FTA. Delayed liberalisation of a sizeable number of products on account of sensitivity could undermine the potential of the Tripartite FTA to enhance intra-regional trade.

The SADC trade regime also allows for exclusions such that by the end of the

implementation period (2012) a number of countries still have non-duty-free tariff lines. Exclusion lists are not substantial, consisting mostly of tariff lines related to arms and ammunition, but also certain prepared foodstuffs. The SADC exclusion lists deserve further analysis.

The SADC regime allows for application of a quota system, provided that the tariff rate under such quota should be lower than the rate applied under the protocol. Sugar is a sensitive product, and there exists a separate annex on trade in sugar based on a quota system for sugar imports from the non-SACU SADC countries into the SACU market. The justification given is that the sugar sector is internationally heavily protected and highly distorted. Sugar has also been an issue in the COMESA FTA where Kenya has been allowed to restrict sugar imports from other COMESA countries. It appears that sugar is likely to emerge as a thorny issue in the tripartite trade liberalisation process.

The fact that some SADC member states have lagged behind in the implementation of their tariff phase-down commitments is likely to complicate the tripartite tariff negotiation process. A 2011 audit of the implementation of the SADC Protocol on Trade found that Malawi's current level of compliance was still at the 2004 and the 2005 levels for its tariff reduction offers to SADC and South Africa respectively. Zimbabwe was granted derogation up to 2014 and has not implemented tariff phase-downs since 2008. Tanzania had unilaterally reimposed tariffs on sugar products and specific categories of paper which had previously been phased down to zero and had for SADC requested an *ex post* derogation for these tariff increases.[9]

With the exception of Seychelles, all SADC members belong to the WTO. The SADC FTA was notified to the WTO under GATT Article XXIV on 2 August 2004. Angola, DRC and Seychelles are not party to the SADC FTA but have signed a declaration committing them to participate in the Tripartite FTA negotiations.

4.4 SACU trade liberalisation

Five SADC members belong to SACU which dates back to 1910. The SACU Agreement was modified twice in 1969 and then in 2002. The SACU trade regime is a product of colonial history rather than an outcome of a preferential trade negotiation process. South Africa

[9] See the 2011 Audit of the implementation of the SADC Protocol on Trade by the USAID SA Trade Hub.

continues to set the applied MFN common external tariff, in consultation with its SACU partners. In some cases, the external tariff appears to reflect South Africa's industrial policy interests rather than the needs of the individual economies of the other SACU members.

The simple average rate of the SACU tariff has been decreasing in recent years, although the pattern of protection has shifted in favour of agriculture. However, average tariff protection for manufacturing is still high compared to agriculture (WTO, 2009). Seasonal import quotas and prohibitions on certain agricultural products, including from each other's markets, still persist. These are aimed at encouraging domestic production of certain agricultural products such as poultry, pork, milk, vegetables, maize meal, wheat flour, and so forth. Botswana, Lesotho, Namibia and Swaziland (generally known as the BLNS) may as a temporary measure levy additional duties on goods imported in their areas to enable infant industries to meet competition from other producers or manufacturers within the customs union, provided that such duties are levied equally on goods from outside SACU. Export taxes are not prohibited.

Customs tariffs and excise duties are pooled together into a common fund which is distributed according to a formula. Since the distribution formula takes into account the countries' share of intra-SACU imports, it has undermined trade facilitation gains of a single customs territory as this requires the maintenance of internal border controls. In addition, goods traded within SACU must be declared at border posts to comply with the Sanitary and Phytosanitary Measures

(SPS) and technical regulations of each SACU member

The 2002 Agreement requires SACU to negotiate new preferential trade agreements as a group. This means that internal consultative processes on relations with third parties have become more intense. SACU was notified to the WTO under GATT Article XXIV on 25 June 2007.

4.5 Building on the tariff liberalisation achieved so far

Substantial progress on trade liberalisation has been achieved within the three RECs. As a policy lesson, it is important that the tripartite trade regime should build upon and improve on the status quo rather than reverting backwards. This process, however, faces some

challenges due to the fact that a tradition has been adopted by some member states to designate sensitive products and/or excluded products, as well as the application of quantitative restrictions import bans. Avoiding a trade regime which includes sensitive and exclusion lists can have a potential of enhancing prospects for specialisation between countries, especially in manufactures and agricultural products. Bringing the SADC FTA and certain SACU trade practices within the ambit of the Tripartite FTA may prove challenging.

5. Reforming rules of origin

Substantial progress has been made within the three RECs towards the reduction and elimination of tariffs. However, rules of origin will be critical in determining whether the Tripartite FTA will promote intra-tripartite trade and investment. Rules of origin are important to avoid transhipment or trade deflection of such a kind that only goods that are entitled for preferential treatment can qualify. This has often not been the case in many preferential trading arrangements (Brenton, 2003). Instead, rules of origin have been used as a protectionist measure aimed at sheltering domestic producers of 'sensitive products' from competition. At the core of the challenge is the belief by some policymakers that rules of origin can promote industrialisation, particularly the development of upstream-downstream production networks through making local or regional content a necessary condition for enjoying trade preferences.

The wholly produced criterion, i.e. goods that are not manufactured but extracted from the ground (such as minerals) or grown from the soil (such as livestock, maize, wheat) of a member country, applies to all the three trade regimes. There is also no controversy about the fact that certain simple operations such as labelling, repackaging or simple mixing of chemicals cannot be sufficient to confer origin, as this is the practice in the three trade regimes.

The difficulty arises if a good is manufactured using imported components: then such a good only originates from a country where 'substantial transformation' takes place. However, 'substantial transformation' is a rather complex process, especially in today's world of globally integrated value chains and production networks. The rules of origin for COMESA and EAC are generally similar as they are based on a general value-added rule of 35% for

local content (with some exceptions in the case of COMESA) or cost, insurance, and freight (c.i.f.) value rule of 60% of ex-factory costs of imported materials. COMESA has an exception for 'goods of particular importance', requiring only a minimum of 25% of ex-factory costs of imported materials. Egypt applies a 45% value-added rule on local materials. Some COMESA member states have raised concern that their products were finding it difficult to enter the Egyptian market owing to such a rule of origin when the level applied by other countries remains 35%.[10]

While the value-added criteria have the advantage of being simple and clear, its calculation can be complex and open to some disagreements. This has happened in some cases in the COMESA FTA. A critical challenge is to get the balance right between avoiding trade deflection and promoting trade when agreeing on the value-added threshold. The fact that a less stringent value-added rule of 25% of imported materials of economic importance exists in COMESA seems to suggest that there is value in considering some flexibility in sourcing inputs. Available evidence suggests that, for many products, value added in low-income countries is substantially less than 30% (WTO, 2011).

SADC rules of origin are significantly different from those applicable in COMESA and EAC. Initially, the SADC rules provided for relatively simple and less stringent rules modelled on those of COMESA. After an agreement on tariff liberalisation schedules was reached, the initial SADC rules of origin regime were changed to cushion perceptions on potential impact of regional tariff reductions. The SADC Regional Indicative Development Plan (RISDP) (August 1992: 25) states quite unequivocally that implementation of the Trade Protocol should be 'accompanied by appropriate rules of origin, which will encourage the optimum utilisation of regional resources and allow forward and backward linkages in the various production chains'. The outcome was 'made-to-measure' product-specific rules of origin which uses a variety of methods for determining eligibility. Value-added requirements were raised considerably and permissible levels of import content were decreased.

A mid-term review of the SADC Trade Protocol conducted in 2004 called for the reform of the rules of origin. The review concluded that rules of origin were complex and not supportive to enhancing intra-regional trade and competitiveness (Brenton, Flatters and Kalenga, 2004). Subsequently, a review was conducted by member states which resulted in

[10] Report of the 28th meeting of the COMESA Council of Ministers, 25 – 27 August 2010, Swaziland

relaxation of some product-specific rules. However, rules for some textile and clothing items are still based on double-stage transformation[11] and there is considerable pressure from some member states to move towards the single transformation rule, emanating from the expiry of the MMTZ arrangement[12]. Wheat flour is still excluded from preferential trade as an agreement on its rules of origin could not be reached.

The Tripartite FTA offers an opportunity to have a fresh look at the rules of origin regimes. They need to be simplified, made more transparent and less restrictive. There is a need to ensure flexibility in sourcing inputs and find easier ways of calculating substantial transformation. There is considerable evidence that restrictions on the use of imported inputs can be costly and do little to promote the development of globally competitive industries. The value-added threshold must recognise global production realities, whereby firms are now distributing their production stages across borders to decrease costs and exploit comparative advantages. This is very important for the majority of the tripartite membership countries which have small and less diversified economies. These economies generally require imported inputs. The higher the amount of domestic value added required, the more difficult it is to comply, thereby constraining specialisation.

Efforts must be made to make sure that their purpose is merely to prevent transhipment rather than to protect certain favoured industries. Contrary to popular view, there is no evidence that restrictive rules have stimulated the development of integrated production structures. Analytical work in SADC has proved the contrary and should provide useful lessons for the design of the tripartite rules of origin (Erasmus, Flatters and Kirk, 2006).

5. Streamlining product standards and technical regulations

International trading rules require that traded goods conform to certain minimum standards and technical regulations. This can affect trade costs, especially if multiple markets have different standards and technical regulations. These costs can be reduced through an effort to harmonise them. COMESA, EAC and SADC have developed certain initiatives to deal with these potential technical barriers to trade (TBT) and sanitary and phytosanitary

[11] Ironically this SADC approach to rules on textile and clothing was a bone of contention in the EPA negotiations resulting in the EU agreeing to a single stage transformation.

[12] This arrangement was a compromise that led to the adoption of the restrictive yarn-forward as a standard rule in the textile and garments sector and allowed poorer SADC members (Malawi, Mozambique, Tanzania and Zambia – the MMTZ) to access the SACU market through a time- and quantity-bound single transformation rule. This arrangement expired in December 2009.

measures. This is largely in the sphere of developing TBT and SPS legal frameworks and capacity building activities. There have also been attempts to harmonise standards in all the three trade regimes. COMESA has been working on developing a regional certification plan aimed at recognising national standards. The EAC enacted a Standards, Quality, Metrology and Testing (SQMT) Act in 2006 and is developing a regulatory and institutional framework to implement the Act. SADC has developed annexes on TBT and SPS to its Protocol on Trade, which establish modalities of cooperation in the implementation of a regional technical regulatory framework and SPS measures respectively. SADC also established a regional accreditation body – the SADC Accreditation Service (SADCAS) – in 2009 to offer accreditation in the areas of testing, calibration, certification and inspection. Since its establishment, SADCAS has accredited testing laboratories in Botswana, Seychelles and Tanzania.

Therefore, lessons from the experience gained within the three RECs should be learned. It seems as if the process of harmonising standards has proved, in many instances, to be tedious. The trade costs associated with standards and technical regulations are likely to be addressed through a concerted effort to adopt international standards. Existing trade regimes do not actively encourage parties to accept as equivalent other members' standards and technical regulations. The reasons for this non-recognition are not clear. However, weak SQAM infrastructure in many countries may explain this reality since equivalence should be based on conformity assessment. Tripartite cooperation on TBT and SPS issues, aimed at upgrading SQAM infrastructure, is required. This is also highlighted by anecdotal evidence of unregulated low-priced products from outside the region which may be harmful to consumers and regional economies. Mutual recognition arrangements should be explored so that countries accept them as being equivalent through appropriate arrangements for accreditation, certification and testing within the tripartite region.

6. Addressing non-tariff barriers to trade

African countries are not only victims of the growing prevalence of non-tariff barriers (NTBs) to trade in industrialised markets, but they are also prone to using them to keep out exports of other African countries, deeply damaging the prospects for intra-regional trade.[13] Another recent study concluded that although the five members of the EAC have succeeded

[13] This was the conclusion of the study by the Economic Commission for Africa (2005) on the prevalence of NTBs.

in eliminating tariffs on intra-regional trade, there has been more limited progress in addressing trade restrictive NTBs, including trade obstacles such as non-recognition of EAC certificates of origin, import bans on milk, day-old-chicks, beef, poultry, and multiple roadblocks (World Bank, 2009). Numerous cases have also been reported in COMESA through the NTB reporting system, including the following, amongst others[14]:

- Kenya imposing stringent technical regulations on sugar imports affecting sugar exports from Mauritius;
- Zimbabwe facing difficulties in exporting milk products to Zambia due to difficulties in obtaining import permits; and
- Milk trade between Kenya and Zambia being affected by NTB prevalence.

A recent study on intra-SADC trade found that NTBs have become widespread and those that were reported by firms affected products that account for one-fifth of regional trade, around US$3.3 billion in 2008. Table 2 below summarises the NTBs recently reported in SADC:

Table 2: NTBs that have been notified to SADC

Barrier	Examples of products affected	Intra-SADC trade potentially affected (% of total)
Import bans, quotas & levies	Wheat, poultry, flour , meat, maize, UHT milk, sugar	6.10%
Preferences denied	Salt, fishmeal, pasta	0.40%
Import permits & levies	UHT milk, bread, eggs, sugar, cooking oils, maize, oysters	5.40%
Single marketing channels	Wheat, meat, dairy, maize, tea, tobacco	5.30%
Rules of origin	Textiles& clothing, palm oil, soap, cake decorations, curry powder	3.00%
Export taxes	Dried beans, sheep, wood	4.80%

Source: World Bank (2011)

It is encouraging that COMESA, EAC and SADC as part of the Tripartite Coordination Mechanism have now instituted an online NTB reporting system. This needs to be made effective in the context of the Tripartite FTA, and, if possible, resolved through a rules-based framework.

[14] See www.tradebarriers.org where non-tariff barriers, in COMESA, EAC and SADC countries can be notified.

7. Embracing a trade in services agenda

The three RECs have not made substantial progress towards including trade in services liberalisation in their market integration processes. Emphasis has been on trade in goods. There is a tendency to postpone dealing with trade in services liberalisation at the outset or to simply express a desire for regional cooperation. A declaration signed at the Second Tripartite Summit (2011) has followed this trend. Trade in services will be dealt with during the second phase of negotiations, which would only commence after the trade in goods negotiations.

The end result will largely be influenced by the approach to be utilised in liberalising services. Services agreements normally follow two approaches. One approach is based on GATS with a positive-list approach to market opening. This requires the parties to list sectors, sub-sectors and modes of supply in which governments will make binding liberalisation commitments. Another approach is based on a negative-list approach whereby exceptions to liberalisation are listed. All sectors and nonconforming measures are to be liberalised unless otherwise specified in a transparent manner in reservation lists. These listed reservations can still be liberalised through consultations or in periodic negotiations. The majority of services agreements that have been notified to the WTO follow a negative-list approach (WTO, 2011).

Existing literature does not say much as to which type of approach generates better outcomes. However, a negative-list approach is regarded as being more effective and transparent and in achieving the deepest liberalisation. Perhaps a careful assessment of the economic benefits and costs of such alternative approaches to services liberalisation in the region should be undertaken before the commencement of the second phase of negotiations.

8. Advancing a trade and transport facilitation agenda

Non-tariff trade costs such as transport costs, inefficient administrative procedures at border crossings, and other costs incurred within domestic policy and regulatory environments have been found to be the most important impediment to intra-African trade.

Transportation has been identified as a major constraint to doing business by the largest proportion of firms in sub-Saharan Africa (World Bank, 2009). This is due to deficiencies in both physical (hard) and policy and regulatory (soft) infrastructure.

A policy tendency exists in the region to attribute higher trading costs largely to inadequate roads, railways and port facilities at the expense of needed regulatory and policy reforms. Improvements in soft infrastructure will maximise the gains to be derived from hard infrastructure. Analytical estimates find that poor physical infrastructure only accounts for half of the transport costs in Africa. A holistic approach to tackle high trading costs in the region is therefore required. This realisation exists within the tripartite framework, such as with the North-South Corridor initiative. This tripartite initiative aims to get goods to market faster and at a reduced cost through improved infrastructure and more efficient border crossings.[15] If this is successfully implemented, it will greatly complement and promote the gains to be derived from the FTA. This should encompass policy and regulatory reform towards more competitive domestic environments; harmonisation of customs documentation, procedures and legislation; expanding one-stop border posts; streamlining border management procedures; harmonising road safety measures (such as axle load and vehicle dimension limits); harmonising road transit charges and carrier licensing; as well as third party insurance schemes, amongst others.

Trade without transport is impossible. Tripartite member states may need to consider a possibility of a comprehensive regional transport agreement with a view to enhance competition in the sector. For instance, the expansion of third-country rule and cabotage can go a long way in addressing the scale-related problems in the transport sector, leading to lower prices.

9. Conclusions

The envisaged 'grand' FTA can be made to work better and deliver meaningful development outcomes for the region. As a principle, it should be built on the progress already achieved by COMESA, EAC and SADC towards trade liberalisation. The FTA must guard against a mercantilist approach to regional market integration by avoiding longer tariff liberalisation

[15] For further details on progress related to the North-South Corridor see http://www.trademarksa.org.

phases, designation of certain products as 'sensitive', excluding certain products from liberalisation, and maintaining restrictive rules of origin. These strategies should be avoided as much as possible. Innovative approaches to dealing with competitive pressures on domestic industries and customs revenue sensitivities should be explored.

The Tripartite FTA must go beyond the abolition of tariff barriers towards addressing the high costs of trading in goods and services in the region. Non-tariff barriers to trade must be tackled within a rules-based mechanism. Trade and transport facilitation is critical, and measures to reduce the costs of trading at the borders and behind the borders should be advanced with vigour. Transport is critical in the production, consumption, distribution or the supply chain of goods and services. A comprehensive regional transport agreement may be a necessary instrument to ensure an efficiently managed transport system in the region.

Services account for a bulk of the region's output and the fastest growing segment of intra-regional trade. As such, it can no longer be relegated to an 'emerging issue' for future cooperation endeavours. A regional service liberalisation agenda is vital to improved trade facilitation, investment formation and economic competitiveness. All these measures can be complementary to other initiatives aimed at addressing the supply-side constraints confronting most economies in the region.

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Chapter 2

Regional Trade Agreements and the WTO: Implications for Eastern and Southern Africa

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1. Introduction

This chapter is written in light of the ongoing negotiations for the 'Tripartite free trade area' now in progress between the member states of three existing regional groupings in Eastern and Southern Africa: the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), and the South African Development Community (SADC). The purpose of the chapter is to provide the multilateral (WTO) context for the formation of the free trade area in regards to both the operation of the WTO rules for qualifying this regional trade agreement, and more particularly, how these rules might apply to the Tripartite parties, affecting their choice in design, notification and implementation of this regional formation.

The chapter will proceed first with a general description of the WTO rules for Article XXIV for free trade areas and customs unions followed by the Enabling Clause rules for preferential trade agreements by and between developing countries. We then conduct a comparison between these two forms before commencing an examination of the notifications of existing Tripartite regional groupings. This allows us to consider the implications of the Tripartite Agreement for its members. Subsequently, we outline the transparency and notifications rules for these types of agreements. Finally, GATS (services) agreements are considered before making general conclusions.

The WTO Agreements grant unconditional most-favoured nation (MFN) rights to all WTO Members for goods (GATT Article I) and for Services (GATTS Article II). This is the core legal principle that is directly challenged by any regional trade agreement formed by a WTO

Member where preferential treatment is granted by one RTA member to another. The MFN rule applies to all 'border measures' such as tariff duties, quantitative restrictions, but also applies to all internal taxes and regulations for goods and services (e.g., product standards or service provider certifications). This means simply that a WTO Member cannot apply 'better' treatment by its domestic regulations to any country's goods or services than it does to any other WTO Member.

The WTO Agreements however also allow groupings of countries or territories a 'conditional right' to 'move ahead' of the rest of the WTO in permitting them to form certain specified types of preferential trade agreements (PTAs).[1] These are allowed in the form of free trade areas and customs unions (for trade in goods), Enabling Clause Agreements (for trade in goods between developing countries only) and lastly, economic integration agreements for trade in services.

WTO Members have a legal right under the provisions of the WTO to form these agreements. However, we also say that these rights are 'conditional' in that each type of regional discipline has its own requirements to be met in order to 'qualify' the agreement, so that the preferential treatment granted by the PTA members can be defended from a non-member dispute settlement claim that its most-favoured rights have been violated. This is the core reason why PTA members care about these qualification rules. We also place the term 'qualify' in quotes because the institutional process as it has evolved does not actually include the granting of a 'permission' from the relevant WTO bodies. Only very rarely has such a Decision been made at the Council level. Rather, we understand from the provisions and the interpretations made in WTO dispute settlement cases that any matters arising from the provisions authorizing preferential trade agreements are subject to the WTO dispute settlement procedures. If a WTO MFN violation is claimed by a non-PTA WTO Member, the PTA members have the option to defend the violation by raising the 'defense' of the preferential trade agreement. At that point in time the burden is on the PTA members to establish that their agreement is in compliance with the relevant provisions. Although we will discuss this in detail further below, at a minimum this means that the agreement was

[1] We use the term 'preferential trade agreements' inclusively to refer all preferential agreements allowed by the WTO rules. The term is also used more selectively to refer only to those agreements authorized by paragraph 2(c) of the Enabling Clause. In that usage, the context should be clear. The term 'regional trade agreements' refers to those that fall within the scope of the WTO Committee on Regional Trade Agreements (CRTA), Article XXIV agreements (free-trade areas and customs unions) and GATS Article V 'economic integration' agreements.

properly notified to the correct WTO body and that the proper materials (the plan and schedule) were provided for examination. It also means that the agreement has been implemented according to its plan.

For a free trade area (FTA), the critical component for qualification is the 'coverage' of the agreement, particularly in the requirement that the members to a free trade area eliminate duties and other restrictive regulations of commerce on substantially all of the trade in products originating in the territories. Since the Tripartite agreement indicates that the countries are forming a free trade area, we will consider the requirements for this type of formation first. However, since members of this arrangement are also developing countries, we will also consider the requirements for formations under the Enabling Clause in turn. At the outset we note the primary difference in the coverage requirements whereby members to these agreements have a much less exacting (and therefore lower) trade-coverage requirement. Developing countries have a right to make agreements for the mutual reduction or elimination of tariffs and non-tariff measures, without reference to eliminating duties on 'substantially all trade" and without the requirement that there be a reciprocal exchange of duty eliminations between the members. We commence the discussion with a treatment of Article XXIV.

2. GATT Article XXIV

The text of GATT Article XXIV[2] permits both the formation of customs unions and free trade areas. It includes the definitions and coverage requirements for both forms and provides additional notification and institutional aspects for these regional trade agreements.

2.1 Customs territories and customs unions

The title of the final text of Article XXIV refers to '*Territorial Application – Frontier Traffic – Customs Unions and Free trade Areas*'. The Article contains twelve paragraphs. The first two establish the territorial application for the GATT as it applies to ´customs territories´ and defines this term as a territory ´to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade ... with other territories´. A number of

[2] The legal text of the Article also includes a definitive interpretation in the form of an ´Understanding´ that was completed during the Uruguay Round and is a part of GATT-1994. This text is titled ´GATT-1994 Understanding on the Interpretation of Article XXIV.´ The Understanding forms the basis of a legal interpretation for Article XXIV and its provisions need to be read together with GATT Article XXIV paragraphs.

customs territories that are not ´states´ functioned as contracting parties to the GATT (and now WTO Members). One example is Hong Kong where the territory has independent control of its borders for the purposes of trade in goods, but not the status of a sovereign state.

In a similar manner, a customs union (formed between two or more customs territories) is also considered as a ´customs territory´ for the purpose of territorial application of the GATT. This distinguishes a free trade area where the individual members retain their full sovereign control of their individual customs territories. The members to a free trade area can arrange to apply the same tariff duty levels to their trade with non-members, but they are not required to and they retain the individual power to alter their individual tariff levels either unilaterally or in the course of other trade agreements, either multilateral or regional.

For the Tripartite agreement, there are three customs union territories either now formed or scheduled for implementation. These are the Eastern Africa Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA). There is also a customs union within the SADC (South African Development Community) which is the South Africa Customs Union (SACU). Since customs unions are customs territories, these unions, to the extent they are implemented, maintain the legal obligation to apply substantially the same duties and other regulations of commerce to the trade of non-members. In this manner they can operate as territories with a uniform tariff duty schedule within a larger free trade area in the same manner that a single country territory can be a member of a free trade area.

2.2 Article XXIV, paragraph 4 - purpose of the regional trade agreement exception

Paragraph 4 of Article XXIV states that the contracting parties recognize the desirability of increasing the freedom of trade by voluntary agreements of closer integration between the parties to such agreements. In other words, the contracting parties recognize explicitly that regional trade agreements are an approved means of allowing two or members to liberalize their own trade in a manner that is preferential as compared to the other WTO Members. The preamble to 1994 Understanding re-affirms this ´purposive´ expression by also recognizing the contribution to the expansion of world trade that can be made by customs unions and free trade areas.

Paragraph 4 goes on to state that the contracting parties also recognize that the purpose of

a customs union or a free trade area should be to facilitate trade between the parties to the agreements and not to raise barriers to the trade of other contracting parties. In other words, *reducing barriers* among the regional members is the objective to be reached by regional trade agreement while at the same time regional members should not be *raising barriers* to the trade of non regional members. This expression establishes the two primary legal aspects for free trade areas and customs unions that are treated by the Article.

The two ´pillars´ of this paragraph 4 expression are played out in two primary paragraphs. Paragraph 8 of the Article establishes the definitions for what constitutes a customs union or a free trade area by providing the requirements for the elimination of trade barriers between the regional members. These requirements are sometimes characterized as the ´internal trade requirements´ for Article XXIV, as they deal with the 'internal trade' within the regional trade agreement. Paragraph 5 of the Article deals with the requirements for not raising barriers to the trade of other GATT parties and also grants the ´exception´ for qualified regional agreements from the other obligations of the GATT. These requirements can be characterized as the ´external trade requirements´ for Article XXIV agreements.

2.3 Article XXIV, paragraph 8 - coverage requirements

Since paragraph 8 provides the definitions for customs unions and free trade areas, it is the first paragraph to consider in any evaluation of a qualified agreement. For a 'free trade area' this,

> ´… 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 Article XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.'[3]

The requirement to 'eliminate' refers both to duties and to 'other restrictive regulations of commerce' (ORRC). These two terms describe what must be eliminated, i.e., the types of barriers to be eliminated by the regional members. This 'elimination' is then also directed to the term 'substantially all the trade' which provides the indicator as to how much trade

[3] GATT Article XXIV:8(b).

between the members must be made free of duties and ORRC. In addition, there is a listing of articles (XI-XV and XX). The barriers established by measures according to these GATT Articles need not be eliminated by the FTA members, at least when their imposition appears 'necessary'.

This is a fairly complicated construction and it is made somewhat more difficult by the unresolved interpretation issues raised by these terms noted above. These have all been longstanding issues in the review of regional trade agreements in the GATT and WTO practice. Unfortunately, paragraph 8 internal trade requirements were also not treated in the Uruguay Round Understanding, except for the following single and not insignificant preamble expression. This states that the contribution of regional agreements to the expansion of world trade,

> '…is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;'

We will complete the scheme of the Article overall before returning to the interpretation issues presented by these coverage terms.

2.4 Article XXIV, Paragraph 5 - external trade requirements

After meeting the definitional tests for internal trade as required by paragraph 8, then a consideration of how the RTA will affect other GATT parties is made as according to Article XXIV:5. This paragraph opens by granting the 'exception' for customs unions and free trade areas in stating that, 'the provisions of the this agreement shall not prevent…the formation of a customs union or a free trade area...'.

This is followed by the *proviso* ('provided that...') language imposing the condition to not raise new barriers to the trade of non-RTA members. For a free trade area,

> '...the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free trade area or ... to the trade of contracting parties not included ... shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing ... prior to

> the formation of the free trade area...'[4]

For a free trade where no external tariff adjustment is required, Article XXIV:5 poses few difficulties in that FTA members can simply maintain their same duties to non-members as previous to the formation. That said however, the paragraph also refers to 'other regulations of commerce'. Depending upon our interpretation of that term, aspects other than only tariff duties must also be considered if they are being altered in a manner that would affect the trade of non-members.

The final part of paragraph 5 provides that any Article XXIV agreement shall include a plan and schedule for the formation of a free trade area 'within a reasonable length of time.' This has been treated by the Article XXIV Understanding which now explicitly sets that period for ten years, and only in 'exceptional cases' should the period be longer as explained to the Council for Trade in Goods. On its face, this is a fairly strict control provision.

2.5 Article XXIV, paragraphs 7 and 10 - institutional provisions

Article XXIV also contains some other control provisions designed to insure that the regional exception is being accorded only to qualified agreements. Even though the practice of reviewing regional trade agreements in the GATT era was not noted for its success in controlling the implementation of poorly qualified RTAs, the institutional requirements of the Article clearly allow for the GATT/WTO system to control the implementation of RTAs.

The main institutional provisions are located in paragraph 7. This establishes a requirement that parties entering a regional trade agreement ´promptly notify´ the GATT contracting parties (CPs) and make available information for the CPs to generate reports and recommendations as they may wish. The primary information to be provided is that of a ´plan and schedule´ for any Article XXIV agreement. Then,

> 'If, after having studied the plan and schedule...the Contracting Parties find that such agreement is not likely to result in the formation of a customs union or of a free trade area within the period contemplated...the CONTRACTING PARTIES shall make recommendations ...

[4] GATT Article XXIV:5(b). The text also refers to interim agreements leading to a free-trade area, which is deleted here for clarity purposes.

> The parties shall not maintain or put into force ... such agreement if they are not prepared to modify it in accordance with these recommendations.'[5]

An additional provision in the Article found in paragraph 10 requires that the parties obtain a waiver based on two-thirds majority for proposed agreements that do not comply with the rules of paragraphs 5 through 8 inclusive, and only if the ultimate formation does actually result in a free trade area or a customs union. This paragraph has been used in those cases where a GATT party is forming a regional trade agreement with another territory that is not a contracting party of the GATT, or now a WTO Member. As WTO membership is now so extensive, this provision does not come frequently into use, but it is still raised occasionally in practice.

2.5.1 Institutional changes made by the Article XXIV ´Understanding´ and the CRTA

The provisions dealing with institutional aspects received some minor treatment in the 1994 Understanding in its section titled ´Review of Customs Unions and Free trade Areas.´ Here the long term practice of conducting reviews by a ´working party´ was formalized and a requirement was made that the working party shall submit a report to the Council on Trade in Goods. The Council has the power to make recommendations as it wishes. A working party can also recommend a plan and schedule when regional members do not provide one, and again regional members may not implement the formation if they are not prepared to modify their arrangements in accord with the recommendations.

The institutional review practice was modified again as a result of the Singapore Ministerial Conference in 1996 with the establishment of the Committee on Regional Trade Agreements (CRTA). This created a recognized committee within the WTO to receive information, review and report to the Councils for goods as well as for services for any RTA falling either under Article XXIV or for services under GATS Article V.

To paraphrase the terms of reference governing the activities of the CRTA:

> a) to carry out examination of agreements and to present its report for appropriate action;

[5] GATT Article XXIV:7(b). In addition, any substantial change to the plan or schedule must also be communicated and the contracting parties can then request consultation with the regional members if the change ´seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.'

b) to consider how the required reporting on the operation of such agreements should be carried out and to make appropriate recommendations;

c) to develop procedures to improve the examination process;

d) to consider the system implications of such agreements for the multilateral trading system and the relationship between them, and to make appropriate recommendations to the General Council; and;

e) to carry out additional functions assigned by the General Council.(WTO, Document WT/L/127, para. 1.)

2.5.2 Examination and reporting practice

The examination record for the CRTA is active but the reporting function to make findings on compatibility and ´recommendations´ for WTO Council action has not been active. In addition, the requirement of attempting to make recommendations has been formally dropped. This flows in large part from a lack of consensus on the underlying qualification provisions and the Committee has been commonly unable to reach consensus on the consistency of various RTAs presented for examination. The earlier GATT working group practice also produced reports that were customarily adopted by the General Council and published, but these too rarely delivered any consensus opinion on the consistency of a given agreement. Rather, they would normally conclude with the statement that ´some members´ felt that the agreement was consistent and that ´other members´ were of the opinion that the agreement was not consistent with the rules. These reports however remain nevertheless valuable in understanding the issues surrounding the various terms and the way the members viewed them.

Longstanding disagreement over the meaning of the terms of the paragraphs in the Article is further complicated where the regional members are themselves participants in the consensus process and are able to ´block´ any unfavorable recommendation supported by a majority. As we will see below, this recommendation function has been removed from the CRTA's responsibility by the 2006 Transparency Mechanism which covers all preferential trade agreements and arrangements.

2.6 Doha Round and dispute settlement developments for regional trade agreements / free trade areas

The work programme for the Doha Round of multilateral trade negotiations (2001 Ministerial) includes a provision dealing with Article XXIV. The governing paragraph reads,

> 29. We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.

This work has proceeded in the Negotiating Group on Rules which reports to the Trade Negotiations Committee (TNC). A sequence to the negotiation work programme was also adopted by the members in the committee, according to the chairman´s "Roadmap for Discussions on RTAs' ´Systemic´ Issues". This document is not public, so the future progression of the discussions is not entirely clear, though there are references in the Chairman´s reports to what has been discussed. One summation indicates that the headings for discussion included ´coverage´ and ´neutrality´ (roadmap headings one and two) and ´systemic´ issues (heading number three).

It is also clear that there have been extensive discussions under the ´coverage´ section and mainly dealing with the term ´substantially all trade´ with the submissions rotating around various tests for the ´quality´ and ´quantity´ indicators that could be used to provide a clarification for this term. A determination by the Members that they would mutually benefit from a more specific test for trade coverage in an RTA can already be considered a major change from the historical view. If actual text resulted, this would be a substantial accomplishment for these discussions.

Developing country issues in the RTA discussions have been frequently noted in the reports, including the degree of reciprocity that should be required between a developed and developing country in the requirement to eliminate duties, and the period of time that may be granted for implementation of a new RTA, i.e., whether a developing country can be granted a longer implementation period. Both of these issues raise the possibility of incorporating special and differential treatment considerations into the text of Article XXIV. These questions are treated in some greater detail below in the description of the individual

terms and the current issues and submissions dealing with them.

2.6.1 Criteria for 'substantially all the trade' (SAT)

GATT and WTO Members have had great difficulty locating a clear agreed-upon definition for this term in the actual practice of forming a regional trade agreement. This has often been blamed on the lack of precision in the drafting of the expression itself, but 'vagueness' has also historically benefited the proponents of regional formations. This 'benefit' essentially put the burden on opponents to any given RTA to 'prove' why the plan and schedule were not compatible with the SAT requirement. As long as there was no measurable criterion that could be applied to assess any given agreement, then it would certainly remain difficult, if not impossible, for a working group to return a recommendation that an agreement was not compatible with the provisions of Article XXIV. The absence of a negative recommendation was the equivalent of 'permission', since Article XXIV:7 places the responsibility on the Council to make modifying recommendations to the regional members if an agreement is not in compliance. In the absence of any such recommendations, the agreements were considered to be 'qualified' since the regional members had done all that was required under the Article XXIV reporting procedures.

This background provided, it is somewhat obvious that the drafters intended for there to be at least some flexibility in this requirement by their use of the term 'substantially'. A memorable quip repeated by the WTO Appellate Body (AB) reflected that SAT must mean 'more' than ´some of the trade´ and at the same time must mean 'less' than ´all of trade´. While this may suggest a low or 'middle' coverage requirement overall, the term perhaps got a bit more 'push' to the 'all of the trade' range in the *Turkey Textiles* case when the AB noted,

> "…we caution that the degree of "flexibility" that sub-paragraph 8(a)(i) allows is limited by the requirement that 'duties and other restrictive regulations of commerce' be 'eliminated with respect to substantially all' internal trade."[6]

While this is obviously not very helpful in applying any discernible standard for the purpose of reporting and reviewing a plan and schedule for a regional formation, the Appellate Body in this case did create a major impact in shifting the traditional burden of proof that had

[6] *Turkey – Restrictions on Imports of Textile and Clothing Products*, Report of the Panel, 31 May 1999, WT/DS34/R, Report of the Appellate Body, 22 October, 1999, AB-1999-5, WT/DS34/AB/R. Quote from the AB report, para. 48.

operated in the GATT years, as noted above. This comes from the ruling that dispute settlement procedures could address any case where a regional formation was put into the defense of a GATT violation. Further, where regional members sought to excuse the GATT violation by asserting the 'Article XXIV defense', it was their burden to demonstrate before a panel why their agreement was compatible with the provisions of Article XXIV, including the SAT requirement. As a result, the absence of identified criterion for SAT was no longer a benefit for regional proponents and the desirability for a lucid and applicable test for SAT became a primary item for clarifying the provisions for regional trade agreements in the Doha Round negotiations. Although the various proposals may or not be settled to a final understanding on SAT in this round, one can see the outlines of the practice as it develops and discern somewhat the coverage rules likely to be either settled in negotiations, or by a WTO dispute panel if and when criterion has to be determined and applied in a dispute.

2.6.2 SAT - 'quantity' and 'quality'

An old issue is whether the SAT term refers to the ´quantity´ of trade to be covered or to the ´quality´ of trade. In the current discussions, almost all Members would agree that the term refers to both and the *Turkey Textiles* Panel suggested as much in its dicta on the question. We know now that there is a quantity / quality test to be applied. The 'quantity' aspect can be viewed in two different ways, or a combination of the two. The first relies upon the percentage of the total volume of trade upon which tariff duties have been reduced to zero, as in, '90% of the total trade between the regional members is at zero tariff duty.' A second quantity approach refers to the percentage of tariff duty lines (not trade volume) that have been reduced to zero duties. As in, '90% of all six-digit tariff duty lines are set at zero.'

The 'quality' aspect refers to whether or not major sectors of trade are being committed for tariff duty elimination. One can see the need for a quality test if the remaining 10% of either the volume of trade or the remaining tariff lines constitute the major traded sectors between the parties, but of course, 'major' presents the same problems of precision as does 'substantially'. A difficulty in the Doha negotiations has been to settle what constitutes 'major' and then whether there is a formula that that strikes a balance between both of the concepts of quantity and quality that can be applied as a ready test for trade coverage in an RTA. This 2005 Chair report from the rules committee provides a summary of these different SAT factors under discussion and reveals also the technical nature of the coverage

issue:

> 22. The main thrust of the discussions has to date been on the clarification and calculation of SAT and on RTAs transition period. The quantitative elements of SAT have attracted most of the Group's attention through consideration of the pros and cons of tests based on trade and on tariff lines, their respective benchmarks, how to combine them, the level of HS disaggregation for the calculations, the non-exclusion of "major sectors", and most recently the relationship of "other restrictive regulations of commerce" with SAT.
>
> Views diverge among those Members favouring a trade based test, a tariff line test and a combined one; the latter one has received broader support, however, there too views differ on the weight to attribute to each benchmark and on how to combine them. Some Members favour a more holistic approach to SAT that would include consideration of "other restrictive regulations of commerce" as well as preferential rules of origin. Qualitative benchmarks to complement the SAT evaluation have been referred to but most Participants favour postponing such discussion to a later stage of the negotiations.[7]

The most recent report of the Chair is dated April 21, 2011, which is the result the Director General's request for a summation of the status of the Doha Round. The paragraph on SAT reads as follows:

> On "substantially all the trade" (SAT), several proposals focused on the criteria for measuring SAT. Around a third of the proposals that have been made concerned the setting of a minimum benchmark for SAT, on the basis of bilateral trade, tariff lines, both, or a combined average of both. It was proposed that SAT should be measured both at entry into force and at the end of the transition period. Also, proposals were made with respect to a clarification of the qualitative assessment of SAT (such as the treatment of major sectors and tariff-rate quotas), as a necessary complement to any quantitative assessment.

[7] TN/RL/15, 30 November, 2005.

This appears to leave all RTA members in a continuing legal 'twilight zone' as to what criterion a dispute panel would apply in any given case. We only have Member submissions in the negotiations as a guideline, together with the various 'question and answer' documents in the CRTA review process for different agreements. We do not know if a dispute panel would attempt to reach into these types of documents as 'sources' to discern criterion, although it is possible that regional members themselves might introduce their review documents to support their claim of compatibility.

With these caveats, many of the review documents rotate around a 'quantity' test that use 90% of either trade or tariff lines as an indicator. For examples, we can see that 90% figure discussed in summations on the EC approach in the Economic Partnership Agreements (EPAs), including the concluded EC-Cariforum EPA, and, closer to home, in the written questions and answers on the SADC protocol formation.[8] Until if and when the test is settled for either trade volume, tariff lines, or both, it would seem that either or both remain viable indicators. What does appear to stick as a benchmark in the practice is the 90% indicator.

The quality test is not even this well settled in the review practice. On any given set of questions and answers one can see attention paid by the WTO members on what sensitive sectors are being left out of the liberalization and how the regional members intend to cover that trade and on what schedule. One also recalls the occasional reference to dealing with RTA reviews on a 'case by case' basis, and this is probably a factor in assessing the coverage of 'major sectors. We can refer to one submission by Australia, which probably lands in the restrictive range of the test, that would require no sector to be dropped that exceeded .2% of total imports from the RTA partner, or the top 50 imports from the RTA partner.[9] While the repeated reports from the Chair have indicated that these discussions cannot continue in the absence of new Member submissions, these are not forthcoming at this writing, and it seems more likely than not that the quality test will not find a resolution in the course of the negotiation round. For RTA members, what is left is to suggest that account be taken of the

[8] On EC-CARIFORUM, see, A.P. Gonzales, (2010), 'EPA WTO Compatibility: a View From a WTO Perspective' EU Delegation Conference, Delegation of the EU to Barbados and the Eastern Caribbean, p. 8, para 27 (on file with the author); and for the SADC Protocol, WT/REG176/5, 2 May, 2007, question 22.

[9] South Centre, (2008), 'Article XXIV and RTAs: How Much Wiggle Room for Developing Countries', Analytical Note, SC/AN/TDP/RTA, p. 13-14.

sensitive sectors in the reporting, and that for those that might qualify as 'major', that elimination of duties be sought for them even if the period of completion exceeds ten years.

2.6.3 Reciprocity / asymmetry

This raises the second issue for SAT, which is what the term requires for the degree of trade reciprocity between regional members. This is to ask whether the degree of elimination of barriers (by whatever criteria) has to be the same for all members, or whether there is some flexibility possible, and especially for developing country members entering an agreement with a developed partner.

A fairly certain legal conclusion is that a free trade area agreement which provides for non-reciprocity cannot be successfully defended in an Article XXIV defense in a panel dispute.[10] This is because the Article provisions require the elimination of duties and other restrictive regulations of commerce be made as ´between´ the members to the formation. This term requires reciprocity where both parties are able by their plan and schedule to eliminate duties and other restrictive regulations of commerce on substantially all trade. If there was to be a resulting text from the Doha round to clarify the meaning of this term then this would also affect the debate on reciprocity and the position of developing countries in the so-called north-south RTAs. The degree of flexibility that can be accorded to a developing country RTA member has been a major point of discussion in resolving the SAT criteria.

It is possible that some degree of non-reciprocity might be written in allowing for a ´developmental dimension´ in these agreements, although there is also Member resistance to introducing the notion of asymmetry to Article XXIV. Recently Bolivia has made the following submission to the Negotiating Group on Rules:

> "Where developing countries are parties to an agreement with developed countries for the formation of a customs union, a free trade area, or an interim arrangement leading to either a customs union or a free trade agreement, special and differential treatment, in particular less than full reciprocity, shall be provided to developing

[10] Unreported GATT cases, EC-Bananas I and II. *EEC - Member States' Import Regimes for Bananas*, DS32/R, 3 June 1993 and *EEC - Member States' Import Regimes for Bananas,* DS38/R, 11 Feb. 1994.

countries regarding the conditions set out above in paragraphs 5 to 9 inclusive, specially with respect to subparagraph 5(c) and subparagraph 8(a)(i) and (b)."[11]

A number of countries including the ACP group have made submissions making this same argument. A sort of middle position, and one perhaps tacitly indorsed in the EU approach to the Economic Partnership Agreements (EPAs) is to allow the coverage of the developing country to commit below 90% while the EU commits above 90% and therefore seeking an overall coverage requirement to balance at or near 90%[12]

While there is no formalized rule on the final degree of asymmetry permitted on the completed formation, asymmetry is at least a part of the general practice to accommodate varying levels of members' economic development during the implementation periods, and with those periods extended beyond the ten years. For examples, The EC – South Africa agreement shows that 20% of SA´s tariffs were eliminated after the 10 year period. For the Canada – Chile FTA, Chile eliminated tariffs after the ten year period on 15% of its tariff lines.[13] Both agreements however met a 90% of trade volume coverage following their longer implementation periods.

2.6.4 Other restrictive regulations of commerce (ORRC)

While the expression 'substantially all the trade' deals with ´how much trade,´ the ORRC term refers to what 'types' of restrictive measures (other than tariff duties) must be incorporated into a plan and schedule for eventual elimination by the regional members. There is a relationship between ORRC and SAT where remaining ORRCs employed by the regional members would also undermine the SAT requirement. This link between the types of restrictions permitted by RTA members and the SAT parameter has not been very well illuminated in the review practice, although it has been raised on occasion especially in reference to the use of intra-regional safeguard clauses. While the ORRC is also on the list of items to clarify in the Doha negotiations, it is not near the top of the work program and there is less submitted material to consider for clarifying the members positions. There is a potentially complex discussion waiting in the wings on the relationship between ORRC and regulatory provisions incorporated in RTAs, such as food and product standards, and the

[11] TN/RL/W/250, 26 January 2011.
[12] South Centre, Supra note 9, at p. 12, paragraph 55.
[13] Scollay, R., (2005), ´Substantially all Trade´: Which Definitions are Fulfilled in Practice? An Empirical Investigation´, Commonwealth Secretariat, London, p. 12.

range of other regulatory policies being included within RTAs such as competition and investment policies, and even extending to provisions on labour, environment, human rights, etc. Since all these policies are ´regulatory´ in that they deal with domestic regulation matters, there is a possible relationship between the ORRC term (the obligation to eliminate ORRCs) and the types of regulatory cooperation policies employed in an RTA when these are preferential in favor of the other regional member.

Another longstanding ORRC issue is the treatment of trade defense measures, notably antidumping (AD) actions and safeguard measures employed as between the RTA members. Historically, some Members have held the position that these actions are not permissible in an RTA since they are not on the list of Articles (XI-XV and XX) under the ORRC term in paragraph 8. Others have taken the opposite view that RTA members cannot be excluded from any AD or safeguard action. A practical perspective would view any remaining ORRC as counting 'against' the SAT requirement along with non-eliminated tariff duties. Together the elimination of duties and ORRCs must reach the volume of trade that would qualify as SAT. This view would allow RTA members some flexibility for AD and safeguards, but not to an extent that would undermine their SAT requirement.

2.6.5 Article XXIV paragraph 5 external requirements – 'other regulations of commerce' (ORC) and ´not on the whole higher nor more restrictive´

Paragraph 5 external trade requirements have a variation between customs unions and free trade areas that reflects the fact that an FTA is not required to establish a common external tariff or commercial policy. However the intended effect of the different provisions is the same, that the duties and ´other regulations of commerce´ imposed at the institution of a customs union, or maintained in each territory of a free trade area, be not higher or more restrictive to the trade of non-members. Since the Tripartite agreement is not calling for a customs union plan, the applicable provision requires that the corresponding duties and ORC shall not be higher or more restrictive than those existing in the same territories prior to the formation of the free trade area. For tariff duties, if there is no increase in the external rates of the signatory countries / territories, then there is no substantive issue presented for the formation.

However, we also consider the term 'other regulations of commerce'. This could be in play

for the formation and its notification if there are regulatory changes in the laws of the signatories being proposed that would affect the trade of non-members. The term ´other regulations of commerce´ has received treatment in the *Turkey Textiles* panel report and a broad definition was applied to include matters falling within the WTO agreements and matters outside the WTO agreements:

> "(M)ore broadly, the ordinary meaning of the terms 'other regulations of commerce' could be understood to include any regulation having an impact on trade (such as measures in the fields covered by WTO rules, e.g., sanitary and phytosanitary, customs valuation, anti-dumping, technical barriers to trade; as well as any other trade-related domestic regulation, e.g., environmental standards, export credit schemes). Given the dynamic nature of regional trade agreements, we consider that this is an evolving concept".[14]

The key term here is 'impact on trade' in the form of regulation, which one would take to mean changes in laws that have some obligatory or mandatory character. For such regulations that affect external trade, an assessment of some kind is required. The 1994 Understanding states that for ORCs, for ´which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.´ This begs the question of what type of examination may be possible for certain types of regulatory policies, but the objective of making an assessment is duly noted.

This is to contrast with a range of possible cooperative policies (customs or trade facilitation/ product standards/ competition policy cooperation, just for examples) that may be conducted by regional members to facilitate trade liberalization. It can be reasonably suggested that these cooperation activities may not be 'regulatory' enough in character to fall within the definition of 'other regulations of commerce'.

When activities are regulatory in nature (harmonization of product or food regulations for examples), then to the extent that they are *not* being applied to the benefit of non members also does not mean that the resulting ORCs have been made 'more restrictive' to outsiders as a result of the FTA. In point, for the trade of the non member, the resulting ORC is identical to the previous ORC. Although a new rule may be preferential as among regional

[14] *Turkey - Textiles* Panel Report, WT/DS34/R, para. 9.120.

members, that also does not mean that it is 'more restrictive' to the trade of non members. Consider the analogy to a regional tariff duty elimination. It is also preferential but it is not 'higher' than the duty prior to the formation as to the trade of non members.

However, preferential character of a regulatory change does call into question whether the most-favoured rights of non members are being violated and if so whether Article XXIV excuses those violations.

2.6.6 RTA measures violating GATT Articles as to other WTO Members

The *Turkey-Textiles* Appellate Body report established a two-part test to determine if a regional member's violation of a GATT obligation could be excused by invoking the Article XXIV exception.

> First, "…that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraph 8(a) and 5(a) of Article XXIV
>
> Second, the party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue".[15]

This second part has been characterized as a type of 'necessity' test. One can argue that no single liberalizing measure - elimination of a single tariff duty line or a single 'other restrictive regulation of commerce' (ORRC) - would ever be 'necessary' to implement a free trade or custom union. After all, paragraph 8 only requires that these duties and restrictions be eliminated on 'substantially' all the trade, leaving a portion of trade upon which elimination need not occur. Nevertheless, the best reading of the text with the Article XXIV paragraph 8 requirements would argue that any matter falling within the scope of a tariff duty or an ORRC would qualify as 'necessary' for the formation of the RTA.

This has implications for the final legality of regulatory activities undertaken by regional members. If they are mandatory and preferential in character then they can draw an MFN complaint where GATT Article I MFN also applies to domestic regulations that affect the internal sale of a product (matters covered by GATT Article III.4). This means that a domestic rule cannot treat a regional member better than a non regional member. To excuse this violation the regional members would need to show that regulatory change was

[15] *Turkey -Textiles*, AB Report, para. 58.

being made in order to eliminate a 'restrictive regulation of commerce'. It is certainly not clear whether a host of regulatory possibilities among RTA members can qualify within the scope of that term, and consider that whatever is put into the scope of ORRC for elimination is then *required* to be eliminated as an aspect of meeting the paragraph 8 definitional requirements for a free trade area.

2.6.7 Time period for completion

As in the SAT discussion above, the negotiations in the WTO group have not progressed so far as to clarify the possibility of longer periods, and there is no recorded consensus that longer periods should apply and be set into the Article XXIV text or understanding. To date, the best summation on this issue remains contained the Chairman´s report from November of 2005

> ´23. With respect to RTAs' transition period, there appears to be convergence among Members on what should be the maximum length allowed. Views diverge, however, on the definition and scope of application of the "exceptional cases" that would allow the parties to an RTA to go beyond the transition period and, in particular, on whether the exception should only be available to developing countries. An additional issue being considered is the relationship between RTAs transition period and the calculation of SAT, in particular the point in time during the implementation of an RTA when the SAT test is to be applied.´[16]

A ´best possible´ outcome from a developing country perspective is probably the ACP opinion contained in its own submission from 2004 which proposes a period of not less than 18 years for developing country implementation of a north-south RTA.[17]

If one takes the view that no results on either SAT, or developmental criteria for limited non-reciprocity or for longer implementation periods will emerge from this Doha Round, then perhaps the functional approach can inform RTA members on implementation periods. On this aspect, Scollay provided one overview of a number of RTAs and found that there has been some greater implementation flexibility being arranged among RTA members than one perhaps assumed.[18] Some of this practice indicates that the ten year 'rule' is being adjusted for

[16] TN/RL/15, 30 November, 2005.
[17] TN/RL/W/155, 28 April, 2004.
[18] Scollay, Supra note 13.

both developed and developing RTA members. Longer implementation periods are clearly in play, noting Canada – Chile (18 years), Canada - Costa Rica (15 years), and EC - Morocco and EC - South Africa (12 years).[19] One north-north trade agreement pushes the outward bounds for sure, that being US – Australia with an implementation over 18 years. Considering that Canada and the US are major players in the system, these longer implementing RTAs provide some argument for longer periods ´in the practice´, although albeit, not an express legal basis to deviate from the ten year rule. Also, to be thorough, one should review the ´special circumstances´ that have been raised by these parties to extend the implementation and how have those factors been received in the CRTA.

2.7 Section conclusion

One can see that the 1994 Understanding, the review and negotiation committees, and the dispute settlement cases have in some measure commenced the process of clarifying the provisions of Article XXIV for free trade areas and customs unions. It is also clear that there are many remaining ambiguities in the rules. What is most clear is that the issue of coverage of the duty elimination between the FTA members is the critical factor in establishing a legal identify of the RTA for the purposes of securing the legal right of the regional members to engage in preferential tariff cuts. A coherent plan showing that cuts can be made on a schedule within a reasonable time is the minimum that is necessary to establish a qualified free trade area. We can see that a 90% rule appears to have taken hold in the practice, whether on trade volumes or tariff lines, that there are references occurring that take into account the liberalization of sensitive sectors, particularly if that sensitive sector is 'major' (according to some criteria), that there is a form of asymmetry being practiced in 'north-south' agreements, at least during implementation, and that some of these sensitive sectors are being liberalized after the '10 year' rule for completion.

So we have to say that while the legal context remains vague, there are some available informal guidelines or benchmarks in the practice, and these suggest that while there are parameters, there are also some flexibilities being practiced that seem to be acceptable to a number of WTO Members.

[19] Ibid., Scollay at p. 7.

We turn now to consider the other preferential arrangement for trade in goods that is possible within the WTO system, Enabling Clause arrangements as among only developing countries. As we shall see, criterions here are largely absent. Following an introduction to Enabling Clause arrangements, we will address some notification issues and then conduct a comparison of the implications for each type of formation for trade in goods, an Article XXIV FTA and an Enabling Clause arrangement.

3. The Enabling Clause

The Enabling Clause is the informal name for the GATT Council Decision titled, ´Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries´.[20] The Decision makes provisions for developing countries in both a vertical and horizontal manner. It grants an exception from the most-favoured nation obligation for trade preferences under the General System of Preferences (GSP0 in favour of developing and least developed countries (the vertical aspect) as well as providing for preferential trading arrangements as between developing countries (the horizontal) dimension. For the purposes of this chapter, we will focus on the horizontal aspects.

3.1 Enabling Clause arrangements, paragraph 2(c)

The arrangements possible between developing countries under the Enabling Clause form a wide avenue for regional arrangements among them. Unlike Article XXIV, the preferences exchanged need not entirely eliminate duties nor need they eliminate any other barriers to trade in respect of substantially all the trade. This means that significant flexibility is offered countries that qualify and notify their arrangements according the Enabling Clause. The provision in the clause that grants this exception reads as follows:

> 1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries[1], without according such treatment to other contracting parties.

[20] Decision of 28 November 1979, (L/4903).

2. The provisions of paragraph 1 apply to the following:

(c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;

Paragraph 2(c) agreements (or arrangements) do not have any of the coverage requirements imposed by Article XXIV. Members of these agreements can either cut or reduce tariff duties, on some or all of the trade, and need not form the coverage in a reciprocal or balanced manner, and not within a specified period of time. It is clear that the Enabling Clause provision grants the utmost flexibility to either initiate liberalization or not as the agreement members may choose. However, the exception is limited to GATT Article I MFN, by the Clause's own terms. This means that a preferential elimination of trade restrictions not governed by Article I would not have the exception. An example would be the elimination of a quantitative restriction between the agreement members that was yet maintained on the trade of non-members. This would be an arguable violation of GATT Article XIII (non discrimination as applied to quotas) and would not apparently find an exception in the Enabling Clause.

An additional issue for the Enabling Clause is the form of the agreement that is being notified. Here we see a long running issue, also not yet resolved, when developing countries notify an Article XXIV type of arrangement but do so under the Enabling Clause. This forces a sort of conflict over which provisions should be applied and which committee (the Committee on Regional Trade Agreements (CRTA) or the Committee on Trade and Development (CTD) - or both) is responsible for the examination.

3.2 Enabling Clause notification issues

As indicated, there have been questions in the practice where the developing country arrangement is notified under the Enabling Clause but also specifies the formation of a legal entity that falls within the criteria and therefore the definitions of GATT Article XXIV. There has been to date no Ministerial Conference declaration or decision which clearly allocates these arrangements either to the purview (and legal requirements) of The CRTA for Article XXIV or to the CTD for the Enabling Clause.

As example of a developing country customs union notified under the Enabling Clause is that of the MERCOSUR notification and review, however, also prior to the WTO and the Uruguay Round Understanding on Article XXIV. Nevertheless, the MERCOSUR case is instructive where a Council for Trade in Goods Decision was adopted to have the MERCOSUR examined both under the requirements of the Enabling Clause and the provisions of Article XXIV. The compromise on this question is seen in the terms of reference adopted for that review.

> 'To examine the Southern Common Market Agreement (MERCOSUR) in the light of the relevant provisions of the Enabling Clause and of the GATT 1994, including Article XXIV, and to transmit a report and recommendations to the Committee on Trade and Development for submission to the General Council, with a copy of the report transmitted as well to the Council for Trade in Goods. The examination in the Working Party will be based on a complete notification and on written questions and answers.'[21]

The most recent documents on record for the MERCOSUR from 2005 show that both committees remain involved in the review of the formation with the CTD being responsible for the reporting function.[22]

This duality of ´review´ and ´examination´ reflects the overlapping terms of reference for both of the Committees where the CTD has the power to review all arrangements under the Enabling Clause and the CRTA has the power to examine arrangements under GATT Article XXIV and GATS Article V. This is not a resolution that clearly determines whether or not the Enabling Clause overrides the substantive requirements for a customs union formation under Article XXIV paragraphs 5 and 8. What is suggested is that WTO Members will actively reserve their rights to challenge a regional formation on the criteria of Article XXIV if they think their trade is being affected by it.

This question has also not been answered for an agreement notified to the Enabling Clause that has declared itself to be a 'free trade area', but the matter has came up for the China /

[21] Recited in, WT/REG/M/40, 31 August 2005. See also, Legal Note on Regional Trade Arrangements under the Enabling Clause, WT/COMTD/W/114, 13 May 2003.
[22] The Secretariat provided its calculations on the overall tariff rate changes created by the MERCOSUR in the form of a CTD document. WT/COMTD/1/Add.15, 24 May 2005. The CRTA took note of that information in its Chairman´s indication that this would also be discussed in the CRTA. WT/REG/M/40, 31 August 2005.

ASEAN ´Framework Agreement On Comprehensive Economic Cooperation Between The Association Of South East Asian Nations And The People's Republic Of China´. This was notified in December of 2004 under the Enabling clause as a ´preferential arrangement´. However, in the submitting documents the parties refer a number of times to the completion of the ´free trade area'. From one of the party submissions:

> 'The Agreement on Trade in Goods: (i) provides for the establishment of a free trade area in goods between China and the six original ASEAN member countries (ASEAN-6) by 2010 and Cambodia, Laos, Myanmar and Vietnam by 2015.'[23]

This inconsistency did not escape the purview of some other WTO Members. As the EC stated in its submission:

> ´Both the Framework Agreement and the ACFTA also include provisions beyond preferential duty treatment, by covering investments, services, non-tariff barriers and cooperation on various regulatory and customs related matters. (…) Therefore, the EC believes that the recently concluded FTA in goods should have been notified under GATT Article XXIV and be referred to the WTO Committee on Regional Trade Agreements (CRTA). The EC strongly encourages the parties of the FTA to take the necessary steps towards this end.´[24]

This issue appears on its face to be one 'form over function' since what the parties 'call' an agreement seems to have a bearing on which committee should review it and which criterion should apply. For a customs union declaration, there clearly is a need for Article XXIV disciplines to be considered when a common external tariff is being formed that affects the external trade. Whether it makes the same sense to extend this treatment to free trade areas being notified by developing countries under the Enabling Clause is perhaps not so clear. If it is only a matter of 'form' then the trap can be avoided for regional parties by simply being more consistent with the drafting of their agreements, how they title them, and how they then organize their submissions for the reporting of them.

At the same time, the comment above suggests that there is more going on here than 'form', in that the EC remark is also looking to the content of the agreement itself and saying, if it has the operable characteristics of a more comprehensive agreement - here free trade area,

[23] WT/COMTD/N/20/Add.1, 26 September 2005.
[24] WT/COMTD/51/Add.2, 8 February 2006.

then it ought to be treated like one when applying the criterion. This proposition should be examined more carefully. an Article XXIV free trade area only *requires* those elements that we have examined in the sections above for paragraphs 5 and 8 of the Article. The rest of the 'policies' listed in the comment are irrelevant to an examination of a free trade area, unless the policy is changing a 'regulation of commerce' that affects the trade of a non-member (as in Article XXIV:5) or can be considered an 'other restrictive regulation of commerce' that therefore needs to be eliminated (as in Article XXIV:8). That the agreement might encompass aspects of services and investment does take 'that portion' out of the scope of the Enabling Clause. If however those aspects are preferential and fall within the GATS rules for most-favoured nation, then the agreement has to be formed and notified in order to qualify for the GATS own regional exception, GATS Article V. As such, that agreement would need to be referred to the Council on Services and then treated by the Committee on Regional Trade Agreements.

The underlying issue here is whether an Enabling Clause notification can encompass an arrangement that liberalizes trade in goods to an extent commensurate with the liberalization required in an Article XXIV free trade area. We do not think that the Enabling Clause prevents developing country members from seeking to achieve a comparable level of trade liberalization that is otherwise 'required' for a free trade area. The Enabling Clause contemplates the 'elimination' of duties as well as their 'reduction' and does not appear to mandate that duties can only be eliminated on some lower volume of trade than 'substantially all' the trade.

The question of what type of agreement is being notified controls to which committee the agreement is going to be referred and thereby what set of criteria is going to be applied. If developing countries commencing an agreement do not want to be bound by the disciplines of Article XXIV, then they should, in the first instance, not be titling their agreement a 'free trade area' nor stating that the objective of the agreement is to establish a 'free trade area'. At the same time, the disciplines of Article XXIV provide a set of parameters which certainly facilitate this higher degree of liberalization. If countries want those disciplines to help insure that they implement their plan and schedule within a reasonable period of time, then that is a good reason to notify a free trade area under Article XXIV.

4. Comparing forms, free trade area or Enabling Clause arrangement, institutional considerations

Given an apparent choice to make between an Article XXI V free trade area and an Enabling Clause arrangement, we can consider by summation the elements in play in some comparative manner by the presentation in this table.

Type of arrangement or agreement:	**Enabling Clause, Para 2(c) arrangement**	**Article XXIV, Free Trade Area:**
Parties:	developing country partners only	any combination of parties
Exception granted for:	GATT Article I, most-favoured nation (para 1)	Any GATT Article violation (para 5)
Tariff duty elimination:	'reduction or elimination of tariffs'	'duties ... are eliminated on substantially all of the trade' (para 8(b)
Quota / other restrictions elimination:	'reduction or elimination of non-tariff measures' (but exception granted only from Art. I MFN)	'other restrictive regulations of commerce ... are eliminated on substantially all of the trade' (para 8(b)
Degree of reciprocity required:	'*mutual* reduction or elimination'	elimination '*between* the constituent territores' (para 8(b)
Time allowed to form:	No time stated	'should exceed ten years only in exceptional cases' (Understanding, para 3)
Notification and review:	New transparency instrument, Committee on Trade and Development	New transparency instrument, Committee on Regional Trade Agreements
External trade requirements:	'shall ... not raise barriers to or create undue difficulties' for the trade of other Members (para 3(a)	'duties and ORRC not higher or more restrictive' than existing prior to formation (para 5(b)

The major difference is in the higher degree of duty elimination required for a free trade area and for such an agreement the availability of a broader exception that would allow discriminatory elimination of quantitative restrictions (otherwise a GATT Article XIII violation). Whether this lower level of elimination provided by the Enabling Clause is beneficial for the developing countries involved depends perhaps on one's point of view. An Enabling Clause arrangement can be tailored so that very little liberalization that would

generate competition between the partners' producers actually occurs. Duties chosen for reduction or elimination could be limited to what only one of the parties produces, and thereby tending to be externally trade diverting either in purpose or effect. For the recipient consumer, the liberalization means the possible substitution of a less efficient regional producer in favour of a more efficient external producer. The free trade area elimination on substantially all the trade would allow for some sensitive sectors to also be left out of the liberalization, but would in addition require that some trade competitive (trade creating) sectors be liberalized along with ones that would likely be externally trade diverting.

Some institutional considerations should also be raised. By 'institutional' we refer to mechanisms created by the parties that can include:

- legislative (what possibilities or requirements for ongoing rule making)
- executive (what monitoring mechanism on implementation issues)
- judicial / arbitral (what recourse for non-implementation or other violations - what rights granted to states or traders - what ongoing interpretative mechanism for the provisions).

Neither of the types of agreements we are discussing in this section are associated with advanced institutional developments, and one can understand why. If an agreement is simply limited to either a reduction or elimination of tariff duties, there is no need for prospective rule making or for an independent executive function to monitor the implementation. Each state is aware of its own implementation policy and also that of its partner. Arguably, an arbitral mechanism is required if the parties want to secure the liberalization and avoid seeing it diminished over time. This is not say that more institutionalism cannot be established as the parties wish. This is particularly the case when there is a form of ongoing cooperation being established to function in other areas of non-tariff barriers, especially those that deal with domestic regulations such as food and safety standards. Here, it is not uncommon to see 'working groups' or 'committees' established by the responsible agencies of the parties. In some cases, free trade areas also establish a Secretariat, albeit this Secretariat may be 'light' in authoritative character and mainly empowered to assist in the cooperation that the parties have designated in the agreement. This is to contrast with the mechanisms that are required in a customs union, notably the formation and maintenance of

an external tariff, a mechanism to provide for trade defense actions across the territory (anti-dumping); and a mechanism to provide for a form of revenue sharing or allocation of customs duties collected.

5. Tripartite Member WTO Notifications, implications of the Tripartite for its regional groupings

Prior to a discussion on some implications of the Tripartite agreement on the regional groupings within it, we provide the following table showing the notification and status of the three regional groupings within the proposed agreement; EAC, COMESA, and SADC.[25]

Agree-ment	Date of entry into force	Date notified	Related provisions	Type of agreement	Document series	Status	Ref.
EAC	7-Jul-2000	9-Oct-2000	Enabling Clause	Customs Union	WT/COMTD/25	Factual Abstract Distributed	…
COMESA	8-Dec-1994	29-Jun 1995	Enabling Clause	Preferential arrangement	WT/COMTD/N/3	Examination not requested	…
SADC	01-Sept-2000	02-Aug 2004	GATT Art. XXIV	Free trade area	WT/REG/76	Factual Presentation Distributed	…

Both COMESA and EAC were notified as under the Enabling Clause. The EAC however was notified as a 'customs union', whereas COMESA was notified as a 'preferential agreement.' In addition, the SADC was notified as a "free trade area' under GATT article XXIV. For the record, we detail the notifications and reviews for these agreements as follows, in order of their notification to the WTO.

5.1 COMESA

The Common Market for Eastern and Southern Africa (COMESA) Treaty, which was concluded on 5 November 1993. The current members of COMESA are Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libyan Arab

[25] From ´Regional Trade Agreements Notified to the GATT/WTO and in Force by GATT/WTO Related Provision´, accessed 14 April 2011, WTO website, Regional Trade Agreements gateway.

Jamahiriya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

On May 4 1994 the COMESA Treaty was notified to the WTO under the Enabling Clause as a preferential arrangement. The COMESA Treaty however provides for the establishment of a customs union, including a common external tariff, within a transitional period of ten years.[26] In January of 2008 COMESA submitted a factual abstract to the Secretariat. Although COMESA is originally notified as a preferential arrangement, we consider below the implications of the formation as a customs union since this one of COMESA's stated treaty objectives.

5.2 EAC Protocol

The East African Community (EAC) Protocol was entered into originally by Kenya, Tanzania and Uganda on November 30 1999.[27] Burundi and Rwanda are also signatories of the Protocol. The Protocol was concluded for the establishment of the Customs Union in 2004, and its entry into force occurred on 1 January 2005. On 9, October 2000, the Parties notified the EAC Protocol on Trade to the WTO under the 1979 Enabling Clause as aiming at establishing a Customs Union and Common Market.[28] The Protocol took effect on 7 July 2000.

5.3 SADC Protocol

The SADC Protocol has been signed by the Governments of Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, the United Republic of Tanzania, Zambia, Zimbabwe, Angola and Madagascar and including the five members of the Southern African Customs Union (SACU). On 2 August 2004, the Parties notified the Protocol on Trade in the Southern African Development Community (SADC) and the Amending Agreement to the Protocol (Amendment) to the WTO under Article XXIV:7(a) of the GATT 1994, as aiming at establishing a free trade area.[29] The Protocol entered into force on 25 January 2000. The Amendment Protocol was adopted and entered into force on 7 August

[26] WT/COMTD/N/3, 29 June 1995.
[27] WT/COMTD/25/Add.1.
[28] WT/COMTD/N/14, 11 October 2000.
[29] WT/REG176/N/1/Rev.1.

2000. Implementation of both the Protocol and the Amendment commenced on 1 September 2000.

The Committee on Regional Trade Agreements (CRTA) issued its terms of reference on December 22, 2004. The terms of reference for the examination of the Protocol were adopted by the Council for Trade in Goods (CTD) on 1 October 2004.[30] The text of the Protocol and the Amendment Protocol were circulated to WTO Members as documents WT/REG176/1 and WT/REG176/2/Rev.1, and are also available, together with their Annexes, on the SADC's official website. The Secretariat issued a Factual Presentation on the 12 March 2007. Written questions and replies on the SADC Trade Protocol were distributed on the 2nd of May 2007.

The SADC Protocol contains seven annexes and sets an eight-year transition period after entry into force for the completion of the free trade area. Asymmetric time frames are prescribed depending on the level of development of the member country. According to the tariff schedules, complete implementation of the agreement will occur by 2012 for all countries except for Mozambique, which plans completion of implementation by 2015.[31]

5.4 Implications for Tripartite Members - overlapping memberships

A longstanding issue in the regional integration in East and South Africa has been the question of overlapping country members in the various regional arrangements operating. In play are two considerations. The first is that there is a clear WTO legal context for the concept of 'customs territory'. We see this in the definitions of Article XXIV for either customs unions or free trade areas, where the reference is to agreements among 'customs territories'. This accommodates the territorial application of the GATT as to customs territories (not all GATT signatories were 'states'), as well as acknowledging that customs unions are also customs territories. A second consideration, which is at issue in some of the regional integration in East and South Africa is that there are customs union plans, i.e., treaties which are dedicated to forming customs unions (customs territories) but which are in an uncompleted state. Do we then note any conflicts of overlapping members as to these territories or is this not an issue at all until formations go into actual implementation. As a practical matter, one has to consider that the second avenue is more realistic, even while

[30] See doc series, WT/REG176/1-5 for SADC notifications and factual presentations.
[31] WT/REG176/4, 12 March 2007.

the implementation process of a customs union, at some point in time, would have to be affected by overlapping members.

A question is whether a Tripartite agreement, notified either as an Enabling Clause arrangement or as a free trade area would have an impact on overlapping members. To try to answer this, let's set out the rules for customs territories.

- A customs union has an external common tariff, meaning that it has the status of a customs territory. In its completed state it can enter agreements as a territory.
- A free trade area is not a territory and its members retain their individual territory powers completely.

What this tells us is that a customs territory (either a customs union or a 'state') can be a party to a free- trade area (or multiple free trade areas), since its own external tariff can be adjusted uniformly to accommodate the membership without its 'common external tariff' aspect being put into jeopardy. A custom union can consistently assume the obligations of duty cuts and eliminations for its external tariff just like a single country member can assume those same duty cuts within the free trade area agreement. For our example, the SACU as a customs union territory can reside within the SADC free trade area with no conflicts presented for the viability of its own common external tariff.

A state member of a customs union cannot however assume a separate national tariff as a member of a free trade area that is not also assumed by the other members of the customs union. This variation in the customs union tariff undermines the requirement of Article XXIV:8(a)(ii) that custom union members impose 'substantially the same duties and other regulations of commerce' to territories not included in the union. This tells us that either all the members of the customs union go into the same free trade area (as in SACU in SADC) or the customs union has to terminate its common external tariff, reverting perhaps to a free trade area, or the member with the inconsistent tariff schedule needs to leave the customs union. If the customs reverts to an FTA, then the appropriate re-notification of the new arrangement should be provided to the WTO and subject to the review process. This allows the grouping to defend in dispute settlement as a free trade area. If a member departs the customs union, one can also note that this does not prevent the formation with that member of a separate free trade area, one party being the remaining customs union and one

party being the departed member.

As we understand the countries that have notified in the arrangements above, there are potential conflicts for Tanzania, which is a member of the EAC customs union and the SADC free trade area, but not a member of COMESA. The other EAC members are members of COMESA (a customs union almost within another customs union). Does the Tripartite Agreement potentially resolve this? The answer is a tentative 'yes' if both customs unions will have 'substantially the same' tariff schedules within the larger Tripartite free trade area. The issue of overlapping membership would still be present, but the practical effect of a final uniform common external tariff for both customs unions within the Tripartite would mean that neither of the customs unions would have significant failings in their common external tariffs. Whether this degree of uniformity of commitments among both customs unions within the Tripartite would actually occur, we do not attempt to answer, but that level of uniformity would be required, and in that case, the Tripartite resolves this customs union conflict. Also note however, that variation in the common tariff would still be an issue for EAC in those cases where COMESA was adopting an external tariff to third countries (not Tripartite members) that were not being also adopted by Tanzania. EAC members that are in COMESA cannot adopt a tariff for COMESA's external purposes different than Tanzania without jeopardizing the EAC common tariff.

A second potential conflict is presented by the common members of the SADC and COMESA. The above notifications show that Malawi, Zambia, Zimbabwe and Madagascar are common to both. Here the Tripartite agreement should be able to assist in the resolution of this conflict as it is presented to a potential COMESA common external tariff. As it stands, the tariff cuts engaged by these common members, but not engaged in the same degree by other COMESA members, is an abridgment of a common external tariff for COMESA. If all COMESA members make the same cuts in the context of the Tripartite Agreement, then the COMESA external tariff, as to those members of the larger agreement is not undermined and can be rendered uniform as to the presentation of the COMESA customs union within the Tripartite. As above however, these common members need to refrain from additional free trade area (or Enabling Clause agreements) with third countries at the risk of undermining an eventual external COMESA common tariff 'to the rest of the world.'

As a tentative conclusion, the Tripartite agreement appears to have the potential of

eliminating the overlapping membership conflicts presented for the two customs unions in such a manner that the practical ability of those customs unions to maintain an overall common tariff to the other members of the Tripartite can be realized. This is subject to the condition that completion of the Tripartite formation would manifest that the members of each customs union were maintaining 'substantially the same' duties and ORCs to the members of the Tripartite. A second caveat, as above, is that this does not solve any external tariff issues for those customs union members if they do not maintain a common tariff (each of them) to their other trading partners in the WTO.

5.5 Whether the Tripartite Agreement can notify under the Enabling Clause

While the section above has considered a Tripartite free trade area notification, there is also an issue presented for an Enabling Clause arrangement, that being whether the Tripartite agreement can be notified under the Enabling Clause if South Africa is a member. The critical consideration for this type of arrangement is whether or not all members to it are developing countries and this raises the status of South Africa in the WTO for the purpose of its regional notifications. This is apparently not a resolved question, nor is the scope of this chapter being extended to review the history of South Africa in the GATT and the WTO. We can however look at the considerations that are in play on the issue of South Africa's status for the purpose of regional notifications. First there is no governing list of developing countries maintained by the WTO and no set of adopted criteria. Countries 'self declare' their status as 'developing' or not and then other WTO Members either accept that declaration or they choose to contest it for any particular purpose for which it might have been invoked. There is no actual 'procedure' for assessing either a declared status or a challenge to it. It is also not clear if a country may or may not declare a 'developing' status for some aspects of the WTO covered agreements and yet seek to be ‘developed’ for other aspects.

These considerations noted, the historical pattern of practice and treatment of a country's status in the WTO and by the WTO Members should be the first line of inquiry to determine whether a declaration of developing country status, here for the purpose of an Enabling Clause arrangement, would be likely to be accepted by the other Members. A number of factors could be considered including previous regional / preferential notifications, whether the country is recognized as a GSP recipient by grantor WTO Members, the characterization of the country and its responses in the WTO Trade Policy Review Mechanism (TPRM), and the

use by the country of other WTO S&D (special and differential treatment provisions) in other WTO Agreements, to name several.

As it stands to date, the WTO RTA Database indicates South Africa has not yet been a party to any preferential agreements notified under the Enabling Clause, although there are indications in the press that preferential arrangement notifications may be forthcoming for agreements being made by South Africa with Brazil and/or India. One might suggest that if those agreements would pass without objections from other WTO Members, then it would seem that the Tripartite could also likely pass. It may also have a bearing that South Africa has been a recipient of GSP benefits from major grantors. One can pose that if a country qualifies for GSP benefits, also authorized by the Enabling Clause, then it would arguably fall into the same developing country category for the purpose of notifying preferential arrangements under the Enabling Clause.

Ultimately it will be the WTO Members reaction to a notification that will tell the story. This will however be made more complicated if the agreement is presented as titled and presented as a 'free trade area' but then notified under the Enabling Clause as a preferential arrangement.

6. The Transparency Mechanism and current review

There have been developments since the commencement of the Doha negotiation round on the subjects of transparency and reporting for regional and preferential agreements. A draft ´Transparency Mechanism for Regional Trade Agreements´ forwarded by the Negotiating Rules Committee in the summer of 2006 was adopted by a Decision of the General Council in December of 2006.32 This mechanism has implications for the functioning of the system in respect of GATT Article XXIV and GAT Article V agreements and Enabling Clause arrangements. The main features of the Decision include:

- ´Early Announcement´ provisions upon commencement of RTA negotiations and upon signature of an RTA.
- ´Notification´ requirements, as a rule to be made to the WTO not later than ´directly following´ RTA ratification and before preferential treatment is commenced. Submissions are to include text, annexes, protocols, etc.

[32] TN/RL/18, 13 July 2006.

- ´Factual presentation´- as based primarily on the data submitted, the WTO Secretariat will prepare a ´factual presentation´. This will not include any value judgments as to compatbility with the rules and cannot be used as a basis for dispute resolution.
- ´Formal review meeting´ - A single review meeting based on the factual presentation, and questions of comments generated by the Members regarding the RTA. This is based on a schedule of circulation of the factual presentation and the Members questions and comments. All is published on the WTO website, including the minutes of the meeting.
- Post-implementation review – RTA members are obliged to provide a report at the end of the implementation period documenting the liberalization. WTO Members have a right to exchange of views in the appropriate body or committee. A summation is provided by the Secretariat and posted on the web site.
- Relevant bodies – The Committee on Regional Trade Agreements (CRTA) shall be the implementing body for GATT Article XXIV and GATS V RTA agreements. The Committee on Trade and Development (CTD) will be the responsible body for Enabling Clause agreements (notified under para 2(c)).

Under the transparency mechanism agreed upon in the Doha negotiations, developing country horizontal arrangements are definitely covered in the early announcement, notification and reporting procedures. (The Enabling Clause itself does require that such arrangements be notified to the contracting parties.).

The Committee on Trade and Development has been instructed to implement the Transparency Mechanism for agreements notified under the Enabling Clause paragraph 2(c). Under this procedure the Chairman of the CTD informs the Committee that a submission concerning a newly-notified RTA under the Enabling Clause has been received. The Secretariat will prepare a factual presentation of the RTA once data is received from the notifying Members.

The RTA would be considered in a dedicated session of the CTD, essentially following the same procedures used by the CRTA in its consideration of RTAs. These include

> the requirement for members to transmit written questions or comments at least six weeks before the meeting, and the distribution of these questions/comments – together with replies- at least three working days before the meeting. The consideration of the RTA would be normally concluded in a period not exceeding one year after the date of notification.[33]

More recently, the WTO Rules Committee has begun a review of the Transparency Mechanism and the issue of where a particular regional trade agreement entered into amongst developing countries should be notified and reviewed has arisen. The United States has proposed that all RTAs notified to the WTO be considered in the CRTA. The U.S. contends that this would lead to more efficiency. The U.S. sees the problem as follows:

> Failure to have the TM function in a single Committee has raised some difficult operational problems in the context of so-called "dual notifications." At best, as a practical matter, if Party A notifies an RTA under Article XXIV of GATT 1994, and Party B notifies the same agreement under the Enabling Clause, it appears that the Secretariat would be required to prepare two factual presentations, and for the same agreement to be considered in both the CRTA and the CTD. Leaving aside any political or legal tensions this may create, this outcome is neither practical nor efficient. In addition, when parties have notified the goods part of their agreement under the Enabling Clause, and the services part under the GATS, the consideration of the RTA has been split so that each aspect would be considered on a different day, creating a disjointed, inefficient experience for participants. It behoves the Membership to provide for a more sensible procedure.[34]

There are some additional proposals, informal and otherwise, that might modify the procedure, including having all RTA members jointly submit the RTA and one suggesting that dual notifications be handled by a joint meeting of the CRTA and the CTD.[35]

[33] WT/COMTD/M/67, 31 January 2008, page 10.

[34] TN/RL/W/248, 24 January 2011. As reported, The European Union, Turkey, Korea, Japan, Switzerland, Colombia, Australia, New Zealand, Canada, Chile and Costa Rica supported the US proposal, India, Egypt, Argentina, China, Bolivia and Brazil 'underscored the importance of the CTD in dealing with development matters'. See TWN, Info Service on WTO and Trade Issues (Feb11/06) 22 February 2011 (Published in SUNS #7083, 8 February 2011.

[35] TN/RL/W/249, 24 January 2011.

However this review turns out, as to which committee reviews which regional / preferential forms, the underlying issue as to the appropriate set of criteria to be applied for the factual examination remains the most important question. For regional members, this means structuring an agreement that uses the terms and references of the form that has been chosen for implementation.

7. GATS Article V Economic Integration Agreements, Article VII Mutual Recognition

Although the Tripartite Agreement does not make specific reference to forming a GATS Article V economic integration agreement, there are references throughout the released text that refer to trade in services and service providers. Several aspects of the GAT are also key to economic development in the region, including commercial presence in the form of cross-border investment and cross border movement of workers in the form of temporary labour mobility. For these reasons, we provide this section on preferential services agreements, first for GATS V agreements and then for GATS VII mutual recognition.

Like the GATT, The General Agreement on Trade in Services (GATS) is also a WTO framework agreement for conducting multilateral liberalization for trade in services, and establishing the ´rules of the game´ for treatment of services and service providers. The GATS has a general most-favoured nation provision (GATS Article II) and establishes a means of categorizing trade in services according to ´four modes of supply´ For a particular type of service (engineering services, just for example), the countries can schedule market access openings for each mode as a function of a negotiation and commitment within the GATS framework.

7.1. GATS modes of supply, market access and national treatment.

Mode 1 covers ´traded services´ whereby the service itself is transmitted across the border without movement of persons or capital. An example would be a data processing transaction. Mode 2 refers to ´consumption abroad´ where a service consumer crosses the frontier of another territory to receive a service. Tourism and educational services are an

example of this mode. Mode 3 refers to ´commercial presence´ whereby a service provider establishes an operation in another territory in order to provide a service. This mode can require investment and movement of management personnel. Banking and retailing services are examples of mode 3. The final mode 4 covers movement of service providers who are natural persons. Medical service providers or agriculture labour are examples of mode 4 movements.

A commitment made in the GATS for a particular service and mode of supply generates a requirement to eliminate quantitative restrictions on the service or its providers (GATS Article XVI). In this Article, there is a set list of quantitative restrictions that unless specifically retained as stated, are deemed to be eliminated by the commitment. They include indicators dealing with the number of suppliers, the number of transactions, limitations on the value of transactions, etc. They are also understood to be eliminated whether or not they are technically imposed as ´border´ measures or whether they are applied as domestic regulations within the market.

A market access commitment further entails an obligation to provide national treatment (GATS Art. XVII). Unlike the GATT, national treatment is not a general obligation but taken up specifically as a function of the negotiation process and its outcome on individual commitments. National treatment means that the foreign service or service supplier will not receive less favourable treatment than that provided to a like domestic service or service supplier. Also as a matter of negotiation, it is possible within the GATS to impose conditions on the market access commitment as well as conditions upon national treatment. In this manner, GATS is quite flexible in permitting countries to tailor the domestic protection they wish to maintain for their services and suppliers.

The GATS was established as a result of the Uruguay Round and for the purposes of concluding that negotiation round, there was not a substantial negotiation for market access commitments, but more the presentation of Members´ existing arrangements in the form of their ´opening schedules´. There have been meaningful sectoral negotiations concluded since then in the fields of basic telecommunication services and financial services. WTO members in the GATS are in the process of the first full multilateral round of negotiations which has also become connected as well to the Doha Round of negotiations. (Technically, the GATS negotiation is independent of the Doha Round, since it was scheduled as a

´built in´ endeavour from the results of the Uruguay Round).

7.2 GATS V provisions

It is within this context of a comprehensive trading framework that the GATS also provides for a regional exception, numbered as GATS Article V and titled ´Regional Integration´. In many respects the concept used for qualifying a GATS V agreement is based on the mold established by Article XXIV of the GATT. Thus, paragraph 1 provides the basic statement of exception in that,

> 1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement (...).

The ´internal requirements are then stated, of which there are two. First, the integration agreement must have ´substantial sectoral coverage´, (and assumedly providing market access for the sectors), and second, it must provide for the absence or elimination of substantially all discrimination, within the meaning of national treatment.

Some explanation is beneficial for both of these requirements. For the first one dealing with substantial sectoral coverage, a footnote to that provision states the following:

> *(footnote 1)* This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply.

The ´a priori´ exclusion text is important for arrangements being considered by developing countries, and particularly as between developed and developing countries. There is a strong interest by developing countries in exploiting opportunities for mode 4 service suppliers, i.e., temporary movement of labour, which is a large source repatriated remittances to the developing country. Since this is a most sensitive area for developed territories (in opening their labour markets to foreign service suppliers), any agreement going beyond the conventional disciplines and market commitments of the GATS would have to consider at least the potential for openings in mode 4. It appears from the text that excluding mode 4 ´outright´ in a GATS V agreement would be facially unqualified for the exception in regard to any other preferential services commitments being made. It is also questionable whether a

bare promise in an RTA to consider mode 4 arrangements at some unspecified point in the future would serve as a reasonable provision in light of the footnote requirement.

There is an ´external´ requirement for GATS V whereby such agreements shall be designed to facilitate trade between the parties and not to raise the overall level of barriers to trade in services to non-members of the regional agreement (paragraph 4).

As in the GATT Article XXIV construction, there is also supplied a list of GATS Articles providing for measures that need not be eliminated (or rendered non-discriminatory). These are for measures permitted under, Article XI (Payments and Transfers), Article XII (Restrictions to Safeguard the Balance of Payments), Article XIV (General Exceptions), and Article XIV bis (Security Exceptions).

The institutional control provisions for GATS V include a requirement that agreements have to be notified to the Council on Trade in Services. They are then referred to the CRTA for review and discussion. The Council can require periodic reporting on the implementation of agreements, and as similar for Article XXIV agreements, the Council may make recommendation to the regional parties as it deems appropriate. As noted previously, GATS V agreements are also subject to the WTO transparency mechanism.

7.2.1 GATS V and ´market access´

GATS V does not recite GATS XVI (Market Access) as a requirement, so perhaps it is arguable that GATS V only requires national treatment to be accorded. This might be a contradictive reading of the Article, since the objective of a GATS V agreement is to liberalize trade in services. However, there are also subtleties to this question. If a measure was internally applied, a national treatment requirement (only) would allow the maintenance of an internal quantitative restriction (number of providers to be licensed, for example), as long as that restriction were also imposed on domestic service providers in equal measure. A market access commitment however would require the elimination of the quantitative restriction as applied to foreign providers, even if it was non-discriminatory. This appears to be the reading that is being adopted in a number of GATS V RTAs being notified to the WTO where the parties recite the market access restrictions from GATS Article XVI that are to be eliminated with regard to the substantial sectoral coverage. For examples, see US -

Bahrain (USTR website) and Australia - Thailand (Australia DFAT website).

7.2.2 GATS V and ´national treatment´

The second internal requirement is that of national treatment. Within this provision there is a subheading indicating that the absence or elimination of substantially all discrimination can be realized either through the ´elimination of existing discriminatory measures, and/or the prohibition of new or more discriminatory measures. This is a somewhat confusing construction that seems to suggest that a ´standstill´ provision might be possible that would preserve existing discriminatory measures (and not eliminate them), and that this type of action would be able to qualify for the requirement. It seems however that this reading would undermine the requirement itself to provide for the absence or elimination of discrimination. This text has not received any clarification in the WTO, but the better reading would be that discriminatory measures need to be eliminated.

7.2.3 GATS V, S&D provisions

A significant difference between GATT and GATS regional exception is that the GATS V provisions contain flexibility for developing country members to regional integration agreements. Paragraph 3 of the Article says that where developing countries are parties to an agreement, flexibility ´shall be´ provided for the qualifying conditions. Especially for those under Article 1(b) requiring national treatment. In addition, for agreements involving only developing countries, ´more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.´ (paragraph 3).

These flexibility provisions appear quite broad on their face, and suggest that developing countries have the opportunity to open their sectors either more slowly than a developed partner in a GATS V arrangement, or as likely, to not open sectors to foreign competition at all.

Several GATS V Agreements between developed and developing countries have been notified to the WTO, including US - Morocco, US - Jordan, and Thailand´s agreements respectively with Australia / New Zealand. (Developed country agreements with Chile or Mexico may also be considered as developing country agreements). It is difficult to determine whether any explicit S&D treatment is being set out in the agreements noted. All

agreements maintain schedules with a number of national treatment and market access exceptions. One has to assume that the balance of concessions reached in the agreements is the result of what was mutually acceptable to the parties, irrespective of S&D. There is no overriding expression being found in the agreements that invoke the S&D text of the GATS V Article. There is no indication that one party was led to grant greater flexibility to the other as a result of the GATS S&D text. This is not to say that such a context might not have had a bearing on the negotiation framework, but that the agreements do not evidence that consideration on their face.

The types of restrictions that one can see in a GATS V agreement are the same types of restrictions that are evident in WTO Members´ GATS schedules generally. Thus, restrictions (or retaining the right to impose restrictions) on the local certification, residency or citizenship for cross border and investment are not so uncommon. The overall approach is for the main trade agreements provisions to accord market access and national treatment generally, and then have annexes to deal with the items that are non-covered by the agreement.

7.2.4 GATS V, implications for Tripartite investment and temporary labour migration

While the Tripartite agreement in its draft form does not specifically call for a GATS V notification, Article 30 of the Agreement does make reference to services liberalization program on the basis of schedules to be negotiated. There are several point to be made that GATS and GATS Article V offers an optimal platform for the members of Tripartite to develop a regional investment and services approach for the larger East and South Africa economic market. GATS mode 3 allows for the positive scheduling for market access of investment by enunciated negotiated sectors. In the context of a GATS V agreement, these sector schedules can be used to define the regional baselines that would be guaranteed for both the region's exporters and importers of investment. Although not all investment encompasses the delivery of services, most investment does contain a services component. As indicated above, the scheduling method for GATS V is also flexible enough to allow variations in national treatment on behalf of the economically weaker members in protection of their more sensitive service sectors. It is granted that a more ambitious approach would use a negotiated 'negative list' of sectors not being allowed to open for cross-border investment from other regional members. Securing the most ambitious approach is not

however the main point. What GATS V (and the underlying GATS general principles) offers is a framework that allows regional members to define over time the 'characteristics' of their own regional market for the purposes of increasing regional investment.

Complementary to this is the process of scheduling according to mode 4 of the GATS, temporary movement of labour. This is also a well-recognized opportunity sector for developing countries, in part as it is linked with the labour that accompanies enterprise investment in mode 3, but also on its own terms for those service suppliers operating across the entire range of economic activities, from unskilled seasonal agricultural labour to certified professions. Again, the templates that are available in the GATS system for defining and then scheduling the cross border aspects provide a framework for the regional members to actively define the nature of the regional labour market over time.

For both the areas of cross-border investment and temporary labour movements, GATS V by its terms requires a 'substantial sectoral coverage'. How many of the GATS V agreements already notified to the Council on Trade in Services are actually able to accomplish this degree of coverage within a reasonable time is not considered here, but certainly a number of them are more aspirational in character than able to exhibit a completed set of schedules demonstrating the GATS V requirements. For the Tripartite members, the process of clarifying what can and can not be scheduled for market access, and what deviations are needed from national treatment to accommodate the adjustments is more important at this juncture than a declaration or notification of a regional integration agreement.

There is a final benefit to undertaking a negotiation on services. Most of the liberalizing actions that are taken in services deal with domestic laws and regulations rather than 'border' measures (tariffs and quotas). As such, the activities of a services group can link to the aspects of the Tripartite program dedicated to cooperation in regulatory areas. Besides competition and standards, the means of examining and certifying service providers and the domestic rules applied to investment approvals, etc., can all be a part of a process of regulatory cooperation.

7.3 GATS Article V bis, ´Labour Markets Integration Agreements´

GATS Article V *bis* provides a separate exception from other GATS obligations for Members entering into agreements ´establishing full integration of the labour markets´. A

footnote to this provisions states that typically such integration includes a right of free entry for persons to the employment markets of the parties and measures concerning conditions of pay, employment and social benefits. For the GATS exception to be available, the Article states that such agreements must exempt citizens of the parties from residency and work permit requirements and that they must be notified to the Council for trade in services.

7.4 GATS Article VII, ´Recognition´

Service provider recognition activities are closely related to the GATS regional exception and raised here for the context that GATS VII provides for the larger discussion of regionalism in services trade. ´Recognition´ is made when one country recognizes the education or experience obtained of a foreign service provider for the purpose of meeting the country´s authorization, licensing or certification requirements. This can be accomplished unilaterally, but more likely by bilateral mutual recognition agreements. The act of recognizing one other country´s service providers presents strong MFN issues where this treatment is not necessarily being accorded to the like service providers of other WTO Members. Article VII applies a sort of procedure to insure that when countries commence bilateral recognition, that the there is a certain multilateral control requiring recognition parties to promptly notify their intent to form an agreement prior to the commencement of negotiations, and then an opportunity provided for other WTO Members to ´indicate their interest in participating in the negotiations before they enter a substantive phase´.[36]

This Article VII text does not guarantee that another WTO Member can receive the benefits of recognition. In any case dealing with certifications, there would have to be a quality assessment made that the qualification system of the other was equivalent to that of the country granting recognition, and in this process there is a strong legitimate interest to insure that the country´s standards are being essentially maintained and that consumers are being adequately protected. However, at the same time, Article VII states clear rights for other WTO Members to be given the opportunity to present their case for joining contemplated bilateral recognition agreements.

There is at least some anecdotal evidence to suggest that where two parties wish to commence bilateral recognition and bypass the procedures of Article VII, that they may be choosing to include recognition activities within the provisions of their economic integration

[36] GATS Article VII:4(b).

agreements as notified under Article V.[37] In other words, that they might seek to apply the regional exception for these activities, which of course does not have a provision opening any possibility for other WTO Members to accede to such an agreement.

The legal question of whether recognition falls within the regional exception of GATS V is complex and not treated here in detail. However, to the extent we have discussed the requirements for GATS V formations, we can see from those provisions that national treatment is the primary requirement, i.e., that regional members accord each other national treatment with regard to substantial sectoral coverage. This said, it would take an expansive interpretation of what constitutes national treatment for it to have a scope broad enough to contemplate recognition, and if it did, then all WTO Members making a national treatment commitment in their GATS schedules would also then be obligating themselves to provide for some degree of recognition as a part of national treatment.

For example, if a country made a market access commitment for road transport services, then national treatment would not only require that foreign lorries and their drivers have access to the granting country´s system of certification on a non-discriminatory basis, (the right to obtain a domestic license), but that the country must also go forward to recognize the foreign licenses and certificates held by the lorry and its drivers.

8. General Conclusions

Regional trade agreements are regulated in the WTO both within the GATT (trade in goods) and the GATS (trade in services). For goods, GATT Article XXIV contains qualifying provisions for the establishment of customs unions, free trade areas, and interim agreements leading to either. In addition, and only for trade in goods, the Enabling Clause Decision of 1979 allows for preferential arrangements between (only) developing countries. For these ´horizontal´ preferential arrangements, paragraph 2(c) of the Enabling Clause provides for regional or global arrangements entered into by developing countries for the reduction or elimination of tariffs. For services, GATS Article V provides for the establishment of economic Integration agreements and for labour market integration arrangements. There

[37] ´…within CTS discussions, a number of Members had indicated that RAs were not notified to the WTO because they were part of an economic integration agreement notified under GATS Article V.´ WT/TN/RL/M/15, (15.06.04), para. 22.

are no Enabling Clause provisions for preferential services arrangements between developing countries, so all of these types of agreements are notified to the Council on Trade in Services and then referred to the CRTA according to the provisions of GATS V. GATS V does allow for flexibility in both north – south and south – south agreements for developing countries.

These rules summarized, we would like to make the closing remark, perhaps a bit obvious, that how regional members view these different WTO disciplines also has some ultimate impact on the quality of the regional integration process. If they are considered as a set of punishing rules that are 'forcing' regional members to unwind their levels economic protection against their better sovereign judgment, then this attitude is going to be reflected in the quality of the agreement, the plan and schedule, and the inevitable difficulties of implementation. This can occur in an agreement where there may be some very willing partners together with some not so willing to participate. We could say that those agreements might require more institutional controls in order to insure implementation, but in point, institutionalism cannot easily fix an agreement where the objectives are simply not being fully shared.

Particularly for Article XXIV agreements, the exception from GATT MFN is being offered for agreements that have as their *purpose* the liberalization of trade between the members. Where regional partners all share that objective, then Article XXIV offers not a set of 'restrictive rules', but rather a 'positive framework' to take up the economic integration that complements the objectives of the parties. Where regional members do not actually share that purpose of trade liberalization in in common, then Article XXIV is probably not the place for their agreement to be.

GATT history is full of regional trade agreements that never approximated the Article XXIV requirements in their plans and implementation. Fifteen years into the WTO era, It is becoming apparent to most observers that those days are at least 'sort of' passed in favour of a more balanced relationship between the multilateral trading system and regional trade agreements, where many agreements are tending more to be formed and implemented according to the real underlying sense of the rules.

While we can study the draft of the Tripartite Agreement (and others) we also cannot read

between the lines and assess the objective will of the members involved to give real effect to the various provisions of this agreement. That is a matter more in the realm of the trade ministers and their negotiators. We can see how a Tripartite Agreement with a significant amount of trade liberalization can resolve some long-standing inconsistencies in East and South Africa regional integration, and that a larger free trade area could provide a new level of regional coherency. If it turns out that all the parties to the Tripartite Agreement also see that significant trade liberalization across the region is a real objective to accomplish - that this is the purpose of the Agreement, then this free trade area may well find a very good home under the auspices of GATT Article XXIV and eventually, GATS Article V.

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Annexes

Annex One: GATT Article XXIV

PART III

Article XXIV

Territorial Application _ Frontier Traffic _ Customs Unions and Free trade Areas

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; *Provided* that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.

2. For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.

3. The provisions of this Agreement shall not be construed to prevent:

(*a*) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;

(*b*) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free trade area; *Provided* that:

(*a*) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(*b*) with respect to a free trade area, or an interim agreement leading to the formation of a free trade area, the duties and other regulations of commerce maintained in each if the constituent territories and applicable at the formation of such free trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall 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 the free trade area, or interim agreement as the case may be; and

(*c*) any interim agreement referred to in sub-paragraphs (*a*) and (*b*) shall include a plan and schedule for the formation of such a customs union or of such a free trade area within a reasonable

length of time.

6. If, in fulfilling the requirements of sub-paragraph 5 (*a*), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, 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.

7. (*a*) Any contracting party deciding to enter into a customs union or free trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(*b*) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of sub-paragraph (*a*), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(*c*) Any substantial change in the plan or schedule referred to in paragraph 5 (*c*) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free trade area.

8. For the purposes of this Agreement:

(*a*) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(*b*) A free trade area 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, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected.* This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (*a*)(i) and paragraph 8 (*b*).

10. 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 a free trade area in the sense of this Article.

11. Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognizing the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two countries from entering into special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitive basis.*

12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

Annex Two: GATT-1994 Understanding on the Interpretation of Art. XXIV of the General Agreement on Tariffs and Trade 1994

Members,

Having regard to the provisions of Article XXIV of GATT 1994;

Recognizing that customs unions and free trade areas have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade;

Recognizing the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

Recognizing also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;

Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;

Convinced also of the need to reinforce the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and improving the transparency of all Article XXIV agreements;

Recognizing the need for a common understanding of the obligations of Members under paragraph 12 of Article XXIV;

Hereby *agree* as follows:

1. Customs unions, free trade areas, and interim agreements leading to the formation of a customs union or free trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article.

Article XXIV:5

2. The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.

3. The "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

Article XXIV:6

4. Paragraph 6 of Article XXIV establishes the procedure to be followed when a Member forming a customs union proposes to increase a bound rate of duty. In this regard Members reaffirm that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26-28) and in the Understanding on the Interpretation of Article XXVIII of GATT 1994, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union.

5. These negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by paragraph 6 of Article XXIV, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the Understanding on the Interpretation of Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

6. GATT 1994 imposes no obligation on Members benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its constituents.

Review of Customs Unions and Free trade Areas

7. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.

8. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time-frame and on measures required to complete the formation of the customs union or free trade area. It may if necessary provide for further review of the agreement.

9. Members parties to an interim agreement shall notify substantial changes in the plan and schedule included in that agreement to the Council for Trade in Goods and, if so requested, the Council shall examine the changes.

10. Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations.

11. Customs unions and constituents of free trade areas shall report periodically to the Council for Trade in Goods, as envisaged by the CONTRACTING PARTIES to GATT 1947 in their instruction to the GATT 1947 Council concerning reports on regional agreements (BISD 18S/38), on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur.

Dispute Settlement

12. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free trade areas or interim agreements leading to the formation of a customs union or free trade area.

Article XXIV:12

13. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

14. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.

Annex Three: Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979

(L/4903)

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES decide as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries(**1**), without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following(**2**):

a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences(**3**),

b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;

d) Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

3. Any differential and more favourable treatment provided under this clause:

a) shall be 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;

b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

c) 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.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:(**4**)

a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party,

consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

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[1] The words "developing countries" as used in this text are to be understood to refer also to developing territories.

[2] It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

[3] As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

Annex Four: GATS Article V 'Economic Integration'; GATS Article VII 'Recognition'

Article V: Economic Integration

1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

(a) has substantial sectoral coverage,(**1**) and

(footnote original) **1** This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply.

(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

(i) elimination of existing discriminatory measures, and/or

(ii) prohibition of new or more discriminatory measures,

either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

2. In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

3. (a) 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.

(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.

6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

7. (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to

the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.

(b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

(c) Based on the reports of the working parties referred to in subparagraphs (a) and (b), the Council may make recommendations to the parties as it deems appropriate.

8. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

Article V bis

Labour Markets Integration Agreements

This Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration38 of the labour markets between or among the parties to such an agreement, provided that such an agreement:

(a) exempts citizens of parties to the agreement from requirements concerning residency and work permits;

(b) is notified to the Council for Trade in Services.

[38] Typically, such integration provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay, other conditions of employment and social benefits.

Article VII

Recognition

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.

3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

4. Each Member shall:

(a) within 12 months from the date on which the WTO Agreement takes effect for it, inform the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;

(b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;

(c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.

5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

Chapter 3

The Tripartite FTA: Requirements for Effective Dispute Resolution

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1. Introduction

This chapter discusses the dispute settlement regime now being negotiated as part of the new Tripartite Free Trade Area (T-FTA). The requirements for the effective settlement of disputes in international trade arrangements will first be dealt with in order to provide the applicable context and to identify benchmarks for evaluating the Tripartite FTA proposals under consideration. The nature of this new trade arrangement, some of its technical features and the scope of its activities will also be introduced.

The exercise should start with a caveat; this trade arrangement does not yet exist and the draft documents have no official status. It is work in progress.[1] It was only at the Johannesburg Summit of June 2011 that the Heads of State and Government decided to start the inter-governmental negotiating process. A final evaluation will only be possible once the outcome of that process is known and the necessary legal instruments have been adopted.[2] However, wider stakeholder participation and debate about substantive issues cannot wait till then; when it will be too late to make any meaningful contribution.

An open discourse about the content of the founding instruments should be encouraged. That can only add to the legitimacy, comprehensiveness and quality of the international agreement which will establish this potentially very important arrangement. Trade agreements are not an end in themselves. They have to address real needs and advance the interests of the communities in the participating countries. Negotiated answers to technical problems (e.g. in areas such as rules of origin, trade facilitation and legal remedies) will only be effective if the views of those directly affected and actively involved in trans-border commercial activities are taken into account.

[1] The Tripartite documents which were available and were used here date back to December 2010 and are identified as the "revised" version.

[2] Article 50(2) of the Draft Tripartite Agreement requires ratification by the Member States of the agreement which will establish this FTA. It shall enter into force upon ratification by two-thirds of the Tripartite Member States. Article 50(3), Draft Tripartite Agreement.

Since October 2008, when the political leadership of the Common Market for East and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) met in Kampala and decided to start preparations for the launching of the Tripartite FTA, the Tripartite Task Force has prepared a draft agreement and some fifteen annexes. These documents are important because they reflect high level technical inputs. They constitute the interim results and this is what can now be evaluated. In this chapter the emphasis will be on the *Draft Agreement Establishing the COMESA, EAC and SADC Tripartite Free Trade Area* and the *Annex on the Tripartite Dispute Settlement Mechanism.*

An understanding of the bigger picture and contemporary developments will be useful. Elsewhere in the world regional integration is pursued with considerable success. The present discussion will start with a brief reference to RTAs which have achieved impressive results and will mention some of the reasons why they are considered success stories.

2. International Developments in Regional Trade Arrangements

The recently published 2011 World Trade Report of the WTO (*The WTO and Preferential Trade Agreements: From Co-existence to Coherence*) is a detailed study and explains what successful regional integration arrangements are about. It also shows that Africa has yet to develop a successful regional integration model and the same dynamic involvement of the private sector. Asian countries have become some of the most active in signing preferential trade agreements, contributing to the increased concentration of trade within the region — second only to Europe in 2009. However, their approach is very specific in addressing the needs of cross-border production chains of the private sector, integration and trade promotion. The Report notes some of the salient features of the Asian approach and the implications for global trade:

> *But more significantly preferential agreements are evolving towards deeper integration that goes beyond tariffs and other measures at national borders — they increasingly include domestic policies such as regulations on services and investment, intellectual property protection and competition policy, which the report calls "deep PTAs".*
>
> *The result is that the deeper agreements can also benefit other countries rather than discriminating against them. The report highlights the case of the Association of Southeast Asian Nations (ASEAN). The evidence shows that ASEAN countries used their group's free*

> *trade agreement as a vehicle to work together to cut red tape and streamline other aspects of trade (known as "trade facilitation"). Improved customs administration cut the costs of trading for members and non-members alike. On the one hand, lower preferential tariffs within these free trade agreements no longer offer much of an advantage because non-preferential tariffs ("most-favoured nation" or "MFN" tariffs in WTO jargon) are already low.*
>
> *At the same time, if deep integration provisions require broader regulation, then these could apply to goods, services and investment from all countries, not just the members of the preferential agreements.*[3]

In this chapter it will not be endeavoured to provide a theoretical analysis of the African approaches to regional integration or to propose better models. That is the function of economists and the practitioners in the field. [4] The record of the African Regional Economic Communities (RECs) is, when compared to achievements elsewhere, rather modest. It has to be added though that African governments face daunting challenges of poverty, high transportation costs, small markets and poor infrastructure.

It is perhaps time to revisit the accepted wisdom when it comes to the design of new regional trade arrangements in Africa. African RTAs are, as a rule, top-down market access endeavours which start with grand political initiatives and the proclamation of customs unions and common markets in quick succession, which are technically complicated and onerous to implement. A repetition of existing recipes will not necessarily work. In this regard the 2011 World Trade Report notes (at p 152):

> *Africa's regional integration initiatives have achieved limited results, raising doubts about the approach adopted to addressing factors that inhibit regional trade. Barriers to trade that raise the costs of doing business can be classified as border or behind-the-border measures. African regional free trade arrangements have focused on border measures, and primarily on tariffs. Tariffs are undeniably an important barrier but they may not be the most important one. Abundant anecdotal evidence suggests that timeconsuming and inefficient border procedures may be more important than tariffs in inhibiting intra-regional trade.*

[3] Press release: http://www.wto.org/english/news_e/pres11_e/pr635_e.htm

[4] See for example the contributions of various economists in the 2010 World Trade Report (WTO. 2011. *The WTO and Preferential Trade Agreements: From Co-existence to Coherence.* Geneva. World Trade Organisation)

> *Multiple border crossings for goods to reach landlocked countries add significantly to the transaction costs of intra-regional trade.*[5]

The Tripartite FTA is now in its design stage. Clarity about the philosophy behind the exercise, the rules of the game, how obligations will be implemented and disputes be settled will be vital. The efforts should not stop there. The success of the proposed Tripartite FTA will, in addition to a realistic conceptual foundation, depend on the political will and the commitment of the member states to make it work. This commitment will have to be reflected in clear legal undertakings and should be demonstrated by the subsequent practice regarding compliance and implementation.

The ultimate test will be the outcomes; will the agreed obligations will be respected and be implemented? What will happen if provisions in the legal instruments are violated? Will effective dispute settlement procedures be in place? Will judicial remedies be available and who will be entitled to them? Will rulings on disputes be enforced and compliance be monitored? The answers to these questions must be provided in the founding instruments and be borne out by actual practice.

This writer argues that the success of the Tripartite FTA will to a considerable degree depend on whether a rules-based approach is followed, effective dispute settlement will be possible and remedies are available to the directly affected parties. When international trade is not conducted on the basis of rules, power considerations and unpredictability will enter the picture. The certainty, predictability, and transparency typical of rules-based arrangements will be absent. The interests of private traders and investors will be jeopardized, while corruption will become more widespread. Ordinary citizens and consumers will suffer.

The rules-based nature of the Tripartite FTA is, in addition, a consequence of the fact that WTO rules such as Article XXIV of the GATT or the Enabling Clause have to be complied with. These rules cover both the internal as well as external dimensions of FTAs and customs unions. Twenty of the 26 states involved in the formation of the Tripartite FTA are WTO members and the applicable WTO rules will have to be respected.[6]

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[5] The electronic version of the "World Trade Report 2011" is available on the WTO website: www.wto.org.

[6] Libya, Sudan, Eritrea, Ethiopia, Comoros, Seychelles are not presently WTO members. Angola, Burundi, Botswana, Democratic Republic of Congo, Djibouti , Egypt, Kenya , Lesotho , Madagascar, Malawi, Mauritius,

The WTO Secretariat has to be notified about the formation of this FTA, enabling members of the WTO to inform themselves about its functioning and legal setup. In December 2006, the General Council of the WTO established a new transparency mechanism for all RTAs. The new transparency mechanism — negotiated in the Negotiating Group on Rules — provides for early announcements of any RTA and notification to the WTO. Members will consider the notified RTAs on the basis of a factual presentation by the WTO Secretariat. The Committee on Regional Trade Agreements will consider RTAs falling under Article XXIV of the General Agreement on Tariffs and Trade (GATT) and Article V of the General Agreement on Trade in Services (GATS). The Committee on Trade and Development will consider RTAs falling under the Enabling Clause (trade arrangements between developing countries).[7]

The rules-based dimension further means that adjudication of RTAs could follow. WTO panels and the Appellate Body enjoy considerable scope to review matters arising from FTAs and customs unions. The WTO Agreements are generally justiciable, while the Understanding on the Interpretation of Article XXIV of the GATT 1994 is quite specific in this regard. There has not yet been a case where a WTO member has attempted to invalidate a preferential trade agreement (PTA) as a whole. However, issues pertaining to PTAs have arisen in cases such as *Turkey Textiles*[8] and *Argentina Footwear*[9] and have been the subject of the legal reviews undertaken as part of those cases.

3. Requirements for effective Dispute Settlement

An effective dispute settlement system for a rules-based inter-state trade arrangement should display certain features. The first is that the legal texts containing the substantive law must be clear. They should explain the nature and scope of members' rights and obligations

Mozambique, Namibia, Rwanda, South Africa, Swaziland, Tanzania, Uganda, Zambia, Zimbabwe are the other parties of the Tripartite FTA. They are WTO members.

[7] WT/L/671, 18 December 2006.

[8] WT/DS34/AB/R adopted 19 November 1999. Article XXIV GATT may justify measures (in this instance textile quotas imposed by Turkey under an EU Association Agreement) inconsistent with certain GATT provisions provided specific conditions are met; namely that the measures must be introduced upon the formation of a customs union and that the formation of that customs union would have been prevented if it were not permissible to introduce the measure at issue. Turkey's measures were found not to be justified because there were alternatives available.

[9] WT/DS121/AB/R, adopted 12 January 2000. Argentina's safeguard measures had to be applied to imports from all sources, including members of MERCOSUR, the RTA of which Argentina is a member.

as well as the powers of institutions established in terms of the applicable treaty. The legal instruments which establish these inter-state arrangements must be drafted with this consideration in mind.

Another aspect concerns the manner in which actual disputes will be dealt with. In a rules-based dispensation disputes about the interpretation or application of the international agreement at stake are,[10] as a rule, settled through a process of adjudication; resulting in final and binding judgments. If the member states of a particular organization or regional arrangement are not prepared to accept this approach and prefer to 'resolve' disputes through consultations and diplomatic efforts, the very dispute settlement system and its outcomes will be different. Power considerations and protectionism are likely to become part of how disputes will be 'settled'. This happened under the old GATT. Compared with the WTO, the GATT of 1947 had a weak institutional and legal basis. Diplomacy and power considerations largely determined how disputes got settled. The outcome of the Uruguay Round brought about fundamental change and the WTO now follows an adjudicative approach for settling disputes between the members.[11]

Another important – and, in the view of many, most significant – difference between the GATT and WTO dispute settlement rules is the change introduced into the decision-making procedures. One commentator put it as follows:[12]

> *"Under the GATT, key decisions depended on consensus agreement to move ahead. This meant that if a party to a dispute was unwilling to have a panel established, or objected to its membership or terms of reference, or did not accept the panel's conclusions, it could refuse its support and thereby block the achievement of consensus and progress. Crucially, the consensus requirement has been turned around by the WTO rules, and progress cannot be blocked unless there is consensus to do so. Thus[,] if a panel has been requested, the DSB must establish it at latest at the meeting following that at which the request was first on the agenda, 'unless the DSB decides by consensus not to establish a panel'.[13] Such*

[10] The applicable law of RTAs usually includes the founding treaty as well as additional instruments (protocols or annexes) which cover specific technical areas. This is also the architecture of the Tripartite FTA.
[11] See further Croome, John. 1999. *Guide to the Uruguay Round Agreements*. World Trade Organization, Kluwer Law International; and Jackson, John H. 1998. "Designing and implementing effective dispute settlement procedures: WTO dispute settlement – Appraisal and prospects". In Krueger, Anne O (Ed.). *The WTO as an International Organization*. Chicago: University of Chicago Press.
[12] Croome, op cit:23.
[13] Article 6.1, DSU.

> *consensus is improbable, since the requesting country is unlikely to change its views unless the dispute has been settled … A panel report shall be approved by the DSB unless appealed or the DSB decides by consensus not to adopt it. In the case of an appeal, the Appellate Body's report must again be adopted by the DSB unless there is consensus agreement in the DSB not to do so. These provisions effectively removed the opportunities that existed under the GATT procedures for blocking the multilateral dispute settlement process. Combined with the system of deadlines introduced to govern how the dispute is handled under the WTO, the new consensus rule should ensure that the whole dispute settlement procedure moves forward in the future more rapidly and automatically than in the past."*

John Jackson has observed that the WTO institutional framework is one with profound implications: "*It embraces the so-called single-package idea, which encourages every nation to accept the entire package. This is in contrast to results under prior rounds, such as the Tokyo Round, where nations could pick and choose among the series of protocol agreements (a process called "GATT a là carte") … The key attribute of the new procedures … is automaticity'. No longer will it be feasible for a nation to block the results of a dispute settlement procedure.* "[14]

In the absence of a rules-based approach to the implementation of a trade regime the more powerful parties stand to benefit when disputes are to be resolved. A less secure arrangement with vague provisions allows member governments to invoke arguments about national sensitivities and domestic policies in order to escape the consequences of their obligations. They could in fact become judges in their own cases if the determination that a dispute exists and that specific violations have occurred cannot be made by an independent forum.

The adjudicative process requires appropriate institutions, a dispute settlement body. This could be a court, tribunal or an ad hoc panel of experts. It may also consist of a combination of these. Such institutions must enjoy judicial independence and their jurisdictional powers must be clear and be respected by the member states. In the WTO dispute settlement

[14] Jackson, John H. 1998. "Designing and implementing effective dispute settlement procedures: WTO dispute settlement – Appraisal and prospects". In Krueger, Anne O (Ed.). *The WTO as an international organization*. Chicago: University of Chicago Press, p 162.

starts with a panel procedure. Its Appellate Body, which is a permanent institution, can review panel reports. The decisions of the Appellate Body are final and binding.

Rules of procedure are important and should provide for the effective and transparent processing of applications. Rules about time lines, submissions and hearings must be clear. These procedural aspects form an important part of the overall dispute settlement process. Their expeditious application requires technical support to the dispute settlement body via a registrar or secretariat.

There should, in addition, be clarity about the jurisdiction of the court or tribunal. Jurisdictional issues are to be decided by the forum in question and on the basis of the applicable international legal instruments. The latter should be drafted to provide a comprehensive and clear picture with regard to jurisdictional issues.

Issues of standing are very important. Who may bring claims about what? It becomes increasingly important to accommodate non-state actors. In the WTO there has been some progress in this regard through the use of amicus curiae briefs.[15] Regional trade arrangements normally cover more disciplines than the multilateral system of the WTO. The former often include provisions on e.g. competition and investment. This tendency increases as integration 'deepens'. The result is a growing need for effective and expeditious dispute settlement and remedies for the parties directly affected. It makes sense to provide for regional procedures which allow private parties to bring claims for the protection of their rights. This is particularly necessary in areas such as competition, investment, with respect to private property and to ensure administrative justice.[16] This is already happening in certain RECs and with respect to specific disciplines.[17]

The private sector is the engine behind trade. If the rights of non-state actors are not protected, if they cannot enforce rulings in their favour and if they do not enjoy the certainty and predictability typical of the rule of law they will shy away from doing business or their

[15] For a discussion of the later see Simon Lester and Bryan Mercurio *World Trade Law - Text, Materials and Commentary, Hart Publishing, Oxford and Portland, 2008 at 198.*

[16] See the discussion by Yan Luo "Dispute Settlement in the Proposed East Asia Free Trade Agreement: Lessons from the ASEAN, the NAFTA, and the EU", in Bartels and Ortino (Eds) Regional Trade Agreements and the WTO legal System, Oxford University Press, 2006 at 419 *et seq*.

[17] An example is the Competition Commission in COMESA, which is a regional competition authority where private parties enjoy standing.

business efforts will be hampered by the inevitable red tape and corruption which follow. The higher costs of doing business will be passed on to consumers.

If the traditional approach is adopted and only states may bring cases to regional tribunals we are likely to see a repetition of the phenomenon that governments are not keen to litigate against each other, especially in Africa. The experience of the SADC Tribunal can be mentioned here. It became operational in 2005 and has heard about 16 cases since that time, before it was suspended in 2010. The judgments by this Tribunal against Zimbabwe's human rights violations had to be implemented by the SADC Summit. In 2010 it decided, instead, to undertake a new study of the powers and jurisdiction of the Tribunal and in the mean time not to allow new cases to be heard. The lawfulness of this action is highly questionable; it amounts to amendment of the applicable legal instruments in a manner not permitted by the applicable amendment clause in the founding instruments.

Not a single SADC case involved a trade dispute between governments, although there were instances where this could have happened. The SADC cases were all about staff issues involving SADC officials[18] or human rights violations in Zimbabwe[19]. For those who might see this as evidence of the absence of real disputes it is suggested that they investigate the experience of business people engaged in cross border trade in SADC. They and their employees are regularly confronted by corrupt officials, border delays and the lack of administrative justice and legal remedies. This does obviously not mean that the SADC problems are unique or that trade disputes are regularly decided in the courts and tribunals of other RECs. The point to emphasize is the benefits to be had through respect for obligations, an idea which one assumes all the Governments of the RECs support. That is what their ratification of the applicable international agreements indicates.

Private traders are not in actual fact protected if their only recourse is to convince their governments of nationality to litigate against another state on their behalf. The rules of Public International Law have traditionally governed diplomatic protection issues. States are entitled to act against foreign governments in cases of a violation of the international minimum standard of treatment persons and when their own nationals are affected.

[18] Under Article 19 of the Protocol on the SADC Tribunal.
[19] Decided in terms of Articles 4(c) and 6 of the SADC Treaty.

However, these nationals do not enjoy a right to diplomatic protection under International Law.[20] When a state does exercise this right, it acts on its own behalf.

The active use of the WTO dispute settlement system by certain state parties has to with factors which are mostly absent in Africa; such as the supra-national powers of the European Commission (which litigates on behalf of all 27 EU member states) and domestic legal arrangements in first world countries (e.g. the US, Japan and the EU) which make private parties entitled to official assistance when their rights have been violated by measures taken by other governments. There may be other considerations too. India, China and Brazil are active litigators because their governments are leaders of emerging economies and pursue policies commensurate to their global roles; or they are enforcing/defending official state measures.[21] African countries are not in the same league and do not really litigate in Geneva; whether because of lack of resources or because of their marginal status in multilateral trade. The fact is that they also very seldom, if ever, litigate against each other in matters involving trade issues under their regional arrangements.

A good case can be made to grant private parties standing before regional forums to enforce their rights in disputes about technical trade issues and matters of an administrative law nature. This will cover aspects such as permits, fees, technical standards, trade remedies and intellectual property. Legal certainty and predictability will be significantly advanced if private parties could, in suitable cases, bring their claims for the protection of trade related rights to regional tribunals and to do so in their own capacity.

This approach will only work if rulings will be enforced and if domestic execution will be possible where required. In such cases private parties should have access to domestic courts when enforcement and compliance so require. This aspect necessitates legal arrangements to allow for the involvement of domestic courts in the enforcement of rulingss by regional tribunals. The domestic incorporation of international agreements (also referred to as "domestication") or the adoption of appropriate municipal legislation may be required. This

[20] The South African Supreme Court of Appeal (SCA) ruled in April 2011 against a South African businessman (Crawford von Abo) who wanted the South African government to give him diplomatic protection and compensation for farms he lost in Zimbabwe. The SCA set aside a judgment by a High Court that ordered the government to pay him compensation for the property he lost during the land redistribution programme in Zimbabwe. The SCA held that even though South Africa's response to Von Abo was inappropriate, it did not give him legal rights to financial compensation. *The Government of the Republic of SA v* **Von Abo** *(283/10) [2011] ZASCA 65 (4 April 2011).*

[21] The majority of cases (about two thirds) now being heard under the WTO's Dispute Settlement Understanding deal with trade remedy issues such as anti-dumping and countervailing.

is a consequence of the obligations of member states to give effect to their treaty obligations. All three RECs in the Tripartite arrangement have provisions to this effect in their founding agreements. They are part of the "general undertakings" of Members. Only one example, Article 8(2) of the Treaty for the Establishment of the East African Community needs to be cited:

> *Each Partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular - (a) to confer upon the Community the legal capacity and personality required for the performance of its functions; and*
>
> *(b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory.*

Domestic remedies must, as a rule, first be exhausted before access to regional courts becomes possible. Such domestic remedies are frequently not to be had. In such cases the answer lies in the approach e.g. adopted in the Protocol on the SADC Tribunal and in Public international Law generally, namely to allow for direct access of natural and legal persons to the regional forum in question if there is a denial of domestic justice. Article 15(2) of the Protocol on the SADC Tribunal provides: "*No natural or legal person shall bring an action against a Member State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.*"

The Tripartite Member States have already granted natural and legal persons standing before the Courts and Tribunals established in their respective RECs. The Treaty for the Establishment of the East African Community provides, in Article 30, for standing of natural or legal persons before the East African Court of Justice:

> *1. Subject to the provisions of Article 27*[22] *of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.*

[22] Article 27 deals with the general jurisdiction of this Court.

> *2. The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be;*
>
> *3. The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.*

Article 18 of the SADC Tribunal grants this Tribunal jurisdiction over all disputes between natural or legal persons and the Community. Such disputes may be referred to the Tribunal either by such persons or by a competent institution or organ of the Community.

The same is possible in the COMESA Court of Justice:

> *Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty: Provided that where the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts or tribunals of the Member State.*[23]

The enforcement of judgments requires a point of finality. Rulings should be respected and be implemented, while compliance measures should be monitored. Failure to comply with final judgments constitutes an additional breach of a legal obligation in rules-based systems. In some instances enforceability of judgments will require domestic courts in member states to issue orders to give effect to the original rulings. A comprehensive and effective dispute settlement system should incorporate these aspects (about domestic judicial procures) into the dispute settlement regime of the inter-state arrangement in question.

The design of the Tripartite FTA is presently undertaken. It is the opportune moment now to consider the requirements for effective dispute resolution and to study the principles already accepted in the legal instruments of the three RECs. If the intention behind the establishment of the Tripartite FTA is indeed to "to build upon the success and best

[23] Article 26 of the COMESA Treaty.

practices achieved in trade liberalisation within the three RECs"[24] this in fact becomes mandatory.

4. Overview of the Content of the Tripartite FTA Agreement

The economic and political objectives behind the formation of the Tripartite FTA are ambitious. The intention is to establish an FTA comprising all 26 members of COMESA, the EAC and SADC. Article 2 of the Draft Agreement reads: "*There is hereby established a Free Trade Area among the Member States of the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community.*"

In geographical terms this means a free trade area from 'Cape to Cairo'; with far-reaching implications regarding the administrative and legal arrangements to be implemented within the member states and at their borders in order to ensure obligations involving customs, immigration, trade facilitation and related matters will be met.

The goal is to bring about the duty-free, quota-free flow of goods and services, and the free movement of business people between the 26 countries involved. This will obviously require considerably more than just tariff liberalisation. Supply-side and infrastructural constraints, which so directly undermine African trade and export efforts, will have to be eliminated. Strong linkages in cross-border supply chains are required and production will have to move beyond primary resource-based goods, in which African states often compete with each other. There should be regional efforts at diversification, international competitiveness, the application of the same technical standards, enforcement of intellectual property rights, the promotion of intra-regional trade, dispute resolution etc.

The pertinent questions which arise are how this ambitious arrangement will work and how committed the Parties are to make it a success. The negotiating process will provide the first indications of what the Parties will accept in terms of obligations and time frames. At this stage the only tentative 'answers' are those in the draft legal instruments, while noting the caveat that the formal negotiations will only start after the Johannesburg Summit decisions of June 2011.[25]

[24] Preamble, Draft Tripartite Agreement.
[25] See above p 1.

At this Summit a Declaration was adopted indicating a somewhat different philosophy compared to what the Draft Agreement might portray. A "*developmental integration approach built on three pillars of industrial development, infrastructure development and market integration*" will guide the negotiations. On the industrial development pillar a "*programme of work*" has first to be developed. For infrastructure the progress made was noted and further work on the programmes is "*encouraged*". Only on market integration has negotiations been launched, "*open to all Member and Partner States*". The negotiations will be conducted in two phases; starting with trade in goods. The movement of business persons will be negotiated during the first phase "*through a separate track in a committee to be established by the Tripartite Sectoral Ministerial Committee*". The second phase will also cover a built-in agenda on trade-related areas. Trade in services is not expressly mentioned.

The objectives contained in the Draft Agreement are divided into general and specific ones. The general objectives appear in Article 3 and include the promotion of rapid social and economic development, elimination of poverty, hunger and disease through improving the location of factors for sustainable generation of national, regional and foreign investment and of trade opportunities; the creation of "*a large single market with free movement of goods and services and business persons, and eventually to establish a customs union*"; the promotion of close corporation in all sectors of economic and social activity in the Member States; to resolve the challenges of multiple membership and expedite the regional and continental integration processes; to build a strong people-based Tripartite Free Trade Area; and to promote close cooperation in all sectors of economic and social activity among the Tripartite Member States.

Article 4 lists the specific objectives: *In order to fulfil and realise the objectives set out in Article 3 of this Agreement, Tripartite Member States shall:*

> *1. eliminate all tariffs and non-tariff barriers to trade in goods;*
>
> *2. liberalise trade in services and facilitate cross-border investment and movement of businesspersons ;*
>
> *3. harmonise customs procedures and trade facilitation measures;*
>
> *4. enhance co-operation in infrastructure development;*
>
> *5. establish and promote cooperation in all trade-related areas among Tripartite Member*

States;

6. establish and maintain an institutional framework for implementation and administration of the Tripartite Free Trade Area and eventually a Customs Union;

7. build competitiveness at the regional, industry and enterprise level in order to promote beneficial utilisation of regional and global market and investment opportunities and beneficial participation in globalisation;

8. adopt and implement policies in all sectors of economic and social life that promote and consolidate an equitable society and social justice; and

9. undertake cooperation in other areas to advance the objectives of this Agreement.

How will these objectives be implemented and what does the language of the present text tell us with regard to the nature of the obligations to be adopted? As a general observation it can be stated that the traditional agenda covering trade in goods and tariff liberalization is covered. The language contains indications of an intention to create certain obligations; although the escape clauses are not neglected. Whether obligations will be enforced through effective dispute settlement, is another matter.

With regard to trade in services and trade related matters, where the real benefits are to be gained if the experiences in Asia are to be believed, the results are slim. Article 30 discusses an agenda for liberalising trade in services which divides matters between priority and other sectors but subject to such flexibilities as the Tripartite Council may approve. A Committee on Trade in Services is proposed to oversee the tripartite services liberalisation programme. In light of the June 2011 Declaration issued by the Summit and the fact that it contains no explicit reference to liberalising trade in services, there is considerable uncertainty as to what to expect in this area. The outcomes of the formal negotiating process will tell.

The text of the Draft Agreement is far less clear with respect to the obligations to address trade related issues. It confirms the traditional approach to focus on trade in goods and tariff liberalization. Whatever will be achieved in trade related areas will depend (at least in terms of the Draft Agreement) on what the Members States will do unilaterally, through cooperation and harmonisation, the application of existing WTO disciplines or the adoption

of future annexes. In competition the Member States "shall prohibit any practice that adversely affects free trade."[26] Regarding investment they "undertake to market the Tripartite Member States as a single investment area."[27] Regarding Standardisation, Metrology, Conformity Assessment and Accreditation (SMCA) the Member States "recognise that lack of harmonisation of SMCA can hinder trade and industry … [and they] shall adopt harmonised practices in SMCA in order to achieve mutual recognition." They shall establish a Tripartite Sub-Committee on SMCA, under the Trade and Customs Committee, for the technical elaboration of a policy on and implementation of Tripartite SMCA.[28] With respect to Sanitary and Phyto-Sanitary Measures the Members shall comply with the WTO SPS Agreement.[29] This does not add anything to existing obligations for those states which are WTO members. However, it is added that they shall initiate activities to achieve regional certification of products in accordance with a programme to be determined by the Tripartite Council. Intellectual property rights are to be protected through national efforts, although a special annex is foreseen to promote cooperation.[30]

The immediate benchmark for evaluating implementation is the reminder that, with respect to trade in goods, FTAs are an exception to the MFN principle of the WTO and have to comply with specific legal requirements. For regional integration in Services Article V GATS has to be complied with. For trade in goods it is Article XXIV GATT or the Enabling clause.

In the words of Article XXIV(8) (b) GATT a free-trade area "*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, XV and XX)* ***are eliminated on substantially all the trade*** *between the constituent territories in products originating in such territories."* (Emphasis added.)

The interpretation of the wording of the WTO rules on TRAs has proved controversial and has made the work of the Regional Trade Agreements Committee very difficult. The Doha Declaration has mandated negotiations (to be conducted in the Rules Negotiating Group) aimed at "*clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental*

[26] Article 23.
[27] Article 24.
[28] Article 25.
[29] Article 26.
[30] Article 27.

aspects of regional trade agreements." Developing countries are particularly concerned about the meaning of "substantially all trade" in Article XXIV and the period allowed for completing the tariff phase down process.

It has now become clear that the Doha Round will not deliver on this score; WTO members are left to struggle with the existing rules. What are the implications for deeper regional integration in Africa? These governments have no choice but to continue their efforts at designing regional arrangements which will assist their development policies in a meaningful and bona fide manner. Concerns that other WTO members may have about the specifics of their plans will become known when their formal agreements to form RTAs are notified and discussed. The philosophy behind Article XXIV GATT is not per se in opposed to the formation of RTAs. The Enabling Clause allows developing countries additional flexibilities which should be exploited.[31]

The elimination of tariffs is one of the first matters to be addressed in any FTA Agreement. Article 8 of the Draft Tripartite Agreement deals with the elimination of import duties and provides:

> *1. Tripartite Member States agree to eliminate all import duties and charges of equivalent effect, on goods originating in the Tripartite Member States in accordance with provisions of paragraph 3 of this Article.*
>
> *2. Tripartite Member States shall not impose new import duties or charges of equivalent effect except as provided for under this Agreement*
>
> *3. The Tripartite Member States shall eliminate import duties and charges of equivalent effect in accordance with schedules contained in* ***Annex I*** *to this Agreement.*
>
> *(a) Tripartite Member States already in the regional FTAs (COMESA, EAC and SADC) shall automatically extend duty free quota free treatment to all other Tripartite Member States implementing regional FTAs, as set out in Schedule 1.*

[31] The Enabling Clause – "The Decision of the GATT Contracting Parties of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" – provides in the relevant part for less strict rules that are available to developing nations when forming RTAs. Eventually, however, the spirit behind the exception to the most-favoured-nation clause has to be respected.

(b) Tripartite Member States not yet in the regional FTAs, or which have not completed implementing FTA tariff liberalization process, shall eliminate import duties on goods originating from other Tripartite Member States in accordance with their Schedules 2.

(c) Tripartite Member States already in the regional FTAs shall eliminate import duties on goods originating from countries that are not in any of the regional FTA in accordance with Schedules 3.

These different schedules will have to be finalised through negotiations. That is when the fine print (on sensitive products and phasing in of obligations) will be thrashed out. It will not be easy to marry the existing tariff regimes of the three RECs (with their own timeframes and derogations) but Article 8 at least provides a workable foundation. The indications are nevertheless of a complicated structure, in particular because of the intention eventually to have a Tripartite Customs Union, in which Members will have to agree on a common external tariff.

The Principles mentioned in Article 5 will also play a role during the negotiations when real content has to be given to "*variable geometry; best practices in the regional economic communities and the Tripartite Member States and international conventions acceded to by Tripartite Member States; and solidarity, equity, fair play and social justice.*"

Certain exceptions to these obligations will be allowed. They include the general exceptions in Article 40 and the security exceptions in Article 41. These provisions are modelled on Articles XX and XXI of GATT. There are also provisions on infant industry protection [32] and balance of payments measures.[33] Experience in the RECs tells us that these are sensitive issues where it will be extremely difficult to enforce strict legal rules. However, in a rules-based dispensation such exceptions are not discretionary. The states which invoke exceptions carry the onus to justify their measures in an objective manner and to demonstrate why they are necessary. Exceptional national measures are to be of limited duration.

[32] Article 21.
[33] Article 22.

Trade remedies are permitted. It should be easier to develop a rules-based approach with regard to safeguards, anti- dumping and countervailing measures because the applicable WTO disciplines have to be respected. However, the investigations, in particular regarding dumping and subsidies, are technically complicated. The Tripartite FTA philosophy is not to create new tripartite institutions for the enforcements of trade remedies. Article 18 provides that "*nothing in this Agreement shall prevent Tripartite Member States from adopting anti-dumping and countervailing measures in accordance with the relevant WTO agreements*." What is not clear is how Annex 6 to the Agreement "*shall govern the conditions and procedures Tripartite Member States shall use in applying anti-dumping and subsidies countervailing measures.*" The WTO disciplines will have to be followed and the question whether this has happened is the substance of a large number of disputes dealt with by the WTO Dispute Settlement Body.

5. Institutions

The success of regional trade arrangements depend on the availability of effective institutions. The Draft Tripartite Agreement provides for a number of "Organs for the Implementation of the FTA"[34] but additional work has to be done. Annex 13 mentions additional organs for dispute settlement tasks.

The present text of the Tripartite agreement mentions a Tripartite Committee and Sub - Committees on Trade and Customs, at Ministerial, Senior Officials and Technical Experts levels to oversee the implementation of the Tripartite Free Trade Area. Their functions range from regular reviews, policy analysis, to receive and consider reports on trade, trade related and customs issues; to resolve through consultation trade, trade related and customs matters referred to it by Tripartite Member States; to implement and monitor measures taken to promote trade; to decide on new annexes and to amend existing Annexes and regulations that may be required and to discharge any other functions as may be required by the Tripartite Council or Tripartite Summit as established by the Tripartite MoU. The Tripartite Ministerial Committee on Trade and Customs shall be assisted by a Sub-Committee of Senior Officials, which will oversee and guide the overall technical work required to facilitate the implementation of this Agreement. The Sub-Committee of

[34] Article 37.

Technical Experts will be responsible for undertaking all the technical work associated with the implementation of this Agreement and shall report to the Sub-Committee of Senior Officials. Each REC shall within its Secretariat establish a dedicated Coordination Unit for the coordination of the activities under this Agreement.

This part of the Draft Agreement is still very much work in progress and is not complete. There is e.g. no provision on how decisions will be taken and meetings be chaired. The powers and functions of the existing three RECs vis-à-vis the new FTA are not explained in any detail.

It may turn out that the institutional dimension of the Tripartite FTA will pose a major challenge for its establishment and proper functioning. One of the reasons is the fact that the nature of the relationship between the Tripartite FTA and the RECs is not clarified. COMESA, SADC and the EAC are legal persons in their own right and enjoy certain privileges and immunities. They are implementing their own integration agendas but do not enjoy any powers with regard to their counterparts, the other RECs involved in this new arrangement. Nothing is said of the legal status of the Tripartite FTA.

Article 37 of the Draft Agreement does not mention a secretariat for the Tripartite FTA, although Article 21 of Annex 13 speaks of the responsibilities of the "Tripartite Secretariat" in respect of dispute resolution:

> *1. The Tripartite Secretariat shall facilitate the Panels in all matters dealt with under this Annex.*
>
> *2. The Tripartite Secretariat shall undertake such other functions and duties as may be required under the Tripartite Agreement and in support of this Annex.*

Article 20(4) of Annex 13 provides that *"[T]he Tripartite Secretariat shall keep under surveillance the resolutions of the dispute (sic) and the implementation of adopted recommendations and rulings of the Tripartite Council under this Annex and shall enforce compliance with the recommendations and rulings as appropriate."*

The Tripartite FTA will apparently function as a permanent arrangement. Certain legal instruments will have to be implemented; which will require institutional guidance and

supervision. If this is indeed the case, its institutional dimension requires more clarity.

6. The Tripartite Dispute Settlement System

At present the Tripartite dispute settlement framework consists of the arrangement provided for in Article 38 of the draft Treaty and Annex 13. It must, however, be mentioned that the Ministerial Committee on Trade and Customs shall also exercise powers which will include the power to resolve, through consultation, trade, trade related and customs "matters" referred to it by Tripartite Member States as well as the power to implement and monitor measures taken to promote trade within the Tripartite FTA.[35] Apparently there is no obligation on the Parties to use this avenue for dispute resolution and no procedures are mentioned.

Article 38 of the Tripartite FTA reads as follows:

> *1. Tripartite Member States shall endeavour to agree on the interpretation and application of this Agreement, and shall make every effort, through co-operation and consultation, to arrive at a mutually satisfactory solution.*
>
> *2. The settlement of any dispute among Tripartite Member States shall, whenever possible, imply removal of a measure not conforming with the provisions of this Agreement or causing nullification or impairment of a benefit under such provision.*
>
> *3. As a last resort, disputes regarding the interpretation and application of this Agreement shall be settled in accordance with the* ***Annex 13*** *on the Tripartite Dispute Settlement Mechanism.*
>
> *4. In the event of inconsistency or a conflict between this Agreement and the treaties and instruments of COMESA, EAC and SADC, this Agreement shall prevail to the extent of the inconsistency or conflict.*

This is a choice in favour of consultation as the preferred method for settling disputes, as confirmed by Article 4(1) of Annex 13: "*Where a dispute arises between or among the Tripartite Member States, recourse shall in the first instance be had to consultations with a view to finding an*

[35] Article 37(1), Draft Agreement.

amicable resolution to the dispute including, but not limited to, the use of good offices, conciliation and mediation." Good Offices, Conciliation and Mediation can be used.[36]

The proposed dispute settlement mechanism is limited to the state parties. Private parties and regional institutions, whether from the Tripartite FTA or the RECs, will have no standing and cannot bring any claims. The final paragraph in Article 38 does, however, foresee that disputes can arise under this Agreement which may involve conflicts between the legal regimes of the Tripartite FTA and the RECs. How this could happen is not explained, neither is the nature of the legal relationship between the RECs and the Tripartite FTA. This matter calls for clarification. This can to some extent be done by clearly defining the 'applicable law' in the jurisdictional clause. The normal approach is to state that the dispute settlement body shall enjoy jurisdiction over all disputes involving the interpretation and application of the founding Agreement. The article in the founding agreement on the definitions should then make clear that the 'agreement' shall include all the annexes in force between the parties and other instruments, regulations etc with binding effect. Future annexes must also be mentioned. Article 14 of the Protocol on the SADC Tribunal is a typical example of the type of formulation which could be employed:

> *The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to:*
>
> *(a) the interpretation and application of the Treaty;*
>
> *(b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community;*
>
> *(c) all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.*

Another reason why the 'applicable law' should be clear has to do with the fact that the three RECs have their own dispute settlement mechanisms, with more detailed powers as matters presently stand.[37] There should be principles regarding choice of law and the choice

[36] Article 6, Annex 14.
[37] The suspension of the SADC Tribunal is hopefully a temporary setback.

of forum. This may involve difficult issues regarding overlaps and conflicts in jurisdiction as well as hierarchy of norms in international law.[38]

How effective will the Tripartite FTA's proposed dispute settlement procedure be? Consultations may obviously lead to trade disputes being resolved. The Tripartite model assumes that this will not always be the case. If consultations fail, adjudication via the panel procedure provided for by Annex 13 becomes possible, or arbitration may be opted for.[39]

The panel procedure in Annex 13 is to some extent based on the WTO model[40] and the system is dealt with in considerable detail. The main function of the panels will be to assist the Tripartite Council in discharging its responsibilities under the Agreement.[41] These functions are still not entirely clear but the intention seems to establish a sui generis dispute settlement body for the Tripartite FTA. It is for this Council to decide what will happen to panel reports. *"Within sixty (60) days from the date the final Panel report is circulated to the parties and notified to the Tripartite Council, the report shall be considered, adopted and signed at a meeting of the Tripartite Council convened for that purpose. The decision of the Tripartite Council shall be final except as provided for in Article 17 of this Annex*."[42]

When opting for a WTO type dispute settlement model (but limited to sui generis panels and excluding an appellate mechanism[43]) the real difficulties will arise with regard to how the two systems are integrated. The problem lies with the grafting of the WTO's sophisticated rules-based dispensation on a trade arrangement which is not based on the same values, institutions and outcomes. One of the reasons why the WTO dispute settlement system is successful and effective is because of the reverse consensus rule applicable to these decisions of the Dispute Settlement Body. It is not possible for a party involved in a dispute to prevent

[38] See e.g. Kyung Kwak and Gabrielle Marceau, "*Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements*", in Bartels and Ortino *op cit* at 465.
[39] Articles 4(8) and 19, Annex 13
[40] The effect of Article 3(4) Annex 13 is, however, obscure. "Where a dispute arises between a Tripartite Member State and a third country or countries, the WTO Dispute Settlement Understanding may apply as appropriate where the parties are Tripartite Members of the World Trade Organisation." This Annex cannot pronounce on matters exclusively governed by the WTO agreements. The definition clause of the Annex defines a third party as "any state that is not a Tripartite Member State interested in a dispute under this Annex".
[41] Article 9 (1), Annex 13.
[42] Article 15(4) Annex 13. Article 17 provides that a party to a dispute may refer a dispute on grounds of fraud, lack of jurisdiction or other illegality, to the Tripartite Council
[43]The EAC, SADC and COMESA instruments do provide for certain appeal procedures.

the adoption of a final panel report or decisions of the Appellate Body. Annex 13 of the Tripartite FTA does not address this aspect.

The recent crisis around the SADC Tribunal is an unfortunate reminder of the consequences when the design of a dispute settlement system is not comprehensive and clear. In a system based on respect for the applicable law the parties to a dispute should not be allowed (as a result of how decisions are taken) to veto judgments on violations of the legal instruments. The SADC Treaty does provide for the possibility of sanctions against members which "persistently fail, without good reason, to fulfill obligations assumed under this Treaty", or when they "implement policies which undermine the principles and objectives of SADC".[44] The Zimbabwe saga and that country's failure to comply with the SADC Tribunal's rulings on its human rights violations have revealed the weakness in this arrangement. The Summit was not prepared to act against Zimbabwe after the SADC Tribunal had ruled against it; instead, it decided to appoint a consultant to investigate the jurisdiction and terms of reference of the Tribunal. It then decided to revisit its jurisdiction. In the meantime, until the results are known, no new cases may be heard and the terms of its Members (the Judges) have not been renewed.[45]

The larger systemic problem here is the fact that decisions by the SADC Summit (consisting of the Heads of State or Government of the members) are taken on the basis of consensus, unless provided otherwise in the Treaty.[46] Article 19 of the SADC Treaty in fact provides that decisions of all SADC institutions shall be taken in this manner. This rule on decision making in SADC has apparently been interpreted to mean that a particular Member actually enjoys a veto right, although this is not what the provisions in question expressly state. If this is the practice in SADC, a decision to act against Zimbabwe was impossible.

In the Tripartite FTA the decision-making process regarding the adoption of panel reports and the powers of the Tripartite Council still need to be explained. The Tripartite Council (not mentioned in Article 37 of the Draft Agreement) will play an essential role in the

[44]Article 33(1), SADC Treaty.

[45]These decisions were taken at the Summit of 16 – 17 August 2010, held in Windhoek. The relevant part of the Summit decision reads as follows: "A study shall be undertaken and completed within six months of the Summit meeting of August 2010, to review the role and responsibilities of the Tribunal. The Committee of Ministers of Justice/Attorneys General shall involve Members of the SADC Tribunal in the study; and the outcome of the study shall be presented by the Committee of Ministers of Justice/Attorneys General at an Extraordinary Summit". The specific terms of reference for this study were subsequently formulated by the SADC Secretariat and included instructions to include proposals on how to strengthen the Tribunal.

[46]Article 10(9), SADC Treaty.

settlement of disputes. It is now yet known exactly how it will be composed, how it will function and what powers it will enjoy. There is still work to be done.

7. Concluding Observations

Critical choices about the scope and nature of legal obligations and about dispute settlement have to be made at the outset when the founding instruments of regional trade arrangements are negotiated. The Tripartite FTA finds itself at this juncture now. What level of ambition will be reflected in the final choices?

Some benchmarks are suggested in this chapter. They are, admittedly, those which will promote a 'rules-based' approach to trade and regional integration. The preference for this approach has been explained. It has to do, amongst other considerations, with legal certainty, predictability and respect for the rights of private parties engaged in the real business of cross-border trade and investment. Effective trade arrangements require legal instruments which reflect with sufficient degree of precision the rights and obligations of the parties, including those of private sector players. There should, in addition, be clarity about the settlement of disputes and the enforcement of judgments. Private persons should enjoy standing in cases where their rights are directly affected.

Obligations should be clear in order to ensure that the intended results are achieved. Legal formulations count. Vague formulations and wide discretions undermine legal certainty and are, in fact, anathema to the benefits to be had from rules-based trade. If interpretation becomes an issue, there should be an independent forum to rule on the correct interpretation or application of the legal instrument at stake. The rulings of this forum should be binding on the parties involved.

As states embark on the road of deeper regional integration, the need for firmer legal arrangements and institutions will increase. Fragmentation will follow if individual member states are free to adopt different approaches and apply different rules with regard to substantive issues governed by the treaty in question. This type of outcome will undermine the very purpose of the exercise.

The Tripartite FTA wants to build on the best practices of the three RECs form which the members originate. Each of these arrangements is involved in ambitious plans to deepen

regional integration and to open and expand markets in Africa. Their legal instruments are, in many ways, already wedded to the promotion of legal certainty. Some examples have been provided. The choices which will be made regarding the Tripartite FTA should promote the momentum which has been gained. It the opposite happens the negative results will not only damper expectations; uncertainties may ensue and optimal choices could be undermined.

Some clear choices have to be made regarding the legal instruments to be adopted for the establishment of the Tripartite FTA. They will impact on the regimes of the three RECs involved; including the manner in which their dispute settlement bodies function. New institutions will be established; which may exercise powers over matters simultaneously falling under the jurisdiction of the organs of the RECs. These issues are not sufficiently clear at present.

Chapter 4

Trade remedy and safeguard provisions in the EAC-COMESA-SADC Tripartite FTA

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1. Introduction

Trade remedies are trade policy tools governments can use to protect their domestic industries against foreign imports. These measures allow for the restraint of imports in such a manner which will otherwise be inconsistent with the principles of the WTO and are generally categorised as anti-dumping measures, countervailing duties and safeguards. However, there is a significant divergence between anti-dumping measures and countervailing duties on the one hand and safeguards on the other. Due to the disparity between these measures, safeguards actually fall outside the true ambit of the meaning of trade remedies. Strictly speaking, the aim of trade remedies is to provide redress under unfair trading conditions, to level the playing field between domestic and foreign producers. This goal includes dumped and subsidised imports, but excludes the circumstances in which safeguards can be applied.

Anti-dumping measures and countervailing duties are utilised in the case of either dumping or subsidisation. Dumping occurs when the normal value of a product is greater than its export price. The normal value is the price of the product in the home market or export market of that product, while the export price is the price of the product in the importing country. Thus dumping takes place when the price of a product in the importing country is lower than the price of the same product in the domestic market of the good. Imports being cheaper than the domestically produced goods can price the domestic goods out of the market which can cause harm to the domestic industry.

Countervailing measures are utilised to correct the unfair trade practice of government subsidisation. This is when the government or public body provides a financial contribution, for instance contributing to the machinery used in the production process of a product, which reduces the production cost of the said product. Thus the producers in the country

receiving the subsidy can produce the product more cheaply than another country, producing a similar product without any government subsidy. If the subsidised product is imported into a country in which the domestic producers are not subsidised, the domestic product is more expensive than the imported product. The domestic product is less competitive in the market, resulting in harm to the domestic industry for which a countervailing duty can be utilised to level the costs between the imported and domestic good.

On the other hand a safeguard measure is not used in the case of an unfair trade practice, but when there is a surge in imports, under fair trade conditions, which causes harm to the domestic industry of a similar product. Safeguards are thus used to protect the domestic industry against a sudden and significant increase in the importation of a product which is also produced by the domestic industry in the importing market. The sudden increase in imports makes it difficult for the domestic industry to compete with foreign imports, thus safeguards give the domestic industry time to adjust and restructure to become more competitive in the market.

The use of trade remedies and safeguards are governed by different rules, regulations and legislation. At the multilateral level the GATT 1994 and various WTO agreements provide the substantive and procedural requirements which must be adhered to when a WTO member wants to implement these remedies against another. In terms of the GATT 1994 both anti-dumping measures and countervailing duties are governed by Article VI, while safeguards are included under the Emergency Exception to the WTO principles under Article XIX. Each trade remedy has its own applicable WTO agreement: the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (known as the Anti-Dumping Agreement); the Agreement on Subsidies and Countervailing Measures (SCM Agreement); and the Agreement on Safeguards. Recently countries have agreed to include the WTO rules on anti-dumping and countervailing in the Doha Development Agenda in order to clarify, simplify and strengthen these multilateral disciplines.

At the regional level various trade agreements include provisions pertaining to the use of anti-dumping measures, countervailing duties and safeguards, including the trade agreements of the East African Community (EAC), Common Market for Eastern and Southern Africa (COMESA), Southern African Development Community (SADC) and the Draft Agreement

Establishing the COMESA, EAC and SADC Tripartite Free Trade Area. However, the type of provisions included in these agreements varies from detailed rules, regulations and procedures to those agreements only referring to the rights and obligations included in the GATT 1994 and the applicable WTO Agreements.

2. Methodology

This chapter provides an overview of trade remedies and safeguards in the EAC-COMESA-SADC Tripartite FTA. The objective of the chapter is two-fold: firstly, to analyse the use of anti-dumping measures, countervailing duties and safeguards by African countries in general and more specifically the various tripartite member states and secondly, to provide an evaluation of the provisions governing the implementation of trade remedies and safeguards in the EAC, COMESA and SADC and the Draft Tripartite Agreement.

The chapter focuses on four main areas:

- A brief overview of the developments regarding anti-dumping measures and subsidies and countervailing measures in the Doha Development Round of Multilateral Negotiations, especially the role that African countries are playing in the negotiations.
- An analysis of anti-dumping measures, countervailing duties and safeguard measures in African countries and the tripartite member states. The focus areas of this section include a sector-specific analysis of Africa's imports and exports according to those product sectors susceptible to anti-dumping, countervailing and safeguard investigations; tripartite countries as reporting and affected countries in multilateral trade remedies and safeguard measures; a sector-specific analysis of the tripartite and its member countries' imports and exports to those countries mostly implementing and affected by trade remedies and safeguards; and bilateral and regional trade remedies and safeguards which have been utilised by the tripartite countries.
- National and regional provisions which currently govern the utilisation of anti-dumping measures, countervailing duties and safeguards in the tripartite countries and the EAC, COMESA and SADC.
- The trade remedy and safeguard provisions in the Draft Tripartite Agreement and Annex 6 to the agreement.

3. Anti-dumping, countervailing and safeguards in the Doha Development Agenda

There has been growing international concern about the increased use of trade remedies in general and in particular anti-dumping measures. African countries are concerned about the abuse of anti-dumping measures as protectionist policy tools. Accordingly, WTO members agreed at the Doha Ministerial Conference to launch negotiations, in terms of the WTO rules, on various issues pertaining to the WTO Anti-Dumping Agreement (ADA) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement) to clarify and improve the disciplines pertaining to the ADA, SCM Agreement and fisheries subsidies. The WTO Agreement on Safeguards was not included in the Doha negotiations agenda.

Africa's position on the need for the reform of the disciplines in the ADA and SCM Agreements was highlighted in the Declaration of the African Group at the WTO Mini-Ministerial (2008), in which the importance of Special and Differential Treatment for developing and least-developed countries in the application of anti-dumping measures, subsidies and countervailing duties were reaffirmed.

Under the improvement of Special and Differential Treatment the African Group included the need for technical assistance from other WTO members and the WTO secretariat to enhance the capacity of developing countries to draft national laws and participate in the investigation and application of anti-dumping measures, subsidies and countervailing duties. According to the proposal the Trade Remedy Facility will assist developing and least-developed countries with the technical complexities and financially taxing aspects currently impeding their application of anti-dumping measures and countervailing duties.

The Facility will be housed in the WTO secretariat with the goal of promoting coherence among trade remedy-related technical assistance by the WTO, United Nations, regional organisations and bilateral donors. Support will include building institutional frameworks and the training of personnel. The proposal also includes the request for the creation of an information database on trade remedy measures in the WTO secretariat to provide trade officials with relevant information on past rulings to clarify the WTO law related to trade remedies and research and analytical papers on the development of the WTO rules.

3.1 Anti-dumping measures

The proposal of the African group includes a request to clarify the provisions in article 15 of the ADA to create more meaningful Special and Differential treatment provisions than those currently available to developing and least developed countries.

The existing Special and Differential treatment provision in the ADA states that a developed country must give 'special regard' to the situation of a developing country before applying an anti-dumping duty. Article 15 does not impose a specific obligation on developed countries regarding the treatment of developing and least-developed countries. For instance, in article 15 developed countries need to explore constructive remedies (lesser duty rule or price undertaking) as an alternative to anti-dumping measures if the affected country is a developing country. However, the obligation in terms of the article extends only to the exploration of alternative remedies and not an obligation on developed countries to implement these constructive remedies. Thus the African group proposed that the duty to explore a constructive remedy be extended to include an obligation on developed countries to also implement an alternative remedy, if the constructive remedy is sufficient to remove the injury to the domestic industry.

The African Group also proposed the introduction of an additional constructive remedy, to the lesser duty rule and a price undertaking: the non-application of anti-dumping measures if the developing country exporter agrees to a price undertaking or ceases to export the product at the dumped price. A price undertaking means that the target exporter of an anti-dumping investigation offers to raise the prices of the dumped export product to a level which will remove or limit the impact of the injury caused by the dumping. A price undertaking can terminate or temporarily suspend an anti-dumping investigation.

In effect, the proposal of the African Group seeks to negate the Panel interpretation in EC-Bed Linen case that a decision not to impose an anti-dumping duty is not a remedy, constructive or otherwise, in terms of the ADA. According to this proposal if a target developing country undertakes to increase its prices on the alleged dumped exports, rather than having anti-dumping duties implemented, the decision by the developed country to accept this price undertaking by the developing country rather than continuing with the anti-dumping investigation and the implementation of anti-dumping duties is in itself a

constructive remedy.

3.2 Subsidies and countervailing

Article 27 of the SCM Agreement differentiates between developing and least developed countries in terms of the application of subsidies and countervailing measures. The Doha negotiating proposals have mainly focused on clarifying the criteria to distinguish developing and least-developed countries in terms of Annex VII to the SCM Agreement.

According to Annex VII (Art. (a) and (b)) a country is least developed if it has been designated as such by the United Nations or if the gross national product (GNP) per capita is less than US$1000 per year. The annex also includes a non-exhaustive list of example countries which were identified as least-developed countries, including Egypt and Zimbabwe. However, the agreement lacks clarity regarding what happens when a listed country's GNP per capita increases above the US$1000 per year threshold. Also, according to Article 27 developing countries had eight years to phase-out any export-subsidies that were in place, posing the question whether countries which graduate from being Annex VII countries will also get the additional eight years to phase-out export-subsidies?

The Doha Implementation Decision of 2001 includes the following decision regarding these questions: the threshold must be changed to 'US$1000 in constant 1990 dollars for three consecutive years.' A country will be eligible for the exclusion available for least-developed countries if the GNP per capita in current dollars is not yet US$ 1000 based on the most recent World Bank data. However, a country, previously removed from the list as a least-developed country due to GNP per capita exceeding the threshold can be restored to the list if the GNP per capita drops below the threshold again.

According to article 27 a countervailing investigation on imports from a developing country has to be terminated if the level of subsidisation on the specific product is less than two% of the value of the product or if the volume of the subsidised imports is less than four% of the total imports of the product for the importing country. However, if the imports from an individual developing country are less than four% of the total imports, but collectively more than a nine% share in the total imports the termination of the investigation does not apply (Art. 27.10(a) and (b)).

India's proposal includes various measures to adjust and clarify these threshold levels to restrict the application of countervailing duties. According to the proposal, countervailing duties should not be applied when subsidy as a percentage of the total volume of imports is less than 7% of the total imports. Countervailing duties on export subsidies should be banned when they account for less than 5% of the value of the imported products, while the de minimis level below which countervailing duties cannot be imposed on all developing countries should be increased.

4. Analysis of anti-dumping, countervailing and safeguard measures in Africa and the tripartite countries

Most African countries have not been greatly affected by trade remedies and safeguards and are also not major users of these trade policy instruments. African countries are mostly excluded from the application of multilateral trade remedy and safeguard application. This is mainly due to the Special and Differential Treatment for developing and least-developed countries provided for in the GATT 1994 and the various applicable WTO Agreements. The other possible reason why many African countries are not affected by the implementation of trade remedy and safeguard provisions is due to the nature of the products African countries export to the rest of the world. The sector-specific analysis will focus on the latter.

On the import side the lack of use of these policy tools by African countries can be due to various factors. The first being the lack of national legislation in most African countries which will enable these countries to utilise these trade measures. Only a few countries have specific national legislation dealing with trade remedies and safeguards and existing national bodies able to utilise these measures. The second factor is more socio-political in terms of the distribution of power among WTO member countries and the threat of retaliation. Africa countries still trade mostly with developed countries, including the EU and the US. These countries have always been among the most prolific users of trade remedies and safeguards. Most African countries will refrain from implementing anti-dumping measures, countervailing duties or safeguards against these developed countries due to their importance as sources of imports and export destinations, capability and capacity to defend their imports against these measures and the threat of retaliation. The third factor is the lack

of capacity to enable African countries to implement these measures. This includes the lack of financial and institutional resources and the required knowledge of these measures. The last factor is the aspect the sector-specific analysis will focus on. This is the sectoral composition of African imports and whether the products African countries imports are mostly those not susceptible to trade remedy application.

4.1 Sector-specific analysis of measures in African countries

In recent years African governments have become more active in the area of trade remedies and safeguards. Anti-dumping action has been taken against South Africa, Egypt, Nigeria, Kenya and Tunisia on products which include steel, copy paper, flowers, machinery and chemicals. Kenya has also considered initiating a safeguard investigation which would have affected various African countries, including Egypt and Ghana.

Table 1 shows the relevant total African imports and exports for 2009 in US$ million according to the different product sectors. The total anti-dumping measures, countervailing duties and safeguards applied by all WTO members in the specific sectors from 1996-2009 are also indicated in the table. The highlighted figures in each column indicate the top five import and export product sectors and the product sectors in which the most anti-dumping measures, countervailing duties and safeguards were implemented.

Table 1: Sector-specific data on exports, imports and trade remedies and safeguards

Product Sectors	US $million		Total number of measures		
	Exports	Imports	ADA	CVD	SG
	2009	2009	1996-2009	1996-2009	1996-2009
I Live animals, animal products	5,544.06	8,988.90	24	4	**9**
II Vegetable products	**14,902.77**	22,982.32	33	3	**9**
III Animal and vegetable fats & oils	1,388.74	5,757.97	2	4	0
IV Food, beverages & tobacco	**17,698.35**	15,899.41	21	**11**	**12**
V Mineral products	**229,755.00**	**59,937.24**	50	5	2
VI Chemical products	12,887.21	**32,589.35**	**463**	**8**	**23**
VII Plastic products	4,010.98	17,873.67	**294**	**10**	2
VIII Raw hides	1,199.10	1,047.86	2	0	1
IX Wood products	2,961.80	3,556.74	41	2	1
X Paper products	2,769.07	7,619.69	100	3	0
XI Textiles & clothing	13,683.66	18,569.54	**211**	7	3
XII Footwear	1,170.71	2,452.10	20	0	3
XIII Non-metallic minerals	1,478.04	5,089.27	64	0	8
XIV Precious stones & metals	**16,684.31**	1,554.88	0	0	0
XV Base metals	**19,161.83**	**41,788.97**	**636**	**53**	**13**
XVI Machinery	13,713.11	**91,880.96**	**196**	**10**	7
XVII Transport equipment	9,101.99	**52,670.95**	22	0	2
XVIII Specialised equipment	1,016.56	6,977.75	21	0	2
XIX Arms & ammunition	15.96	220.91	0	0	0
XX Miscellaneous manufactured articles	1,248.91	5,626.89	55	0	2

Source: WTO, UN COMTRADE Statistics and tralac calculations

The African export figures show that Africa's major export product category for 2009 was mineral products, followed by base metals, food, beverages and tobacco products, precious stones and metals and vegetable products.

- Exports of mineral products accounted for 62% of Africa's total exports for the year.
- Base metals accounted for 5% of Africa's total exports and 2% of the total base metal exports. South Africa accounted for 46% of the total African base metal exports followed by Zambia (16%) and Egypt (12%).
- Africa's third largest export, food, beverages and tobacco products, contributed to

4.8% of Africa's total exports, mostly exported by Ivory Coast (23%), South Africa (14%) and Ghana (12%).

- Africa exported 5% of the total world exports of precious stones and metals. 51% of these exports were from South Africa, 13% Botswana and 8% Sudan.
- Vegetable products were mainly exported from Egypt (20%), South Africa (17%) and Kenya (13%).

On the import side African countries mostly imported machinery, mineral products, transport equipment, base metals and chemical products, accounting for approximately 18% of Africa's total imports for 2009.

- African countries' main import product, machinery, accounted for 3% of the total machinery imports for the year, with South Africa (18%), Algeria (12%), Nigeria (11%) and Egypt (10%) the main importing countries.
- Mineral imports by African countries accounted for 3% of the total mineral imports for the year; mostly imported by South Africa (23%).
- Transport equipment was Africa's third most important import sector, importing 5% of the world's imports in the product sector.
- In terms of base metals, Africa imported approximately 5% of the world imports of which Algeria (20%) and Egypt (18%) were the main importers in Africa.
- South Africa (18%), Egypt (12%), Algeria (10%) and Nigeria (9%) were Africa's main importers of chemical products, accounting for 1.3% of Africa's total chemical imports from the rest of the world.

The data in Table 1 also indicate anti-dumping measures, countervailing duties and safeguards in the different product sectors, according to the WTO data from 1996 until 2009.

- The table shows that the use of anti-dumping measures, countervailing duties and to some extent safeguards is concentrated in the secondary sector of the economy, with

only a small number of safeguard measures being relevant in the primary sector (mostly agricultural commodities).

- There is also a significant overlap among the product sectors which attract anti-dumping measures, countervailing duties and safeguards. During the time period base metals where the product sector in which the most anti-dumping measures and countervailing duties where implemented and the second most important sector affected by safeguards.
- Safeguards were mostly applied on imports of chemical products, which is also the sector in which the second most anti-dumping duties where applied.
- Other product sectors in which there are also overlaps between the use of anti-dumping measures and countervailing duties include plastic products and machinery, while safeguards have mainly been implemented in the product sectors food, beverages and tobacco, vegetable products and live animals and animal products.

Comparing Africa's exports with the product sectors in which trade remedy and safeguard measures have been implemented can provide a possible explanation to the question of whether African countries have not been greatly affected by the implementation of anti-dumping duties, countervailing measures and safeguards purely due to the nature of the main export products of these countries. According to table 1 African countries mostly exported mineral products, base metals, food, beverages and tobacco products, precious stones and metals and vegetable products in 2009. From 1996-2009 the use of anti-dumping measures were the most prolific in the base metals, chemical products, plastic products, textiles and clothing and machinery sectors. Countervailing duties were mostly implemented on base metals, food, beverages and tobacco products, plastic products, machinery and chemical products. Safeguards were mainly implemented in the product sectors chemical products, base metals, food, beverages and tobacco products, live animals and animal products and vegetable products.

The only product sector which is an important African export product and also highly susceptible to anti-dumping measures, countervailing duties and safeguards is base metals. During the time period 28% of all anti-dumping measures, 44% of all countervailing duties

and 13% of all safeguards implemented were in the base metals sector. Although Africa's base metal exports might be susceptible to anti-dumping measures, countervailing duties and safeguards these products are only Africa's second largest export products and account for only 2% of the total world exports. South Africa also accounts for almost 50% of these exports, leaving a small share of exports to be divided among the rest of the African countries. This seems to suggest that African countries (other than South Africa and Egypt) have not been adversely affected by trade remedies and safeguards due to Africa's largest export sector not being a key target for anti-dumping measures, countervailing duties and safeguards. On the other hand South Africa and Egypt are the countries which export most of the products in which anti-dumping measures, countervailing duties and safeguards have been prolific, which have also made them the African countries mostly affected by these measures.

African countries have mostly imported machinery, mineral products and transport equipment which have only been affected by a limited number of anti-dumping measures, countervailing duties and safeguards. Base metals and chemical products are two sectors which are relatively important import sectors and highly susceptible to trade remedy investigations. However, both these product sectors are not Africa's largest importing sectors presenting only a small percentage of Africa's total imports and providing a possible reason why African countries might not use trade remedies to protect their domestic industries, if they also produce these products domestically.

4.2 Trade remedies and safeguards in the tripartite member states

Although African countries have become increasingly aware and concerned about the proliferation of trade remedy and safeguard usage, South Africa and Egypt are the only tripartite member states which have significantly utilised these measures on the multilateral level. In COMESA, Kenya has utilised the trade remedy and safeguard provisions under the COMESA Treaty and Regulations. However, it is alleged that dumping, subsidies and import surges from different regions have increasingly affected the Southern African markets since mid-1990.

4.2.1 Multilateral measures under the WTO

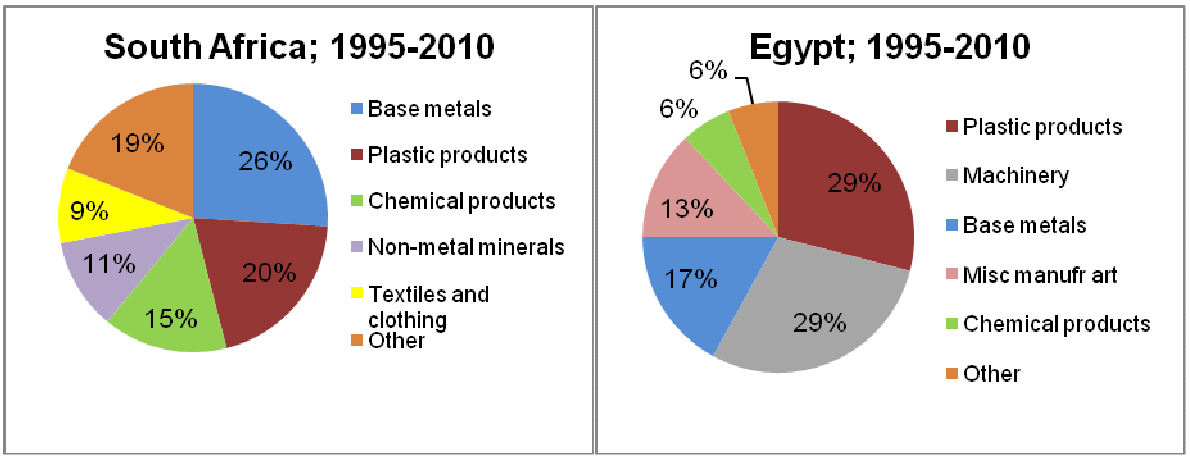
The WTO statistical data on anti-dumping measures, countervailing duties and safeguards shows South Africa and Egypt as the only tripartite states which have implemented anti-dumping measures and safeguards and South Africa as the only country which implemented countervailing duties. Apart from South Africa and Egypt, Libya, Malawi and Zimbabwe have also been affected by anti-dumping measures; however, the anti-dumping duties against the latter two countries were implemented by South Africa.

4.2.1.1 Anti-dumping measures

a) Reporting countries

Out of all the tripartite member states South Africa and Egypt are the only member countries which have implemented anti-dumping duties notified to the WTO. Between 1995 and 2010 South Africa initiated 212 anti-dumping investigations of which 128 final measures were implemented, while Egypt initiated 67 investigations and implemented 52 final anti-dumping measures. Thus South Africa implemented 5.26% and Egypt 2.14% out of the total 2433 final measures implemented during the time period. Figure 1 below shows the anti-dumping measures implemented by South Africa and Egypt from 1995-2010 by product sector.

Figure 1: Anti-dumping measures by sector



Source: WTO statistical data on anti-dumping measures

Figure 1 shows the difference and similarities between the product sectors which have been affected by anti-dumping measures implemented by South Africa and Egypt. Both countries have implemented anti-dumping duties in the base metals, plastic products and chemical products sectors. However, the other major sectors affected by South African anti-dumping duties are non-metallic minerals and textiles and clothing and by Egyptian anti-dumping measures are machinery and miscellaneous manufactures articles. During the time period South Africa, compared to Egypt, implemented anti-dumping duties in a wider product range. South Africa's 128 anti-dumping measures have been spread across 10 product sectors, with the top five affected sectors representing 81% of South African measures, while the 52 measures Egypt implemented are concentrated in 6 product sectors.

The top three countries both South Africa and Egypt targeted with anti-dumping duties were the same, just in a different ranking. In implementing anti-dumping duties Egypt and South Africa mostly targeted imports from China, 23% and 14%, respectively, followed by Korea and India.

Since the beginning of 2011 South Africa has already initiated four anti-dumping investigations: hexagon bolts from China; acetamidophenol from China and the US; polyethylene terephthalate from Taipei, Korea and India and unframed mirrors from India.

b) Affected countries

Apart from South Africa (59 investigations) and Egypt (12 investigations) other tripartite member states whose imports have been subjected to anti-dumping investigations between 1995 and 2010 include Libya (2 investigations), Zimbabwe (2 investigations), Malawi (1 investigation) and Mozambique (1 investigation). During the time period imports from all tripartite member states was the subject of 2.05% of the total anti-dumping investigations. 47 final anti-dumping measures of the total 2433 measures implemented between 1995 and 2010 affected tripartite member states. Member countries affected were South Africa (1.6%), Egypt (0.21%) and Libya, Malawi and Zimbabwe (0.04% each).

Three of the five measures implemented against Egypt and the one each against Malawi and Zimbabwe were anti-dumping duties implemented by South Africa. The measure implemented against Malawi was in the product sector of textiles and clothing and the one against the Zimbabwean imports was in the base metals sector. The EU was the country which implemented an anti-dumping duty against Libyan imports. The US, India and Argentina were the countries which mainly targeted South African exports.

On 21 January 2011 Pakistan initiated an anti-dumping investigation on the imports of soda ash from Kenya.

4.2.1.2 Safeguards and countervailing duties

Egypt and South Africa are the only two tripartite countries which have implemented safeguard measures in terms of the WTO Agreement on Safeguards. Between 1999 and 2008 Egypt implemented four safeguards in the product sectors of live animals, animal products; chemical products; textiles and clothing and machinery. South Africa has only implemented one safeguard measure, in 2007 against the importation of chemical products.

South Africa and Egypt are also the only countries to initiate countervailing investigations with Egypt initiating four investigations in 1998 and South Africa thirteen between 1997 and 2010. South Africa is the only country which implemented final countervailing duties, implementing five duties between 2000 and 2010 in the product sectors of chemical products, plastic products, textiles and clothing and base metals. Four of the countervailing duties were against subsidised imports from India and one against Pakistan.

South African imports of food, beverages and tobacco products and base metals have been the only products in the tripartite region which have been subject to countervailing duties. Between 1997 and 2001 four countervailing duties were levied against exports from South Africa into New Zealand and the US (two measures each).

4.2.1.3 Sector-specific analysis of multilateral measures by the tripartite countries

The sector-specific analysis in this section will focus on imports, exports, anti-dumping measures, countervailing duties and safeguards in the tripartite and specific tripartite member states. The analysis includes and expands the methodology used in the sector-specific analysis done under section 4.1 of the chapter:

1) The tripartite export and import data in specific product sectors (data obtained from UNCOMTRADE) is compared with the anti-dumping measures, countervailing duties and safeguards in the different product sectors (data obtained from the WTO statistical databases). This reveals the product sectors which are important as exports and imports for the tripartite, but also product sectors with a high incidence of anti-dumping measures and safeguards.
2) We then determine which tripartite member countries are the main exporters and importers of those important product sectors and which countries are the main export destinations and sources of imports.
3) In terms of the tripartite export figures the countries which have implemented the highest combined total of final trade remedies and safeguards are determined. For the import data the countries which have been mostly affected by the total number of final trade remedies and safeguards are calculated.
4) The sector-specific export data of the top tripartite member states are then compared with the export and import data of the main importers and those countries which have implemented the most measures. This can show the nature of the products exported by the tripartite member states as an indicator of the lack of tripartite exports affected by trade remedy and safeguard measures.
5) On the import side the import data is compared with the countries mostly affected by trade remedy and safeguard measures to show whether the type of product and the

country as a source of the imports are not those regularly affected by anti-dumping measures, countervailing duties and safeguards as an indicator to why tripartite member states have not been a great user of these measures.

Table 2 below shows the aggregated data for tripartite imports and exports for 2010 in US$ millions and the total final anti-dumping measures, countervailing duties and safeguards which were implemented between 2000 and 2010 (number of final multilateral measures).

Table 2: Tripartite sector-specific data

Description	Exports	Imports	ADA	CVD	SG
	2010	2010	2000-2010	2000-2010	2000-2010
I Live animals, animal products	2,869.75	5,071.62	20	3	6
II Vegetable products	**12,474.96**	12,209.40	24	2	**8**
III Animal or vegetable fats and oils	615.51	4,221.43	2	3	0
IV Food, beverages and tobacco	7,755.05	9,227.01	10	3	**11**
V Mineral products	**132,972.21**	**41,094.20**	43	5	2
VI Chemical products	**9,994.92**	**21,072.11**	**411**	**7**	**18**
VII Plastic products	2,766.72	10,889.63	**240**	**10**	1
VIII Raw hides	687.35	601.22	1	0	1
XI Wood products	766.46	2,139.79	27	2	1
X Paper products	2,241.56	4,974.05	64	3	0
XI Textiles and clothing	6,176.69	9,599.54	**177**	**7**	4
XII Footwear	148.41	1,710.16	16	0	2
XIII Non-metallic minerals	1,252.93	3,054.58	51	0	**9**
XIV Precious stones and metals	**18,964.06**	1,892.21	0	0	0
XV Base metals	**27,095.82**	**21,497.69**	**438**	**41**	**13**
XVI Machinery	8,805.14	**53,828.59**	**136**	**10**	7
XVII Transport equipment	7,733.79	**24,009.87**	14	0	2
XVIII Specialised equipment	629.27	4,649.89	10	0	2
XIX Arms and ammunition	6.50	130.70	0	0	0
XX Misc manufactured articles	8,369.56	3,694.82	40	0	0
XXI Collectors' pieces and antiques	56.90	78.75	0	0	0
XXII Other unclassified goods	268.89	6,345.30	0	0	0

Source: UNCOMTRADE and the WTO statistical database

Table 2 shows that mineral products, base metals and precious stones and metals as the top aggregate export products for the tripartite territory in 2010. The highest affected product sector by anti-dumping measures and countervailing duties and the second most safeguard measures between 2000 and 2010 was base metals. Chemical product exports attracted the

most safeguards and second most anti-dumping measures. In terms of imports the tripartite countries mostly imported machinery, mineral products and transport equipment during 2010. Other important import products were base metals and chemical products. Although mineral products have been the most important import and export sectors for the tripartite member countries, there has been a lack of trade remedies and safeguards in this product sector over the time period. Thus further analysis, import and export data, will focus on base metals and chemical products as important export and import sectors for the tripartite member states as well as sectors highly affected by anti-dumping measures, countervailing duties and safeguards.

A) Sector-specific export analysis

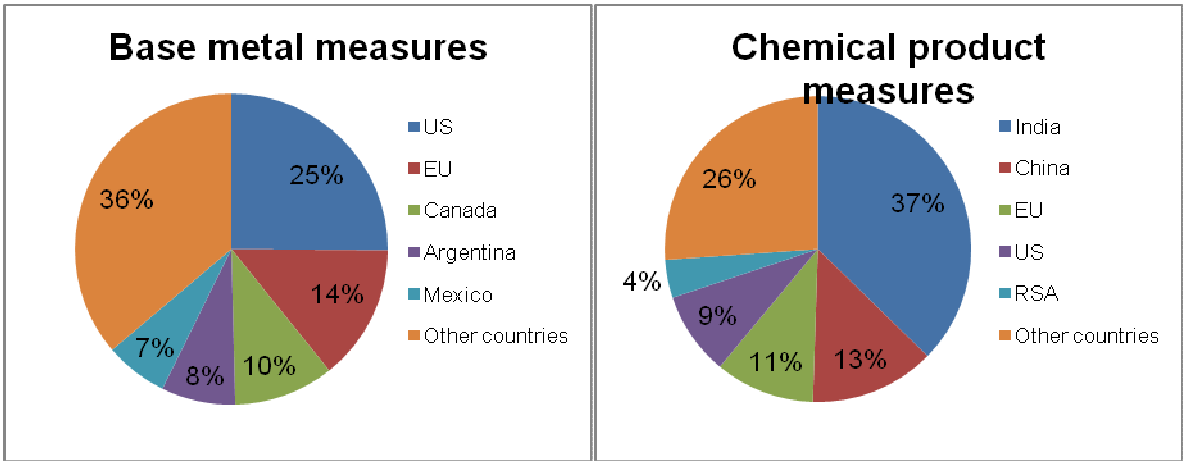
The export data on base metals and chemical products by all tripartite member states and the top five exporters in the case of each product sector indicate the following:

- In 2010 the aggregated tripartite exports of base metals and chemical products were approximately US$ 27 billion and US$ 10 billion respectively. However, the tripartite member states only contributed 2% of the world exports of base metals and 0.72% of the total chemical product exports for the year.
- South Africa (47%), Zambia (21%), Egypt (10%), DRC (9%) and Mozambique (4%) were the top base metal exporters in 2010, while South Africa (43%), Egypt (29%), Libya (7%), Kenya (4%) and the DRC (2%) topped the list of the chemical product exporters.
- The EU and the US fell under the top export destinations for both base metals and chemical products exported from the tripartite territory during 2010.
- In 2010 South Africa mainly exported base metals to the EU (22%), China (11%) and the US (9%) and chemical products to the EU (18%), US (17%), Zimbabwe (8%) and India (7%).
- The main markets for Egyptian base metal exports were the EU (27%), Saudi Arabia (17%) and Libya (8%) and for chemical product exports, the EU (49%), Turkey (11%) and the UK (5%).
- Zambia exported the bulk of its base metal products to Switzerland (60%) and China (24%); the DRC exported mostly to China (72%) and Zambia (10%); and Mozambique

exported base metals to the EU (98%) and South Africa (1%).

- The most important markets for Libyan chemical product exports were the EU (53%) and Turkey (15%); for Kenyan exports Uganda (25%), Tanzania (18%) and India (8%) and for chemical products exported from the DRC it was Zambia (84%), the EU (7%) and Brazil (4%).

Figure 2: Top five countries implementing trade remedy and safeguard measures; 1995-2010



Source: WTO statistical database

Figure 2 above shows those countries which have been responsible for the implementation of most of the total trade remedy and safeguard measures. The data shown in the figure include all final anti-dumping measures, countervailing duties and safeguards which have been implemented in the particular product sectors by each of the top five countries as a percentage of the total final measures implemented over the same time period (1995-2010). The figure shows that the US, EU, Canada, Argentina and Mexico have been responsible for a total of 64% of the total trade remedy and safeguard measures implemented in the base metal sector in the time period. India, China, the EU, US and South Africa were the countries which implemented the highest number of measures in the chemical product sector, implemented 74% of the final aggregate measures in this product sector.

If we focus on the export data and those countries which have been responsible for the utilisation of most of the trade remedy and safeguard measures the following emerges:

- The US and the EU are the only two countries which are important export destinations for base metal exports from the top five exporters and also main users of trade remedies and safeguards. Although the EU is a very important market for base metal exports from the tripartite as a whole, but also these five countries, the significance of these exports and sources of imports into the EU market are quite neglible. In 2010 the EU imported only a small percentage of base metals from these five countries; South Africa (0.7%), Mozambique (0.4%), Egypt (0.2%), DRC (0.05%) and Zambia (0.02%). South Africa was the only country whose exports did not form a completely insignificant portion of the base metals imports of the US during 2010. 1.1% of the USs base metal imports were from South Africa.
- India, the EU and US are the only countries where there is an overlap between significance as an export destination for chemical products and the use of trade remedy and safeguard measures. However, South Africa was the only exporter which exported a non-insignificant portion of the US chemical product imports (1.6% of US imports). Although the EU is an important market for the exports of chemical products from the tripartite member states, the EU imports only a small percentage of their chemical products from tripartite sources, including 0.17% from Egypt and 0.15% from South Africa. The US also sources a small percentage of its chemical product imports from South Africa (0.41%), Egypt (0.17%) and Libya (0.03%).

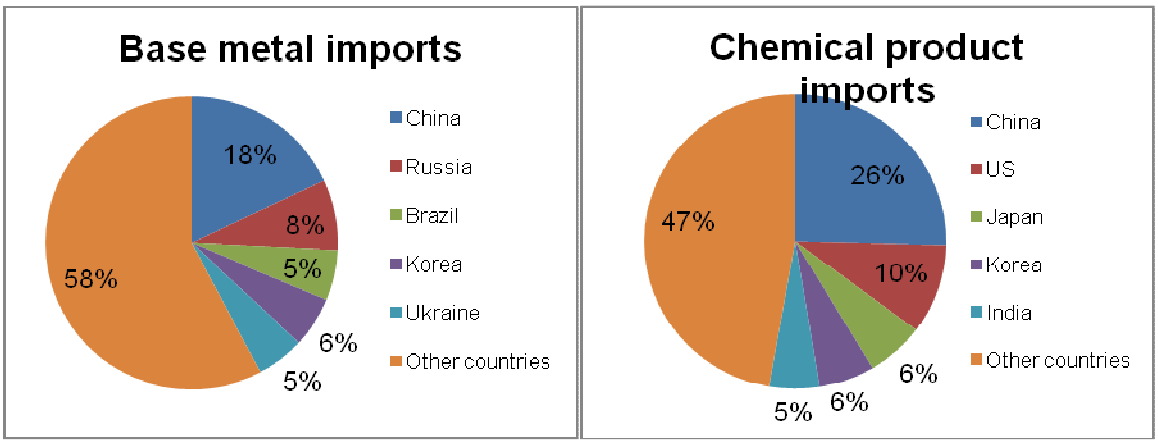
The data suggests that the member countries of the tripartite have not been greatly affected by the utilisation of anti-dumping measures, countervailing duties and safeguards due to the nature of their exports to those countries utilising these measures. Although the countries to some degree, do export those products which have been affected by trade remedy and safeguard measures, it is either South Africa or Egypt who is the main exporter and it is also these tripartite countries mostly affected by the measures, or the percentage of exports by these countries are insignificant in terms of anti-dumping measures, countervailing duties and safeguards. This can lead to the exports by other tripartite countries either being disregarded under the de minimis requirements or the Special and Differential Treatment provisions in the applicable WTO Agreements.

B) Sector-specific import analysis

The data on the importation of base metals and chemical products show that the tripartite countries imported approximately US$ 21billion of each of these product sectors in 2010, accounting for 2% and 1.5% of the total base metal and chemical product imports, respectively for the year.

- South Africa, Egypt, Kenya and Libya are four of the five top importers in both product sectors, while Angola is included in the top five base metal importers and Ethiopia for chemical product imports in 2010.
- The top five countries' base metals and chemical products account for 73% and 79%, respectively of the total tripartite imports of these products. The EU, China, South Africa and the UK are important sources for both these product sectors, with Turkey part of the top five exporting countries for base metals to tripartite countries and the US part of the top five in chemical product exports.
- Egypt mostly imported base metals and chemical products from the EU (32% and 51%) and the US (13% and 9%).
- South Africa mostly imported base metals from the EU (34%) and China (22%), while chemical products were mainly sourced from the EU (44%) and the US (13%).
- Turkey (33%) and the EU (26%) were the countries Libya imported the most base metal products from, while the EU (62%) and Switzerland (9%) were the main sources for imports of chemical products.
- Kenya imported the majority of their base metal products from South Africa (38%), China (14%) and India (10%) and chemical products from the EU (29%) and India (19%).
- The countries exporting the majority of base metal products to Angola were the EU (54%), China (16%) and the UK (10%). In 2010 the EU (24%), India (13%) and Jordan (12%) were the countries Ethiopia sourced most of their chemical products from.

Figure 3: Top five countries affected by trade remedies; 1995-2010



Source: WTO statistical database (2011)

Figure 3 above shows the five countries which have been affected by trade remedies, in the base metal and chemical product sectors, the most between 1995 and 2010. This analysis only includes the data on anti-dumping measures and countervailing duties. These measures are directed at the imports of specific countries; this makes it possible to determine which countries are affected by the measures implemented. However, safeguard measures are implemented by specific countries against specific imports, irrespective of the source of the imports. This makes it difficult to determine which specific countries will be affected by a safeguard measure.

Figure 3 indicates that the countries mostly affected by anti-dumping measures and countervailing duties on their base metal exports are China, Russia, Brazil, Korea and the Ukraine, affected by 42% of the final trade remedies implemented by their trading partners on base metal imports. China, the US, Japan, Korea and India are affected by 53% of the final anti-dumping measures and countervailing duties implemented on chemical product imports by all WTO member countries.

Table 3 below combines the data on the countries which are important source countries for base metals and chemical products imported by specific tripartite member states and those countries mostly affected by anti-dumping measures and countervailing duties. The table shows the percentage of base metal and chemical products the countries import from some of the countries mostly affected by anti-dumping and countervailing measures.

Table 3: Importers and exporters of base metal and chemical products

Importer	Exporter
Base metals	
Egypt	Ukraine (12%); China (7%); Russia (4%); Korea (2%)
South Africa	China (22%); Korea (3%); Brazil (2%)
Libya	China (13%); Korea (7%); Ukraine (3%)
Angola	China (16%); Brazil (3%)
Kenya	China (14%); Korea (2%); Russia (2%)
Chemical products	
Egypt	US (19%); China (8%); India (3%)
South Africa	US (13%); China (9%); India (5%); Japan (2%)
Libya	China (3%); US (3%)
Kenya	India (19%); China (8%); US (6%); Korea (3%)
Ethiopia	India (13%); China (8%); US (5%); Korea (2%)

Source: UNCOMTRADE and tralac calculations

What the table shows is that each major importing country imports either base metals or chemical products from at least two of the countries mostly affected by trade remedies. Although Egypt and South Africa have been major users of anti-dumping measures and countervailing duties, the other importing countries have not been major implementing countries. The data seem to suggest that some of the products imported by the tripartite member states may be susceptible to dumping and subsidies, although these products are not the most important import sector for the tripartite countries.

Although the exporting countries are not necessarily the only or major source of base metals and chemical products for the tripartite countries, there is still a risk that dumping or subsidisation can take place which can harm the domestic industry of the various tripartite member states, given there is a domestic industry. This requires the member states to have the capacity to utilise the multilateral and any domestic anti-dumping and countervailing provisions to protect the domestic industry. However, currently there is a lack of national legislation and regulations, financial capacity and technical capabilities to adequately utilise these multilateral trade remedy provisions. Thus the lack in use of trade remedies can be

attributed to a lack of institutions, knowledge and know-how, rather than the nature of the products imported by the tripartite member states.

4.2.2 Regional and bilateral trade remedies and safeguards

The tripartite member states, apart from South Africa and Egypt, have not been big players on the multilateral field of trade remedies and safeguard measures. These countries have thus far also not been greatly affected by any implemented multilateral measures. However, there has been some utilisation on the regional front, especially in terms of the COMESA Treaty and Regulations.

Although even the number of documented regional measures has been few, there have been allegations of dumping, subsidisation and import surges reported by members of the tripartite, although with limited documentary proof. In 1993 Zimbabwe alleged that maize exports were flooding the Southern African market undermining the maize producers in Zimbabwe. The Zimbabwean chemical industry was under a potential threat due to alleged dumped chemical exports, while South Africa was accused of price-undercutting which affected the Zimbabwe Fertilizer Company and allegedly dumping batteries which affected the company Chloride Central Africa in Zimbabwe in 1995.

In 2002 Zambia alleged that there had been a significant amount of dumped and subsidised imports entering their market from Zimbabwe. The alleged dumped products included, building materials of asbestos, cement and roofing sheets, beer and soft drinks, long-life milk, metal products, soybeans and soy cake, timber and wood products and wheat. Fertilisers and fuels imported from Zimbabwe were alleged to be subsidised. However, there has been little documentation regarding these allegations to suffice any action under the WTO Agreements on anti-dumping measures and countervailing duties. Thus the private sector lobbied government to restrict these imports through the utilisation of various safeguard clauses, including the WTO Agreement on Safeguards and regional safeguards under the COMESA Treaty and Regulations.

In 2003 the Ugandan sugar industry approached the parliamentary committee in Kampala to protect the domestic industry from dumped exports. In 2005 Namibia alleged that its domestic industry was facing closure due to dumped dairy products from South Africa. The member states of the EAC have also alleged that sugar is being dumped into the market by

low cost producing countries, including South Africa.

In 2008 Kenya threatened to implement a blanket subsidy on all the imports from Egypt under the COMESA Regulations. Kenya alleged that the Egyptian government was subsidising economic activity in the country to increase exports. It was alleged that the subsidies ensured that any item grown, produced or processed in Egypt were 600% cheaper than those products in Kenya. One of the complainants were the Kenyan flour millers which claimed that Egypt imported wheat from Argentina, France and the US and then uses cheap, government subsidised labour, power and transport to mill and export the cheaper products in the region. In order to solve this problem the Kenyan government suggested that a blanket countervailing duty of 200% be introduced on all Egyptian imports, without any exception.

Kenya utilised the trade remedy and safeguard provisions in the COMESA Treaty and Regulations to protect various domestic industries. Kenya applied a COMESA safeguard on wheat imports which was aimed at limiting wheat imported from Egypt and Mauritius. This measure expired at the beginning of 2009. Kenya's domestic sugar industry has also been protected from sugar imports from other COMESA members, including Swaziland, Malawi, and Zambia by a tariff rate quota (TRQ). This measure was set to expire in February 2008, but was extended until January 2012 on condition that the Kenyan government will privatise the sugar mills in the country. The rate applicable to any sugar imports above the quota limit of 220 000 tonnes needed to be reduced from 2008 by 30% increments until full liberalisation in January 2012.

5. Trade remedy and safeguard provisions in COMESA, EAC and SADC

5.1 National legislation and regulations

For countries to be able to utilise multilateral and regional anti-dumping measures, countervailing duties and safeguards countries need to have enacted domestic legislation and put investigating authorities in place. Identical provisions in the ADA and the SCM Agreement require all WTO members to align their national laws, regulations and procedures with the provisions of these agreements. According to the Agreement on

Safeguards (Article 3.1) WTO member countries may only apply a safeguard measure once an investigation has taken place, by a competent domestic authority, in accordance with established national procedures.

The ADA (Article 18.4 and 18.5) and the SCM Agreement (Article 32.5 and 32.6) state:

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question, and Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.
>
> In terms of the regional agreements of COMESA, the EAC and SADC, the EAC Customs Union Regulations contain national legislation requirements pertaining to anti-dumping, subsidies and countervailing, while the COMESA Regulations require established national procedures and a competent authority to investigate allegations of a surge in imports, dumping and subsidies.

The EAC Customs Union Regulations regarding both anti-dumping measures and subsidies and countervailing measures (Regulation 4 in both regulations) state the following:

> These Regulations shall apply to investigations or reviews initiated under existing national legislation of Partner States upon coming into force of the Protocol.

The COMESA Regulations on Trade Remedies and Safeguards also require the following:

> Even before initiating the first action, a member State should have established its procedures for taking action and identified a competent authority to carry out investigations into the existence of the pre-conditions for safeguard, countervailing or anti-dumping action.

In COMESA, the EAC and SADC six of the combined 26 countries are currently not WTO member states and have as such not notified any domestic legislation to the WTO. Of the twenty remaining tripartite countries only eight have notified domestic legislation, regulation and/or procedures. The table below shows those countries which have notified the WTO of national procedures:

Table 4: Notification of domestic legislation/regulations

Country	Legislation/Regulations
Egypt	Law 161 of 1998 Concerning the Protection of the National Economy from the Effects of Injurious Practices in International Trade as amended by the Decree of the Minister of Trade and Industry No 569/2008
Kenya	Customs and Excise Act Section 125 and 126; Section 137 of the East African Community Customs Management Act of 2004; no domestic legislation on safeguards
Malawi	Customs and Excise Act Section 85 and 86; no domestic legislation on safeguards
Mauritius	Procedures for anti-dumping actions; no domestic legislation on anti-dumping, safeguards and countervailing duties
RSA	International Trade Administration Act 71/2002; Customs and Excise Act; ITAC Anti-Dumping Regulations and ITAC Safeguard Regulations
Uganda	The Customs (Dumping and Subsidies: Rates) Act of 1964 and the Customs (Dumping and Subsidies) Act of 1970; no domestic legislation on safeguards
Zambia	Customs and Excise Act 1994 Sections 72-75 and 198 and the Customs and Excise Regulations 54/1994; Act 12/2004 amending the control of Goods Act Chapter 421 with Safeguard Measures
Zimbabwe	Customs and Excise Act Part VI Sections 73 and 77-81 and Competition Regulations 266/2002; no domestic legislation on safeguards

Source: WTO Member States notifications[1]

In the EAC only two countries (Uganda and Kenya) of the five member countries have notified domestic legislation. However, these two countries overlap with the countries in COMESA which have notified national legislation or procedures. In total seven countries (Egypt, Kenya, Malawi, Mauritius, Uganda, Zambia and Zimbabwe) of the nineteen COMESA member states notified domestic legislation, regulations and procedures. Four of these countries overlap with the five countries which have notified legislation in SADC (Malawi, Mauritius, South Africa, Zambia and Zimbabwe). Mauritius has not notified domestic legislation as such, but rather national procedures for anti-dumping action. Those countries

[1] [Online]. Available: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

which have notified legislation has mostly been regarding anti-dumping measures, with Egypt, South Africa and Zambia being the only countries with domestic legislation and regulations in place pertaining to safeguard measures.

5.2 Regional provisions and regulations

5.2.1 COMESA

The provisions regarding anti-dumping measures, countervailing duties and safeguards are included in Chapter six of the COMESA Treaty regarding Cooperation in Trade Liberalisation and Development.

Article 51 of the COMESA Treaty, dealing with dumping and anti-dumping measures, prohibits both intra-COMESA dumping and dumping by a third country into the territory of a member state if it causes or threatens material injury to an existing domestic industry in the member state or the material retardation of the establishment of a domestic industry. According to Article 52 a subsidy granted by a member state, third country or state resources which has the effect of distorting competition, due to a specific undertaking or the production of specific goods being favoured by the subsidy is seen as being inconsistent with the Common Market. Article 52.2 allows a member state to implement a countervailing duty which is equal to the estimated amount of the subsidy granted on the manufacturing, production or export of the product. Article 61 allows for the use of a necessary safeguard if the implementation of any of the provisions under Chapter six causes a serious disturbance in the economy of a member state. This safeguard measure will be in place for a period of one year, but can be extended by the COMESA Council of Ministers.

At the twelfth meeting of the COMESA Council of Ministers in 2001 the decision was made to adopt the Regulations on Trade Remedies on safeguard measures, anti-dumping, subsidies and countervailing duties and dispute settlement. These regulations allow for certain exceptions when member countries experience adverse effects due to trade liberalisation: emergency measures to temporarily restrict imports (safeguards); measures against the selling of products at unfair low prices (anti-dumping measures); and countervailing duties to offset export subsidies. Detailed provisions regarding the conditions for application, notification, duration, repetition, and compensation regarding these exceptions are provided

for in the regulations.

The regulations include specific quantitative preconditions for the implementation of countervailing duties and anti-dumping measures. To implement a countervailing duty, apart from the requirement of a subsidy causing injury, the subsidisation should not be less than 2% of the value of the imported product. Also the importation of the subsidised product should at least be equal to 4% of the imports of the like product or combined 9% for those individual supplying countries with a market share of less than 4%. In terms of dumping the dumping margin may not be less than 2% of the normal export price and the imports of the dumped product must be at least 3% of the imports of the like product and combined at least 7% for those individual countries with a market share smaller than 3%.

5.2.2 EAC

The EAC provisions on trade remedies and safeguards are provided for in article 75(1)(f) and (g) of the EAC Treaty (as amended on 14 December 2006 and 20 August 2007); the Customs Union Protocol article 16 (anti-dumping actions), article 18 (countervailing measures) and article 19 (safeguard measures); and separate regulations annexed to the Protocol: Annex IV (Anti-Dumping Measures); Annex V (Subsidies and Countervailing Measures); and Annex VI (Safeguard Measures) EAC Customs Union Regulations.

According to article 16 of the Protocol dumping is prohibited if it causes injury to an established domestic industry of a member state, materially retards the establishment of a domestic industry or frustrates the benefits a member state expected from the removal or absence of duties and quantitative restrictions among member states. Article 18 provides a similar provision than that of COMESA regarding countervailing duties. The article states that countervailing duties can be implemented to offset the effects of a subsidy, but only to the extent that the countervailing duty is equal to the estimated amount of the subsidy on the manufacturing, production or exportation of the product.

A member country can implement a safeguard measure in accordance with the regulations if a product is imported under such conditions which causes or threatens serious harm to the domestic industry (article 19). The article also makes provision for a transitional period of five years after the Protocol came into force. According to article 19(2) (a) and (b), if a member country considered implementing a safeguard measure during these five years, the

country had to inform the Council of Ministers of any measure it is considering and demonstrate that their economy will suffer serious injury from industrial and raw material imports, due to the application of the common external tariff. The Council will then examine and consider the merits of proposal and decide the appropriate action.

Article 24 of the Protocol also allows for the establishment of the EAC Committee on Trade Remedies to deal with various matters, including any matter pertaining to anti-dumping measures, subsidies and countervailing duties and safeguard measures. However, the Committee is yet to be established.

Both the Anti-Dumping and Countervailing Regulations distinguish between intra-EAC actions in which case the regulations are applicable and any action initiated by a member country against a third country. In the latter action the various WTO Agreements are applicable. The aim of the regulations is to ensure the uniform application of anti-dumping measures, countervailing duties and safeguards among EAC member states and provide detailed substantive and procedural requirements for the implementation of these measures. However, the regulations are similar, if not identical to the provisions in the WTO Anti-Dumping Agreement, SCM Agreement and Agreement on Safeguards. The EAC Countervailing Regulations even includes the categories of non-actionable subsidies available in the SCM Agreement (excluding the footnotes to the article), although these provisions in the WTO Agreement has since expired.

5.2.3 SADC

The provisions regarding anti-dumping measures, subsidies and countervailing measures and safeguards in SADC are provided in article 18, 19 and 20, respectively, of the SADC Trade Protocol. The provisions are very limited, mostly referring to the WTO Agreements applicable in each instance and not nearly as detailed as those procedural and substantive requirements provided in COMESA and the EAC.

According to article 18 the Protocol does not prevent any member state from applying anti-dumping measures which are consistent with the WTO provisions. In terms of countervailing duties, article 19 states that a member country can apply a countervailing duty to offset the effects of a subsidy against another member country which is in accordance with the provisions of WTO. Article 20 of the Protocol emulates the basic requirements in

the WTO Agreement on Safeguards: a member country can implement a safeguard measure if the increased quantities of a product imported into its territory causes or threatens to cause serious injury to the domestic industry.

6. Trade remedy and safeguard provisions in the Draft Tripartite Agreement

The Draft Agreement Establishing the COMESA, EAC and SADC Tripartite Free Trade Area (revised December 2010) Part V provides the basic provisions pertaining to trade remedies. Included in this section are anti-dumping and countervailing measures (article 18), safeguard measures (article 19), co-operation on trade remedies (article 20), infant industries (article 21) and balance of payments (article 22). Annex 6 of the Draft Agreement provides the conditions and procedures applicable to the implementation of trade remedies under Part V of the Agreement.

Article 18 states that the agreement shall not prevent the tripartite member states from implementing anti-dumping measures and countervailing duties in accordance with the applicable WTO agreements. In applying anti-dumping and countervailing measures member states must be guided by the WTO Anti-Dumping Agreement and SCM Agreement, while following the procedures and conditions provided in Annex 6 to the agreement. Tripartite member states can only apply a safeguard measure if it has been determined that a product is imported into the territory of a country in such increased quantities which cause or threatens serious injury to the domestic industry, following the conditions and procedures in Annex 6 and guided by the WTO Agreement on Safeguards (article 19).

Annex 6 to the Draft Agreement is the Annex on Trade Remedies under Article 18 of the Agreement. This would seem to indicate that the annex is only applicable to the implementation of anti-dumping measures and countervailing duties (provided for in article 18 of the agreement). However, article 19 of the Draft Agreement, regarding safeguard measures, also states that Annex 6 on trade remedies applies in the application of a safeguard measure by tripartite member states. Thus according to the Draft Agreement Annex 6 is only applicable to the trade remedies of anti-dumping measures, countervailing duties and safeguards. However, the definition of trade remedies in the annex is quite broad, including any measure which is recommended by the Sub-Committee on Trade Remedies necessary to protect the domestic industry which is in accordance with the annex. The trade

remedy measures provided for under article 4 of the annex also go beyond anti-dumping measures, countervailing duties and safeguards.

According to article 2 of Annex 6 trade remedies applied in accordance with the annex are applicable to trade between tripartite member states as well as trade between tripartite member states and third countries. The authority to initiate and conduct trade remedy investigations and decide the measures to be implemented, if any, lies with the Trade Remedies Sub-Committee. According to the interpretations in article 1 of the Annex the Trade Remedies Sub-Committee is the Sub-Committee established in accordance with article 8 of the annex. Article 8 authorises the notification of the Sub-Committee, by those tripartite member states which are also members of the WTO, as the necessary investigating authority and competent body required in terms of the WTO Anti-dumping Agreement, SCM Agreement and Agreement on Safeguards.

These provisions seem to be more relevant in the case of a customs union, rather than a free trade agreement. While the first allows for a common external tariff and common policies related to trade with non-members, in the case of a free trade arrangement members have different customs duties and policies pertaining to non-members. Thus the requirement of using the Draft Agreement and Annex 6 in the case of trade remedies implemented against non-members as well as the establishment of a central body to investigate allegations of dumping, subsidies and a surge in imports against members and non-members alike relate more to the establishment of a customs union. However, the current aim for the tripartite and the arrangement to be governed by the Draft Agreement is that of a free trade agreement. These provisions can thus cause some confusion regarding the aim of the tripartite as a free trade arrangement or a customs union and which trade remedy provisions to apply in the context of trade with non-member countries.

According to article 3(1) of the annex the application for the implementation of a trade remedy must be made to the Sub-Committee which will then determine whether an investigation needs to take place. If the Sub-Committee determines that an investigation is necessary the initiation of the investigation can be delegated to its members (article 3(3)). Article 3(2) allows three 'groups' to apply for the protection of trade remedies: an industry, national or regional business association; tripartite member state on behalf of a national or regional industry; and a registered consumer organisation. Thus, apart from giving the

domestic or regional industries protection under the annex, consumers are also furnished with standing to apply for protection when dumping, subsidies and a surge in imports cause harm to domestic or regional industries.

In article 4(1) of the annex it is stated that the Sub-Committee can recommend any measure which may be in accordance with sub-paragraph (2). This sub-paragraph provides a list of six possible measures which may be implemented by the member states:

a) Safeguards, including increased customs duties and quotas;

b) Anti-dumping duties lower or equal than the dumping margin;

c) Countervailing duties to offset subsidies;

d) Price undertakings to raise the price of an import product;

e) Orders to those industries in the region to guarantee and uphold fair competition and sustainable human development conditions;

f) Any measures in the public interest that will provide adequate protection for domestic and regional industries.

In terms of this sub-paragraph there are more measures available to the tripartite member states than just anti-dumping measures, countervailing duties and safeguards. The article makes provision for the specific application of a price undertaking as a trade remedy, rather than an alternative measure, to prevent for instance a final anti-dumping duty from being implemented. Sub-paragraphs 4(2)(e) and (f) make interesting additions to the trade remedy measures available to the tripartite member state, although the workings of these provisions are currently uncertain.

Sub-paragraph (e) allows for orders to be given to those enterprises doing business or having an economic presence in the region to ensure that the conditions for fair competition and sustainable human development are maintained. There is uncertainty regarding the implementation of this provision: the meaning or definition of orders, fair competition and sustainable human development; the legal status and enforceability of these orders; and who will decide and what will be the conditions of fair competition and sustainable human development.

Sub-paragraph (f) creates space for the implementation of a wide variety of measures under the rubric of public interest. According to the sub-paragraph any other measure can be implemented, which is in public interest and will provide the necessary protection for the domestic or regional industry. However, nowhere other than sub-paragraph (f) and article 6(12) of Annex 7 to the agreement is there any reference to the public interest. Neither the Draft Agreement nor Annex 6 and Annex 7 make reference to the meaning or interpretation of the term 'public interest' in the context of the tripartite free trade area. Annex 7 to the agreement, pertaining to competition policy and consumer protection, states that the Tripartite Council may only approve a merger or acquisition if it fulfils an overriding public interest.

Furthermore sub-paragraph (f) allows for the application of 'any other measure', in the public interest, without specific guidelines regarding which measures are included and excluded. This seems to suggest that just as long as the Sub-Committee deems a measure adequate protection to a domestic or regional industry and in the public interest the measure will be allowable and sufficient under the sub-paragraph. This provision seems to be a catch 22 remedy to include any other measures not specified in the article which might also be able to protect the domestic and regional industry.

Article 2(3) of the annex also allows for the application of trade remedies, other than those allowed for in article 4 of the annex, if a tripartite member state entered into a trade arrangement with the country under investigation. The Sub-Committee once again has the authority to recommend whether a trade remedy should be applied in accordance with the existing trade arrangement between the countries rather than the remedies available in the Annex 6 to the Draft Agreement.

7. Conclusion

There has been growing international concern about the increased use of trade remedies and safeguards as protectionist trade policy tools. Developing and least developed countries are specifically concerned about the abuse of anti-dumping measures under the auspices of WTO-compliant measures to protect a domestic industry against harm caused by foreign imports. This led to the inclusion of various issues pertaining to anti-dumping measures, subsidies and countervailing duties in the negotiating agenda of the multilateral round of trade negotiations under the Doha Development Agenda. The issues to be addressed include the clarification of the multilateral anti-dumping and countervailing provisions under the applicable WTO agreements, assistance to enhance the ability of developing countries to draft national laws and participate in subsidy and countervailing investigations and creating more meaningful special and differential treatment provisions for developing and least-developed countries.

Trade remedy and safeguard provisions are also becoming more popular in modern regional and bilateral trade agreements. However, there is a great degree of variation among the types of provisions which can be found in different trade agreements, ranging from comprehensive substantive and procedural rules governing the use of anti-dumping measures, countervailing measures and safeguards among member countries to those only referring to the rights of the member countries in terms of the GATT 1994 and the applicable WTO agreement. These provisions have also become more popular in trade agreements among African countries. In the tripartite configuration both the EAC (EAC Treaty, EAC Customs Union Protocol and EAC Customs Union Regulations) and COMESA (COMESA Treaty and the Regulations on Trade Remedies) have detailed requirements member states need to comply with, in certain instances even going further than the requirements set out in the GATT 1994 and WTO agreements; SADC (SADC Trade Protocol) on the other hand has very limited provisions only referring to the rights and obligations of the member countries in terms of the GATT 1994 and the WTO.

The Draft Tripartite Agreement and Annex 6 to this agreement aim at combining the different approaches of the three regional economic communities (RECs), by providing both basic (in the Draft Agreement) and detailed and comprehensive (in Annex 6) requirements member countries will need to adhere to. However, annex 6 differs from the provisions in

the RECs by including measures other than anti-dumping, countervailing and safeguards under the auspices of trade remedies, and is also applicable to trade between member countries and third parties and creates the Sub-Committee on Trade Remedies as a central investigating authority. However, in order for the tripartite member states to be able to utilise the multilateral and regional measures, domestic legislation, knowledge, technical expertise and financial resources are required. Only a limited number of tripartite countries have domestic legislation and regulations in place which allow access to these multilateral and regional measures, while knowledge, technical expertise and the financial ability to implement these measures are lacking in most of the tripartite member states.

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Agreement on Subsidies and Countervailing Measures

COMESA Trade Remedies and Safeguards Regulations

COMESA Treaty

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East African Community Treaty

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Protocol on the Establishment of the East African Customs Union

SADC Trade Protocol

Chapter 5

Services Negotiations under the Tripartite FTA: Issues to consider

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1. Introduction

It is envisaged that the proposed Tripartite Free Trade Area (T-FTA) will not only cover trade in goods, but also trade in services. One of the general objectives stated in Article 3 of the draft Tripartite Agreement is the creation of a large single market which would include the free movement of services. Services negotiations at the tripartite level will however only be addressed in the second phase of the negotiations, together with the other trade related issues of intellectual property rights, competition policy, and trade development and competitiveness. It is also likely that the tripartite services negotiations will be sequenced to take into consideration the outcome and progress of services liberalisation at the regional levels. Due to the varying pace of progress made by member states of the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC), it is difficult to provide a comprehensive analysis on the state of services liberalisation in the tripartite region. For this reason the chapter starts with an analysis of the services liberalisation commitments made by the tripartite member states at the multilateral level since it is the only experience some of these countries have had with services negotiations. This analysis also attempts to set a benchmark for the calculation of 'substantial sectoral coverage' which all services agreements will have to be World Trade Organisation (WTO) compatible.

The chapter takes note of developments in the SADC and COMESA configurations and provides a more in-depth analysis on the services liberalisation commitments made by the EAC member states. Of these three, the EAC is the only configuration that has scheduled binding liberalisation commitments, so no comparison can be drawn between the outcomes of thse regional services negotiations. The chapter therefore compares the process and liberalisation commitments of the EAC with that of the Mercosur member states to put the progress of the African countries into context. The more experience member states have

with services liberalisation processes, the better they can design and implement a larger tripartite strategy.

The tripartite services negotiations will have to take into account what has already been achieved in the markets of COMESA, EAC and SADC. The chapter examines the services provisions in the draft Tripartite Agreement and looks at the services negotiating guidelines that were published in November 2009. The chapter compares the proposed process under the Tripartite FTA with the ongoing processes at the regional levels and highlights some of the challenges member states may encounter. The regional negotiations are taken as the starting point for identifying some challenges on the way forward. It presents suggestions on the sequencing of the negotiations, the manner and degree of liberalisation, the responsibility of the more developed member states, deeper integration in a services market and the administration of information. The chapter concludes with brief recommendations on how member states can prepare for services negotiations at the tripartite level.

2. The multilateral framework

The General Agreement on Trade in Services (GATS) is specifically relevant to a comprehensive analysis on services liberalisation of countries in COMESA, EAC and SADC. The process of negotiating and implementing services liberalisation commitments at the multilateral level is the only experience many of these countries have had with regard to services negotiations. Services negotiations at the bilateral level with the European Union (EU), in the context of the Economic Partnership Agreement (EPA) are in a state of uncertainty while the regional processes of COMESA, EAC and SADC are at different stages of progress. Nevertheless, 20 of the 26 tripartite member states participated in the GATS negotiations and acquired some experience in dealing with services negotiations and the scheduling of commitments.[1] An important feature of the GATS is the flexible framework it provides for countries to make liberalisation commitments in specific services sectors and modes of supply. These specific commitments are legal obligations undertaken by the individual member states, regulating the level of market access provided to foreign services suppliers and the conditions under which they are allowed to operate domestically. These

[1]Countries that are not WTO members have not had any experience in negotiating services and negotiations at the regional level will be their first.

undertakings are recorded in the national schedules of each member state on a sector-by-sector basis and only bind the countries to the extent that they have committed themselves. These schedules of commitments form an integral part of the services liberalisation strategy of a country and a similar process of scheduling will be followed at the regional and bilateral levels. The schedules basically determine how far a country is prepared to liberalise its services industries.

There was no requirement on World Trade Organisation (WTO) members to schedule a minimum number of commitments during the GATS negotiations, but this is different with respect to regional or bilateral negotiations. The GATS provides its own set of criteria for integration between member states; therefore at the regional or bilateral level there will be an obligation on countries to liberalise to a certain threshold, that of 'substantial sectoral coverage'. This threshold has, however, not yet been clearly defined and this provides another reason for the analysis of the GATS schedules; governments must understand how to negotiate services schedules to comply with the international rules set out in the relevant GATS provisions. This analysis is based on GATS Article V; and specifically the requirement that services liberalisation in regional trade agreements demonstrate 'substantial sectoral coverage,' with respect to the number of sectors included, the modes of supply and volume of trade affected. Table 1 provides a summary of the services liberalisation that the tripartite member states have undertaken in the GATS.

Table 1: Liberalisation under GATS

Countries[2]	Sectors committed (out of 12)[3]	Sub-sectors committed (out of 160)[4]	Commit-ments negotiated (out of 1280)[5]	Partial commit-ments made[6]	Full commit-ments without restrictions[7]	Percentage liberalised commit-ments[8]
Angola	3	9	72	13	52	**5.08%**
Botswana	3	20	160	74	54	**10.00%**
Burundi	5	28	224	62	162	**17.5%**
DRC	6	12	96	24	72	**7.50%**
Djibouti	3	30	240	53	63	**9.06%**
Egypt	4	29	232	28	99	**9.92%**
Kenya	5	59	472	195	203	**31.09%**
Lesotho	10	78	624	165	326	**38.36%**
Madagascar	1	4	32	4	12	**1.25%**
Malawi	5	29	232	58	174	**18.13%**
Mauritius	3	28	224	113	110	**17.42%**
Mozambique	1	13	104	26	78	**8.13%**
Namibia	2	3	24	0	24	**1.88%**
Rwanda	4	10	80	4	76	**6.25%**
South Africa	9	91	736	239	345	**45.63%**
Swaziland	3	9	72	0	56	**4.38%**
Tanzania	1	1	8	2	4	**0.47%**
Uganda	2	11	88	42	46	**6.88%**
Zambia	4	16	128	32	96	**10.00%**
Zimbabwe	3	19	152	51	101	**11.88%**
AVERAGE	**3.85**	**25**	**200**	**59.25**	**107.65**	**13.04%**

Source: www.wto.org

In trade negotiations, parties are expected to negotiate in good faith by complying with the relevant WTO rules; for services negotiations this implies that countries must observe the disciplines of GATS Article V. A detailed analysis such as this, breaking down the schedules

[2] Comoros, Ethiopia, Eritrea, Libya, Seychelles and Sudan are not WTO members and therefore have no specific commitments under GATS. Five of these countries – Comoros, Ethiopia, Libya, Seychelles and Sudan – are observer governments which are in various stages of the WTO accession process.

[3] The number of core sectors included in the GATS schedule of each country as defined in MTN.GNS/W/120.

[4] The number of sub-sectors included in the GATS schedule of each country as defined in MTN.GNS/W/120.

[5] The total number of commitments that can be negotiated in services negotiations, in both the market access and national treatment columns and with respect to all four modes of supply.

[6] The number of commitments with limitations. Measures inconsistent with market access and national treatment obligations can be maintained if so inscribed in the schedule. Mode 4 commitments expressed as 'unbound except as indicated in the horizontal section' are included in the calculation of partial commitments, but only if specific exclusions are made the horizontal commitments.

[7] Full commitments made without any restrictions, indicated by an inscription of 'none'.

[8] Percentage of full and partial commitments are expressed as a%age of the total number of possible inscriptions (1280). Partial commitments are included since these will form the baseline for progressive liberalisation.

of commitments by sector, while having regard for the modes of supply in each sub-sector, can help to promote the understanding and compliance with these disciplines. Currently there is no agreed definition of what constitutes 'substantially all trade' in the area of services, and no acceptable way of determining that threshold, but effective communication between negotiating parties on what exactly constitutes 'substantially all trade' can alleviate some uncertainty. For example, in the Cariforum[9] EPA negotiations, initial market access targets were proposed to guide the drafting of the services schedules. The more developed economies in Cariforum were expected to liberalise 75% while the lesser developed economies were expected to liberalise 65% of their sub-sectors.[10] Despite the thresholds that have been proposed in the Cariforum EPA, it can nevertheless be argued that simply considering the number of committed sub-sectors is not sufficient to determine the depth and degree of liberalisation. GATS Article V also refers to the modes of supply, something which is not taken into account in the EU calculation. If the EU approach (that of counting sub-sector lines) is followed, it is possible that parties could be confronted with a situation as illustrated in the extract below:[11]

G. Pipeline transport	**Limitations on market access**	**Limitations on national treatment**
(a) Transportation of fuels (CPC 7131) (b) Transportation of other goods (CPC 7139)	1) Unbound 2) None 3) Unbound 4) Unbound	1) Unbound 2) None 3) Unbound 4) Unbound

In the example above, Mode 1, 3 and 4 were left unbound with only Mode 2 being liberalised. Mode 2 deals exclusively with 'consumption abroad' meaning the service is delivered outside the territory of the party making the commitment. Also, in this mode of supply, countries may only impose restrictive measures affecting their own consumers and not those of other countries on the activities taking place outside of their jurisdictions. Therefore, the effects that Mode 2 commitments will have on foreign suppliers' access are

[9] Refers to the Caribbean Forum of African, Caribbean and Pacific States consisting of 14 member states of the Caricom (Caribbean Community) plus the Dominican Republic.
[10] If considering and counting the number of sub-sectors committed in the Cariforum negotiations, it can be argued that the suggested thresholds were not achieved.
[11] This is an actual extract from the conditional initial offer which South Africa submitted in March 2006.

negligible. In this scenario the transportation of fuels (CPC 7131) and the transportation of other goods (CPC 7139) will count towards the threshold (if using the EU calculation) despite the quality of the commitment. For that reason it is crucial that the depth of the scheduled commitment to which the modes of supply contribute is also considered. So, basically, to comply with GATS Article V, a substantial part of a country's services industry must be scheduled across all modes of supply. Consider, for example, the percentage of commitments made by South Africa, which has the highest number of commitments in the region. According to the method of including the number of sectors *and* modes of supply, South Africa only committed 45.63% of its services industry. Achieving a threshold of between 65% - 75% will not be an easy task, even for a country such as South Africa which has sufficient capacity to deal with the negotiation of trade in services and the effects of the liberalisation.[12]

On average, the COMESA-EAC-SADC countries have scheduled only 13.04% of their services industries. This is a far cry from the expected threshold, and very far from the levels of liberalisation aimed at in the Draft Tripartite Agreement, which goes beyond the EU proposal. Certain thresholds have been noted in the proposed services negotiations under the Tripartite Agreement. The original Annex 12 (November 2009 version)[13] to the Tripartite Agreement refers to mandatory commitments that 'shall' be undertaken in the priority sectors of Business, Communication, Transport, Financial, Tourism, Energy and Construction Services. The threshold for these priority sectors referred to in the Annex is 'a credible level and amount of liberalisation', but the text also makes provision for the possibility of no limitations or restrictions in the priority sectors, with some minimal time-bound exceptions. The idea of limiting restrictions is more in line with the negative list approach, something which will discussed at length in the chapter.[14]

The draft Agreement establishing the COMESA, EAC and SADC Tripartite Free Trade Area, together with its 14 annexes, covers a number of areas that are deemed important for the effective operation of the regional market. Annex 12 of the draft Tripartite Agreement (November 2009 version) deals exclusively with trade in services and sets out the guidelines

[12] If one only calculates the number of sub-sectors committed by South Africa (and leaves out the modes of supply) , the%age of liberalisation will inevitably be higher. South Africa committed 91 of its 160 sub-sectors resulting in liberalisation of 56.88%.

[13] The annex has not been revised together with the main text and the other annexes. See discussion in the paragraph directly below.

[14] See the section on 'The manner of services liberalisation under the Tripartite Agreement' below

countries can use during the first round of services negotiations. However, this Annex 12 – which has the objective to guide member states in the tripartite services negotiations – was not revised in December 2010, when the main agreement and the other annexes were revised. It is likely that the guidelines will have to be reworked based on the outcomes and progress of the regional negotiations in the COMESA, EAC, and SADC. Services negotiations will only proceed once other issues relating to the goods agenda have been finalised. This has been confirmed by Annex 1 to the *Declaration Launching the Negotiations for the Establishment of the Tripartite FTA*, which states in paragraph 2(iii): 'The second phase will cover negotiations on the following areas: trade in services, intellectual property rights, competition policy, and trade development and competitiveness'.

Provision is also made in the original Annex 12 for the six tripartite countries that are not WTO members. According to the text, 'Member States shall extend their commitments under the General Agreement on Trade in Services to all other Member States that are not Members of the World Trade Organisation'. This is not only an expression of how non-WTO members are to be treated but also a clear indication that commitments made under the GATS will be used as the baseline for further services negotiations. It can be seen from Table 1(Liberalisation under GATS) above that countries made varying commitments ranging from fairly liberal to very limited.[15] In terms of the GATS, there was no requirement on WTO member states to schedule a minimum number of commitments;[16] however, they are obliged to enter into successive rounds of negotiation to liberalise trade in services. For example, a country like Tanzania only made commitments in one sub-sector (out of a possible 160 sub-sectors) while South Africa at the other end of the spectrum made commitments in 91 sub-sectors. Another reason why the multilateral dimension is important is the fact that the process under the GATS is the only experience many tripartite member states have had with regard to the liberalisation of trade in services. This is likely to change as countries in SADC and COMESA also take on additional regional commitments, but only

[15] Roy (2009) suggests that four key determinants (democracy, relative power, relative endowments and the negotiating process) explain why governments undertook varying commitments. One can add to this argument that many of the African member states liberalised offensive sectors, particularly tourism, with the hope of attracting more foreign investment.

[16] This was the case in the Uruguay Round regardless of whether a member state was a developed, developing or least developed country. It was long after the Uruguay round, only in 2003, that the WTO Council for Trade in Services adopted the 'Modalities for the special treatment for least developed country members in the negotiation on trade in services (TN/S/13)'. Flexibility is provided for LDCs by requiring them to liberalise fewer sectors and fewer types of transactions, and by progressively extending market access in line with their development situation.

time will tell how these processes will unfold. If regional services liberalisation is concluded in all three configurations (COMESA, EAC and SADC) before services negotiations under the Tripartite Agreement start, then it may be possible to take the outcomes of these regional processes as baseline for tripartite negotiations.

3. Ongoing negotiations at the multilateral level

Least developed countries (LDCs) are not expected to participate in the ongoing GATS negotiations. The WTO Ministerial Decision adopted on 18 December 2005[17] recognised the particular economic situation of LDCs and the difficulties they face, thereby acknowledging that these countries were not expected to undertake new commitments in the context of the progressive liberalisation under GATS. All other WTO member states, however, were urged to participate actively in the negotiations to achieve higher levels of liberalisation. Few tripartite member states participated, with only Egypt, Kenya, Mauritius and South Africa tabling initial offers in the context of the ongoing GATS negotiations. Participation in general has been poor with only 71 initial offers and 31 revised offers having been submitted in these ongoing rounds of services negotiations. It is unlikely that the countries participating in the ongoing negotiations will undertake bold commitments; instead countries can be expected to publish and commit reforms already undertaken at the domestic level. It can be assumed that countries will rather leave the more ambitious and far-reaching commitments for the regional or bilateral levels. Firstly, it is expected of countries involved in regional or bilateral negotiations to comply with the requirements of GATS Article V and therefore they will have to negotiate 'substantial' liberalisation commitments in line with certain thresholds; and secondly, all parties have to participate in these negotiations, something which increases the negotiating leverage.

Countries are aware that the approach taken at the multilateral level will have a regional and bilateral impact because commitments made under GATS are for the benefit of all WTO members. The areas liberalised at the multilateral level will not be the subject of regional negotiations since these already apply to all negotiating parties that are WTO members. Tripartite member states that are not WTO members will not receive market access and national treatment benefits undertaken at the WTO; however, tripartite member states are

[17] See WT/MIN(05)/DEC.

obliged to extend their commitments made under GATS to all other member states that are not WTO members. Therefore, the further the degree of liberalisation at the multilateral level, the less liberalisation space a country will have in regional and bilateral negotiations. This fact has been recognised by some countries and is arguably a reason for the cautious approach taken in the ongoing multilateral negotiations.

4. Progress at the SADC level

The importance of developing trade in services is recognized in Article 23 of the SADC Protocol on Trade, which requires member states to adopt policies and to implement measures in accordance with their GATS obligations with the view to liberalise trade in services. Discussions to address trade in services in line with Article 23 commenced in September 1999 when the SADC Committee of Trade and Industry decided that priority should be given to elaborate a regional strategy to liberalise trade in services. A SADC Trade Negotiations Forum meeting to implement the mandate was held shortly afterwards in June 2000 in Lesotho where the Maseru action plan was adopted. Six core services sectors were identified which would be the subject of the initial SADC focus. The priority services sectors are transport, communications, finance, construction, tourism and energy. Incidentally, these are also the priority sectors identified by the Tripartite Agreement, together with the sector of business (including professional) services. These are considered as the key services sectors to support general economic development in SADC, while the first three (transport, communications and finance) are also regarded as essential to facilitate the physical trading of goods.

Although the process was initiated more than 10 years ago, there is still no signed protocol on trade in services. According to the preamble of the draft Protocol on Trade in Services, the contracting parties seek to achieve coherence in the region's intra-regional, inter-regional and multilateral commitments and negotiations on trade in services. The objective is to follow an incremental liberalisation process to eliminate substantially all discriminatory measures in order to enhance competitiveness and to ensure consistency between the implementation of this and various other SADC protocols on sector specific issues. The development of a coherent regional approach to services trade liberalisation potentially

carries significant payoffs. A regional vision can help achieve greater transparency through the development of rules that require mutual openness from all the parties. A regional approach can also increase the credibility of domestic policy choices through the adoption of legally binding commitments, and the creation of efficient regulation through rules that favour the adoption of international best practices.

The Draft Protocol is being circulated amongst member states for approval after cosmetic changes were made to the Most Favoured Nation (MFN) clause. The purpose of the MFN clause is to ensure that a member state's service providers are never disadvantaged if another member decides to negotiate a better regime for services trade with a third party. Nothing prevents a member state from entering into new preferential services agreements with third parties provided such agreements do not impede or frustrate the objectives of the regional protocol. The protocol only obliges a member to inform other member states of its intention to negotiate such an agreement and to afford them an opportunity to negotiate the preferences granted therein on a reciprocal basis. If, however, some member states conclude a preferential agreement in, for example, the SADC-EPA context prior to the adoption of this protocol, those member states must afford reasonable opportunity to the other member states to negotiate the preferences granted therein on a reciprocal basis. Despite this obligation, member states may maintain measures which are inconsistent with the MFN obligation provided those measures are listed in the MFN exemption list. The agreed list of MFN exemptions that will be annexed to the protocol must be reviewed by the Trade Negotiating Forum for Services on a regular basis with a view to ultimately eliminate them.

Even after the protocol is signed, major work still lies ahead for the member states. Negotiating a services protocol has additional complexities that have to be dealt with, the most important one being the schedule or list of commitments. After all, preferences are not granted through tariff concessions, but through discriminatory restrictions on the movement of labour and capital and a variety of domestic regulations such as technical standards, licensing requirements and procedures as well as professional qualification requirements. Judging from the length of time it took other configurations to complete the whole process, a long road lies ahead.[18] However, it is necessary for the members to find

[18] For example, the ASEAN and Mercosur configurations, both consisting mainly of developing countries took many years to negotiate trade in services. In the ASEAN configuration, the ASEAN Framework Agreement on

ways of fast-tracking this process, particularly if the supra-regional negotiations at the tripartite level lie ahead.

5. Progress at the COMESA level

The theoretical premise of a common market is to ensure the free movement of goods, services, capital and labour. Article 6(e) of the COMESA Treaty states as one of its objectives the removal of 'obstacles to the free movement of persons, labour and services, right of establishment for investors and right of residence within the Common Market'. More specifically, COMESA member states agree to adopt the necessary measures to progressively achieve the free movement of persons, labour and services as well as the right of establishment and residence of COMESA citizens (Article 164). In the area of trade in services (Part IV of the Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence), member states agree to remove restrictions on services trade in accordance with a programme to be adopted by the council. The target date was set for 2004 but it was only in 2009 that the programme actually started gaining momentum. On that basis a set of trade in services regulations was prepared by legal and trade experts and adopted by the COMESA Council in June 2009. The COMESA Regulations on Trade in Services provide a framework for the liberalisation of trade in services and a set of rules to guide the process of domestic reform. According to Article 12(1) of the COMESA Treaty, regulations must be published in the official COMESA Gazette and will enter into force on the date of publication unless otherwise specified. The regulations were published in June 2009 and adopted by the COMESA Council..

A Committee on Trade in Services was also established under the regulations in order to oversee the liberalisation and negotiating process. The first meeting of this committee was held in September 2009 where the rules of procedures[19] and a set of guidelines on the negotiating of services and the preparation of the related services schedules were adopted. A roadmap was also adopted in terms of which member states would submit their offers and

Trade in Services was signed in 1995. A number of negotiating rounds have been held since with subsequent rounds planned until the end of 2015. For more information on the Mercosur process, see the section on 'Comparing the services obligations of the regional agreements' below.

[19] The rules provides for the composition of the committee, the conduct of meetings and other incidental matters.

requests by February 2010 and start negotiations on the initial offers and requests in May 2010. This included an indicative list of priority sectors which would be confirmed once member states completed their internal consultation processes.

At the second meeting of the Committee on Trade in Services held in May 2010, four priority sectors (communications, finance, transport, and tourism services) were identified to be the focus of the first round of negotiations. Despite this initial focus, nothing would prevent member states from liberalising and taking commitments in additional sectors. Similarly to the original Annex 12 (November 2009 version) on the guidelines of the tripartite services negotiations, the negotiating guidelines adopted by COMESA provide that the priority sector shall, to the extent possible, not have any limitations. Apparently this is to ensure deeper and broader liberalisation than undertaken at the multilateral level and additionally to comply with the 'substantial sectoral coverage' requirement of GATS Article V. in order to attain a credible amount of liberalisation.[20] COMESA member states were accordingly required to undertake national consultations and prepare draft schedules of commitments which would be the starting point for text based negotiations on the liberalisation of the four priority sectors.

The Committee on Trade in Services held a third meeting in May 2011 where the Secretariat introduced the methodology and matrices that will be used during the services negotiations. It was agreed that the draft schedules prepared by the member states and the matrices would form the basis of discussions with the countries' stakeholders to validate and improve their schedules of specific commitments. Member states are expected to carry out these national consultations and submit the improved schedules to the Secretariat. Negotiations will take place after the revised schedules have been circulated amongst the member states.

6. Progress at the EAC level

Of the three configurations, the EAC is furthest ahead in terms of progress and is the only one to have drafted a comprehensive schedule of services commitments. It is simpler to negotiate services chapters if fewer countries are involved, a challenge which might constrain the negotiations at the tripartite level. The larger the configuration the better the

[20] See Report CS/CM/XXIX/2 of the 29th Meeting of the COMESA Council of Ministers.

coordination and political persuasion must be to successfully conduct services negotiations. Any government has the potential to obstruct the process and delay the entire negotiations. The complication that may arise from the large number of countries involved in the tripartite negotiations has to be taken into account.

In accordance with Articles 76 and 104 of the EAC Treaty, the EAC Common Market Protocol was concluded to give effect to the establishment of a common market which would have as its objectives the free movement of labour, goods, services, capital and the right of establishment. This protocol was ratified by member states at the end of April 2010, and amongst other things makes provision for the progressive implementation of the free movement of services. Member states agreed that this had to be done gradually in line with the Schedule on Progressive Liberalisation, which would be annexed to the protocol to form an integral part of the agreement. In support of this progressive approach, member states addressed the seven priority sectors of business, communication, distribution, educational, finance, tourism and transport services in the first round of the services negotiations. As provided for in Article 23 (2) of the protocol, the idea is to address the remaining sectors in subsequent negotiations. It is the responsibility of the EAC Council to issues directives on the modalities for further rounds of negotiation.

In line with Article 23(1) of the EAC Common Market Protocol, member states have agreed to certain liberalisation commitments in the seven priority sectors and attached these to the protocol as Annex V. Based on the positive list approach and the W/120 classification systems utilised in the GATS, each of the EAC member states undertook liberalisation commitments, some which are linked to an 'elimination date'. Commitments made by each member state will take effect on the preferred date specified by them, which varies between 2010 and 2015. It can be assumed that measures indicating an elimination date of 2010 would take immediate effect and be already phased in. It is the responsibility of the member states to ensure that their domestic laws and regulations conform to what has been agreed at the regional level. This will be an ongoing process and countries that have indicated future elimination dates must also ensure that the commitments are met and complied with in the domestic sphere.

If the same analysis is used as in Table 1 to determine the progress made at the multilateral level, the picture presented in terms of the GATS commitments changes quite significantly:

Table 2: Liberalisation under the EAC

Countries	Sectors committed (out of 7)[21]	Sub-sectors committed (out of 140)[22]	Commit-ments negotiated (out of 1120)[23]	Partial commit-ments made[24]	Full commit-ments without restrictions[25]	Percentage liberalised commit-ments[26]
Burundi	7	89	712	143	514	**58.66%**
Kenya	7	67	536	159	311	**41.96%**
Rwanda	7	105	840	241	585	**73.75%**
Tanzania	7	56	448	130	289	**37.41%**
Uganda	7	102	816	244	558	**71.61%**
AVERAGE	7	83.8	670.4	183.4	451.4	**56.68%**

Rwanda and Uganda which made modest commitments at the multilateral level, undertook extensive liberalisation commitments during the regional negotiations. Both countries made deep and sweeping commitments in all of the seven sectors and across all four modes of supply. This is a sign that smaller economies are realising the important contribution services liberalisation can make to their development. In a sense these countries are testing the water to see what effect such substantial liberalisation can have on their economies. It also shows that these countries are willing to take more risks and liberalise further in the regional context when similar negotiating partners are involved, as opposed to the bilateral or multilateral negotiations with more developed negotiating partners. The more advanced economies of Kenya and Tanzania instead opted for a more cautious approach in offering fewer sub-sectors (67 and 56 sub-sectors respectively) for liberalisation. This will likely give

[21] The number of core sectors included in the first round of services negotiations as per the guidelines including business, communication, distribution, educational, finance, tourism and transport services.
[22] The number of sub-sectors considered by the member states in the seven priority sectors. According to the W/120 classification system used in the GATS negotiations, the total number of sub-sectors is 140 if only the above seven core sectors are considered.
[23] The total number of commitments that can be negotiated in services negotiations, in both the market access and national treatment columns and with respect to all four modes of supply.
[24] The number of commitments with limitations. Mode 4 commitments expressed as 'unbound except as indicated in the Schedule on the Free Movement of Workers' are included in the calculation of partial commitments.
[25] Full commitments made without any restrictions, indicated by an inscription of 'none'.
[26] Percentage of full and partial commitments expressed as a%age of the total number of possible inscriptions (1120).

them more options in later negotiations, including the tripartite negotiations. It can be argued that the outcome of the regional negotiations of COMESA, EAC and SADC will play an important part in the tripartite negotiations. An economy with greater offensive interests such as Kenya will be careful to liberalise areas in which it might have a competitive advantage in the greater region. Kenya liberalised 41.96% in the regional negotiations in contrast to the 31.09% liberalised at the multilateral level. It can be assumed that South Africa will take a similar kind of approach in the SADC services negotiations.

Countries such as Rwanda, Uganda and even Burundi have instead liberalised key sectors, arguably with the hope of stimulating investment, activity and competition in these areas. These three countries fully liberalised the telecommunications sector, including the audio-visual sector, which traditionally proved to be a very sensitive area. They also fully liberalised the education sector and large parts of the professional, financial and transport services sectors. Burundi, Rwanda, and Kenya fully liberalised their tourism sectors, but these undertakings are similar to what has been committed during the GATS negotiations. Countries cannot undertake more protective (or restrictive) measures than their original GATS schedules since these commitments are assumed as the baseline for regional negotiations.[27]

Schedules of services commitments typically include a horizontal section where governments address issues of a cross-cutting nature that apply to all scheduled sectors, such as the movement of persons. The EAC intentionally omitted the horizontal section and instead decided to deal with these issues elsewhere. In addition to Annex V (schedule of commitments on the liberalisation of services), the protocol also includes annexes on the Movement of Persons (Annex I), the Movement of Workers (Annex II), the Right of

[27] It is possible for countries to change scheduled commitments already made at the multilateral level by following the procedures set out in GATS Article XXI. According to the provision, a country wishing to modify or withdraw any commitments in its schedules can do so three years after the commitment entered into force. The country must notify its intention to change the commitment at least three months before implementing the change. This will give any WTO member affected by the change an opportunity to be identified as an affected member, and to notify their claim of interest for compensation. Countries will then enter into a consultation process to determine the necessary compensatory adjustments due to the affected country. Reaching an agreement on compensation is undoubtedly a critical aspect of the process but no explanation is provided on the nature of compensation or the manner in which it should be determined. The compensatory calculation is further complicated by a lack of historical precedents on the use of GATS Article XXI. To date only two WTO members have invoked the procedures of GATS Article XXI. The EU submitted notifications to accommodate the harmonisation of the additional country schedules upon enlargement of the community, while the United States withdrew its GATS commitments made on gambling and betting services after a WTO dispute ruling in favour of Antigua.

Establishment (Annex III), the Right of Residence (Annex IV) and the Movement of Capital (Annex VI). As stated in Article 52 of the protocol, these 'annexes form an integral part of the Protocol'. For the purposes of services liberalisation, Annex II on the Free Movement of Workers is the most relevant, since Mode 4 (movement of natural persons) inscriptions frequently refer back to this annex. Under GATS, Mode 4 inscriptions typically read 'Unbound, except as indicated in the horizontal section' implying that measures regulating the movement of natural persons are set out under the horizontal section. In the case of the EAC a separate set of regulations was devised to deal exclusively with the movement of workers, their spouses and children.

Annex II basically sets out the requirements workers must comply with when entering the territory of another member state and the procedure for acquiring a work permit. In accordance with Article 10 of the EAC Common Market Protocol the purpose of the annex is to enable workers of the member states to move around freely in the EAC to apply and take up employment without discrimination. To this effect, Article 13 of Annex II guarantees equal treatment for the nationals of member states with regard to the a) terms and conditions of employment, b) access to employment, c) occupational health and safety, d) contribution to a social security scheme, e) access to vocational training, f) freedom of association and the right to collective bargaining, and g) access to dispute resolution. It covers access to employment opportunities (market access) as well as equal treatment after the employment has been taken up (national treatment). Provision is also made for the gradual implementation in line with the schedule for the free movement of workers. The schedule lists the various categories of workers together with the preferred date of implementation as indicated by the member states. The implementation date varies between 2010 and 2015 but is not necessarily linked to the elimination date indicated in the schedule for the liberalisation of services as stated in Annex V.

The approach to comprehensively address issues of a cross-cutting nature in the annexes is a notable improvement on the horizontal section generally used in the GATS schedules. In the horizontal section countries typically undertake that foreign employment be agreed on by the contracting parties and approved by government (Kenya), or lists the permitted occupations and requirements for entry (Burundi). Other member states (Rwanda, Tanzania and Uganda) chose to omit the horizontal section and instead dealt with such exceptions in the schedules themselves. The improved annexes are far more comprehensive and avoid

ambiguity and uncertainty by providing greater details and more information. Closely related is the annex on the Free Movement of Persons (Annex I) which applies to visitors, medical tourists, persons in transit and students. Measures dealing with self-employed persons, companies or firms which seek to undertake economic activities in other member states are contained in Annex III on the Right of Establishment.

7. Progress at the EPA level

Apart from trade negotiations at the regional level, many of the COMESA, EAC and SADC member states are also in the process of negotiating bilateral EPAs with the EU. The process which started in 2002 has been fraught with difficulties and it is uncertain when the negotiations will be concluded. Although the inclusion of new generation trade issues such as services is not a requisite for the EPAs to be WTO compatible, the EU is insisting on negotiating binding obligations as part of the broader development component. Nevertheless, member states that initialled the interim EPA agreed in principle to continue negotiations on trade in services through the inclusion of a 'rendezvous clause' which deals with the outstanding issues. All five EAC member states initialled the interim EPA which included a chapter entitled 'Areas for future negotiation'. In Article 37(d) parties agree to continue negotiations on trade in services. The EAC was the only configuration in Africa which negotiated the agreement as a coherent configuration.[28] The member states of SADC split into the SADC EPA and Eastern and Southern Africa (ESA) EPA while the COMESA member states were split between the SADC EPA, ESA EPA and EAC EPA.

Of the 11 ESA EPA members, only six countries (Comoros, Madagascar, Mauritius, Seychelles, Zambia and Zimbabwe) initialled ESA interim EPA. The ESA EPA text also contained a similar 'rendezvous clause' for future negotiations which included trade in services. As for the SADC EPA it is currently only Botswana, Lesotho and Swaziland that have agreed to continue negotiating trade in services with the EU. What makes the situation in the SADC EPA unique, is the fact that Namibia is the only initialling African Caribbean and Pacific (ACP) country that opted out of the services part of the negotiations. Strangely enough, despite the opposition to include a new generation trade agenda in the EPAs, none

[28] The EAC only started to negotiate as a coherent group in 2007. Before that Tanzania was negotiating as part of the SADC EPA, while the other EAC member states were negotiating as part of the ESA EPA configuration.

of the other ACP countries took that route. It can of course be argued that Namibia went further than any other ACP country by also managing to attach a list of concerns (also known as the contentious issues) to the interim EPA. New generation trade issues (including services) was, however, not part of these concerns because Namibia only initialled the goods chapter of the interim EPA. Namibia's name was deleted from Article 67 of the interim EPA which dealt with the ongoing negotiations on trade in services, investment, competition and government procurement. This really serves as confirmation that the inclusion of trade in services is not a requirement for the WTO compatibility of bilateral agreements.

The 'rendezvous clause' in the interim SADC EPA is the most comprehensive of all three EPAs and includes detailed guidelines on the manner in which services are to be negotiated. This is in contrast to the requirements in the ESA EPA and EAC EPA which is simply an undertaking to continue with efforts to negotiate trade in services. The framework for the second phase of the negotiations is contained in Article 67 of the SADC interim EPA and requires the initialling countries to start work towards liberalising one services sector. The deadline for concluding the 'liberalisation schedule for one services sector' was agreed to happen 'no later than 31 December 2008'. It was further agreed 'to negotiate progressive liberalisation with substantial sectoral coverage within a period of three years following the conclusion of the full EPA'. The current focus of the EPAs is on finalising the goods agenda and addressing the list of contentious issues, and therefore services negotiations in the context of the EPA have not started. This suspension can prove valuable to the region as this gives countries the opportunity to negotiate services at the regional level first before engaging the EU. Services negotiations at the regional level will also allow countries to become familiar with the regulatory frameworks, establish meaningful communication channels with the relevant stakeholders and give them room to devise an effective liberalisation strategy.

It is possible for a country to have more than one services liberalisation agreement in place; there are no rules placing a maximum threshold on services agreements. The only obligation countries have is to comply with the requirements as set out in GATS Article V. A case in point is Chile which currently has 15 services agreements in place. It will, however, become more complicated to administer multiple services agreements, especially if countries are employing the positive list approach.

Table 3: Comparing the services obligations of the regional agreements

	WTO	SADC	COMESA	EAC
Scope and application	X	X	X	X
Most Favoured Nation	X	X	X	X
Transparency	X	X	X	X
Market access	X	X	X	
National treatment	X	X	X	X
Domestic regulation	X	X	X	X
Specific commitments	X	X	X	X
Additional commitments	X		X	
Mutual recognition	X	X	X	X
Subsidies	X	X		X
Standstill clause		X		X
Special and Differential treatment / flexibility	X	X	X	
Anti-competitive business practices	X	X	X	X
Monopolies and exclusive suppliers	X	X	X	
General and security exceptions	X	X	X	X
Emergency safeguard measures	X	X	X	
Denial of benefits	X	X		
Promotion of trade in services		X	X	
Negotiations with third parties (MFN clause)		X	X	X
Modification of schedules	X		X	
Excluding government procurement	X	X	X	
Establishment of enquiry points	X	X	X	
Institutional provisions	X	X	X	X
Dispute settlement mechanism	X	X	X	X
Development of Annexes	X	X	X	X

As seen from the comparison, both the SADC Protocol and the COMESA regulations on trade in services are largely based on GATS rules and provisions. One expects this inclusive approach was taken for the benefit of non-WTO members to provide them with a comprehensive framework for the liberalisation of services. This is in contrast to the leaner

approach taken by the EAC where all member states are already parties to GATS. The EAC does not have a separate set of regulations dealing with trade in services, but a services chapter is included in the main Protocol on the Establishment of the EAC Common Market. It deals with some basic issues such as the scope and application, mutual recognition, domestic regulation, national treatment and certain exceptions. However, by taking such a concise approach, important issues may be neglected. For example, the EAC services chapter does not mention market access to deal with the entry of foreign suppliers, even though a provision on national treatment is included. These two issues usually go hand in hand, and judging from the schedule[29] as attached to the EAC Protocol as Annex V, this seems like a glaring omission. Other important services issues such as subsidies, anti-competitive behaviour and negotiations with third parties are not specifically dealt with in the services chapter, but are elsewhere included in the main protocol. Where nothing in the SADC Protocol regulations prevents member states from using subsidies in the area of trade in services, EAC member states are prohibited from using subsidies which distort or threaten to distort competition.[30] As the EAC Protocol deal with goods and services trade, it can be questioned whether this undertaking refers to both or only to trade in goods. This ambiguity points to the dangers of integrating a concise services chapter into a wide-ranging protocol. The COMESA regulations are silent on subsidies – so it can also be questioned which agreement will take preference for countries that are signatories of both the EAC and COMESA agreements. Under the Tripartite agreement, potential conflict is clarified in Article 38(4): 'In the event of inconsistency or a conflict between this Agreement and the treaties and instruments of COMESA, EAC and SADC, this Agreement shall prevail to the extent of the inconsistency or conflict'.

The SADC Protocol and COMESA regulations confirm adherence to GATS disciplines and explicitly undertake to progressively liberalise in conformity with GATS Article V. The EAC Protocol does not mention the GATS, most likely because all five EAC member states are WTO members – something which is not the case with the SADC and COMESA member states. No specific liberalisation threshold has been agreed by the EAC member states, except that implementation must be progressive in accordance with the schedules on the progressive liberalisation of services as annexed to the protocol.

[29] The schedules contain both market access and national treatment limitations.
[30] Even if prohibited subsidies apply to trade in services, it can still be argued that member states can exclude subsidies from the operation of the article if so specified in the services schedules.

Perhaps more far-reaching are the undertakings referring to a 'standstill' of the services sectors. SADC member states are not allowed to introduce new or more discriminatory measures during the negotiations. EAC member states also agree to refrain from introducing new restrictions on the provision of services. The COMESA regulations avoid reference to a standstill clause and state that member states must strive to achieve progressively higher levels of liberalisation in each successive negotiating round. Barriers to services are created and maintained by domestic legislation and regulations; therefore the reference to the prohibition of new or more discriminatory measures is included to control the loading of additional discriminatory legislation. However, the standstill clause emerged as a contentious issue in the SADC EPA negotiations as countries argued that the prohibition on new or more discriminatory measures 'in all sectors' effectively amounts to the immediate liberalisation of country's services industry. This is in contrast to GATS where it is at the discretion of the parties which sectors are offered for liberalisation. The crucial difference here is the scope – the GATS 'standstill' only encompasses the specific sectors that have been committed, while the 'standstill' in the SADC Interim EPA spans all services sectors. On a literal reading of this provision, parties to the SADC interim EPA will not be able to introduce any additional or new domestic legislation that deny market access for foreign suppliers or discriminate against them in any of the services sectors, whether the services sectors have been committed or not. It can be argued that the approach taken in SADC and the EAC is more in line with the provision in the SADC Interim EPA by limiting the policy space of member states to take protectionist measures. Both the provisions of SADC and COMESA are rather vague on the effect or operation of the standstill clause. It is nevertheless an important issue to highlight, as the approach taken to curb new protectionist measures can have significant consequences.

None of the regional configurations prohibits subsequent services negotiations with third parties. The SADC Protocol and COMESA regulations have similar provisions allowing for the conclusion of preferential agreements in accordance with GATS Article V which include the possibility of extending such preferences to member states on a reciprocal basis. The EAC Protocol does not contain a specific reference to the negotiating of services agreements with third parties but refers in general to Article 37 of the Protocol on the Establishment of the EAC Customs Union. However, the Customs Union Protocol only deals with trade in goods. A process is stipulated in Article 37 on how to deal with

subsequent trade agreements but it is not clear whether this also refers to the negotiating of trade in services.

Services negotiations are not only about liberalisation but also about increasing the transparency of rules and regulations affecting trade in services. GATS Article III, dealing exclusively with transparency issues, places three main obligations on the member countries: 1) publish all relevant laws and regulations of general application; 2) notify any new, or any changes to these laws and regulations to the Council for Trade in Services; and 3) duly administer and update such measures. To assist with the administration of the laws and regulations, each WTO member is required to establish an enquiry point and notify it to the Council for Trade in Services. However, by June 2011, only 13 countries in COMESA, EAC and SADC had notified their enquiry points. Angola, Burundi, Egypt, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, South Africa, Uganda, Zambia and Zimbabwe were the only countries that made notifications under GATS Article III:4. Both the SADC Protocol and the COMESA regulations obliged the establishment of national enquiry points to facilitate communication and exchange information between member states. The COMESA regulations go one step further by also enabling services providers to have direct access to these enquiry points. Under the SADC Protocol, requests for information would have to be channelled through the providers' own government. The EAC Protocol provides for the right of partner states to request information on measures of general application, but does not specifically mention the creation of enquiry points. Looking ahead, effective enquiry points to organise the increasing amount of regulatory information will become indispensible, especially in the larger tripartite configuration.

All three sets of regulations provide for dispute settlement procedures. The EAC and COMESA utilises the dispute settlement mechanisms already in place under the EAC Treaty and the COMESA Treaty. The SADC Protocol on Services proposes a sui generis set of dispute settlement procedures specifically aimed at settling trade in services disputes. An annex is attached to the SADC Protocol specifically dealing with issues such as consultations, the establishment of the panel of judges, and other procedural and institutional issues. A ban is placed on forum shopping within SADC by preventing member states to invoke another dispute settlement procedure if the mechanism provided for in the services protocol is elected (Article 2 of Annex 1 on the SADC Protocol on Trade in Services).

When dealing with domestic regulation, countries typically undertake that measures affecting trade in services will be administered in a reasonable, objective and impartial manner. In line with GATS Article VI this guarantee is also given in all regional and bilateral agreements. Member states in all three regional configurations give the same standards of reasonability, objectivity and impartiality. SADC and COMESA member states, however, go one step further by reiterating the obligations in GATS Article VI: 2(a) by mandating the establishment of special tribunals to review administrative decisions affecting trade in services.

All three regional agreements are closely based on the GATS and many provisions are similar to those of the GATS. One can argue that this approach has been followed for the benefit of the non-WTO members in SADC and COMESA. There is one area, however, where SADC and COMESA member states venture beyond the disciplines of GATS. Article 18 of the SADC Protocol on Trade in Services concerns the 'promotion of trade and investment in services' and Article 13 of the COMESA Regulations refers to 'cooperation and development', both of which have no basis in the GATS. These provisions make an effort to promote an attractive and stable environment for the supply of services through a number of measures. These include mechanisms to identify and disseminate information on business opportunities, the development of model laws and regulations, the introduction of simplified administrative procedures, as well as the development of mechanisms for joint investment. The SADC Trade Negotiating Forum on trade in services must establish the necessary infrastructure for such steps within three years while the COMESA Committee on trade in services is given five years to complete its proposal. Additionally, the COMESA regulations include a unique provision specifically dealing with the simplification of procedures. COMESA member states are obliged to examine the procedures and formalities applicable to services and simplify those that are overly complicated. The provision is not clear on when administrative procedures are regarded as 'sufficiently simple', but it points to the intention of the member states to simplify and reform onerous domestic regulation.

8. Comparison to the Mercosur process

In 1991 Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Asunción with the objective of establishing a common market to allow for the free movement of goods, services and factors of production. Trade between members of the bloc known as Mercosur, consisted mainly of goods while the liberalisation of trade in services raised complex and sensitive issues at a time when there was not sufficient expertise or political will to address them (Gari 2006). Issues such as tariff elimination, the common external tariff and the institutional structure to establish a customs union enjoyed preference and it was only in 1997 that the framework document to liberalise trade in services was signed.[31] Although the Montevideo Protocol on Services was signed by the Mercosur members in 1997 it was decided that the protocol would not be sent for legislative approval until the texts of the sectoral annexes and the lists of specific commitments had been completed. One assumes that this decision was taken in order to comply with the requirements of GATS Article V. The ratification process was fraught with delays before it finally entered into force in December 2005. Argentina, Brazil and Uruguay deposited their instruments of ratification to fulfil the procedural obligations while Paraguay is still required to ratify the protocol.[32]

The ultimate goal of the Montevideo Protocol is to phase out restrictions on trade in services over a ten-year period, beginning from the date of entry into force.[33] Further liberalisation is to be progressive with annual negotiating rounds being incorporated in the schedule of specific commitments. In line with the multilateral process conducted under GATS, Mercosur members opted for a positive list approach whereby the liberalisation commitments only apply to the listed sub-sectors and modes. All the Mercosur member states included GATS plus commitments in their initial offers. However, these initial regional commitments made in terms of the Montevideo Protocol were modest with only slight improvements mostly in the professional and transport services sectors. It has to be kept in mind that only the initial commitments as agreed in 1998 by the Mercosur member states

[31] Another explanation for the delay in reaching an agreement put forward by Mercosur officials was the novelty of the issues and lack of experience on how to deal with them. See Gari (2006: 9).
[32] The Montevideo Protocol required only three member states to deposit their instruments of ratification for the protocol to enter into force.
[33] See Article XIX of the Montevideo Protocol. Pursuant to GATS Article V:7, the Montevideo Protocol on Trade in Services was notified to the Council for Trade in Services on 5 December 2006.

have entered into force which explains the lack of enhanced liberalisation.[34] Since then there have been six negotiating rounds to expand the scope of liberalisation, but these additional commitments are not yet binding. The commitments made in these six rounds have been consolidated and approved by the Council of the Common Market (CMC)[35], but must be domestically incorporated before they can enter into force and become effective. Article XXVII of the Montevideo Protocol states that the schedules of specific commitments must be incorporated into the national legal system in accordance with the procedures laid down in each country. It remains to be seen how long the Mercosur member states will take to domestically incorporate the improved undertakings. Shortly after consolidation the Montevideo Protocol was notified to the WTO in December 2006.

The results of the later negotiating rounds were inspiring, with the Mercosur countries making liberal and comprehensive strides beyond their initial commitments. Member states undertook liberalisation commitments in all of the core services sectors (except for the last category 'Services not included elsewhere'), the scope and depth of which clearly show the commitment of Mercosur to build a common market for services trade.[36] Their efforts are in line with GATS Article V which requires substantial sectoral coverage regarding the number of sectors, the modes of supply and volume of trade affected. Mercosur member states have included many of the 160 sub-sectors and have in some instances gone further than the W120 classification list. They have also expanded the horizontal section by including additional categories of professionals which will be exempted from the strict Mode 4 restrictions.[37]

Mercosur is making good progress to complete its liberalisation process by the deadline of 2015. The Montevideo Protocol entered into force in December 2005 and it was agreed to complete the liberalisation process within 10 years of that date. In order to maintain the momentum, the regional bloc recently adopted a roadmap with directives to guide the countries through the final stages of liberalisation.[38] The work plan ahead consisted of a

[34] Brazil has also domestically adopted the first round of negotiations in terms of Decreto Legislativo 926/2005 which expanded its offer in the sector of telecommunications.
[35] See Mercosur/CMC/Dec. N° 01/06.
[36] Besides the specific commitments, the protocol is also supplemented by four annexes specifically addressing the movement of natural persons, financial services, land and water transport and air transport.
[37] As a rule, no commitments are made in Mode 4 (the inscription frequently reads 'unbound except as indicated in the horizontal section') but certain types of professionals are allowed to supply their services if there is compliance with the requirements inscribed in the horizontal section.
[38] See Mercosur/CMC/Dec. N° 49/08.

diagnosis of the current situation, defining the areas where no major difficulties exist, identifying those sectors more sensitive to liberalisation, and determining the regulatory frameworks to be harmonised. These directives are regularly reviewed and monitored to ensure member states stay on track. The latest reaffirmation of their commitment to the liberalisation process and target deadline was made in December 2010.[39]

Using the same approach as in Tables I and II, this is the threshold to which the Mercosur member states liberalised their services industries:

Table 4: Liberalisation under Mercosur

Countries	Sectors committed (out of 7)[40]	Sub-sectors committed [41]	Commit-ments negotiated [42]	Partial commit-ments made[43]	Full commit-ments without restrictions[44]	Percentage liberalised commit-ments[45]
Argentina	11	191	1528	573	735	**85.60%**
Brazil	11	161	1288	444	623	**82.84%**
Paraguay	11	160	1312	210	249	**34.98%**
Uruguay	11	186	1488	441	468	**61.09%**
AVERAGE	**11**	**175.5**	**1404**	**417**	**518.75**	**66.13%**

Member states closely followed the W/120 Classification system, but in many instances went beyond the traditional classification and included additional sub-sectors of interest.[46] New categories were created in the sectors of communication, financial (particularly insurance), transport and cultural services. At the time of the services negotiation in the Uruguay Round, it was unclear to most of the developing world exactly what services liberalisation entailed and how it should be implemented. Few countries included additional sub-sectors

[39] See Mercosur/CMC/Dec. N° 54/10.
[40] The number of core sectors included all rounds of services negotiations.
[41] The number of sub-sectors considered by the member states. However, Mercosur member states went beyond the classification of the W/120 classification system and included additional sub-sectors. This explains why member states were able to commit more than the standard 160 sub-sectors traditionally used.
[42] The total number of commitments that can be negotiated in services negotiations, in both the market access and national treatment columns and with respect to all four modes of supply.
[43] The number of commitments with limitations. Mode 4 commitments expressed as 'unbound except as indicated in the horizontal section' are included in the calculation of partial commitments.
[44] Full commitments made without any restrictions, indicated by an inscription of 'none'.
[45] Percentage of fully and partially commitments are expressed as a%age of the total number of commitments negotiated.
[46] There is no obligation on negotiating partners to use a specific classification when negotiating trade in services; parties only need to be in agreement regarding the description of the supplied services which must be expressed in clear and unambiguous language. Parties are therefore free to include any services, regardless of whether these are contained in the W/120 of CPC lists.

under the W/120 system, despite the cardinal importance of those unstated activities. Things have also changed in the fifteen years that have passed since the GATS negotiations, with modern services such as mobile communications playing an increasingly important role. As countries grow more aware of the significance of regulating specific services activities, new headings will be included.

The more developed economies in the Mercosur region made substantial liberalisation commitments with the lesser developed economies of Uruguay and Paraguay making fewer commitments. When developing countries are parties to a services agreement, GATS Article V:3(a) states that flexibility must be provided when considering the degree of substantial sectoral coverage, particularly regarding the elimination and prohibition of discriminatory measures. It does not specify how much flexibility must be provided, but such flexibility should be extended in accordance with the level of development of the countries concerned, both overall and in individual sectors and sub-sectors. In the case of Mercosur, flexibility is clearly provided for the lesser developed economies by allowing them to schedule fewer commitments and in fewer sub-sectors. It can be argued that the Montevideo Protocol complies with the requirements because, on the whole, the configuration has liberalised to an average degree of 66.13%. The significant liberalisation efforts of Brazil and Argentina have helped the member states achieve a more acceptable threshold, highlighting the responsibility that the more developed countries have when negotiating services agreements. The opposite situation exists in the EAC, where the lesser developed countries have liberalised most, with the more developed economies of Kenya and Tanzania making more limited commitments.

Although Paraguay scheduled 160 sub-sectors, many sub-sectors and modes of supply were left 'unbound', meaning no commitments were made in those areas. It is also interesting to note that Mercosur countries in general made a far larger percentage of partial commitments than the EAC member states. On average, Mercosur countries made four partial commitments for every five full commitments, while the EAC countries made two partial commitments for every five full commitments. This is an indication that the Mercosur member states were more cautious in scheduling their commitments, although the operation of the standstill clause has to be considered.[47] Depending on the wording of the standstill

[47] For more information, see the section on 'Comparing the services obligations of the regional agreements' above.

clause, countries may not be allowed to introduce new restrictions beyond the status quo. EAC member states undertake in the EAC Protocol to progressively remove existing restrictions and not to introduce any new restrictions on the provision of services in the partner states. This is in contrast to the right provided for in the Montevideo Protocol to introduce new restrictions, even covering market access and national treatment obligations, as long as these do not nullify or impair the obligations arising from the schedules of specific commitments.

Mercosur member states also made comprehensive horizontal restrictions applying to all services sectors. In addition, they specified general conditions applicable to each of the core sectors. So, although the Mercosur configuration has a higher average percentage of liberalisation commitments, it seems as if the services industries in South America are more restricted that those in East Africa. They have comprehensively and in great detail set out the current and foreseeable restrictions, clearly describing each measure. In effect, the Mercosur member states followed a negative list approach because they have addressed all of the services sectors.[48]

9. The way forward

This new situation of supra-regional services negotiations will demand continuity and coherence; the converged tripartite market will have to build on what has already been achieved in the regional markets of COMESA, EAC and SADC. However, developments in the area of trade in services are still novel experiences for the regions and it is difficult to predict how these regional negotiations are going to turn out. Apart from the progress made by the EAC, the outcomes and effect of regional services liberalisation is still somewhat unclear. If it was a question of simply extending the liberalisation commitments to the other configurations, the process would be more straightforward, but it can be expected that unique components from each of the configurations will be included in the tripartite services negotiations.

[48] For a complete discussion on the negative list approach, see 'The manner of liberalisation under the Tripartite Agreement' below.

When services negotiations at the tripartite level eventually commence, most countries will have acquired substantial experience in dealing with services liberalisation. For example, if a country like Kenya chooses to negotiate services at the EPA level, it could have negotiated services at the EPA level, EAC level and COMESA level before the start of the tripartite services liberalisation process. The same holds true for a country like Swaziland which could possibly negotiate services at the EPA level, COMESA level and SADC level before starting the tripartite process. Therefore some countries will likely have to negotiate a number of times before finally negotiating at the tripartite level. For a country with relatively little experience and capacity in negotiating services, this will probably be a daunting task. But the upside is that lessons can be taken from those countries with experience, on how they have sequenced, harmonised and dealt with these layers of services negotiations. It can be argued that, when the time comes to negotiate services at the tripartite level, countries would already have acquired the necessary experience and capacity to effectively negotiate a services chapter.

If one considers the original Annex 12 (Guidelines on the negotiation of trade in services) large parts of the annex deal with basic issues such as the process of services liberalisation, compatibility with WTO rules and how to negotiate and complete schedules. The guidelines seem to apply to countries that have no experience negotiating trade in services. This may very well be true today, but this will inevitably change in the near future. It can be argued that these basic guidelines will be unnecessary after countries have participated in their regional services negotiations. It makes more sense to publish the guidelines after taking stock of the progress made at the various regional levels.

Hypothetically speaking, the guidelines may instruct countries to extend liberalisation commitments made under COMESA, EAC and SADC to other configurations. It seems as if the guidelines contained in the original Annex 12 oblige member states to do just that: 'Member States shall exchange offers and requests on the basis of which schedules of specific commitments shall be agreed. The commitments shall include sectors and sub-sectors that Member States have liberalised under the programs of the regional economic communities'. A measure such as this can simplify the regulatory framework dealing with trade in services and is something that deserves consideration. This will keep the regulatory framework simple and will ease the transition towards the convergence of the services markets. Otherwise the possibility exists that a country will have one or more sets of rules for

COMESA, EAC and SADC countries, another set of rules for tripartite members, in addition to the sets of rules for EU countries and other WTO members. Furthermore, all of these rules will have to be incorporated into domestic laws – which will complicate the process.

Judging from the services schedules of the EAC, the kind of commitments made in the member states are deep without many restrictions. Guidelines adopted at the COMESA level also encourage member states to make deep commitments, if possible without restrictions. Although the SADC guidelines are still to be adopted, the Draft Protocol on Trade in Services hints at the same kind of deep liberalisation in line with GATS Article V.[49] The Tripartite text takes a similar approach by aiming for a 'credible amount of liberalisation', which is more closely described in the original Annex 12 as follows: 'Commitments in the priority sectors shall to the extent possible not have limitations or restrictions.[50] The tripartite services liberalisation process is clearly aimed at substantial liberalisation, preferably without any restrictions. But from the intentions and progress at the regional levels of COMESA, EAC and SADC it is difficult to imagine that countries will be able to make more extensive (or deeper) commitments at the tripartite level. Countries will be able to undertake lesser commitments at the tripartite negotiations, but this will be difficult for two reasons. Firstly, it is clearly not the intention of the tripartite negotiations that member states maintain more restrictive measures at the supra-regional level. The operation and effect of the standstill clause will also become an issue, especially for countries that have dual membership of the regional organisations. Secondly, more restrictive schedules may not comply with the 'substantial sectoral coverage' as set out in GATS Article V. So, depending on the approach of the tripartite member states, the process can either be simple (by automatically extending liberalisation commitments/preferences) or more complicated (by renegotiating the liberalisation commitments). It will require careful consideration on the part of the tripartite member states on how they want to merge the regional services negotiations.

10. Services liberalisation under the Tripartite Agreement

The main tripartite document is the draft Agreement establishing the COMESA, EAC and SADC Tripartite Free Trade Area, together with its 14 annexes covering a number of areas

[49] See Article 16 (1) of the SADC Protocol on Trade in Services.
[50] See Article 18 of the original Annex 12 (Guidelines on the negotiation of trade in services).

that are deemed important for the effective operation of the regional market. Annex 12 of the draft Tripartite Agreement (November 2009 version) exclusively deals with trade in services and sets out the guidelines countries can use during the first round of services negotiations. However, this Annex 12 was not revised together with the draft agreement and the other annexes in December 2010. Despite the fact that the services annex was omitted, it is still necessary to analyse the original Annex 12 (November 2009 version) as this is the only available document shedding some light on the liberalisation process the tripartite member states are likely follow. Furthermore, the guidelines contained in the annex are quite similar to what is expected from the member states at the regional levels of COMESA, EAC and SADC; so in that sense the analysis can contribute to the regional debate.

In Article 30(1) of the revised draft Tripartite Agreement (December 2010 version), member states undertake to liberalise trade in the priority sectors, subject to such flexibilities as the Tripartite Council may approve. This hints at the special and differential treatment for the lesser developed countries in the configuration, most likely in the form of lower levels of commitments and delayed implementation. Both the SADC and COMESA services texts take into account the different levels of development for the purpose of granting special and differential treatment.[51] The EAC Protocol does not mention special and differential treatment, probably due to the size of their market, and the more equal development of their economies. However, it is interesting to note that – judging from their services schedules – the smaller economies are in fact prepared to liberalise further than their more developed counterparts.[52]

Article 30(2) of the Tripartite Agreement sets out the objectives of the services negotiations which are to attain 'a credible level and amount of services liberalisation, support the strengthening of infrastructure, promote competitiveness, build the capacity of micro, small and medium scale enterprises, and contribute to the deepening of integration in the Tripartite Member States'. This is similar to Paragraph 17 of the COMESA services guidelines which states that 'commitments in the priority service sectors will assist to attain a credible level and amount of liberalisation, support the strengthening of infrastructure, promote competitiveness, build the capacity of micro and small and medium enterprises, and

[51] See Article 16 (5) of the SADC Protocol on Trade in Services and Article 12 of the COMESA Services regulations.
[52] See the section on 'Progress at the EAC level' above.

contribute to the COMESA-EAC-SADC Tripartite process of merging the three regional economic communities'. The 'credible level and amount of liberalisation' allude to the requirements of GATS Article V to substantially liberalise services in economic integration agreements. The COMESA Regulations on Services also refer to a credible level while the EAC Protocol is silent on the required threshold. The SADC Protocol and COMESA regulations explicitly mention the WTO requirements, indicating that negotiations must be conform to GATS Article V.[53]

The references to the 'strengthening of infrastructure' likely refers to the infrastructure and network services of business, construction, telecommunications, finance, transport and energy which are the foundations upon which an economy is built.[54] These services are embedded in all parts and sectors of the economy and make a crucial contribution to competiveness and productivity in general. They provide the backbone for other sectors, not only for other services sectors, but also for the traditional industries such as agriculture, mining and manufacturing. It seems that member states realise that it is essential to 'promote competition' by not inhibiting market access to the more efficient suppliers of these services as this can have a detrimental effect on growth and development prospects of a country over the longer term. In this regard, the transfer of knowledge and technology will play a key role in fulfilling the purpose of increased competition and the development of micro, small and medium enterprises.

Similar to the process in the regional negotiations, liberalisation at the tripartite level will be progressive, which means that successive rounds of negotiations are foreseen to achieve an increasingly higher level of services liberalisation. Typically, the priority sectors will be addressed first after which subsequent negotiations will cover the remainder of the services sectors. However, tripartite member states only undertake to liberalise trade in the priority sectors which according to the annex are identified as: a) Business; b) Communication; c) Transport; d) Financial; e) Tourism and travel related; f) Energy, and g) Construction and Related Engineering. The main text is silent on the liberalisation of rest of the services sectors while the annex only 'encourages' member states to undertake commitments in the remaining sectors. These sectors may be of a sensitive nature to some of the countries, providing a possible explanation for their omission. According to Article 30(5) the Tripartite

[53] See Article 16(1) of the SADC Protocol on Trade in Services.
[54] The six sectors mentioned here together with tourism services were identified in the original Annex 12 as the seven priority sectors.

Council will adopt guidelines on each successive round of negotiation, so it is expected that such guidelines will address the remaining sectors when the time is right.

11. The manner of liberalisation under the Tripartite Agreement

As mentioned, the Tripartite Agreement and the original draft Annex 12 focus largely on basic issues such as the process of services liberalisation, compatibility with WTO rules and how to negotiate and complete schedules. The emphasis is clearly on services liberalisation and how to achieve compatibility with WTO rules logically follows. In line with the approach used in the WTO, the draft Tripartite Annex (November 2009 version) explicitly provides for the use of the positive list approach. According to this approach members only list the commitments they are willing to undertake; therefore if they omit a sector or sub-sector, that area is not liberalised or committed. But at the same time the annex also makes provision for the possibility of no limitations or restrictions in the priority sectors, with some minimal time-bound exceptions.[55] The latter proposal, however, points more to a negative list approach. The seven priority sectors of business, communication, transport, finance, tourism, energy and construction services comprise about 85% of the services sector with the remaining five sectors taking up only 15%. A positive list approach in a situation like this can be questioned, where member states clearly want to commit large parts of their services industries, with as few restrictions as possible.

In the WTO the 'positive list' approach was adopted specifically on request of the developing countries since they felt that they did not have the administrative resources and capacity required to examine all the services sectors and to determine all the measures applying to each sector. Since many of the subsequent regional and bilateral negotiations have been conducted in line with the agreed WTO principles, the same positive list approach was adopted. It can nevertheless be argued that the negative list approach is a more comprehensive one, and also a more suitable approach for regional services negotiations where countries want to establish a common market that provides for substantial liberalisation in all sectors.

The negative list approach requires that all sectors be liberalised unless a specific reservation is made to exclude certain measures. The main advantage – something which is already

[55] See Paragraph 18 of the original Annex 12 ('Guidelines on the negotiation of trade in services').

envisaged in the tripartite process – is the obligation placed on countries to consider all services sectors and this implies negotiation on all areas. It is true that the negative list approach places greater responsibility on the negotiating countries and forces them to have in-depth knowledge on all areas, but, at the time when the tripartite negotiations start, countries would hopefully have gathered the necessary experience to consider and negotiate all sectors. Most importantly, a negative list would provide for a more transparent and visible regulatory framework for two reasons. Firstly, the negative list approach typically contains two parts: reservations for current non-conforming measures and reservations for future measures. This is a very important distinction because it shows which areas are currently restricted in terms of legislation and which areas are marked for possible restrictions in the future. This can provide a clearer and more predicable indication for investors of what governments are planning or thinking in each area. Of course in the positive list approach there is no such indication – it is difficult to tell why a sector or sub-sector has been omitted.

The second reason why the negative list is more transparent is due to the scope and detail of the measure or reservation. Typically an annex on non-conforming measures includes the following: i) the sector, sub-sector and classification; ii) obligations concerned; iii) level of government maintaining the measure; iv) a description of the non-conforming measure; and v) the existing measures in force. The example in the box below is an extract from an actual Chilean services schedule as agreed between Chile and Australia:

Sector:	Professional Services
Sub-sector:	Legal Services
Industry classification:	CPC 861 Legal services
Obligations concerned:	National Treatment (Article 9.3) Most-Favoured-Nation Treatment (Article 9.4) Local Presence (Article 9.6)
Level of government:	Central

Measures:

Tribunals Organic Code, Title XV (*Código Orgánico de Tribunales, Título XV*)

Decree 110 of the Ministry of Justice, Official Gazette, March 20, 1979 (*Decreto 110 del Ministerio de Justicia, Diario Oficial, marzo 20, 1979*)

Law 18.120, Official Gazette, May 18, 1982 (*Ley 18.120, Diario Oficial, mayo 18, 1982*)

Agreement on Mutual Recognition of Examinations and Professional Degrees between Chile and Ecuador, Official Gazette, July 16, 1937 (*Convenio sobre mutuo reconocimiento de exámenes y de títulos profesionales entre Chile y Ecuador*)

Description: Cross-Border Trade in Services

Only Chilean and foreign nationals with residence in Chile, who have completed the totality of their legal studies in the country, shall be authorised to practice as lawyers (*abogados*). This paragraph shall be understood in accordance with Chile's obligations under any other international treaty.

Only lawyers (*abogados*) duly qualified to practise law shall be authorised to plead a case in Chilean courts and to file the first legal action or claim of each party.

The following documents, among others, shall be drawn up solely by lawyers (*abogados*): drafting of articles of incorporation and amendments thereto; mutual termination of obligations or liquidation of corporations; liquidation of community property between spouses (*sociedad conyugal*); distribution of property; articles of incorporation of juridical persons, associations, water canal members (*asociaciones de canalistas*), and cooperative associations (*cooperativas*); agreements governing financial transactions; corporate bond issuance agreements; and sponsoring applications for legal representation made by corporations and foundations.

Chile has a bilateral agreement with Ecuador, whereby Ecuadorian citizens holding a lawyer's degree granted by a University in Ecuador are admitted to practise as lawyers (*abogados*) in Chile.

None of these measures apply to foreign legal consultants who practise or advise on international law or Australian law.

The big advantage here, and what makes this approach more transparent and user friendly, is the detailed description and explanation on exactly what every reservation entails. Additionally, where the measure can be found in domestic legislation is included in the schedule. So it provides greater clarity and complete transparency, and sets out a more detailed framework for domestic regulation and services liberalisation. In the positive list approach one might be aware of the restrictions, but would have no idea of where to find them. Also, a more comprehensive approach will improve the institutional memory of a government since the ability to accurately store and administer large amounts of regulatory information will become increasingly important over time, especially if negotiations are taking place on more than one front. An accurate recording of restrictions will also help the government to provide clear information on the measures affecting trade in services, an obligation which is an important element of all services agreements.

Chile has concluded a large number of regional trade agreements, of which 15 contain extensive undertakings and obligations on trade in services. It is typically countries with more experience in services negotiations that prefer the negative list approach, but this kind of approach enabled these countries to be more effective than other countries in negotiating multiple agreements. As countries take on more services agreements, it becomes increasingly difficult to administer the applicable restrictions towards each negotiating partner. This is a fact tripartite member states will have to deal with, especially the countries with multiple memberships in COMESA, EAC and SADC.

12. Creating a more integrated market

Meaningful services liberalisation can only be achieved by focusing on the regulatory environment that would determine the access for foreign suppliers (market access) and conditions for their local operations (national treatment). The suppliers would accordingly know what is allowed and how to conduct their operations in a given services market. But in the steps towards a more integrated services market, other issues besides liberalisation become crucial. It is expected that services liberalisation will be less of an issue when the tripartite negotiations start since this will already have been comprehensively addressed at the regional levels of COMESA, EAC and SADC. At that time, hopefully the domestic regulatory frameworks will be strong enough to allow for substantial liberalisation and to welcome any foreign competition. Or on the other hand, perhaps countries would have

realised that services liberalisation alone did not bring the desired benefits they were hoping for. Tripartite member states will have to find ways to build on the substantial liberalisation already achieved in the regional negotiations.

It can be argued that one way to build on the substantial liberalisation already achieved in the regional negotiations will be serious efforts aimed towards deeper integration by addressing issues such as transparency, competition regulation, specific sectoral disciplines, mutual recognition agreements and the harmonisation of certain areas by going through a process of domestic reform. With deeper integration agreements, the focus should be shifted from liberalising the barriers that exist at the borders, towards addressing the 'behind-the-border' issues, which exist within the jurisdiction of the member states. All three configurations deal to varying degrees with these 'deeper integration' issues, with some also scattered in related protocols and regulations. For example, the SADC Protocol on Tourism, and Chapter 19 of the COMESA Treaty include aspirations to standardise the registration, classification, accreditation and grading of tourism providers. Those obligations relating to harmonisation and standardisation will have the biggest practical impact, but are also more challenging since they have to be addressed at the regional level with the input and approval of all member states. In the EAC Treaty, member states have also agreed to establish a common code of conduct for private and public tour and travel operators, standardise hotel classification and harmonise professional standards of tourism and travel agents. The draft EAC Protocol on Tourism and Wildlife management deals with these and other issues of deeper integration. However, these obligations have not yet been incorporated into domestic legislation, something which could impact on the regional development of the tourism industry. There have been reports that tour operators and tour guides from certain countries have been denied entry due to onerous qualification standards (Kruger 2010). This is a serious barrier to trade that can only be addressed by harmonising regional standards on training and qualifications of tourism providers.

The transport sector which plays an important role in facilitating the physical trading of goods can be highlighted as another example of how deeper integration is envisioned. Member states to the SADC Protocol on Transport, Communications and Meteorology, the COMESA Treaty and the EAC Treaty agree to harmonise a substantial number of standards, procedures and regulations covering all the sub-sectors of the transport industry. For instance, in the area of road transport, very broadly these sub-sectors include measures on

the following: vehicle safety and equipment, driving licences, documentation, and procedures, carrier obligations, transport law enforcement, technical standards, road infrastructure, transit charges, safety requirements for dangerous loads, and regional trunk road projects. These are areas that are addressed in all three configurations. In COMESA and EAC, member states also agree to undertake measures to ratify or accede to international conventions on road traffic and road signs and signals, and to take such steps as may be necessary to implement these conventions. It is important, however, to note that these measures are not concerned with the liberalisation of tourism services: liberalisation, in particular market access and national treatment considerations, will be addressed in the regional services negotiations and schedules.

So too are there specific obligations dealing with cooperation and harmonisation in other areas such as communications, financial, education, health, transport and energy services. Tourism is one of the simpler examples with far more being expected of member states in areas such as transport and financial services. If countries want to address issues apart from services liberalisation, it is here where they should start. Their intentions for deeper integration have clearly been stated by focusing on cooperation, harmonisation and standardisation in some of the priority sectors. These kinds of measures have the potential to make a great impact on the regional development of the services industries, but only if they are effectively implemented.

The achievement of an integrated market is about more than liberalisation; it will also require a deeper integration of regulatory aspects to create benefits for the regional market. Implementation is unfortunately still lacking, the main challenge being the pace of adjustment at the regional level. Anticipated change at the regional level happens faster than what can be adopted and implemented at the national level. At the regional level, a plan of action is adopted, but lobbying, review, legal drafting and parliamentary approval at the national level take time. This is the main reason why not all of the regional obligations have been implemented domestically. The process of implementation becomes more complicated for countries that are part of more than one regional configuration. Furthermore, if the tripartite process runs parallel to the COMESA-EAC-SADC processes, it creates the risk of unnecessary duplication. It is important to carefully define how the tripartite negotiations will overlap and complement the regional negotiations and sequence the process accordingly.

13. Developing a domestic services agenda

The effectiveness of the services liberalisation strategy and process will largely be driven by the responsible institutions. Assigning responsibility for the process is sometimes complicated, mainly because there are many different government departments involved in the formulation, negotiating and implementation of the services strategy. In many countries the negotiating of trade in services is the responsibility of the Trade and Industry Department, while implementation coordination rests with the relevant line department. Developing a clear strategy for services therefore poses, for most governments, genuine institutional challenges to the extent that no single agency takes a holistic view of services and their interlinked contribution to the development and growth process (World Bank, 2009).

Accordingly, any attempt to devise a services liberalisation strategy must begin by setting up a cross-sectoral, multi-issue steering committee and designating the coordinating function to a specific ministry or agency. This institution will ultimately then be empowered to develop a services road map and strategy and oversee the implementation (Ibid). This is particularly important for countries where different departments are responsible for the negotiating of the obligations and the implementation thereof.

Other institutions that are crucial for the functioning of a regional services market are the national enquiry points and the administrative tribunals. These institutions will become increasingly relevant to facilitate and improve the administration of regulatory aspects. Although the establishment of these institutions are specific requirements under the GATS, some countries have still not implemented them. Fully functional institutions can also assist with the promotion of trade in services (which clearly is the intention of the SADC and COMESA texts), the dissemination of business opportunities, and improving the predictability and certainty for prospective investors. It will be of little help if the regional obligations agreed at the COMESA, EAC and SADC levels are simply reiterated at tripartite level. In the end it will come down to the implementation of the agreed obligations. The frameworks in each regional configuration have been drafted to include various obligations relating to the highlighted areas, but now it is up to the countries to manage the implementation phase.

Member states are now in the preparatory phase and should use the opportunity at the regional and national level to organise, coordinate and improve their national negotiating forums by increasing stakeholder participation; in other words, an effective forum where a services strategy and responses can be formulated and discussed should be established. Services activities are so diverse and specialised that it would be difficult for a central agency to make informed decisions. Every sector is dynamic and has its own rules, standards, procedures, conditions and even associations to facilitate the regulation of that specific industry. A simple review of even one sub-sector will expose the differentiation and specialisation when compared to other sub-sectors; each of 160 plus sub-sectors is indeed a niche area with its own characteristics. A central agency cannot keep abreast of the developments and therefore the advice and support of a wide range of stakeholders are needed in the liberalisation process.

The idea is that the engagement between the government and stakeholders is collaborative, constructive, and continuous. It must be a two-way process in which governments share the significance and progress of the negotiations and inform stakeholders how the process of liberalisation can affect their business (World Bank, 2009). Governments should also be clear on the kind of support expected from the stakeholders. On the other hand, stakeholders such as government departments, government agencies, national bodies, regulators, labour and academia are also well placed to make meaningful contributions to the negotiating process due to their specific technical knowledge in their respective areas. In particular, the private sector has practical experience and is best placed to inform governments of challenges and possible opportunities. Most importantly, the private sector will also be able to evaluate the impact of the liberalisation policies and reform, since the liberalisation process will ultimately yield winners and losers. It is therefore important to manage the reform process to deter interest groups from derailing the process. In order to maintain the momentum of reform it is important to make common cause with the winners to counter pressures from the losers (Hodge 2001). The fact remains: it is not only about the process of liberalisation by removing barriers to services trade, it is also about the continuous management of the process to understand how the decisions made affect the everyday traders. This knowledge will enable governments to make more effective and informed decisions when supra-regional negotiations are conducted.

Particularly in the developing countries, most of the services trade occur in Mode 3 through

the establishment of a local established branch, subsidiary, joint venture or representative office by a foreign supplier. It is therefore important that the regulatory framework is considered fair, credible and predictable by prospective foreign investors (Hodge 2001). However a more effective regulatory framework and competition rules also have the potential to protect domestic industries and enhance market conditions for all players. On the other hand, ineffective regulation and competition will result not in lower prices but in higher profits, thereby benefitting the owners of capital rather than labour or the consumers (Ibid).

The first step in analysing the regulatory framework is to complete a full regulatory audit to get a clear impression of what the applicable rules in each of the services sectors are. Preparing of a full inventory of measures affecting all trade in services is necessary to cultivate a greater understanding and appreciation of the regulatory regime. All measures, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other forms taken by central, regional or local governments and authorities, and non-governmental bodies, in the exercise of delegated powers must be reviewed in order to be aware of the relevant rules. The analysis of the regulatory framework can include regulatory impact assessments to determine the benefits and costs of services liberalisation. Many of the tripartite member states undertook full liberalisation in some sectors (mostly tourism), so an impact assessment for understanding the effect such liberalisation had on the local economy can be useful for the formulation of an overall services strategy. Such audits and regulatory assessment can provide governments with insights on which sectors to open up and which barriers to remove. It can also highlight the sensitive areas where government intervention of some kind is necessary. There has been recent interest from developing country governments to modify commitments made under GATS in order to restrict foreign investment or to favour domestic suppliers, a process which is set out in GATS Article XXI. To date only two countries have invoked this process[56], but it can be argued that there are less invasive measures to promote domestic participation without modifying earlier liberalisation commitments.

[56] The EU submitted notifications in 2004 (S/SECRET/8) and 2005 S/SECRET/9) in order to accommodate the harmonisation of the additional country schedules upon enlargement of the community. The only other country to invoke the modification procedures of GATS Article XXI was the United States to modify restrictions on cross-border gambling.

14. Conclusion

At the moment it is difficult to predict the outcome of the regional negotiations, something which will have an impact on the tripartite process. It is only the EAC member states that have negotiated binding liberalisation commitments, while SADC and COMESA are still in different stages of the negotiating process. This creates a certain degree of uncertainty which will only be resolved once all configurations have completed their liberalisation schedules and processes. It is after the finalisation of the schedules that the Tripartite Committee on Trade in Services can evaluate the regional outcomes and decide on the most suitable way forward. It is likely that the services negotiating guidelines will only be revised and published once this has been determined.

The published guidelines will have go beyond the basic issues and also clarify some of the more challenging areas. Some of the more pertinent issues relate to the WTO compatibility of the eventual tripartite services chapter. What will be the responsibility of the more developed countries in the configuration? The analysis done in chapter shows that Kenya has been cautious in making liberalisation commitments beyond what were scheduled under GATS. Although the more developed countries will have a greater interest in protecting their services industries, clear thresholds will have to be set. The original guidelines call for the 'possibility of no restrictions' in priority sectors; member states, however, need to be more realistic and precise when stating such objectives. The degree of flexibility for the lesser developed states must also be stated clearly. It is understandable that tripartite member states long for the absolute free movement of services, but countries must be able to retain some kind of policy space when negotiating services. In this regard the operation and effect of a possible standstill clause must be carefully weighed as it has the potential to liberalise all services sectors with almost immediate effect.

The current services chapter in the Tripartite Agreement consists of only five provisions, of which the one to establish the Tripartite Committee on Trade in Services is the most important. This services committee must oversee and drive the liberalisation process at the tripartite level based on what happened at the regional levels. The committee has the responsibility to adopt guidelines on each round of services negotiations and will play an important role in the success of the negotiations. It must have the necessary technical capacity and expertise to effectively guide the negotiations and make optimal proposals on

the way forward. The negotiating guidelines for the first round of negotiations on the priority sectors are crucial and will set the tone for the rest of the process. It will require meticulous thinking and contemplation on how the regional processes can be merged into the larger tripartite negotiations.

It may take a long time before the tripartite services negotiations actually start; meanwhile countries must use the opportunities at the regional level to prepare the ground for effective liberalisation and essential domestic reform. Governments must ensure that all relevant obligations under the WTO and regional agreements are fully implemented and that all necessary institutions are established and functioning properly. All measures affecting trade in services must be identified, indexed and stored to facilitate the administration and dissemination of the regulatory information. Meaningful communication channels must also be established between government and stakeholders to appreciate the differentiation and developments in the various services sectors. This constructive engagement is also crucial to monitor the progress and effect services liberalisation have on the wider economy. This is the time to use the opportunities presented by the regional negotiations in order to acquire the necessary experience and capacity to effectively negotiate a more complicated services chapter at the tripartite level.

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Chapter 6

Mobility of Business Persons in East and Southern Africa

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1. Introduction

The liberalisation of movement of natural persons on a temporary basis across international borders to engage in economic activities has proven to be very difficult. At the heart of the problem lies the perception that temporary movement will lead to permanent residence, that local workers will be displaced by foreigners and that they will put strain on the public purse. Beyond the political sensitivities, people moving on a temporary basis face a host of time-consuming, costly and overtly burdensome procedures. The General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO) provides a framework of rules and principles to facilitate temporary movement. Member states are allowed to grant market access to their territories for a defined group of persons through legally binding commitments. The movement of persons has an important role to play in the delivery of services and investment. There exists a close relationship between the temporary movement of persons across borders and other modes of services supply. The opportunity to supply services across borders is often a necessary first step to establishing a commercial presence in another country. Unlike with trade in goods, trade in services frequently requires the movement of persons to establish or maintain a commercial presence abroad. Frequently this would require a person's qualifications and experience to be recognised by the host state in order to perform the service. This is no simple matter.

The rest of this chapter is organised as follows:

The first section deals with the scope and coverage of the movement of natural persons in GATS. An assessment of the developments in the current multilateral negotiations in respect of temporary movement is also provided. The multilateral commitments made on temporary movement by the states involved in the proposed Free Trade Agreement (FTA) between the

member states of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) are briefly highlighted. The section also covers the barriers and challenges preventing effective market access and addresses possible means of facilitating temporary movement.

The remaining sections examine the approach taken by each of the three regional economic communities comprising the proposed COMESA-EAC-SADC FTA (henceforth Tripartite FTA) in respect to the temporary movement of natural persons in order to take stock, and compare and highlight certain market access challenges. Finally, to analyse the current Draft COMESA-EAC-SADC FTA in so far as it relates to the movement of persons. In conclusion the technical implementation issues that need to be dealt with to make the movement of business persons under the COMESA-EAC-SADC FTA work are discussed.

2. Multilateral rules and negotiations on the movement of natural persons

2.1 Basic provisions of the General Agreement on Trade in Services

The WTO's General Agreement on Trade in Services regulates the international trade in services and provides for it to take place through four possible modes of supply. One of these modes is defined as the supply of a service 'by a service supplier of one Member, through the presence of natural persons of another Member in the territory of any other Member' (GATS Article I(2)(d)). This type of supply is more commonly known as Mode 4. Trade taking place under this particular mode of supply, like any other mode of supply, always involves the trading of services by a service supplier. In this case, a service supplier can be either a natural person (GATS Article XXVIII(k)) or a juridical person (GATS Article XXVIII(l)). This particular mode of trade always involves the non-permanent presence of a natural person in the territory of a foreign country through whose presence services are being traded. WTO members can describe the market access conditions and treatment accorded to service suppliers in their schedules of specific commitments. However, it should be noted that only service suppliers are eligible for market access and national treatment commitments. It is therefore important to determine the origin of a service supplier because GATS commitments can neither be demanded by a country's own service suppliers nor

from those of a non-member state (S/C/W/301).

The GATS *Annex on the Movement of Natural Persons Supplying Services under the Agreement* identifies two categories of natural persons that are covered, namely those that are self-employed service suppliers and those who are employed by a foreign service supplier. In the case of the former category, the natural person must be of foreign origin but may operate from a foreign base or from a base in the host country. In the case of the latter category, the natural person is employed by a foreign service supplier which could be another natural person or a juridical person. In this case, both the natural person present in the host country and the service supplier must be from another WTO member state but not necessarily the same member state.

Consequently, foreign natural persons employed by host country service suppliers are not covered by GATS. As a result, host country service suppliers cannot claim benefits from their own government regarding the employment of foreign workers on a temporary basis. However, a foreigner working for a host country service supplier on a contractual basis (as a self-employed person) could be covered by GATS, but not if that same person is an employee of the company (S/C/W/301).

The first category of natural persons receive their remuneration directly from the customer in the host country whereas the second category of natural persons receive their remuneration from their employer; the service supplier.

To complicate matters even further, GATS does not cover measures affecting citizenship, residence or employment on a permanent basis. It refers only to employment on a temporary basis, but does not specify a period of time that would constitute employment on a temporary basis. As a result, each WTO member needs to specify in its schedule of specific commitments what the permitted duration of stay would be. Members are also required to specify the terms, limitations and conditions on market access (GATS Article XX(1)(a)).

In sum, GATS covers the movement of natural persons of all skill levels on a non-permanent basis only in so far as it relates to the supply of a service. However, employees in the non-services sector (e.g. manufacturing), persons with citizenship and permanent residence or

employees of host country firms are excluded from the coverage of GATS.

2.2 Multilateral negotiations on the movement of persons

In Article XIX(1) GATS mandated WTO members to enter into successive rounds of negotiations not later than five years from the date of entry into force of the WTO Agreement on 1 January 1995. Services negotiations commenced on 1 January 2000 even though member states failed to launch a broad negotiating agenda at the third Ministerial Conference in Seattle, 1999. Nonetheless, in March 2001 the Council for Trade in Services adopted *Guidelines and Procedures for the Negotiations on Trade in Services* (S/L/93). The Guidelines were endorsed by the fourth Ministerial Conference in Doha, November 2001 (WT/MIN(01)/DEC/1). This was followed by the adoption of objectives, approaches and timelines for the negotiations as set out in Annex C to the Hong Kong Ministerial Declaration in 2005 (WT/MIN(05)/DEC). The aim of the negotiations is to expand the sectoral and modal coverage of commitments and to improve their quality. The annex provides in Paragraph 1(d) that members should be guided by the following objectives with regard to Mode 4 in making new or improvement commitments:

i. on the categories of Contractual Services Suppliers, Independent Professionals and Others, de-linked from commercial presence, to reflect *inter alia*:
   - removal or substantial reduction of economic needs tests (ENTs)
   - indication of prescribed duration of stay and possibility of renewal, if any

ii. on the categories of Intra-corporate Transferees and Business Visitors, to reflect *inter alia*:
   - removal or substantial reduction of economic needs tests
   - indication of prescribed duration of stay and possibility of renewal, if any.

In addition, the annex encourages members to ensure clarity, certainty, comparability and coherence in scheduling and classification of commitments and advise that remaining economic needs tests adhere to the *Guidelines on the Scheduling of Specific Commitments under the GATS* (S/L/92) pursuant to the Decision of the Council for Trade in Services adopted on 23 March 2001 (Paragraph 1(f)). Members should, in general, base the classification of their sectors and sub-sectors on the WTO Secretariat's Services Sectoral Classification List

(MTN.GNS/W/120) as identified by the corresponding Central Product Classification number and explanatory note of the United Nations' Provisional Central Product Classification. Members are also required to develop disciplines on domestic regulation pursuant to the mandate of GATS Article VI (Paragraph 5).

During the period between the commencement of the services negotiations in January 2000 and the Doha Ministerial Conference in November 2001 seven members submitted negotiating proposals on the temporary movement of natural persons supplying services under GATS (Mode 4) to the Council for Trade in Services. The countries include India (S/CSS/W/12), the United States (S/CSS/W/29), the European Communities and their member states (S/CSS/W/45), Canada (S/CSS/W/48), Japan (S/CSS/W/42/Suppl.2), Colombia (S/CSS/W/97) and Kenya as part of a general proposal (S/CSS/W/109). The proposals include the following main ideas:

- Improving market access commitments for certain groups (e.g. intra-corporate transferees, other skill levels) and delinking commitments from commercial presence (e.g. independent professionals, contractual service suppliers);
- Clarity and predictability of commitments and uniformity of definitions of personnel categories;
- Access to information and transparency of conditions on entry and stay, criteria of economic needs tests, and administrative procedures;
- Compliance with GATS Article VII to facilitate recognition of qualifications and experience and licensing.

The WTO Secretariat prepared an informal note (JOB(03)/195) on the *Categories of Natural Persons Subject to Commitments under Mode 4* in October 2003. It describes frequently used categories of natural persons included in the horizontal section of members' schedules of specific commitments and highlights the most common definitional elements in the description of these categories. Reaching a common approach on these categories and their definitional elements would enable countries to assess the real market access opportunities and assist companies in understanding if and how commitments facilitate temporary entry and reduce the cost of doing business abroad. The main categories highlighted in the note include intra-corporate transferees, business visitors and services salespersons, contractual

service suppliers, and 'other'.

Entries on intra-corporate transferees typically refer to three sub-categories namely executives, managers and specialists, with a description of each category. For example, an 'executive' could be described as someone that

- primarily directs the management of an organisation;
- exercises wide latitude in decision making;
- receives supervision or direction only from high-level executives (the board of directors or stockholders);
- does not directly perform tasks related to the supervision of the service/s of the organisation.

This category of persons is working within a juridical person established in the territory of a WTO member who is being temporarily transferred to a subsidiary or branch established in the territory of another member.

A degree of overlap exists between the activities carried out under the categories described as business visitors and services salespersons in the schedules of WTO members. Sometimes, the two categories are merged with some referring to it as business visitors and others as services salespersons. The term business visitor is sometimes used to refer to 'foreign natural persons seeking entry into another member's territory for the purpose of setting up a commercial presence' whereas services salespersons sometimes refer to 'persons seeking entry for the purpose of negotiating for the sale of a service on behalf of an enterprise'. In other schedules the two terms mean the exact opposite.

The third category, contractual service suppliers, refers to either employees of a foreign-based enterprise or to a self-employed/independent professional person. This category of persons supplies a service in the territory of a WTO member on the basis of a contract which provides the justification for their access to the host country. The category is of particular interest to developing countries and small and medium sized enterprises because it is not necessary to have a commercial presence in the host country. Having access to supply a service in a foreign market is often a necessary first step to test demand before a

commercial presence is established in the other country.

The fourth category, 'Other', includes categories such as fashion models, artists, sportspersons, graduate trainees, installers, and spouses/partners of intra-corporate transferees or professionals.

In February 2005 two additional negotiating proposals on Mode 4 were submitted by Argentina, Bolivia, Brazil, Chile, Colombia, India, Mexico, Pakistan, Peru, Philippines, Thailand and Uruguay (TN/S/W/31) on the one hand, and by Bulgaria, Canada, the European Communities and Romania (TN/S/W/32) on the other. The two groups agreed on the same common personnel categories and to a large extent reached uniformity on the specific definitional elements of each personnel category. However, the first proposal also developed and proposed common conditions of market access that could be attached to each of the categories of service suppliers. For example, the proposed conditions

- Delineate the duration of stay for each category;
- Provide that wage parity will not be a pre-condition of entry for contractual service suppliers and independent professionals;
- Provide that economic needs tests will only be applied in exceptional circumstances for intra-corporate transferees, contractual service suppliers and independent professionals on condition they
    - are applied on a non-discriminatory basis;
    - mention the services sectors and occupations to which the test shall apply;
    - set out the definitions, criteria and conditions to be used in applying the test; and,
    - specify the duration of application of the test.

GATS Article XVI 2(a-d) provides that partial market access commitments in the form of quantitative measures be specified in a member's schedule either numerically or through other specified criteria or through an ENT. In other words, measures in the form of ENTs comprise a type of quantitative restriction which must, like any other limitation, be described concisely indicating the elements which make it inconsistent with Article XVI. However, the term 'economic needs test' is not defined in GATS. The *Guidelines for the*

Scheduling of Specific Commitments under the GATS (S/L/92) provides in Paragraph 9 that an ENT entry 'should indicate the main criteria on which the test is based'. Ultimately, a member is bound to administer an ENT in a 'reasonable, objective and impartial manner' (GATS Article VI (1)). The absence of described criteria and the lack of transparency on the operation of ENTs lead to concerns that they are performed in an arbitrary or discretionary manner. In order to promote further discussion Canada submitted a paper on ENTs relating to Mode 4 commitments to the Council for Trade in Services (TN/S/W/46) and the Committee on Specific Commitments (S/CSC/W/47) in 2005. It highlights the need for greater transparency on the relationship between Mode 4 commitments and relevant immigration laws, regulations and administrative procedures as well as the requirements and procedures for work permits or visas. In order to facilitate greater transparency and predictability Canada proposed that each member provide voluntarily and separate from its schedule of specific commitments all relevant laws, regulations, policies, practices or administrative guidelines with respect to each Mode 4 commitment (TN/S/W/47). The paper on ENTs also provides an illustrative list of common elements found in an ENT in Mode 4. The criteria could include:

- Skills: Does the foreign person meet the minimum skill threshold?
- Salary: Are the wages and working conditions offered comparable with those offered to citizens or permanent residents in the same occupation?
- Economic impact: Will the entry of the foreign worker result in job creation or job retention for the benefit of citizens or permanent residents; will entry result in the transfer of skills and knowledge for the benefit of citizens or permanent residents; will it fill a labour shortage?
- Advertisement and recruitment: Has the employer advertised the job adequately to attract or train citizens or permanent residents?

Since the Hong Kong Ministerial Conference, negotiations have stalled. In May 2008 the Chairman of the Council for Trade in Services published a report on the *Elements required for the Completion of the Services Negotiations* (TN/S/33) followed by a report by the Chairman of the Trade Negotiations Committee on the Ministerial *Services Signaling Conference* (JOB(08)/93) in July of the same year. The report indicates that several members are willing to expand or improve on their current commitments on business services. The nature of

business services often requires the physical presence of individual professionals. According to the report, members also indicated possible improvements to 'virtually all relevant categories, including intra-corporate transferees, business visitors, contractual service suppliers, and independent professionals. Some of the envisaged commitments were de-linked from commercial presence as referred to in Annex C of the Hong Kong Declaration. Several participants also indicated their willingness to extend permitted periods of stay; clarify, reduce or eliminate economic needs tests; remove definitional uncertainties; and adjust current entries to prevailing scheduling conventions' (Paragraph 46).

The Chairman of the Council for Trade in Services later provided an updated report to the Trade Negotiations Committee as part of the stocktaking exercise in March 2010 (TN/S/35). Finally, in April 2011, the Chairman of the Council for Trade in Services published a report on the current state of play in the services negotiations to the Trade Negotiations Committee (TN/S/36). The report provides in Paragraph 64 that Mode 4 'offers by many Members were still linked to commercial presence and made subject to nationality and residency requirements. Numerical ceilings and economic needs tests remain a significant cause of concern.' The report also expresses concern over the stability of commitments because in some cases commitments are linked to domestic laws, guidelines or lists which diminish the predictability of commitments (Paragraph 65).

2.3 Multilateral commitments of Tripartite FTA member states

GATS does not prescribe a specific manner in which members should schedule market access or national treatment conditions in Mode 4. In practice, schedules of national commitments of GATS members provide predominantly in the horizontal section of national schedules of specific commitments for the following categories of natural persons: independent professionals, contractual service providers, intra-corporate transferees, and business visitors. African countries have mainly opted for a different scheduling approach based on the hierarchical categorisation of workers.

Six of the 26 Tripartite FTA member states (Libya, Eritrea, Sudan, Ethiopia, Comoros and Seychelles) are not members of the WTO. All of the Tripartite FTA members that are WTO members made specific commitments under GATS in Mode 4. Almost half of them decided not to include a horizontal section in their schedules of national commitments.

Their commitments in Mode 4 are therefore sector-specific in nature. This differs from other members' schedules with horizontal sections in the sense that the same set of Mode 4 commitments does not automatically apply to all the services sectors in which commitments are scheduled. However, in these cases one usually finds identical scheduling language for each sector-specific commitment in Mode 4. Overall, the commitments are very limited in scope and in general confined to highly skilled persons based on a hierarchical categorisation of natural persons (e.g. executives, managers, specialists) that are linked to Mode 3 trade (the setting up of a commercial presence and intra-corporate transferees). Without exception, all schedules of national commitments contain ambiguities and market access or national treatment restrictions including nationality requirements, labour market tests, and quotas on the number of foreign suppliers. With the exception of South Africa and Egypt, none of the countries indicated the permitted duration of stay in their schedules of commitments. Only South Africa and Burundi defined the different service supplier categories of persons in which they would allow foreigners to enter their markets. Other typical uncertainties in schedules are references to national labour and immigration laws without further explanation of the scope and content thereof or indicating the market access limitations.

2.4 Obstacles to Mode 4 Trade

Market access commitments have arguably very little meaning if countries do not ensure that service suppliers get access to their territories to exercise that particular activity. There are a number of obstacles relating to Mode 4 trade apart from the absence of clear Mode 4 definitions and categories and vague inscriptions in schedules of commitments. Most important among these obstacles are administrative procedures and recognition of qualifications and experience.

2.4.1 Administrative procedures

Domestic measures relating to the entry and stay of service providers into the territory of another country are eroding the value of market access commitments made by WTO members. The problem originates in immigration legislation and relates to the absence of a separate system of visa and work permit rules and procedures between the temporary movement of labour (Mode 4) and the permanent movement of labour (immigration). Most

countries have separate visa and work permit systems with varying conditions attached to each. A visa generally confers a right on a foreigner to enter a host country for a specified period of time whereas a work permit allows a foreigner to take up paid employment in the host country. A wide range of types of visas (e.g. tourist, business, study) and work permits (e.g. specialist occupation, intra-corporate transferee) usually exists depending on the length of stay (e.g. 90 days, one year, two years), purpose of visit or other characteristics (Ng, 2007:5).

Unnecessary bureaucratic impediments affecting temporary movement such as visa and work permit application and processing practices, limitations on the length of stay, quantitative limits on visas, transferability of work permits in the overseas market, fees and other cost, delays in issuance, and wage parity negate the little market access available. Wage parity regulations require foreign workers to be paid the prevailing wage in a particular sector. However, this does not equate to being paid the local minimum wage, which is less intrusive (Winters, 2008: 521). The objective of wage parity regulations is to protect foreign workers from exploitation but it erodes the cost advantage of hiring foreigners and works like a *de facto* quota (Chaudhuri, 2004 quoted in Martin, 2006:7).

The challenge is therefore to create visa and work permit regimes that provide for objective implementation, minimum discretion and greater certainty. India proposed a common set of administrative rules and procedures relating to work permits and visas that include a transparent and streamlined application process; easier renewal and transfer procedures; adequate in-built safeguard mechanisms to prevent temporary workers from entering the permanent labour market; mechanisms to verify the status of an application, causes for rejection, and requirements to be fulfilled; time frames in which visas must be granted; and, the issuing of 'GATS visas' for select companies to be used by their workforce abroad (S/CSS/W/12). This proposal has not made any headway due to the reluctance of some countries to discuss immigration matters (including visas and work permits) in the WTO. The main objection is that immigration issues do not constitute a services issue *per se*. Nonetheless, many of these ideas have been incorporated in the East African Community's *Protocol on the Establishment of the East African Community Common Market* (see Section 5 below).

2.4.2 Recognition of qualifications and experience

The ability of professionals to provide a service in a foreign market is adversely affected by a lack of recognition of professional or equivalent qualifications and licensing requirements. As a result, professionals are not permitted market access, or if work permits/visas are granted, the scope of the work they may undertake is limited to specific activities (TN/S/W/14). GATS does not provide an obligation on a member taking the commitment (host state) to recognise the education, licences or certifications of the applicant.

However, GATS disciplines allow countries to accord recognition to education or experience obtained abroad, or to licences or certificates granted in another country (GATS Article VII). Such recognition can be achieved either through a bilateral agreement or arrangement or may be granted autonomously provided other interested countries are afforded the opportunity to negotiate their accession to such an agreement or arrangement. Alternatively, in the case of autonomous recognition, countries must be allowed to demonstrate that education, experience, licences, or certifications obtained in their country should be recognised. Here the onus of proof of equivalence will be on the host state.

The idea behind recognition agreements is to recognise the particular qualification of a person obtained in another country as equivalent without having to requalify in the host country. This is of particular relevance to regulated professions (e.g. doctors, dentists, nurses, social workers, financial advisors, lawyers, architects) to obtain licences to practise their professions in the host state. The counter-argument of course is that most persons delivering professional services under Mode 4 act as consultants or advisors leaving local licensed persons to sign off on audits, plans, and so forth, thereby arguing that recognition is not a real concern.

Mutual recognition can refer to both academic qualifications and professional qualifications. The recognition of academic qualifications basically concerns curricula and degrees and can confer the facility to allow further study, be eligible for training, or have the right to use a title or a degree. The recognition of professional qualifications refers to a decision by a regulatory and/or professional body to allow entry into and or practice of a profession which can be subject to the possession of a degree/diploma, a professional title, a period of certified vocational training, and professional examination (Zarrilli, 2005).

However, mutual recognition agreements do not necessarily lead to automatic market access for professionals. According to Zarrrilli (2005: 7), two basic approaches to mutual recognition are followed. According to the harmonisation-based approach, recognition is provided on a profession-by-profession basis due to the harmonisation and coordination of the education and training required by each profession. The equivalence-based approach on the other hand is not based on prior harmonisation of curricula and training requirements but on the recognition of equivalence of qualifications. The first approach normally leads to unconditional market access, whereas the second approach is often accompanied by an adjustment mechanism to offset gaps between education and training systems. The harmonisation approach has proven to be laborious and time consuming in order to compare educational and training systems, agree on the details for each profession, and, to implement specific rules. The equivalence approach, however, has been shown to lead to faster and concrete results but contains more discretionary powers and less predictability and automaticity of market access.

Whenever a country extends market access for professional services, it must provide adequate procedures to verify the competence of professionals from another country (GATS Article VI(6)). Domestic measures relating to qualification requirements and procedures and licensing requirements must be based on objective and transparent criteria such as competence and the ability to supply a service. In addition, licensing procedures may not in themselves constitute a restriction on the supply of a service. Pending the development of disciplines which aim to ensure that requirements are transparent, objective and necessary WTO members may not apply licensing and qualification requirements that nullify or impair specific commitments.

The role of professional bodies, higher education institutions and other competent bodies in particular are important to assess and recognise the quality of a foreign qualification, to verify its accuracy, and ultimately to achieve the free movement of professionals. The evaluation process requires clear criteria and guidelines on processing times, fees, documentary requirements and a right of appeal. The assessment of professional competence requires certain basic conditions to be in place, for example the appropriate regulation of the profession in both countries, trust in the quality of academic and professional education, examination and practical training in the other country, willingness on the part of the professional bodies which award qualifications and licences to cooperate,

and an adjustment mechanism to rectify any deficiencies in a professional qualification.

3. Southern African Development Community

The SADC Protocol on the Facilitation of Movement of Persons of 2005 has not yet been implemented as it has not been ratified by the requisite number of signatory states. The main objective of the protocol is the abolition of visa requirements for short periods of stay of up to 90 days and the facilitation of permanent and temporary residence and establishment in the territory of another member state (Article 3). It does not convey a right to conduct work for remuneration during this period of time. It also does not define the meaning of temporary residence. The term 'establishment' is defined to mean the exercise of an economic activity or profession as an employee or self-employed person establishing and managing a profession, trade, business or calling (Article 18). However, people will not be granted establishment or enjoy rights and privileges in terms of the protocol but in terms of national laws. Fortunately, the protocol provides for the harmonisation of all relevant national laws, statutory rules and regulations including the development of model laws.

However, it would seem that the Draft Protocol on Trade in Services takes a backward step by providing in Article 17 that a member state may apply its own laws, regulations and requirements regarding entry and stay, work, labour conditions, and establishment of natural persons. The Draft Protocol does not make mention of harmonisation. The Draft Protocol also does not deal with measures relating to persons seeking or taking employment in another member state or confer a right of access to the employment market of another member state (Article 17(2)). Countries are not prohibited form maintaining market access limitations such as quotas or economic needs tests on the temporary movement of natural persons. Neither does the Draft Protocol provide common definitions and categories of services suppliers or stipulate any conditions of market access to clarify commitments and make them more predictable. It would appear that despite the watered-down objectives of the protocol due to the metamorphosis it has undergone since its first draft in 1996, the Protocol on the Facilitation of Movement of Persons will be sidelined by the Services Protocol.

It would also appear that political sensitivities on the entry of foreign workers into a country

have prevailed; this is despite indications of skills shortages in the region. Local attitudes against the liberalisation of movement of persons are enforced by the perceived idea that it would open the floodgates of unskilled persons at the expense of the employment of local unskilled workers and put strain on public services. Winters (2008: 496) argues that temporary mobility is unlikely to come from the poorest segments of society because they are simply too disconnected from the global economy to know about such opportunities and too unskilled to take advantage of them. Illustrating these sensitivities is the recent decision by the South African government to import 50 000 persons with scarce skills from outside Africa over the next three years. According to the government, this is necessary to protect neighbouring countries from a so-called brain drain (Business Day, 2011). However, for example, more than 5 400 foreign teachers already work in South African public schools. Most of them (3 796) are from neighbouring Zimbabwe (timeslive, 2011).

4. Common Market for Eastern and Southern Africa

In contrast, the COMESA Council adopted Regulations on Trade in Services (CS/CM/XXVI/2) in accordance with the COMESA Treaty with the aim of enhancing the establishment of a common market. The regulations cover measures affecting trade in services through all four modes of supply. Annex 1 to the Regulations deals specifically with the temporary movement of natural persons and has the same scope and contains the same exclusions as the GATS *Annex on Movement of Natural Persons Supplying Services under the Agreement* (see 2.1 above). It provides that members must negotiate specific commitments applying to the movement of persons.

Although members are at liberty to maintain market access limitations, the annex provides for the reduction or elimination of quantitative measures and economic needs tests within specified time frames. Where members decide to maintain economic needs tests, they must specify the sectors and occupations to which the test shall apply, the definition, conditions and criteria to be used, and the time frame for phasing out the test. In line with current developments in multilateral negotiations, the annex identifies four categories of persons, namely independent professionals, contractual service suppliers, business visitors (divided into two subcategories: services sellers and persons responsible for setting up a commercial presence) and intra-corporate transferees (subdivided into managers and specialists).

Significantly, the annex provides common definitions to describe each personnel category and subcategory. This would increase the predictability of commitments and assist companies and individual service suppliers in assessing market opportunities.

5. East African Community

Similarly, the member states of the EAC concluded a *Protocol on the Establishment of the East African Community Common Market* in November 2009 that provides for the most advanced and comprehensive system for the free movement of persons in the region. The protocol entered into force in June 2010 and provides for the free movement of goods, services, labour, services and capital and the right of establishment and residence. It makes provision for the issuing of common national identification and travel documents, which forms the basis for the free movement of citizens. The protocol and its various annexes provide for different rules and procedures for entry, stay, work, establishment and residence for three main groups of citizens, namely persons (visitors, students, medical patients, persons in transit), workers and the self-employed. Workers and self-employed persons including their spouses and children have a right to residence in the territory of other member states. This right does not provide for permanent residence and is limited to the duration of the person's work permit or validity of their common standard travel document.

The first group (visitors, students, medical patients, etc.) are allowed to enter and stay in the territories of member states for a period of up to six months with the possibility of a further extension not extending the duration of the validity of the common standard travel document or national identity card. They are issued with a pass, free of charge, at the point of entry which does not allow them to undertake employment except for students on internships or industrial training.

The second group (workers) includes persons that perform services for and under the direction of another person in return for remuneration. This group encompasses contractual service suppliers and intra-corporate transferees. The Schedule for the Free Movement of Workers in Annex II of the protocol contains the categories of workers (excluding self-employed persons) that are granted market access to each of the five member states. The members adopted a finer classification of personnel categories based on the International Labour Organisation's International Standard Classification of Occupations for the scheduling

of specific commitments. The classification covers the full range of occupations from executives to unskilled labourers. The categories in which commitments were made include mostly, but not exclusively, highly skilled persons (see Table 1 for an aggregated representation).

Workers are entitled to enter and stay in the territory of another member state on the presentation of a contract of employment at the point of entry. If the period of employment is less than 90 days a special pass is issued that entitles the holder to enter, stay and work. In the case of longer periods of employment, a person is entitled to enter and stay in order to apply for a work permit from the competent authority in the host country. Work permits are issued for an initial period of up to two years with the possibility of renewal upon application. The Regulations on the Free Movement of Workers (Annex II to the Protocol) provide clear procedures and time frames for the application, denial and cancellation of work permits. Workers including their spouses and children have a right to equal treatment of employment as accorded to the workers of the host state. This includes equal remuneration, the right to enjoy social security benefits and to join a labour union.

Table 1: Commitments on the movement of natural persons by category and country

Category of workers	Kenya	Burundi	Tanzania	Rwanda	Uganda
Directors and chief executives	X				X
Specialised departmental managers	X				X
Other departmental managers	X				X
Physical science professionals	X	X		X	
Mathematicians, statisticians and computing professionals	X	X		X	X
Engineering science professionals	X	X	X	X	X
Health and life science professionals	X		X	X	X
Teaching professionals	X	X	X	X	X
Legal professionals	X				X
Social science and related professionals	X				
Writers and creative or performing artists					X
Business professionals	X				X
Land surveying			X		
Other professionals	X	X			
Engineering technicians	X			X	
Optical and electronic equipment operators				X	
Medical and health science	X	X			
Associated professionals	X				
Physical and life science professionals	X	X			
Ship and aircraft controllers	X		X		X
Business and social services associate professionals	X				
Primary and pre-primary education and other teachers	X				
Other business social services, athletics, sports and related services	X				
Extraction and building trades workers	X				X
Metal, machinery and related trades workers	X				X

Source: EAC Common Market (free movement of workers) Regulations (Annex II)

The third and final group of citizens, namely self-employed persons, is regulated by Annex III (Right of Establishment Regulations) of the protocol. The right of establishment allows an individual to take up and pursue economic activities as a self-employed person or to set up and manage economic undertakings in the territory of another member state. The right also permits workers that are employed in the territory of a member state to remain in that territory for the purpose of taking up economic activities as self-employed persons. Such a person would need to apply to a competent authority for a work permit in the host state. Work permits that are issued to self-employed persons would be limited to professionals and investors seeking to set up a commercial presence in the host state. The applicant would need to prove that s/he has obtained the necessary licence, registration and any other authority or permission for establishment. In addition, the person must have sufficient capital and other resources for the purpose of establishment.

In order to facilitate the free movement of labour (workers and self-employed persons) members decided to harmonise and mutually recognise academic and professional qualifications. This approach towards mutual recognition involves, on the one hand, the harmonisation of curricula, examinations, standards, certification and accreditation of educational and training institutions, and, on the other hand, recognition of the equivalence of professional qualifications granted, experience obtained, requirements met and licences or certifications granted in any other member state.

6. COMESA-EAC-SADC Tripartite FTA

The negotiations for the establishment of a COMESA-EAC-SADC FTA were launched on 12 June 2011 at the second COMESA-EAC-SADC Tripartite Summit of Heads of State and Government. The broader objective, according to the Communiqué of the first COMESA-EAC-SADC Tripartite Summit of Heads of State and Government, is to merge the three Regional Economic Communities (RECs) into a single Regional Economic Community. In addition to the launching of negotiations, the Tripartite Summit adopted a *Roadmap for the Establishment of the Tripartite FTA* as well as the *Tripartite FTA Negotiating Principles, Processes and Institutional Framework*.

The member states will first enter a phase of pre-negotiation preparation before the commencement of formal negotiations within six to twelve months from the date of launching the negotiations. This preparatory phase would include the adoption of a schedule of negotiations and rules of procedure. The member states will also need to formulate national negotiating positions during this period. The responsibility for implementation lies with the member states with the assistance of the Tripartite Task Force headed by the Chief Executive Officers of the three RECs. The responsibility of the Tripartite Task Force is to coordinate and provide technical and administrative support to the negotiating process. The overall responsibility for the monitoring of the process lies with the Tripartite Sectoral Ministerial Committee.

The *Tripartite FTA Negotiating Principles* provide that 'the negotiations shall be REC and/or Member/Partner State driven'. This means that the negotiations will not necessarily be conducted among the three RECs. The Members of EAC are obliged to coordinate their trade relations with third parties and to develop common negotiating positions. Equally, the Agreement of the Southern African Customs Union (SACU), with the members South Africa, Botswana, Lesotho, Namibia and Swaziland, provides that common negotiating positions on trade in goods should be developed for purposes of undertaking negotiations with third parties. The particular provision in the SACU Agreement (Article 31) which makes provision for the establishment of a common negotiating mechanism has not yet been implemented by the member states. The haphazard manner in which the still-to-be-completed SADC-EPA negotiations took place is proof of the need for the establishment of the common negotiating mechanism.

COMESA launched a customs union in June 2009 and is implementing a common external tariff over a three-year period ending mid-2012. This raises the question whether COMESA will develop a common negotiating position in order to preserve its common external tariff. Likewise, SADC also envisages the establishment of a customs union; however, there are indications that some of its members have lost their enthusiasm for the project.

The Tripartite FTA negotiations will take place in two phases. The first phase will include negotiations on trade in goods as well as the movement of business persons. This will be followed by negotiations on trade in services, intellectual property rights, competition policy, and trade and development and competitiveness in the second phase. The movement of

business persons will be negotiated 'through a separate track in a committee to be established' by the Tripartite Sectoral Ministerial Committee. The *Roadmap for Establishing the Tripartite FTA* envisages the completion of the first phase of negotiations within 24 to 36 months from the date of launching the negotiations. Although this process has barely started, it is worthwhile to analyse the Draft Tripartite FTA Agreement and its annexes (December 2010) within the current preparatory period. These draft texts will also be subject to negotiation because the member states have not negotiated or agreed on its content. The next section will continue to focus on the movement of natural persons as provided in the Draft Tripartite FTA.

6.1 Tripartite FTA negotiating text on the movement of business persons

Article 29 of the Draft Tripartite FTA Agreement provides that 'Tripartite Member States shall grant entry to business persons in accordance with **Annex 10** on Movement of Business Persons. Tripartite Member States shall implement the provisions on movement of business persons in their national measures'. The Annex on Movement of Business Persons contains a very broad and comprehensive definition of 'business persons' and includes 'a natural person residing in a Tripartite Member State who is engaged in trade in goods, the provision of services or the conduct of investment activities, and shall include business visitors, traders and investors, professionals, and intra-company transferees' (Article 1).

A person must be a resident and engaged in an economic activity in any of the Tripartite member states to qualify for the benefits under the annex. The definition of a business person is, unlike that of GATS, not confined to services providers only, but extends also to persons operating in the goods sector and to investors. The annex uses mostly the same terminology found in GATS negotiations for the categorisation of persons. It provides for four categories of persons namely business visitors, traders and investors, intra-corporate transferees, and professionals. This common and comparable approach provides for a complete but welcome change in the scheduling of commitments in Mode 4 to that which the African WTO members had followed in GATS. It also compares, to a certain extent, with the COMESA's Regulations on Trade in Services and the EAC's Protocol on the Establishment of the East African Community Common Market.

The annex provides for full market access for all four categories of business persons by prohibiting the use of numerical quotas (Article 2(2)(b), 3(2)(b), 4(2)(2), 5(2)(b) and 6) and economic needs tests (Article 2(2)(a), 3(2)(a), 4(2)(a), 5(2)(a)). GATS makes provision for the liberalisation of the movement of natural persons within a regional integration context (Article V). However, the footnote to Article V(1)(a) prohibits the *a priori* exclusion of any mode of supply. The members of the Tripartite FTA can negotiate the free movement of natural persons but not in isolation and to the exclusion of other modes of services trade. As a result, negotiated commitments on the liberalisation of movement of natural persons supplying a service can therefore only enter into force at a later stage after the conclusion of a comprehensive services agreement (which in this case forms part of the second phase of the Tripartite FTA negotiations). This does not, however, prevent members from negotiating and implementing measures on entry and stay which relate to the movement of natural persons but fall outside the ambit of GATS. Members are also not prohibited from concluding mutual recognition agreements in accordance with Article VII of GATS.

The annex contains to varying degree the elements relevant to define or describe each of the categories (or sub-categories) of persons covered by the agreement. The term 'business visitor' is not defined in the annex. Nonetheless, the category 'business visitor' in the GATS negotiations (TN/S/W/31 and TN/S/W/32) refers to senior representatives of a services supplier of another member state. These persons negotiate or conclude agreements (including attending business meetings, sales fairs and conferences) for the sale of services and are responsible for setting up a commercial presence in the host state. They do not engage in direct sales to the end consumer or in supplying services themselves and are remunerated from a source outside the host state. The COMESA Regulations on Trade in Services provide for a similar description of business visitors. In the case of the draft Tripartite FTA the definition of a business visitor also includes a person seeking to conduct investment activities or trade in goods.

The annex covers two sub-categories of persons not commonly found in the schedules of specific commitments in GATS or in the negotiating proposals. This could be attributed to the broader scope of the annex to include the movement of persons involved in trade in goods and investors. The category described as 'traders and investors' includes persons (traders) that are involved in the cross-border supply of goods or services from the territory of one Tripartite member state in the territory of another (Article 3(1)(a)) as well

as persons (investors) seeking to 'establish, develop, administer or provide advice or key technical services to the operation of an investment to which the business person or the business person's enterprise has committed, or is in the process of committing, a substantial amount of capital, in a capacity that is supervisory, executive or involves essential skills' (Article 3(1)(b)).

Although ill described, the definition of a trader could be construed to have the same meaning as 'contractual service suppliers' in the COMESA Regulations on Trade in Services and the GATS negotiating proposals. In those cases this category of persons covers cases where the foreign services supplier has obtained a contract to deliver a service to a client in the host state but which requires the presence of the supplier's employees with appropriate educational and professional qualifications to execute contractual obligations. It could also include 'after sales' service providers where machinery/equipment is purchased on condition that the installation, maintenance or repair is carried out by the supplier or a sub-contractor. Contractual service suppliers receive their remuneration from their foreign-based employers and not the client. They can only provide services that are directly related to the contract. The definition of an investor overlaps to a large extent with that of a business visitor as defined in the COMESA Regulations on Trade in Services. Again, the definition of an investor in the draft Tripartite FTA includes not only suppliers of services but also goods.

The third category of business persons in the annex covers intra-corporate transferees and is limited to three sub-categories namely managers, executives and specialists. Unlike the EAC Protocol, it excludes categories such as persons being transferred for career development purposes and spouses or partners of intra-corporate transferees. The term 'intra-corporate transferees' includes residents of a Tripartite member who are employed by an enterprise established in the territory of a Member and who are being transferred temporarily to render services to that enterprise in the territory of any other Member. In this case, the service supplier has a commercial presence in the host state to which the intra-corporate transferee is being transferred. The three sub-categories of intra-corporate transferees are not defined in the annex and should be further developed.

The final category of business persons in the annex refers to independent professionals 'seeking to engage in a business activity at a professional level' (Article 5(1)). Again, this category is not further defined. In the case of COMESA Regulations on Trade in Services and

EAC Common Market Protocol, independent professionals refer to self-employed persons primarily based in the territory of another member state. Such a person must have obtained a service contract in the territory of the country where the service is to be provided. The person must also possess the appropriate educational and professional qualifications and licences relevant to the provision of the service. This is accompanied by a further requirement that the person's qualifications must be recognised by and accredited with the professional bodies in the territory of the member state where the service is provided.

Apart from the absence of clear definitions and common parameters of the four categories of business persons, the annex has avoided conditions of market access, for example conditions on duration of stay, prior employment, access to social security benefits or conditions of wage parity. The movement of natural persons goes hand in hand with conditions of entry and stay and the recognition of experience and qualifications, but mention of this too has been avoided. Having gained entry into a country and after having received recognition of their professional qualifications and obtaining the necessary licence to practice, temporary workers still have another layer of working conditions and pay issues that need to be addressed in order to facilitate their movement.

7. Conclusion

In order to comply with what the member states are asking for, a number of technical implementation issues need to be solved if the free movement of business persons is to work. The objective of the members of the proposed Tripartite FTA should be to set a common standard for the scheduling of commitments to make it comparable, clear and predictable. This should include the adoption of common categories of persons that are properly described and defined. When numerical quotas or economic needs tests are applied, they should be applied in accordance with transparent criteria. In order to make commitments meaningful, priority should be given to the relaxation of conditions of entry to and stay in member states. Members should consider taking additional commitments to increase transparency on the procedures for application and processing of visas and work permits. They should describe the types of visas and work permits, the documentation needed for an application, the process to be followed for evaluation, processing times, notification of delays, written explanations for denial of an application, reasonable or no

application fees, and clear and simple re-applying procedures. Authorities should make this information available electronically.

Finally, all three regional economic communities identified mutual recognition of professional qualifications as a priority. GATS obliges members to put adequate procedures in place to verify competence where professional services are concerned. Moreover, licensing and qualification requirements must be based on objective and transparent criteria. The procedures that are followed for the issuing of licences may not in themselves constitute a restriction on the supply of a service. Thus, ignoring this important matter is not an option. Information inadequacies require governments to ensure that minimum quality standards are maintained and that consumers are protected from incompetent suppliers.

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Chapter 7

Sugar: Implications of the Tripartite FTA

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1. Introduction

Sugar and sugar policies are at the heart of agriculture in the Southern African Customs Union (SACU) and the Southern African Development Community (SADC) regions, and therefore the implications of changes to the sugar policy and trade regimes in the region are important when considering a regime change such as the proposed Common Market for Eastern and Southern Africa, East African Community and SADC (COMESA-EAC-SADC) 'tripartite' agreement. The objective of this chapter is to examine these relationships and the possible implications of such an agreement.

The chapter starts with an overview of global sugar production and trade to place Africa and the region in perspective. This reveals that analysis of the sugar industry is complicated by the heavy support given in the Organisation for Economic and Cooperation Development (OECD) countries to beet producers and how this in turn distorts the market for producers in the rest of the world. This is followed by a more detailed examination of the African sugar profile. Here the main conclusion is that African exports and imports of sugar are roughly in balance, but that not much of this is intra-African trade. In the fourth section the agricultural production regimes in the tripartite countries of COMESA, EAC and SADC are examined to place sugar in perspective, while in Section 5 the sugar policy regime is analysed, followed in Section 6 by a discussion of the agricultural policies in the individual countries of the tripartite area. In Section 7 the Global Trade Analysis Project (GTAP) model is used to assess the likely implications of a tripartite agreement for sugar production and trade.

2. Sugar – the global picture

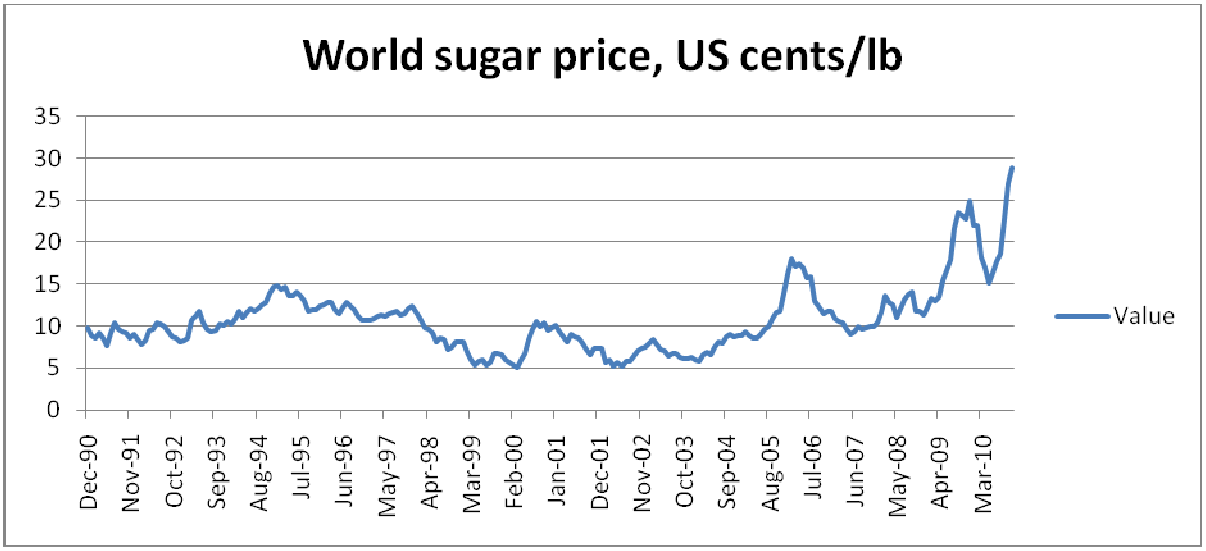
In early 2010, world sugar production was forecast at some 164 million tons in the 2010/11 marketing year, while world sugar consumption was forecast at 158 million tons, with exports of 54 million tons and ending stocks of 27 million tons (USDA, 2010).

More than 100 countries around the world produce sugar either from sugar beet or from sugar cane (Illovo, 2010). Approximately 79% of total production is made from sugar cane grown primarily in the tropical and subtropical zones of the southern hemisphere, and the balance from sugar beet which is grown mainly in the temperate zones of the northern hemisphere. Generally, the costs of producing sugar from sugar cane are lower than from sugar beets. The highest cost production by a considerable margin is Japanese cane sugar, followed by beet in China, Ukraine and Russia, ahead of cane in the US and China and then beet in France. The lowest cost producers are Malawi and Brazil, followed closely by Swaziland, South Africa and Zambia. This bodes well for the Southern African producers, although they are threatened by the next cheapest producers, Australia and Thailand, both major exporters.

Illovo (2010) estimates that 71% of the world's sugar is currently consumed in the country of origin, and the balance traded on world markets. Because of this residual nature of the world market, the world market price has historically been one of the most volatile of all commodity prices. The largest exporters in 2009/10 (Brazil, Thailand, Australia, the European Union (EU) and SADC) supplied approximately 93% of all world exports. South Africa is currently ranked as the eighth largest exporter. Global production and consumption have grown from around 50 million tonnes in 1960 to 100 million tons in the mid-1980s and above 150 million tonnes currently. With the estimated 2010 consumption currently running ahead of projected production, the world sugar price has recently increased).

Figure 1 shows the world sugar price from December 1990 through to and including November 2010. Note that the most recent data shown represents a peak that is well above the February 2006 peak that foreshadowed the global commodity boom of mid-2008.

Figure 1: World sugar price, US cents/lb



Source: Index Mundi at http://www.indexmundi.com/commodities/?commodity=sugar&months

Table 1 shows global cane sugar production for 2000 and 2008. Brazilian production dominates and has almost doubled over the decade, while second placed India has increased more slowly, and Chinese production has also increased dramatically. Of the other export-oriented countries, Thailand's production has increased while Australian, South African and especially Cuban production all declined. The only other African country in the top twenty producers is Egypt.

Table 1: Global cane sugar production, million tonnes, 2000 and 2008

	2000	2008	Increase (%)
Brazil	327,704,992	645,300,182	96.9
India	299,323,900	348,187,900	16.3
China	69,298,730	124,917,502	80.3
Thailand	54,052,124	73,501,610	36.0
Pakistan	46,332,600	63,920,000	38.0
Mexico	44,100,000	51,106,900	15.9
Colombia	35,000,000	38,500,000	10.0
Australia	38,164,688	32,621,113	-14.5
Argentina	18,400,000	29,950,000	62.8
Indonesia	23,900,000	26,000,000	8.8
Guatemala	16,552,400	25,436,764	53.7
Philippines	24,491,000	26,601,400	8.6
United States	36,114,000	25,041,020	-30.7
South Africa	23,876,162	20,500,000	-14.1
Vietnam	15,044,300	16,128,000	7.2
Egypt	15,705,800	16,469,947	4.9
Cuba	36,400,000	15,700,000	-56.9
Venezuela	8,831,520	9,448,162	7.0
Peru	7,535,150	9,395,959	24.7

Source: FAOSTAT, 2010

Global sugar trade is shown in the next two tables. Firstly, Table 2 shows the main global exporters from 2000, while Table 3 shows the importers. Brazil is the dominant exporter and has overtaken the EU, even when intra-EU trade is included. Thailand's exports have steadily increased. The EU dominates world imports with nearly one–quarter of the total when intra-EU imports are counted. Next comes the US and Russia, followed by Nigeria. Algeria and Egypt are also relatively large importers.

Table 2: World sugar exports, $ million

	2000	2005	2006	2007	2008
World	8,861	14,890	20,543	19,160	18,356
Brazil	1,199	3,919	6,167	5,101	5,483
EU-27	2,853	4,529	5,616	4,513	4,935
Thailand	644	705	734	1,259	1,432
India	96	129	690	1,311	1,028
Mexico	51	72	390	94	403
UAE	135	355	297	393	387
Guatemala	191	237	299	358	378
Cuba	448	153	135	198	315
Mauritius	211	345	353	296	292
South Africa	260	276	378	280	221
Croatia	1	135	185	204	172
Swaziland	98	147	289	165	166
Belarus	80	216	127	127	164
Fiji	110	131	124	115	157
Colombia	194	268	361	261	156
% of total	74	78	79	77	85

Note that EU-27 includes intra-EU trade
Source: FAOSTAT, 2011

Table 3: World sugar imports, $ million

	2000	2005	2006	2007	2008
World	9,201	15,598	20,649	19,469	20,120
EU-27	2,073	4,511	4,458	4,806	5,594
United States	552	874	1,349	826	1,091
Russian Federation	765	797	1,119	1,162	974
Nigeria	105	309	388	414	603
Korea	293	395	547	451	544
Japan	305	366	493	443	479
China	197	551	791	455	464
Saudi Arabia	123	245	415	394	449
Canada	210	308	418	312	432
Malaysia	254	298	394	447	418
Bangladesh	54	224	198	407	409
Algeria	220	281	427	373	389
Egypt	68	145	148	135	378
Indonesia	283	589	577	1,040	367
Iraq	115	164	261	136	317
Subtotal ($m)	5,615	10,058	11,984	11,801	12,907
Subtotal (%)	61.0	64.5	58.0	60.6	64.1

Note that EU-27 includes intra-EU trade
Source: FAOSTAT, 2011

3. The African picture[1]

Table 4 examines sugar cane production for African countries from 1980, with South Africa and Egypt the major producers, contributing some 45% of the total cane sugar production of the continent. If Tanzania is placed in the EAC regional group, then one-third of the tripartite cane sugar is produced in COMESA, 12% in EAC and 55% in SADC.

The final row shows that Africa's share of world production has declined from 7.8% of the world total in 1980 to 5.3% in 2008, largely as a result of the rapid increases recorded in

[1] Sugar beet is grown in Morocco (2.93 million tonnes in 2008) and Egypt (5.13 million tonnes in 2008), but this discussion focuses on cane sugar only.

Brazil and elsewhere. Almost 90% of Africa's production is recorded in Table 4, meaning that sugar production in Africa effectively means cane sugar production in the tripartite region.

Table 4: African cane sugar production, 1,000 tonnes, 1980 - 2008

	1980	1990	2000	2005	2007	2008
South Africa	14.06	18.08	23.88	21.27	19.72	20.50
Egypt	8.62	11.10	15.71	16.32	17.01	16.47
Sudan	1.28	4.22	4.98	7.19	7.47	7.45
Kenya	4.53	4.75	3.94	4.80	5.20	5.11
Swaziland	2.78	3.84	3.88	5.20	5.00	5.00
Mauritius	4.56	5.55	5.11	4.98	4.24	4.53
Zimbabwe	2.53	3.09	4.23	3.29	3.00	3.10
Madagascar	1.39	2.00	2.19	2.45	2.60	2.60
Malawi	1.48	1.79	2.10	2.40	2.50	2.50
Zambia	0.92	1.13	1.60	2.50	2.50	2.50
Mozambique	2.00	0.33	0.40	2.25	2.06	2.45
Tanzania	1.48	1.32	1.36	2.30	2.37	2.37
Uganda	0.34	0.61	1.48	2.35	2.35	2.35
Ethiopia	0.00	0.00	2.18	2.45	2.20	2.30
DRC	0.89	1.69	1.67	1.52	1.55	1.55
Angola	0.30	0.27	0.35	0.35	0.36	0.36
Burundi	0.01	0.09	0.20	0.18	0.18	0.18
Rwanda	0.02	0.04	0.04	0.06	0.10	0.06
Subtotal	**47.19**	**59.90**	**75.28**	**81.84**	**80.41**	**81.39**
Africa total	56.93	71.33	86.18	92.44	91.68	92.85
World total	734	1,053	1,257	1,322	1,617	1,736
Africa% of world	7.8	6.8	6.9	7.0	5.7	5.3

Source: FAO database

Exports of the main sugar producing African countries involved in the tripartite agreement are shown in Table 5, where the top three (Mauritius, South Africa and Swaziland) exported some 65% of the African total in 2008, down from 83% in 1980 and 1990, largely because South African exports declined while those of Mozambique, Zambia and Uganda have increased substantially.

Table 5: African tripartite country sugar exports, US$1,000

	1980	1990	2000	2006	2007	2008
Mauritius	281,882	349,228	211,150	352,632	296,349	291,910
South Africa	497,262	211,828	260,210	378,286	280,302	221,044
Swaziland	165,052	171,018	97,791	289,233	164,607	165,751
Mozambique	24,595	7,862	24,900	61,245	60,076	85,191
Zambia	0	1,060	22,879	59,070	82,383	57,941
Zimbabwe	73,320	61,506	88,243	147,755	32,462	52,746
Malawi	46,469	28,166	24,900	47,936	60,972	50,746
Uganda	0	0	754	11,291	32,768	38,034
Kenya	28,405	70	1,818	8,023	14,175	29,163
Egypt	4,307	783	8	29,215	58,275	24,288
Ethiopia	2,004	16,773	10,300	891	48,232	13,593
Tanzania	4,544	9,300	6,772	6,538	22,138	7,728
Madagascar	11,706	20,368	562	5,889	3,223	6,977
Su total	1,139,546	877,962	750,287	1,398,004	1,155,962	1,045,112

Source: FAOSTAT, 2011

Table 6 completes the African analysis by showing the tripartite country imports in the same format as Table 5. Heading the table in 2008 with one-third of the total is Egypt (down from over half of the total in 1980 and 1990). Kenya has reached $100 million of imports in recent years from an almost-zero base, while Ethiopia, Djibouti, South Africa, DRC and Madagascar have gone from low figures to around $50 million of imports each.

Table 6: African tripartite country sugar imports, US$1,000.

	1980	1990	2000	2006	2007	2008
Egypt	239,000	315,677	68,227	148,400	135,131	377,552
Angola	44,408	28,000	18,900	124,209	96,415	112,486
Kenya	1,176	54,757	47,566	67,188	108,543	100,286
Libya	62,078	94,688	35,856	98,115	79,336	81,275
Ethiopia	27	954	7,697	42,272	33,674	64,733
Uganda	22,000	4,600	21,730	36,207	63,442	60,740
Djibouti	3,692	6,066	3,000	24,346	50,193	58,387
South Africa	0	11,037	1,850	12,720	36,707	57,850
DRC	8,600	9,700	13,100	41,616	43,214	53,318
Madagascar	0	99	5,288	39,674	35,096	47,903
Botswana	10,170	17,768	28,181	42,212	27,284	32,400
Mozambique	0	11,200	65,000	6,834	9,972	23,078
Mauritius	13	8	10,988	22,331	17,229	18,254
Rwanda	6,040	5,953	3,112	8,838	13,928	16,068
Eritrea	0	0	3,000	8,200	42,800	14,200
Lesotho	8,878	10,000	9,500	11,000	11,200	11,200
Burundi	2,840	3,033	1,566	4,886	4,602	6,084
Comoros	1,402	1,103	1,096	2,175	4,002	3,769
Zimbabwe	0	285	61	64,566	78	3,254
Namibia	19,800	26,200	12,300	34,272	4,754	1,876
Zambia	5	17	1,036	1,190	283	1,711
Swaziland	0	0	664	1,587	906	1,609
Seychelles	695	1,347	1,364	2,008	1,779	1,501
Malawi	121	5	1,397	140	47	165
Subtotal	**430,945**	**602,497**	**362,479**	**844,986**	**820,615**	**1,149,699**
Net exports ($m)	**708**	**276**	**394**	**576**	**338**	**-98**

Source: FAOSTAT, 2011

South African sugar exports are shown in Table 7, ranked by 2009 exports. There are seven African countries in the top 15 destinations for 2009, headed by Mozambique, itself a major sugar exporter and no doubt partly reflecting South African exports via Maputo. The total export to the world increased in 2009 from the consistent pattern of the earlier years, but an examination of the lower two rows of Table 7 explains that this was driven by the high average price. Exports have consistently been around the million tonne mark except for the 1,426 million tonnes in 2000 and 1,283 million tonnes in 2007. The right-hand column shows the total exports from 1996 to 2009 inclusive, highlighting the variability in output and exports. Over this period exports to Saudi Arabia, Malaysia, Mauritius and Tanzania were all around $100 million, but these are not reflected in the table because of this variability.

This next section examines the tariff rates facing South African exports to the tripartite region. These tripartite countries are grouped into COMESA, EAC and SADC to overcome the classic African problem of overlapping membership. Excluded from the analysis are the BLNS countries (Botswana, Lesotho, Namibia and Swaziland), as in theory there is free and unfettered access for sugar between South Africa and these countries. In reality, and contrary to the new SACU Agreement, as Vink and Sandrey (2008) point out, this is not actually the case, but here it is so assumed.

Table 7: South African sugar (HS1701) exports, US$ million

Destination	1996	2000	2005	2007	2008	2009	Subtotal
Indonesia	0.0	0.0	44.0	12.8	9.4	76.4	157
Mozambique	8.7	27.7	4.8	67.1	53.5	64.4	480
Japan	45.5	25.7	47.0	33.1	36.7	46.5	500
Zimbabwe	0.0	0.0	0.0	0.1	3.1	24.1	28
Bangladesh	0.0	0.0	3.7	0.0	0.0	21.1	40
United States	41.6	17.3	20.7	7.9	0.0	19.3	220
Sudan	0.0	0.0	0.4	4.8	0.2	18.1	33
Angola	2.9	1.9	7.2	13.8	11.4	16.6	93
Iran	4.8	43.7	14.4	0.0	0.0	13.6	311
Russia	7.8	0.0	0.0	0.0	0.0	13.5	97
Kenya	7.0	18.5	18.1	16.9	11.4	12.8	211
Madagascar	2.2	3.2	8.0	6.8	16.9	11.9	126
India	0.1	0.0	10.2	11.8	5.1	10.1	59
Korea	32.0	29.9	31.8	35.0	26.0	8.7	418
Uganda	1.6	0.8	2.9	11.8	15.3	7.2	53
Total	270.9	253.1	275.0	276.1	217.9	386.7	3,822
Africa as% total	56.9	66.6	77.5	80.4	86.7	94.2	74.0
1,000 t	902.3	1426.3	1082.5	1283.5	980.9	1076.3	905.5
Average $/kg	0.30	0.18	0.25	0.29	0.28	0.20	0.43

Source: World Trade Atlas

Table 8: Access regimes and exports for South African sugar (HS 170111)

Destination	Tariffs (%)			South African exports $m		
	MacMaps1	MacMaps2	WTO	2007	2008	2009
COMESA						
Sudan	16.2			5	0	18
Comoros	0.0	0.0				
Seychelles	0.0	0.0		1	0	0
Ethiopia	5.0	5.0		0	0	0
Djibouti	10.1	20.0	11.5			
Egypt	7.0	2.0	2.0			
Eritrea	2.0	2.0				
Libya	0.0	2.0				
Comoros		0.0		3	3	4
EAC						
Kenya	85.3	20.0	62.5	17	11	13
Uganda	91.1	35.0	35.0	12	15	7
Tanzania	85.3			3	3	4
Rwanda	30.0		30.0	2	1	1
Burundi	23.2	15.0		2	0	1
SADC						
Mozambique	3.0	7.5	7.5	67	53	64
Zimbabwe	20.0	15.0	20.0	0	3	24
Angola	3.9	2.0	4.0	14	11	17
Madagascar	2.6	5.0	5.0	7	17	12
DRC	20.0	20.0		3	3	2
Zambia	5.4	15.0	25.0	1	0	0
Malawi	25.0	25.0	25.0	1	2	0
Mauritius	0.0	0.0	10.0	6	0	0

Source: MacMaps, International Trade Commission, WTO and WTA

A couple of features are apparent from Table 8 regarding the current tariff access conditions for South African sugar as defined by HS 170111. The first is the variation between the World Trade Organisation (WTO) data in the third column of the tariff block and the two columns to the left from the MacMaps and the International Trade Commission website (which is a referral to MacMaps). These differences are highlighted by the confusion in the EAC tariff, which is in theory a common tariff to non-EAC countries: it is likely that there

are some concessions to South Africa here that may or may not be universal through the EAC members. The second feature is that despite the rhetoric from SADC about their Free Trade Agreement (FTA), there are high duties against South African exports to Zimbabwe, Zambia and Malawi. The trade data in the three right-hand columns is sourced from the World Trade Atlas (WTA); this reinforces the data in Table 7 to place the access issues in perspective.

4. The economic setting for the tripartite countries

The data for this discussion is sourced from the United Nations (UN) World Development Indicators, the Food and Agricultural Organisation (FAO) and the Central Intelligence Agency (CIA) websites, with the most consistent recently available data used.

Table 9 provides base demographic and economic information about the 26 countries for 2008. The first point to note is the concentration of the Gross Domestic Product (GDP), where five countries, namely South Africa, Egypt, Angola, Libya and Sudan account for 79.2% of the total. Conversely, the smallest 12 economies represent only 4.5% of the total, with a combined GDP of little more than Kenya's. South Africa alone accounts for 38.7% of the GDP, while Egypt accounts for another 17.8%.

Table 9 also shows the wide dispersion in Gross National Income (GNI) per capita. This ranges from $9,010 (Libya) to Burundi with $110. Many poor people live in the region – 15 of the 26 countries have an average GNI per capita below $1,000 annually. Note that the data is the actual GNI per capita figures, and that when adjusted for purchasing power parity (PPP) they often increase by as much as three times at the poorest end of the spectrum. For example, the CIA (2011) reports that the DRC ranked 227th on its listing of per capita GDP using purchasing power parity (last in the CIA 2009 listings) but with a per capita value of $300 as opposed to the $140 shown in Table 9. Using this 2009 CIA data the region can be placed in perspective globally, as 12 of the 26 tripartite countries are placed in the bottom 28 places on their listing: from Tanzania's 200th place to the DRC's number 227. These countries are Zambia, Tanzania, Uganda, Comoros, Madagascar, Ethiopia, Rwanda, Malawi, Mozambique, Eritrea, Burundi and the DRC. It is no coincidence that the CIA's listing of birth rates also shows that eight of the top thirteen in the world are in the region, as in

order for per capita GDP to increase GDP growth must exceed the rate of population growth.

The right-hand side of the table shows the agriculture value-added (contribution to GDP), again reflecting considerable variation. The resource-rich countries, particularly Botswana, Libya and South Africa (the only country in Africa with significant industrial capacity) are in stark contrast to many of the poorer countries such as DRC, Tanzania, Ethiopia and Rwanda where this contribution is 40% or more. Next is the import trade data, with the percentage of imports designated as 'food' and the derived value of the food imports. Many countries have food imports above the average 12.6% of total imports, as that average is reduced by South Africa's 6.1%. Not shown is that the average food import value is 4.5% of GDP, and that several significant but very poor countries have a percentage value above 10% of their GDP (e.g. Eritrea and Zimbabwe at 18.4% and 18.3% respectively and DRC at 10.2%). The oil-rich countries of Libya and Sudan have food imports expressed as a percentage of GDP of only 3.1 and 2.8% respectively (below the tripartite average) while Angola's 4.8% is only marginally above the average. Note that the trade values for Botswana, Lesotho, Namibia and Swaziland are significantly under-reported in this and subsequent analyses as South Africa and the BLNS often do not report their bilateral trade data.

Table 9: Economic settings for COMESA, EAC and SADC, 2008

Reporter	Population	GNI		GDP	Agriculture share of GDP	Total imports	Food imports	
	million	$bn	Per capita $	$bn	%	$m	% Imports	$m
SADC	**215.4**	**403.3**	**1,872**	**434.8**		**167,359**	**8.9%**	**14,946**
South Africa	48	274	5,720	284	3	99,500	6.1	6,070
Angola	17	43	2,540	61.4	9	20,982	14	2,937
Botswana	1.9	11.5	6,120	12.3	2	5,212	12.7	662
Zambia	12	9.2	770	11.4	22	5,060	6	304
DRC	62	8.6	140	9	42	4,400	20.8	915
Namibia	2.1	7.2	3,450	7	11	4,340	17.1	742
Mozambique	21	7.1	330	7.8	28	3,804	16.2	616
Mauritius	1.3	7	5,580	6.8	5	4,651	23.6	1,098
Madagascar	20	6.4	320	7.4	26	3,980	10.7	426
Zimbabwe	13	4.5	340	3.4	19	2,950	21.1	622
Malawi	14	3.5	250	3.6	34	1,650	17.2	284
Swaziland	1.1	2.9	2,560	2.9	7	1,700	12.1	206
Lesotho	2	2.1	1,030	1.6	12	2,005	3.2	64
EAC	**127.2**	**55.6**	**437**	**56.5**		**17,149**		**2,257**
Tanzania	40	16.3	410	16.2	45	7,125	13.9	990
Kenya	38	24	640	24.2	26	11,074	13	1,440
Uganda	31	11.3	370	11.8	24	4,526	14	634
Rwanda	9.7	3.1	320	3.3	40	1,146	12.5	143
Burundi	8.5	0.9	110	1	35	403	10	40
COMESA	**205.55**	**232.69**	**1,132**	**258.02**	**29.5%**	**77,245**	**19.1%**	**14,743**
Egypt	75	119.5	1,580	130.5	14	48,382	19.7	9,531
Libya	6.2	55.5	9,010	58.3	2	9,150	19.9	1,821
Sudan	39	36.7	950	46.2	28	9,352	13.8	1,291
Ethiopia	79	17.6	220	19.4	46	8,036	13.9	1,117
Eritrea	4.8	1.3	270	1.34	24	530	46.5	246
Djibouti	0.83	0.9	1,090	1.1	4	574	77.7	446
Seychelles	0.90	0.76	8,960	0.73	3	1,041	22.4	233
Comoros	0.63	0.43	680	0.45	47	180	32.1	58
Total	**548**	**675.29**	**1,232**	**733.12**		**261,753**	**12.6%**	**32,936**

Source: UN World Development Indicators and FAO

A salient point that emerges from this analysis is that the current SADC membership contributes nearly two-thirds of the total GDP: if the drive to more fully integrate the SADC economies becomes meaningful economic reality, the issue for Cape to Cairo actually is integration of SADC with Kenya, Uganda and Egyp,t and then the realisation of the Cape to Cairo project by Libya, Sudan and Ethiopia. Conversely, without SADC integration it is doubtful that Cape to Cairo will become a reality.

Column 6 shows the agriculture value-added, and here there is again considerable variation. The resource-rich countries (particularly Botswana, Libya and South Africa) stand in stark contrast to many of the poorer countries such as DRC, Tanzania, Ethiopia and Rwanda where this contribution is 40% or more. This reflects the abiding pattern of smallholdings of largely subsistence farming in many countries, with some large-scale farming.

Sub-Saharan Africa accounts for 12% of the world's farmers, 16% of the agricultural land and 28% of those living on less than a US$1 a day, while also having the world's slowest agricultural growth in an environment that is heavily interventionist and slow to reform. Recently, a World Bank study (Anderson and Masters, 2009) estimated the extent of the distortions that this intervention has created in African countries.

The World Bank study extends the work of the International Food Policy Research Institute (IFPRI) and the Organisation of Economic Cooperation and Development (OECD) that have measured agricultural policy distortions in the developed (and some developing) countries for several years. In the World Bank study the nominal rates of assistance (NRA) for some 75 countries that account for between 90 to 96% of global agricultural production were assessed. This included 21 countries in Africa, of which 11 are in the tripartite region. An NRA for each major farm product was computed as the percentage by which policies change the gross returns to farmers for that product relative to what they would have received in the absence of these policies. A positive NRA means that the country subsidises that particular product while conversely a negative NRA represents a tax on the product. The weighted value of these individual products gives the overall NRA for the agricultural sector in that country.

The study shows that, while the extent of taxation in Africa has declined, farmers on average are still taxed, in contrast with farmers in Asia and Latin America, where farmers are, on

average, supported (these averages hide important exceptions, such as Argentina with its heavy export taxes on agricultural commodities). In Africa, the average masks the fact that the West African countries (i.e. not past of the tripartite are) still tax exports of products such as coffee and cocoa relatively heavily. Overall, Anderson and Masters (2009) show that there is considerable variation by country in the study; overall, for the 2000-04 period, South Africa, Madagascar and Uganda are neutral, Mozambique and Kenya give moderate support to their farmers, Tanzania, Egypt, Sudan and Ethiopia tax them quite heavily while both Zambia and especially Zimbabwe tax farmers severely. There is also a strong anti-trade bias in the region.

More detailed information is provided by Anderson and Masters (2009) on the individual products and their degree of assistance. They identify four broad groups of products, the first are those that are generally supported, namely sugar (the most heavily supported), sorghum and milk. The second group includes those products that are neither supported nor taxed, including banana, plantain, wheat and cassava, while the third group includes lightly taxed products such as maize, rice, coffee and possibly tea. The final group includes the highly taxed products of sheep meat, beef, groundnuts, cotton and, most of all, tobacco. The next step in the agricultural support analysis is to look at the impact of these policies upon consumer prices. The study found in general that Ethiopia and Sudan are the largest subsidisers of food products in the region on a total value basis, while on a percentage basis Zambia and Zimbabwe are the largest. Conversely, only Mozambique and Kenya effectively tax consumers. No particular product stands out as being heavily subsidised, unlike in the developed world where milk, rice and sugar are heavily supported.

Anderson and Masters (2009) also provide more detail on the African sugar regime (Table 10). Their study covers all the sugar producing countries of the tripartite region with the important exceptions of Swaziland, Mauritius and Malawi. Nevertheless, the other eight countries produce 82.5% of the total sugar crop in the region. Sugar clearly stands out as the most heavily supported product in Africa during 2000–2004, with an NRA of 44%, more than double the second-place sorghum at 21% and thirdly milk at 15%. This contrasts sharply with the overall African average of negative (taxed) 8.9% for all covered products. By value, sugar is again the most heavily supported, with transfers (explicit or implicit) of $429 million, comfortably more than milk at $374 million and sorghum at $330 million.

Table 10: NRA values for sugar in available tripartite countries,%

	Most recent NRA data			
	Years	2000-2004	1995-99	1990-94
South Africa	2000-05	44	35.9	78.9
Madagascar	2000-03	-0.7	-0.8	-0.2
Mozambique	2000-03	102	91	19
Kenya	2000-04	37	31	-27
Tanzania	2000-04	103	40	23
Uganda	2000-04	17	16	15
Egypt	2000-05	-7	-5	-24
Sudan	2000-04	121	-24	-20

Source: Anderson and Masters (2009). Data for Ethiopia, Zambia and Zimbabwe not available

Despite the missing data there is interesting information in Table 10. Of the SACU countries both South Africa and Mozambique support sugar, while Madagascar is neutral. South Africa's support is reducing while Mozambique's is increasing over the three periods shown. For the three EAC countries, support is very high and increasing in both Kenya and Tanzania and high and also increasing in Uganda. Finally, the two COMESA countries show differing patterns, with very high and increasing support in Sudan, and modest and decreasing taxation in Egypt. Table 10 can be read in conjunction with Table 8, which shows the sugar tariff rates: the general pattern of countries supporting sugar as measured by NRA and actual tariff rates is apparent (these tariffs are of course a major factor in the NRA calculations).

The next section examines each tripartite country with special reference to sugar where data is available.

5. The sugar trade regime

To recognise the special place that sugar holds in the region it is appropriate to start with a mention of sugar policies. Anderson and Masters (2009) confirm that sugar is the most heavily supported agricultural product in most of Africa; the justification often used is that internationally the sector is heavily protected and operates in a distorted trading regime.

This is confirmed by OECD data: the global average Nominal Assistance Coefficient (NAC) for sugar is 1.96. This means that domestic producers on average are receiving nearly double the world market price for their sugar. This is not the highest – rice has a NAC of 3.96, while other products are not far behind sugar: sheep meat at 1.74, beef at 1.54, milk at 1.41 and wheat at 1.50, for example. At the other extreme, producers in Australia and Brazil receive no more than token Producer Support Estimates (PSE) supports for their sugar.

Sandrey and Vink (2008) report on the complexity of the global sugar trading regime: high protection in the OECD countries is only partially balanced by concessions to some developing countries that allow preferential access for relatively minor quantities. Production costs have become almost irrelevant for these two groups. In the middle are the major sugar exporters trading at a global price that is artificially reduced by a combination of denied access and subsidised exports, from the EU in particular.

Reforms in the EU sugar regime now operate on a definite timeframe. On the supply side, following an adverse WTO decision, EU export subsidies are to be slashed, production quotas reduced and the internal domestic prices reduced by around one-third – yet these will still be somewhere near 50% above the global reference price. On the market access front, the sugar import regime is to be gradually relaxed, with quota- and duty-free access from the world's poorest countries under the Everything but Arms (EBA) concession from 2009. This creates both winners and losers amongst African producers. The losers are those that currently have preferential access (the 'haves') and will see their economic rents dissipate, while the winners are those operating almost exclusively on the global market (the 'have-nots') who will see their world export price rise. In Africa the first group is mainly Mauritius (a high cost producer) and Swaziland (a lower cost producer). These production costs are likely to dictate how a country fares in the sugar market. Among the losers, it is likely that Mauritius, at the extreme, will exit the sugar sector completely.

The second group (winners) is exclusively South Africa (a low-cost producer), and here there is potential to see an expansion of the sector in response to enhanced global market prices. It is not, however, a foregone conclusion that this expansion will eventuate within South Africa in the face of the more competitive suppliers of Brazil and Australia in particular. There is a third group of least developed countries (LDCs) that will have quota- and duty-free access into the EU under EBA. For Africa, these countries with reasonable

supply potential are Malawi, Zambia, and possibly Zimbabwe and Sudan. Their future is basically in their own hands and depends upon their ability to increase production and exports under the new EBA regime (although Zimbabwe currently does not have EBA access but is heading towards an LDC given its current economic performance).

The 'wild card' is the recent offer by the EU to the African, Caribbean and Pacific (ACP) countries negotiating a package of Economic Partnership Agreements (EPAs) for quota- and tariff-free access to the EU. The offer covers all products, including agricultural goods (except rice and sugar), and will apply immediately following the signing. It appears that rice and sugar will be fully liberalised in 2015, but this is a guarded offer. The only country to be excepted will be South Africa.

Finally, there appears to be limited hope in the short or medium term for multilateral sugar policy reforms. The US has consistently blocked reform attempts through FTA) (with Australia a case in point), and the stalling of the Doha Round emphasises yet again the problem of special interest groups even though the current position points towards the ability of developed countries to use their policy space in sensitive products to block sugar reforms. Perhaps the dogleg of high oil prices leading to ethanol production from sugar directly and corn indirectly through artificial sweeteners may offer hope for sustained higher global sugar prices, as that is the best the African continent can hope for. This, however, has the downside of exaggerating a sugar price fall should oil prices decline and of delaying more substantive developed country reforms.

The position in the individual countries is described below, with information on the sugar regime included where this is available.

6. Agricultural policies for the individual countries

6.1 SACU

6.1.1 Botswana

The contribution of agriculture to both Botswana's GDP and exports is low. The beef sector used to be the major agriculture product of importance to exports, but now accounts for about 7% of total export revenue, compared to about 70% from diamonds. The dualistic agriculture sector consists of commercial and traditional subsistence subsectors; each undertakes both crop and livestock activities. Commercial agriculture covers about 30% of arable land, comprising mainly cattle grazing on freehold or leased holdings. The major subsistence crops are sorghum, maize, millet, and pulses. Botswana is only about 20% self-sufficient in grains, 15% in vegetables, 25% in fruits and 3% in dairy products.

6.1.2 Lesotho

Lesotho, a small mountainous and land-locked country is not only resource-poor, but also faces considerable problems associated with environmental degradation and soil erosion on its 9% (and shrinking) portion of the total land that is classified as arable. Agriculture is the dominant sector in Lesotho, as 80% of the population of around two million live in rural areas deriving their livelihood from crop (maize) and animal production. One cannot isolate agricultural policies in Lesotho from its food security, and a disturbing aspect of its agricultural performance is that in recent years Lesotho has been a regular recipient of food aid. Perhaps 60% of the population is considered to live below the poverty line, and that percentage has actually increased over the last decade as increasingly Basotho are 'living on the edge' – perilously close to chronic and irreversible food insecurity, poverty and depredation.

6.1.3 Namibia

Commercial farming is undertaken by some 4,500 farmers and focuses mainly on beef production for export to the EU under preferential arrangements and live cattle, sheep, and goats to South Africa, while some maize, wheat, and cotton are also produced. Communal farming supports 95% of the nation's farmers, covers about half of total agricultural land, and is home to 65% of the population. The country imports about half of its cereal requirements

and imports of sugar and dairy products are important.

6.1.4 South Africa

By the late 1970s, the racial segregation of South African agriculture was complete, subsidisation of commercial farming peaked and the productive base of the farming sector in the homelands ceased to provide any meaningful income opportunities to all but a handful of farmers. In the period around 1980, however, farm policy started to change. After 1994, South Africa adopted a policy of openness and limited intervention in markets. The policy objective was to promote trade and therefore competition that would result in efficient allocation and use of resources as well as increased economic activities. This led to the deregulation of both agricultural and trade policies as supports were reduced, markets deregulated, border tariffs reduced and export subsidies eliminated. These changes were dramatic and South Africa now has a very lightly protected (but still very dualistic) agricultural sector. This is confirmed by Kirsten, Edwards and Vink (2009) who assessed the NRA for South African sectors and showed that especially sugar and then yellow maize and perhaps oranges are the only major products being heavily supported while the other main products are basically neutral or lightly taxed.

6.1.5 Swaziland

Swaziland has all the characteristics of a dual economy and is a small land-locked country with high levels of poverty and income inequality. Agriculture is the backbone of the economy, but yet again the sector is acutely dualistic. A dynamic commercial sub-sector occupies 26% of the land, holds an estimated 90% of available irrigation infrastructure, and uses modern technologies to produce mainly cash crops (sugar). A traditional sub-sector involves semi-subsistence smallholder agriculture with communal grazing and low-productivity subsistence agriculture and animal husbandry.

Sugar and sugar-related products are the major export, and are heavily dependent upon preferential access into the EU. Around 60% of agricultural production is focused on the sugar sector, which contributes some 11% of GDP. Swaziland has not been self-sufficient in cereal production since 1980, and by the early 2000s food production had further declined to only 40% of the nation's needs. Many people are vulnerable and food-insecure in the country, with the main contributing factors the high poverty rate, inequality of income

distribution, the high incidence of HIV/AIDS, chronic drought, widespread soil erosion and land degradation, lack of agricultural land, isolation from markets, limited alternative income generating opportunities, gender restrictions for women to access land and resources, and lack of implementation of appropriate policies.

6.2 The rest of SADC

6.2.1 Angola

The WTO (2006) reports that much of Angola's poverty is concentrated in the agricultural sector, a sector that (combined with forestry and fishing) contributes around 8% to GDP and employs over 50% of the labour force, and is based largely (around 80%) on subsistence agriculture. Before independence Angola was a major agricultural producer, and was self-sufficient in food and a significant exporter of many crops, including coffee, cotton, bananas and sugarcane. The recent FAO data shows that the main agricultural products from the sector are dominated by cassava, which is followed a long way back by potatoes, sweet potatoes, maize and cow's milk. Imports at $1,272 million are valued at slightly more than total production from what was once an economically important sector. These imports are headed by chicken meat, followed by wheat flour, beer, wine and sugar, with the top four imports all over 100 million each. Conversely, agricultural exports have slumped to an almost non-existent $7.4 million, with $5.5 million of these being palm oil.

6.2.2 DRC

It is difficult to get information on the agricultural sector in this war-torn and very poor country beyond the basic indicators. Conflict that began in May 1997 has dramatically reduced national output and government revenue, increased external debt, and resulted in the deaths of more than five million people from violence, famine, and disease. All the indications are that agricultural potential is enormous, as the DRC has significant land and water resources, but that currently the dominance of the subsistence sector, the abject poverty of the sector and the almost failed-state status of the country means that the realisation of this potential is a long way off.

6.2.3 Madagascar

Madagascar is another poor country where around three quarters of the population earns most of its income from the mainly subsistence farming sector. The major crops are rice (the basic foodstuff), roots and tubers, industrial crops such as groundnuts, sugar cane, cotton and tobacco, which provide the raw material for local agro-industrial units, and some cash crops mainly intended for export (vanilla, cloves, pepper, coffee, and cocoa). During 2007 agricultural imports were to the value of $247 million, headed by rice, soybeans, food wastes, wheat and sugar, while exports of $181 million where headed by vanilla, cloves, cocoa, fruit preparations and coffee. Overall the sector has moved from slight taxation to a neutral or slightly positive regime. Agriculture remains a key economic sector in the country but its performance since the 1950s has been insufficient to cope with demographic pressures or to contribute to a significant reduction in rural poverty. This is accentuated by the population growth from 4.2 million in 1950 to around twenty million currently as this puts intense pressure on the agricultural sector, and periods of civil unrest and political uncertainty have also disrupted the rural economy and discouraged investment. However, distortions to the sector have been significantly reduced for most commodities as a result of the liberalization policies that were initiated beginning in the late 1980s, with the exception being sugar and vanilla where domestic market inefficiencies still isolate producers from world markets.

6.2.4 Malawi

Malawi's economy is heavily dependent on agriculture and exports of primary commodities of tobacco, tea and sugar, but production has been volatile, with major food shortages in 2002 and 2005 when Malawi experienced several food emergencies and large parts of the population received food aid in 2005. However, as the 2002 and the 2005 food crises eased, imports of agricultural products declined. Malawi's exports are highly concentrated, with agricultural products accounting for nearly 90% of total merchandise exports. The share of tobacco and cotton in these exports has risen recently owing to good prices. For 2007 tobacco represented 56% of agricultural exports that totalled $755 million, while the next were maize ($100m), sugar, tea, and sunflower seed.

6.2.5 Mauritius

Mauritius is a middle-income net-food-importing country. Agriculture (consisting mainly of the overwhelmingly dominant sugar production) continues to be the important sector in terms of its share in exports and on account of its linkages with other sectors. This one crop dominates agricultural production with a 76% share of production and a higher 86% share of exports. The sugar sector is an interesting case study, as the over-reliance on sugar exported to the EU under preferences has had the effect of 'crowding out' other parts of agriculture. As these preferences are being eroded the country has had to make substantial adjustments to compensate.

6.2.6 Mozambique

The WTO (2008) shows that the agricultural sector employs about three-quarters of the labour force, and as they are mostly engaged in subsistence farming on an informal basis, agriculture plays a central role in achieving poverty reduction. The main exports are cashews, cotton, refined sugar, tobacco, and fishery products, and although they are low in terms of relative contribution to the total value of exports, they are significant in terms of their contribution to rural incomes. The sector is actually quite highly supported as the country has gone about trying to set a policy regime to harness the immense agricultural potential in what only a few short years ago was possibly the poorest country in the world. From 1999 intervention has been largely restricted to import duties and Value Added Tax (VAT), while some specific sectors are more highly controlled: sugar, through an import surcharge; cashew through an export tax; tobacco through geographical concessions; and cotton through minimum prices and closed geographical concessions.

6.2.7 Zambia

Growth of agriculture has remained low, and enhancing the productivity of small-scale farmers by reducing their dependency on rain-fed agriculture remains critical to the development of the sector and the reduction of rural poverty. There are a small number of large commercial farms which account for about 45% of the country's agricultural output, and around one million smallholder farmers who grow crops focused on maize, cassava, rice, cotton, and tobacco. In good years Zambia exports maize and in bad years it imports, and the problem is, as in much of the region, that small farm size leads to a lack of mechanisation

and economies of scale, with consequential low labour productivity and hence poverty. In 2007 the main agricultural products by value were maize, cotton, cassava, game meat and sugar, while the top 20 exports of $238 million were slightly more than double the agricultural imports of $112 million. The main exports were tobacco with half of the total, followed by cotton and sugar. The main imports were fats, other food preparations, cigarettes, maize and wheat. Zambia continues to penalise its agricultural sector at a level of at least twice any other country surveyed in the region except for the melt-down sector in Zimbabwe.

6.2.8 Zimbabwe

Examining the data for ten years earlier shows that the overall decline in agricultural production had reduced the value of tobacco by just on two-thirds by 2007, the staple maize had halved, while cotton was down by about one-third. Overall, the sector is heavily taxed at the highest level of the regional countries examined by the World Bank, as their study found consistently high taxation levels between -63 and -81% of the market value of the commodities for groundnuts, cotton, tobacco, wheat, maize, soybeans and sorghum. Central to the Zimbabwean issue is land rights. After independence the resettlement process progressed very slowly but relatively smoothly through to around 1998 when impatience regarding the lack of land redistribution led to the precipitous 'fast-track' land reform programme that was implemented in February 2000. The rest is, as they say, history, with no seemingly visible solution apparent.

6.3 The East African Community

Food insecurity in the EAC has increased recently due to several factors, including unfavourable weather conditions (drought or floods) making emergency food aid necessary. Tariffs are the main trade policy instrument in the sector, although some non-tariff measures are still in force.

6.3.1 Burundi

Agriculture plays a key role in Burundi's economy, employing 90% of the labour force and accounting for 36% of the GDP. Coffee is the major export (over 50% of Burundi's total exports), followed by tea and then cotton. These products are usually grown by small

farmers, but the state had a very strong hold over processing and marketing through state enterprises that often have a buyer's monopoly in that planters were obliged to sell their production at prices fixed in advance, and which declined over time. Imports of US$80 million were led by maize, flours of wheat and maize, malt and peas.

6.3.2 Kenya

Agriculture is the backbone of Kenya's economy, as around 80% of the population lives in rural areas with predominantly small-scale farming. The sector has been constrained by several problems, with the result that Kenya is a net food-importing developing country. Maize and wheat are the main food crops, while the main cash crops are tea, horticulture (cut flowers to Europe), pyrethrum, coffee, and sugar cane. Over-taxation is one of the main constraints for Kenya's agriculture, as a wide range of taxes, levies, cesses, and fees charged on production, inputs, and services used by the sector, distort prices and make farmers uncompetitive in domestic and world markets. In contrast, the success of the cut flower and vegetable export trade has showed that targeted support to infrastructure and extension services can be beneficial to developing an export industry. Kenya lightly taxes its exportables, modestly supports its import-competing products while heavily supporting the mixed trade status products of wheat and sugar. The main products by value during 2007 were cow's milk, tea (number 3 producer in the world), maize, beans and bananas, while imports were headed by palm oil, wheat and sugar ($95m), and exports were dominated by tea, flowers and coffee.

6.3.3 Rwanda

Agriculture plays a key role in Rwanda's economy in terms of employment and exports, with production based mainly on family and subsistence farming. The sector was affected by the 1994 genocide and remains subject to climatic uncertainties. The main cash crops are tea and coffee, which provide more than half of the country's export revenue. Generally, Rwanda's agricultural policy targets food security, while the main imports are palm oil, sugar, wheat flour, malt, and rice.

6.3.4 Tanzania

In Tanzania the main traditional cash crops are coffee, cashew nuts, cotton, pyrethrum, sugar, tobacco, tea, and sisal. The country is self-sufficient in food, with 2007 imports and exports of $653 million and $553 million respectively being almost in balance. The top imports were wheat and palm oil, with values of just over one-third of this total each, followed by sugar, while exports were more diversified and included coffee, tobacco, wheat flour, cotton and tea. In assessing the levels of support or taxation associated with agriculture in Tanzania there is a very clear pattern whereby the import-competing crops of especially sugar and wheat but also maize are heavily supported, while the exportables of tea, tobacco and cotton especially are mostly taxed heavily. Marketing inefficiencies and limited competition persist for many products and part of the remaining high distortion is attributable to high distribution and marketing costs from inefficient marketing structures and high transport costs faced by exporters.

6.3.3 Uganda

Agriculture was lightly taxed in the 1960s, but the burden of taxation increased significantly during the chaotic years of the 1970s and 1980s. Since the onset of agricultural liberalisation at the beginning of the 1990s, the discrimination against agricultural production has been greatly reduced to the current insignificant levels; the detailed support levels of near zero for almost everything except the positive supports of 17% to both rice and sugar show this. Uganda's problem has been that its low annual increase in food production has been outstripped by population increase, and its per capita production has been one of the worst performers in the region ensuring that it remains one of the poorest countries in Africa. Meanwhile, agriculture is the dominant sector of the economy in terms of contribution to GDP, exports and employment as subsistence farming makes up the bulk of the rural economy. Imports of $967 million during 2007 were dominated by wheat, palm oil, sugar, sorghum and dried peas, while exports over the same period were little over half of the agricultural imports and were headed by coffee and tobacco.

6.4 The rest of COMESA

6.4.1 Djibouti, Seychelles and Comoros

In combination these three island economies contributed only $102 million to the agricultural production of the region in 2007, or 0.16% – an even lower percentage than their contribution of 0.28% of the population. Djibouti has an almost exclusively services-oriented economy that is dominated by port activities. Agriculture is based on limited arable land and oasis type pastoral farming – primarily family-run subsistence nomadic livestock farming. FAO data shows that for 2007 the total production of just $11 million was completely dominated by imports of $259 million, including palm oil ($69m) and sugar. Seychelles qualifies as a middle-income economy, with extremely limited arable land and a population of around 90,000. The tourism sector has fuelled development with a contribution from tuna fishing, while agriculture's contribution is extremely limited. By contrast, agriculture in Comoros, also a small and relatively poor country, contributes almost half of the GDP. However, chronic political instability has hampered development. The country is not self-sufficient in food production, and the FAO reports that food imports of $40 million were almost exactly matched by production, with the staple rice being the main import, followed by chicken meat, sugar, wheat flour and palm oil.

6.4.2 Egypt

While Egypt is the largest agricultural producer in the region, it is a significant importer of agricultural products. The WTO confirms that agriculture's contribution to GDP has been declining but the sector retains a significant role in employment (about 34% of the labour force). Financial assistance to the sector is provided in the form of subsidised electricity and water, the latter being provided almost free of charge to farmers. The government also subsidises various food products, most notably bread, sugar, and oil, for low-income groups. In the middle of the 20th century the state took control of ownership of the means of production and regulated prices. By the 1970s this started to change, and the change accelerated so much in the 1980s that by 2006 Egyptian agriculture was again largely subject to market forces. Nonetheless, some distortions remain, and in particular the production of rice, cotton and milk is effectively taxed while maize and to a lesser extent wheat and sugar production is subsidised. At the consumer level the important staple bread is heavily

subsidised at a considerable cost to the government coffers, and lesser subsidies are provided through ration cards for sugar and cooking oil.

6.4.3 Eritrea

Eritrea is another very poor country that has had a violent recent past and a current reliance on aid and remittance monies. Like many of the tripartite economies nearly 80% of the population is engaged in subsistence agriculture that produces very little surplus. FAO data shows production of $87 million, only marginally above imports of $78 million. Production is dominated by sesame and sorghum, followed by cow's milk, roots and tubers and pulses, while imports are led by wheat, sugar, wheat flour, sorghum and other cereals. The exports are minimal.

6.4.4 Ethiopia

Despite considerable agricultural potential, Ethiopia's agriculture continues to underperform for a number of reasons that have included political instability and severe civil unrest, weak infrastructure, weather constraints, low technology levels, generally poor productivity and conflicting and dramatically changing policy regimes. This background is especially important as the sector accounts for 46% of GDP and both employs the majority of the active workforce (80.2%) and provides the main contribution to exports. The FAO data highlights the large animal herds of Ethiopia but their rather muted milk and meat production from these vast herds. Imports during 2007 were $457 million, including wheat ($210m), palm oil ($70m) and sugar. The overall support levels to agriculture are a relatively high 11.2%.

6.4.5 Libya

In 1958, before the oil wealth, agriculture supplied over 26% of Libya's GDP, and Libya actually exported food. Although agricultural production has remained relatively constant since that time, food imports have risen dramatically as the wealth has increased. During the 1950s when agriculture was important the sector was characterised by low levels of productivity and income and peasants flocked to the cities as a result of the oil boom. FAO data shows that production of $500 million was only one-third of the imports that were valued at $1,443 million during 2007 and completely dwarfed exports of a mere $9.6 million.

6.4.6 Sudan

Sudan is the third largest agricultural producer in the region, with agriculture the most import sector in the country, employing about 70% of the active labour force and contributing close to 40% of GDP. The sector is based upon three systems: the irrigated sector, the semi-mechanised rainfed sector, and the traditional rainfed sector, with these three accounting for around 30%, 10% and 60% respectively of agricultural production. Thus, the traditional sector dominates overall production, but for crops, which contribute just over half the agricultural output, the irrigated sector is the main contributor with around 60% of the crop production. Sudan, despite being endowed with natural resources, remains underdeveloped as a result of civil strife and poor economic management with government having been very interventionist since independence in 1956. Civil unrest remains acute, but on the positive side, the discovery of oil in the mid-1990s led to a change from almost total reliance on modest agricultural exports to an oil boom. During 2007 agricultural imports of the top 20 products were $1,007 million, with wheat ($287m), sugars ($154m), milk powders, palm oils and coffee as the main imports. Exports were a lesser $213 million, with sesame, cotton, sorghum, molasses and sugar as the main exports. Sudan penalises its livestock and most exportables but heavily supports its import-competing products such as sugar and in particular and milk and wheat.

7. Impacts of the Tripartite FTA on regional sugar trade

The sugar sector warrants extra attention as (a) it is highly protected in most of the region (and indeed the world) and (b) it is therefore one that shows a significant liberalisation response in South Africa in particular. To this end, the GTAP database and its associated general equilibrium model were used to analyse the tripartite agreement and its implications for the sugar sector. In this exercise, the baseline consists of the integration of the 'known' 2007 macroeconomic and trade data into the GTAP model to find conditions that will prevail at the end period of 2020 without the FTA. This is known as the 'baseline scenario', or what the world may look like once all known factors are allowed for except the FTA. Now the GTAP model can be simulated for an assessment of the difference that the selected policy change of the Tripartite FTA is likely to make, all other things held equal. Output from

the FTA scenario reveals the likely FTA changes to a large number of variables, including changes to sugar production and trade in the tripartite region and consequently in the world.

For the purposes of this exercise the GTAP database was updated with developments such as the implementation of the Trade, Development and Cooperation Agreement (TDCA) between South Africa and the EU, and, most significantly, the assumption that the EPAs between all African countries except South Africa and the EU will be implemented. For the EPA the assumption is that (a) EU27 tariffs are reduced to zero for all EPA countries, (b) for South Africa the EU reduces its tariffs by 20% in an agreement associated with the EPA, (c) all EPA countries reduce their tariffs by a blanket 40% on EU imports, and (d) there are no changes to SACU tariffs.[2] GTAP allows for analysis of South Africa and Botswana as countries in their own right, but aggregates Lesotho, Namibia and Swaziland. While not ideal, as the three economies are very different, there is no alternative, and another 13 tripartite countries/regions are modelled along with six African countries/groupings outside the tripartite area, while the remaining groupings include China, the EU, the US, India, Brazil, the rest of Latin America, Russia, and the rest of the world (RoW).

Table 11 shows changes to global sugar trade at 2020 with full integration. Importers as listed in Column 1 are shown on the left-hand side and import sources (exporters) are in the columns across the table. Reading along the bottom row we see that global imports from South Africa (i.e. South Africa's exports) increase by $446 million, making it the clear winner in the sugar outcome from the Tripartite FTA. Other winners were Mozambique ($131m), Malawi ($31m), rest of SACU (Swaziland) ($27m), and the EU ($24m). However, most of the latter is increased intra-EU trade ($38m). Other losers are Egypt with -$77 million (as presumably the higher priced sugar from Egypt that contains sugar beet is displaced by cane production), Tanzania, Brazil and the rest of world, all non-African countries except the EU and Brazil. Global imports increased by a lesser $202 million. Other points of interest are the big increases of sugar ($40.9m) from South African into Mauritius and the increased imports from Mozambique into the Rest of Eastern Africa displacing 'Othe'" and Egypt. Note also that the EU imports less from both Mozambique and Tanzania but more from Malawi.

[2] While this may not be an exact representation of the EPA outcomes, it seems a realistic one.

Table 11: Changes to regional sugar trade: full integration in whole tripartite region

Importer/source		Zaf	Xsc	Egy	Mwi	Moz	Tza	Uga	EU	Brazil	Other	Total
Zaf	South Africa				1.0	0.2			0.1	20.8	0.2	22
Xac	Angola/DRC	23.8	2.1		1.6	0.1		0.3	-0.6	-25.4	-0.1	2
Mdg	Madagascar	9.8	8.9		-0.8	1.0				-1.0	-1.7	16
Mus	Mauritius	40.9	0.0						-0.1		-10.3	30
Moz	Mozambique	13.9									-0.1	14
Tza	Tanzania	19.8	0.7		3.9	7.4				-1.1	-27.4	3
Uga	Uganda	21.7	8.2	-0.3	-0.2	0.7	-3.6		-0.1		-0.2	26
Xec	Rest Eastern Africa	342	39	-85	-5	139	-2	-11	-11	-83	-189	134
EU	EU27	-0.4	-31	0.3	30.9	-17.7	-62	-0.9	38.0	0.3	10.0	-33
other	Rest of world	-19.7	-0.5	0.3					-0.2	4.2	5.1	-11
	Total	446	27	-77	31	131	-68	-13	24	-86	-213	202

Source: GTAP output

Table 12 repeats this analysis, but in this instance each of the constituent regions of the tripartite area (COMESA, EAC and SADC) is assumed to reach full free trade first, i.e. the model reflects only the final step, namely the integration of the three regions by means of an FTA. Reading along the bottom row, global exports from South Africa increase by $371.8 million and from Mozambique by $134.8 million, making these two countries the clear winners in the sugar outcome from the Tripartite FTA. These changes are at the expense of the non-African exporters, whose exports decline by $208.8 million. Global exports overall increase by $64.5 million, so the sugar outcome is trade creating rather than purely trade diverting. The big change in imports is the trade into the rest of East Africa (Kenya and Sudan and some other minor countries). Imports increase by $50.9 million, with big increases of $351 million from South Africa and $151.4 million from Mozambique that are replacing imports from the rest of SACU ($123.6 million) and non-Africa ($205.5 million). All other changes are minor, but note that there are some substitution effects surrounding the EU sugar trade, with more from the rest of SACU and less from Mozambique and non-Africa in particular.

Table 12: First SADC, then EAC, then COMESA sequenced

Exporter/Destination	Zaf	Xsc	Egy	Mwi	Moz	Tza	Uga	nonAf	Tot
South Africa				0.2	0.0			8.7	9.0
Rest of SACU	-0.6				0.0			-0.1	-1.3
Uganda	25.0	-6.7	-1.2	-1.3	0.8	-3.1		-0.2	11.4
Rest of East Africa	351.0	-123.6	-68.1	-4.3	151.4	-7.5	-11.9	-205.5	50.9
EU	-0.2	10.7	0.1	0.0	-16.5	-0.5	0.1	-10.9	-4.7
Total	371.8	-118.1	-68.4	-5.2	134.8	-11.1	-11.6	-208.8	64.5

Source: GTAP output

The results are similar to the earlier exercise, albeit of a smaller magnitude, except that the rest of SACU (read Swaziland) now loses, because in the first exercise Swaziland had access to COMESA, and therefore access to Kenya at a zero tariff. However, with the full tripartite agreement South Africa (and Mozambique) now pushes others back. A caveat needs to be added to this outcome: there are conflicting reports for sugar tariffs into Kenya, presumably the main market influencing the trade changes in sugar. MacMaps, the standard source for these tariffs, shows that Kenyan tariffs are 85.3% for sugar at an aggregate level, while the WTO reports them at 62.5% at that same aggregate level. In the GTAP model they are applied at the detailed tariff rate for Kenya of 79% as found in MacMaps. The higher the tariff the greater the impacts of these tariffs going to zero will be. Unfortunately a great deal of the results for the simulation depends on this one tariff.

8. Summary and conclusions

The purpose of this report has been to describe the sugar industry in the SADC region within the context of the wider setting of the African continent as well as the global sugar industry. To this end, the report has described the global industry as one that is heavily distorted through government intervention, especially (but not exclusively) in the OECD countries, with the result that the world sugar trade is also distorted. The description of the African sugar scene that follows shows that intra-African trade is small compared to African countries' imports from the rest of the world and exports to the rest of the world. The

report then describes the policy regimes for agriculture in the constituent countries of the proposed tripartite region that will come about as a result of an FTA between COMESA, EAC and SADC, and also provides a thumbnail sketch of agriculture in each of the constituent countries. In the final section, the GTAP model is used to show the main outcomes of the creation of the Tripartite FTA.

The main findings of this analysis include the following:

1. Sugar is a major global industry, but some 80% of total production is consumed in the country where it is produced. The global sugar market therefore has some of the characteristics of a residual market. Taken together with the fact that most of the OECD countries produce sugar and that many developing countries support the sugar industry by means of a range of market interventions, it is clear that the global sugar market is heavily distorted. Only rice, it seems, is more distorted.
2. Malawi, South Africa, Swaziland and Zambia in Africa are low-cost producers, while Egypt is a high-cost producer.
3. South Africa, Egypt (sugar beet and cane sugar), Sudan, Kenya and Swaziland are the largest sugar producers in Africa. South Africa and Egypt count under the top 20 largest global producers. South Africa is a net exporter of sugar, and Egypt a net importer, and these two countries are responsible for 45% of the continent's output.
4. Nigeria, Algeria and Egypt are the largest sugar importers into Africa. Intra-African trade is small, apart from South Africa's exports into the rest of the continent, and shows no real growth trend.
5. The World Bank study on the distortions to agricultural incentives calculated the Nominal Rates of Assistance for 8 of the eleven African sugar-producing countries in the period 2000-2005. The results show that the South African industry was heavily protected, while sugar cane production was also subsidised in Mozambique, Tanzania and Uganda. Madagascar was neutral, and farmers in Kenya, Egypt and Sudan were taxed.
6. The GTAP analysis shows that South Africa will be the big winner from an FTA between COMESA, EAC and SADC, largely through increased exports into East African countries.

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Chapter 8

Tripartite FTA Rules of Origin: Reflections on the status quo and the challenges ahead

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1. Why Rules of Origin?

Three regional economic communities - the Southern African Development Community (SADC), the Common Market for East and Southern Africa (COMESA) and the East African Community (EAC) - on 12 June 2011 formally launched negotiations towards a Tripartite free trade area (T-FTA). On implementation this will become Africa's largest FTA comprising 26 countries and would give effect to a free trade corridor ranging from the Cape to Cairo.

The June 2011 summit (held in South Africa) to launch the T-FTA negotiations, adopted a development-focused approach for the T-FTA based on market integration, industrial development and infrastructure development. It is planned that by June 2014 - three years after the launch of negotiations - that two (market integration and infrastructure development) of three negotiation phases will be concluded. The third phase, dealing with industrial development and other trade related measures, has no specific time frame attached[1].

In terms of the roadmap for establishing the T-FTA, phase 1 will include negotiations on tariff liberalisation and Rules of Origin (RoO) and various other trade and market-related aspects[2].

The RoO in preferential trading arrangements set out the conditions according to which the origin of a product is determined, and form a key component of a preferential trade area. For the T-FTA to work, a new RoO framework will need to be developed to distinguish preferential trade flows and to give effect to many of the benefits that a larger and more

[1]Fundira (2011), tralac hotseat comment; available at http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=105303&cat_id=1059

[2] Draft: "Tripartite FTA Negotiating Principles, Processes and Institutional Framework"

integrated market offers. At present, SADC's RoO differ substantially from the rules contained in the COMESA and EAC agreements, which are broadly the same.

Since products very often contain local and foreign inputs a set of rules is required to determine what constitutes a local product. The RoO set out the rules for what is considered to be substantial transformation of non-originating goods and materials, being the amount of local processing and value-addition necessary for the processed good to obtain the economic nationality of the exporting country.

Ultimately the purpose of preferential RoO is to help prevent trade deflection. This would take place when products are channelled from an exporting country to their final destination via the customs territory of a third country having more favourable market access to the destination country. Trade deflection also takes place when producers in the third country engage merely in 'screwdriver-type operations' - importing nearly complete products and adding very little local value before taking advantage of the available trade preferences in the destination country upon re-export. RoO also interface with development aspects, although there are different schools of thought on how these are and should be interlinked and how development would materialise. One such school believes that restrictive RoO which impose local sourcing requirements provide incentives to upstream producers and investors in such goods and services, while another school of thought considers this practice to be unnecessarily restrictive and self-defeating, and that flexible RoO are more conducive to production and exports and ultimately economic development, and also that producers will naturally choose local supply sources over others all things being equal (as this often simply makes better business sense). The challenge for the design of RoO thus lies first and foremost in developing rules that meet the criteria of (avoiding) trade deflection, while incorporating a 'right' amount of flexibility for producers and also providing some incentive for upstream supply development.

1.1 RoO Methodology for determining origin in preferential trade areas

For the purpose of determining origin various tests can be applied. These tests determine how much processing - when both local and imported materials are used - must take place before a product can be considered to be of local origin. While the WTO and World Customs Organisation (WCO) have devised standards on RoO, these apply primarily to

non-preferential RoO and no best practice or binding standard exists for preferential RoO. Non-preferential RoO are used to *allocate* origin and are used mainly for trade statistics and other measures, such as anti-dumping action and so forth. Preferential RoO on the other hand apply to preferential trade areas and *determine* origin based on the criteria set out in the preferential trade area.

RoO generally consider goods that are the growth or manufacture (exclusively from local sources) of a country to take on the nationality of that country. These goods are normally referred to as being **wholly produced** (or 'wholly obtained') and typically include vegetable products that are grown and harvested within the country, products mined or otherwise extracted from the soil or sea floor, and fish caught there, and so forth.

Products that contain imported ("non-originating") materials need to be substantially transformed locally in order to be considered as originating. To measure substantial transformation, RoO generally employ one or more of the following tests:

Technical requirement (also known as the 'specific processing' test SP): A product is substantially transformed when specific processing requirements have been met. These are out of necessity tailored to products or sectors, which therefore allows a tailored approach in the specification of 'substantial transformation'. The main drawbacks of this methodology are that they require substantial technical negotiating resources in the context of a free trade area since the rules are drawn up at a product-level, which also exposes the process to political and protectionist influences where the ensuing rules can ultimately become a barrier to trade.

Change in tariff classification (also known as 'change in tariff heading' test or CTH): A product is substantially transformed when the imported inputs used are classified within a different heading (or chapter, or tariff sub-heading as the case may be). This methodology is based on the HS nomenclature product specification. A change in chapter classification would mean that non-originating inputs may be used when from a different product chapter while a change in tariff heading or sub-heading applies this test at the 4 and 6-digit level of classification respectively. While the CTH test does not discriminate methodologically between products, it is nevertheless based on a system (HS) [3] that was not designed around RoO and can thus impose vastly different transformation burdens on

[3] The Harmonized Commodity Description and Coding System (HS)

producers depending on the specific product or sector. In some instances a CTH will translate into virtually no transformation (for example certain fresh and dried vegetables that are classified within different headings) whereas in other sectors unprocessed and processed goods fall under the same heading (for example rough and processed diamonds). The CTH out of necessity requires application of a separate ("negative") list of processes *not* conferring origin, in order to counter some of the underlying weaknesses of the methodology.

Value added test (VA): This methodology refers broadly to a percentage test whereby a specific percentage threshold of value added (or imported content, local content, local production cost etc.) must be complied with and can be based on various denominators such as ex-works price, ex-works cost, net production cost, total material cost and so forth). The choice of numerator and denominator has an important impact on the restrictiveness and processing burden of the respective origin requirement.

The RoO applied in the SADC FTA utilise each of each of the three tests applied on a product by product basis to measure substantial transformation. The EAC and COMESA RoO follow primarily an across-the-board approach. The three respective RoO regimes are discussed in more detail in the following section.

2. Overview of the SADC, COMESA and EAC Rules of Origin regimes

SADC, COMESA and EAC each employ their own RoO within their respective preferential trade areas. COMESA and EAC RoO are to a large extent the same, but differ fundamentally from the RoO used in SADC. This section provides a brief overview of the three RoO regimes in the region.

2.1 SADC RoO

SADC follows a line by line approach for its RoO. That means that RoO are determined at the product or sector level, rather than using a single rule (or rules) for all products. Goods are considered originating when they are wholly produced in a SADC member state or when any imported materials used are substantially transformed based on a specific technical requirement (SP). Many goods are also subject to a CTH requirement, and for some products a%age-based rule (VA) is used, mostly by setting a maximum threshold for

imported materials. In many instances two or three tests are used jointly, for example the CTH test in combination with a maximum threshold for certain imported material.

When SADC's preferential RoO were originally designed in the late 1990s they followed a very similar approach to what is today used in COMESA and EAC. These rules were initially based on an across-the-board percentage test as well as a CTH requirement (as optional alternatives). Although they largely mirrored the COMESA and EAC rules they were never fully implemented, and ultimately a product-specific approach was adopted in the Amended Trade Protocol. For a small number of products no SADC preferences exist and thus no RoO (for example wheat flour and certain products containing wheat flour).

2.2 COMESA RoO

The RoO approach used in COMESA is fundamentally different from that followed in the SADC FTA. COMESA uses an across-the-board approach (albeit with some exceptions), and products are deemed to be originating in a member state when they are wholly produced there or substantially transformed by meeting one of the following conditions:

- **Percentage rule (material content rule)**: the CIF [4] value of non-originating materials must not exceed **60%** of the total cost of materials **or**
- **Percentage rule (value added rule)**: the value added resulting from the production process must account for at least **35%** of the ex-factory cost of the product. A product that is considered as being of "particular importance to the economic development of the Member States", and accordingly included as such on a designated list by the COMESA Council, a value-added threshold of **25%** (instead of 35%) must be met to represent substantial transformation and confer origin **or**
- **Change in tariff heading rule (CTH):** a good is considered to be substantially transformed if it undergoes a change in tariff heading (CTH), whereby the materials used can be classified under a different heading to that of the product.

[4] CIF: Cost plus insurance plus freight (to local port)

The two percentage options can be illustrated through the following equations:

- Material content rule (up to 60% of material content may be imported; the rule may also be inverted whereby the value of local materials used must exceed 40% of total material cost):

$$\frac{CIF\ value\ of\ non\ originating\ (\text{'imported'})\ materials}{Cost\ of\ local\ materials + CIF\ value\ of\ imported\ materials}\ x\ 100$$

- Value added rule: The value added resulting from local processing must exceed 35% (or 25% in the case of goods classified as being 'economically important goods')

$$\frac{Ex\ Factory\ Cost - CIF\ Value\ non\ originating\ (imported) materials}{Ex\ Factory\ Cost}\ x\ 100$$

Egypt has been applying a higher percentage value added threshold of 45% (instead of 35%) over the last decade. Zambia, Malawi and Uganda initially also applied 45% but have since complied with the COMESA requirement. Egypt's higher threshold is applied by member states on a reciprocal basis. This issue (of differentiation) has been highly contentious and COMESA member states have frequently requested Egypt to apply the COMESA RoO standard. In terms of its trade profile, Egypt's exports to the rest of COMESA are highly diversified and consist mainly of industrial products while its imports from COMESA are highly concentrated and comprise mainly agricultural and resource-based products, predominantly tea and copper which are imported under the "wholly obtained" provisions. At the First Private Sector Business Forum held in Johannesburg on 8-9 March 2011, Egypt indicated that it would be formally communicating a revised position on the value-added principle that would bring it in line with current COMESA rules.

2.3 EAC RoO

The EAC RoO largely match those used in COMESA apart from a few differences. Products are deemed to be originating in a member state when they are wholly produced there (using the same criteria that COMESA applies) or when non-originating goods and materials have been substantially transformed according to across-the-board application of a percentage test or in certain cases the CTH requirement. Where applicable, the CTH test may be used for products that are included in a special list.

With respect to the percentage rule, EAC RoO use both the material content as well as the value added test. However, unlike COMESA, where the value added rule is used a 35% threshold must be met and there is no option of a lower 25% rule for so-called 'economically important' products.

3. Trade flow overview for the SADC, COMESA and EAC regions

The planned T-FTA will see the 26 member states of SADC, COMESA and the EAC become part of a giant regional market, although the direction and benefits of increased trade are likely to remain skewed given the vast differences in economic development within the group of member states. This section provides a short overview of the trade dynamics within this group of countries[5].

SADC recorded global exports of $119 billion in 2009, and global imports of $117 billion, resulting in a minor trade surplus. South Africa's exports and imports accounted for the largest contribution to SADC trade flows, with 45% of total exports and 55% of total imports. Next in line was Angola, with 33% of SADC exports and 14% of SADC imports. The next largest exporters and importers among SADC member states each contributed with 5% or less to the aggregate.

From the perspective of regional trade flows, South Africa is likewise a dominant player and notwithstanding the country's aggregate trade deficit in 2009 ($10 billion on exports of

[5] The trade data is for the year 2009 unless indicated and is sourced from the ITC Trade Map database. Trade Map is based on the COMTRADE database and is maintained by the UN Statistics Division. Where countries have not reported their own trade flows, the data is mirror data and is derived from the reported imports and exports from trade partners.

$54 billion), it recorded a trade surplus of $4.7 billion with the rest of SADC based on exports of $7.2 billion. South Africa also enjoys a major trade surplus with COMESA, valued at $5.2billion, based on $5.9 billion worth of exports to COMESA countries. The situation with regard to EAC member states is similar, with a $1.4billion surplus on $1.5billion worth of exports. The concentration ratio of South Africa's regional exports was therefore 65% with regard to SADC, 88% with regard to COMESA and 93% with regard to EAC.

A more detailed analysis (by HS chapter) reveals that South Africa's exports to each of SADC, COMESA and EAC are heavily concentrated in manufactured or processed goods, particularly machinery, motor vehicles, mineral fuels, whereas its imports from the rest of SADC, COMESA and EAC member states are mainly concentrated in natural resources (precious and non-precious metals, cotton, tobacco and so forth).

COMESA's 2009 global exports were worth $93 billion and imports $120 billion. This puts COMESA broadly into the league of SADC with respect to global trade albeit that it recorded a substantial trade deficit during the period under review. As is the case in SADC, COMESA's global trade was dominated by a small number of countries, and specifically Egypt and Libya. These two countries together accounted for 66% of COMESA's global exports (Egypt: $38 billion; Libya $22 billion). Sudan accounted for 10% of COMESA's exports, Kenya for 5% and Zambia for just under 5% during this period. With regard to COMESA's global imports, Egypt (39%) and Libya (16%) are the two largest players, followed by Kenya (8.5%), Sudan (7.1%) and Ethiopia (6.6%).

Trade between Egypt, which accounts for the highest share of COMESA trade, and the rest of COMESA is more evenly balanced in terms of value. Total bilateral trade (in 2008) was valued at $2.7 billion, of which $1.6 billion is accounted for by Egypt's exports to COMESA, resulting in a trade surplus in favour of Egypt of $0.6 billion. However Egypt's trade surplus with the rest of COMESA stands in stark contrast to the country's substantial trade deficit in global trade, which was $25 billion in 2008.

Egypt's trade relationship with COMESA also reveals a similar trade pattern to that between South Africa and SADC, where exports (from Egypt and South Africa) to other member states consist predominantly of processed goods while imports mainly of unprocessed and resource-based goods and materials.

The **EAC** member states collectively exported $9 billion in 2009 and imported $22.6 billion, thus recording a $13 billion trade deficit with the rest of the world. Kenya is the largest exporter in this group with a 48% share in 2009, followed by Tanzania (32%), Uganda (16%), Rwanda (2.3%) and Burundi (1.2%). Global imports by EAC member states went mainly to Kenya (45%), followed by Tanzania (29%), Uganda (19%), Rwanda (6%) and Burundi (1%).

While the patterns of inter and intra-regional trade in the SADC/COMESA/EAC region clearly point towards the higher industrial capabilities and export competitiveness of the economically stronger countries (notable South Africa, Egypt and Kenya), this may also point towards the greater ability of producers in the larger economies to meet more restrictive regional RoO requirements. In other words, economically more advanced countries in the region may face fewer challenges in meeting the required RoO than less advanced countries do, which may place them at a regional advantage and may even provide them with an incentive to encourage stricter RoO than what might otherwise be the case. This may be true especially also when countries have sizeable domestic industries 'to protect'. Restrictive RoO nearly always favour the economically more advanced country within a regional preferential trade arrangement.

4. The Tripartite Rules of Origin: State of Play

4.1 Background: The Kampala Tripartite workshop on RoO (July 2010)

During July 2010 a Tripartite workshop on RoO was held in Kampala, Uganda. Its purpose was to provide a platform for dialogue between trade policy experts, government institutions and academia and included inputs from COMESA, EAC and SADC stakeholders. The expected outcome was to "generate consensus on critical issues particularly on Rules of Origin, and to achieve ownership of the Tripartite Process by the business community" [6].

Issues raised at this workshop *inter alia* included the specification used in applying the percentage test for determining origin, and relate to the actual threshold used on the one hand but in particular to the treatment of transportation costs and its prohibitive impact also on landlocked countries in the region. Countries that face high intra-regional transportation

[6] Tripartite Workshop on Rules of Origin; Draft report of the Tripartite Workshop on Rules of Origin CS/IPPSD/CBC/07/10/III/3 (COMESA Business Council)

costs, especially in terms of the sourcing of non-originating materials, are substantially burdened by the cost of obtaining these goods and materials. For example, Insurance and freight charges are presently added to the value of non-originating materials.

Other issues raised at the consultative workshop related to the impact that exogenous variables (such as exchange rate fluctuations) can have on traders that are dependent on certain non-originating inputs, especially when the RoO applied are based on a percentage test. These factors can often not be readily predicted or mitigated yet impact on whether a product is determined to be of local origin (thus benefiting from trade preferences) or not. Another issue raised concerns the applicability of the CTH test for determining origin, given the various known weaknesses around this methodology and the inconsistent and at times inequitable 'substantial transformation' burden it places on producers wishing to export under preference.

The need to expand a simplified trade regime (STR) for cross-border traders has also been emphasised. Under the current RoO regime, products valued at under $500 were not subject to the same proof of origin requirements as higher value goods, and the meeting recommended that the price ceiling be raised to $1,000.

The meeting adopted as a "regional private sector position on the Tripartite RoO" the following principles and criteria for substantial transformation:

- that the methods of calculating value-addition and non-originating content be the same as in COMESA/EAC RoO
- that [the application of the] CTH [principle] should be harmonised between the three RECs, and that the [COMESA] Secretariat would "come up with a proposal in this regard"
- [that proposals for] limited sector-specific RoO if necessary should be advised to the Secretariat within three months
- Egypt made the intervention that it "would like to see the value addition (to be) no less than 45% to encourage regional integration and investment".

4.2 Draft Tripartite RoO: Timelines and technical overview (based on Draft RoO published December 2010)

Draft T-FTA regulations were first published in October 2009, and included an Annex on RoO. These draft RoO were superseded in December 2010 by a new Annex (4) on RoO[7].

While the latest draft text on RoO significantly overlaps with the current COMESA and EAC RoO, it also contains a number of changes from the previous version. These include a change in the method of calculating non-originating material content in order to exclude the cost of shipping and insurance from the value of non-originating materials, including intra-regional logistics and other associated overheads, a simplification of the rules by proposing an across-the-board percentage value based methodology albeit with provision for exemptions (using CTH and SP criteria), and simplified provisions relating to small cross-border traders. Some of these aspects had previously been raised at the Tripartite private sector workshop on RoO that was convened in July 2010 (Kampala).

The current draft text differs from COMESA and EAC RoO *inter alia* on the following points:

- the percentage method for calculating local content / non originating content is changed to reflect changes in the valuation of materials using ex-works <u>*price*</u> (previously ex works <u>*cost*</u>) as the denominator
- the proposed percentage thresholds for substantial transformation are changed
- the wholly obtained provisions are simplified with respect to fishing vessels (albeit that there is significant scope for further simplification)
  - the value-added percentage test as used in COMESA/EAC RoO has been removed (this has been substituted with the " percentage local content" test, sometimes referred to as the build-up method[8]).

[7] Annex 4: *Annex on Rules of Origin under Article 12 of the Agreement*
These documents are available from the tralac website at the following shortened URL: http://tinyurl.com/3mkejxf

[8] This also matches the method contained in the LDC proposal at the WTO on RoO reform

The current draft text differs from the SADC RoO *inter alia* on the following points:

- the draft Tripartite text applies the RoO primarily on an across-the-board basis rather than the differentiated product-by-product basis used in SADC RoO
- the percentage test which forms the core of the draft T-FTA RoO is used in only a few product categories in the SADC FTA, and which the latter uses selectively
- in cases where SADC currently employs a percentage test, it is broadly similar in specification to that used in the draft T-FTA RoO, albeit that the draft proposes a 70% maximum threshold for non-originating materials rather than the 30-60% used by SADC. This makes the draft T-FTA RoO percentage test significantly less restrictive than the current SADC rules where applicable (whereas COMESA/EAC RoO also use the *non-originating materials* percentage test, it is based on total material cost as denominator - ex-works cost (excludes mark-up) as opposed to ex-works price (includes mark-up).
- given the dominance of a specific processing/ technical requirements in SADC RoO, it also contains value tolerance provisions; these are absent in the T-FTA draft text

The following points provide a broad summary of the T-FTA RoO (Draft of December 2010)[9]:

- The T-FTA RoO are based on the principle products being wholly obtained or substantially transformed in the Tripartite Member State(s)
- The wholly obtained provisions (Article 4) are broadly similar to those of the COMESA/EAC/SADC RoO but include expanded definitions to cover products of mariculture, products made onboard factory ships, and products that have been extracted from the marine soil or subsoil outside their territorial waters. The wording in the latest draft version contains various provisions that use the same wording as the RoO in the Economic Partnership Agreement (EPA) RoO agreements.
- The main fishing provisions continue to be part of the definition of "wholly obtained". The definition of qualifying (fishing) vessels is changed; " *vessels*" and " *factory ships*" continue to be linked to the origin of fish and qualify when they are "*registered or*

[9] http://tinyurl.com/3mkejxf

recorded in the official records of a Tripartite Member State". In contrast, under COMESA rules, vessels must also meet one of three conditions: at least 75% of officers to be nationals of a member state, or at least 75% of crew have to be nationals of member state, or majority control and ownership has to be held by Nationals of the member state. SADC RoO are also stricter, and require that the vessel must sail under the flag of the member state, more than 75% of officers and crew must be nationals, and majority ownership must lie with persons who are nationals of the member states.

- The basis for conferring origin to goods containing non-originating content is based primarily on a percentage (value of materials) approach, or an alternative test (using the CTH or SP method) when a product is included in a special Appendix attached to the Agreement (no such Appendix has been drawn up at the time of writing).
- Substantial transformation of non-originating materials is deemed to take place either when the value of non-originating materials (VNOM) used in the production of a good does not exceed 70% of the ex-works price of the product (see formula 1 below) or when the value of originating materials (VOM) is equal to at least 30% of the ex-works price of the good.

Formula 1

$$\text{Import material content} = \frac{VNOM}{Ex\,works\,Price} \times 100$$

Formula 2 (alternative)

$$\text{Local material content} = \frac{VOM}{Ex\,works\,Price} \times 100$$

- Cumulation between member states is permitted and included under Article (8)
- The Draft RoO contain no provision for value tolerance (*de minimis*). Value tolerance is generally applicable only to the WO, CTH or SP tests. SADC RoO provide for a

10% *de minimis* rule, albeit with certain exceptions, specifically textiles, clothing and automotives. COMESA/EAC have none.

- Article 12 of the Draft RoO offers a derogation from the principle of territoriality, allowing outward processing of up to 10% of the value of the good (this principle was not previously part of SADC / COMESA / EAC RoO but is commonly applied in EU RoO, including EPAs).
- The Draft RoO make concessions to small cross-border traders as part of a simplified trade regime (STR). Article 23 would exempt from proof of origin goods valued at less than $2,000[10] if the good is considered a "commonly traded good" and imported by cross-border traders that "are endorsed by adjacent Customs Authorities". The provision does not specify whether this relates to a *per consignment*, *per product*, or *per time period* basis.
- Article 19 on 'Approved Exporters' would permit the customs authorities of the exporting country to authorise exporters that make frequent shipments to make out invoice declarations irrespective of the value of the shipment. This would ease the administrative burden for regular exporters.

[10] The Kampala meeting had earlier recommended that the amount be set at $1,000 and this proposal was taken to the COMESA Council of Ministers Meeting held in Swaziland in August 2010. The same threshold was also recommended at the March 2011 private sector meeting on RoO arranged by the Comesa Business Council (CBC)

Table 1: Overview of key components of regional RoO (SADC, COMESA/EAC, T-FTA)

RoO	COMESA & EAC	SADC	Tripartite Draft
Basis for determining origin	Wholly obtained or substantial transformation	Same	Same
Tests for substantial transformation	Non-originating materials ≤ 60% based on total cost of materials **or** Value-added ≥ 35% based on ex-factory cost	Product-specific rules based on maximum non-originating content, CTH, SP methodologies (or in combination)	Non-originating materials ≤ 70% based on ex-works price of product **or** value of originating materials ≥ 30% based on ex-works price of product
	CTH (EAC: if included in special list , and subject to conditions)	n/a	Special rules (CTH or SP) if included in Appendix I
	Value-added ≥ 25% if designated as "economically important" (*not applicable to EAC RoO*)	n/a	n/a
Wholly obtained	List of criteria	Similar list	Similar, further expanded
Criteria relating to fish in wholly obtained provisions	Products of fishing conducted within the Member States; Products obtained from the sea and from rivers and lakes within the Member States by a vessel of a Member State	Products of fishing conducted there; Products of sea fishing and other products taken from the sea by their vessels	Products obtained by fishing conducted there; Products from sea, rivers or lakes of Tripartite Member State by vessels of that Member State
Criteria relating to 'qualifying' vessels	Vessel must be registered in Partner State and fulfil one of following conditions: 1) 75% officers nationals from Member State 2) 75% of crew from Member State 3) majority equity and control by nationals of Member State	Vessel must be registered in Partner State and fulfil one of following conditions: 1) sail under flag of Member State 2) 75% of officers and crew from Member State 3) majority equity and control by nationals from Member State	Vessel must be registered and recorded in the official records of a Tripartite Member State

RoO	COMESA & EAC	SADC	Tripartite Draft
Principle of Territoriality			Included, but with 10% derogation, by value
Cumulation	Full - Member States treated as 'one territory' for purposes of implementing RoO	Full - Member States treated as 'one territory' for purposes of implementing RoO (separate Article on cumulation)	Full - Member States treated as 'one territory' for purposes of implementing RoO (separate Article on cumulation)
Value of originating materials			Value of materials used; **PLUS** any costs related to the international shipment of the merchandise from State of export to the importing Tripartite Member State
Value of non-originating materials	Material content rule: CIF (cost plus insurance plus freight) value of imported materials **MINUS** any transport costs incurred in transit through Member States	Customs value of materials **MINUS** transport costs incurred in transit through Member States **PLUS** cost of transport to port or place of importation **PLUS** insurance **PLUS** loading, unloading and handling charges associated with the transport of the imported goods	Value of materials used; **MINUS** any costs related to the international shipment of the merchandise from State of export to the importing Tripartite Member State
Value addition rule	The difference between ex-factory cost of product and the CIF value of non-originating materials used		
Value tolerance / *de minimis*		10% based on ex works price, excluding products of Chapter 50-63, 87 and 98	

4.3 Outcomes of the private sector workshop on Tripartite RoO (March 2011)

A private sector follow-up to the Kampala workshop on T-FTA RoO held in 2010 was convened in Johannesburg during March 2011. The main objectives of the workshop were to: [11]

- engage the Tripartite private sector in a public private dialogue to accelerate enhanced regional integration through the Tripartite FTA.
- to discuss the private sector position on the Rules of Origin with a technical analysis study on the RoO in EAC, COMESA and SADC.
- To formalize the Tripartite Business Forum as the recognized platform known as the voice of the tripartite private sector.

The main focus of this workshop was on the private sector gaining a better understanding of the key similarities and differences between the RoO regimes of the three regional FTAs, and also on a detailed analysis of the draft T-FTA RoO agreement that was published in December 2010. The workshop also clarified the extent to which the draft RoO instrument is consistent with and incorporates the outcomes of the private sector workshop previously held in Kampala, and drew up a number of recommendations.

The meeting agreed on the following observations, outcomes and recommendations:

- On the test for **substantial transformation** and formulae used to calculate relevant%**ages**: The meeting took note of the proposal contained in the Draft Tripartite RoO, which inter alia proposes a 30% local content rule as well as a 70% non-originating content rule (optional alternative), based on ex-works price. The meeting also recognised that the proposed methodology - which differs from the percentage test currently used in the three regional trade areas - deals with some of the previously-raised concerns namely the treatment of the cost of insurance, freight

[11] Source: Workshop report COMESA Secretariat CS/TCM/ROO/XII/3

and other related charges (both in terms of international as well as intra-regional logistics). The meeting also noted the absence in the draft T-FTA RoO of a value-addition rule (being one of the across-the-board alternatives used in COMESA and EAC FTAs). The meeting resolved that further consultations with private sector stakeholders on the proposed methodology and thresholds will be necessary. Some concern was expressed about the absence of a value-addition rule. (*Reference in T-FTA RoO December 2010: Art 5 (1)*)

- On **harmonised T-FTA RoO, alternatives and exemptions**: The meeting supported a harmonised approach to RoO with an across-the-board basis for determining origin throughout the proposed T-FTA. Notwithstanding, it was recognised that a value-based (%age) test may not be the most appropriate in all situations. The current SADC rules are based to a large extent on rules other than a value-based test, while the COMESA RoO contain a list of products to which the CTH basis applies. The meeting agreed that the Tripartite RoO should include a harmonised list of products subject to an alternative test to measure substantial transformation, and that further consultations on this will be necessary. (*Reference in T-FTA RoO December 2010: Art 5 (2)*)
- On harmonisation the **Simplified Trade Regime (STR)**: The importance of developing the SME sector was emphasised. The meeting proposed that a limit of $1,000 be set for exemptions from proof of origin, which is in line with proposals at the Kampala private sector workshop on RoO, and that the use of this facility should be further specified as being on a *consignment basis*. The draft T-FTA RoO proposes a $2,000 threshold for cross-border traders albeit subject to restrictions (*inter alia* that qualifying goods must be endorsed by adjacent Customs Authorities) (*Reference in T-FTA RoO December 2010: Art 23(1)*)
- **Product rules for fish and conditions relating to vessels:** The meeting took note of the simplified RoO relating to vessels as contained in the Tripartite Draft RoO, and the expanded criteria under the definition of 'wholly obtained' products. The meeting recommended that the criteria relating to fish should be amended and clarified as the case may be so that any fish and related fish products caught in inland waters (rivers and lakes) and within member state's territorial waters be considered originating in the Tripartite member state. Further consultations with private sector stakeholders will be

needed to clarify the private sector's position on the treatment of fish caught in a country's exclusive economic zone (EEZ) and on the open seas. (*Reference in T-FTA RoO December 2010: Art 4*)

- On **certification**: The meeting recommended that administrative procedures be simplified and that one-stop shop facilities be set up to streamline the issuance and verification of certificates of origin at various locations, including at border posts.
- On the differentiated value-addition rule currently still being applied by **Egypt**: The meeting was informed by Egypt that a formal communication will be submitted to the COMESA Secretariat in due course on the issue of Egypt's application of a 45% threshold in lieu of the COMESA requirement of 35%. This would lead to a harmonised application of the COMESA RoO.

5. Key challenges ahead

Despite RoO being included as part of the first phase of negotiations, the likelihood of protracted and tough negotiations on a subject which very much forms the basis of the T-FTA is very high. The major challenge lies in the fact that a common RoO framework will need to be agreed despite the many fundamental differences that exist especially between the SADC RoO on the one hand and those of COMESA and EAC on the other. Despite there being some differences between COMESA and EAC RoO, these are unlikely to pose a major challenge and relate mainly to the absence (in EAC) of a lower percentage local content requirement for certain products. Fundamentally the two RoO regimes are the same.

Whereas the COMESA/EAC rules are applicable across-the-board (by offering alternative tests for determining origin), the SADC rules are product-specific and in most cases involve a technical requirement. Judging by the time it took to conclude the current SADC RoO, and the number of disagreements and interventions that emerged during the extremely drawn out process, it is likely that various national interests will resurface during the upcoming negotiations.

One of the major challenges will be whether the T-FTA RoO should be negotiated at the

product and sector level (SADC model) or across-the-board. COMESA/EAC stakeholders have always favoured an across-the-board approach which has been shared by various SADC stakeholders. However, this approach is not favoured by all SADC member states and it is common cause that South Africa in particular - as the largest economy within the T-FTA area - has generally been opposed to it instead favouring a more tailored approach to RoO. Product by product negotiations are generally far more complex and resource-intensive, technical and vulnerable to political economy influences, but at the same time offer a greater chance of dealing with situations where the across-the-board approach delivers unsatisfactory or inappropriate outcomes.

A further observation is that technical resources on the subject of RoO are generally scarce and it is extremely challenging to properly co-ordinate a national or regional private sector position especially considering some competing interests in this regard. In a similar vein, RoO negotiations are often conducted at a predominantly political level and often without much input - be it co-ordinated or otherwise - from private sector stakeholders who ultimately are impacted by the RoO. In many trade agreements the RoO have gone well beyond the objective of avoiding trade deflection and led to restrictive trade regimes that undermine regional trade. T-FTA RoO negotiators need to bear this in mind.

Some of the key challenges in relation to the T-FTA RoO can be summarised as follows:

- To coordinate private sector inputs into the RoO process and to provide the necessary technical and financial resources to assist with obtaining private sector input on the T-FTA RoO;
- To agree on a RoO methodology for T-FTA RoO, given the fundamental differences between SADC and COMESA/EAC RoO;
- To decide on whether to conduct line by line RoO negotiations or to follow an across-the-board approach;
- To decide how best to incorporate the current list of "economically important" goods as per COMESA RoO, whether to do away with this list or whether to introduce a transitional arrangement;
- To decide what methodology to follow for products where a simple threshold-based

rule is not technically feasible;

- To clarify issues around the fisheries provisions, and to consider the draft T-FTA RoO for fish and fish products in light of its less restrictive approach in relation to fishing vessels;
- To decide on whether to align a combined RoO regime with the existing SADC RoO or with the COMESA/EAC rules;
- To obtain a better understanding on the RoO approaches (similarities and differences) currently followed in the different RoO regimes in relation to key traded goods;
- Specifically, to understand the impact of the draft T-FTA RoO methodology involving local content thresholds, the absence of a value-addition rule and the treatment of cost items such as freight and insurance charges relating to non-originating inputs and inter as well as intra-regional transportation. The implication of the clause contained in the draft T-FTA RoO is that the adjusted value of the non-originating materials will be lowered, and exporters will be penalised less by the cost of overheads relating to non-originating materials.
- To fully consider the content of the draft T-FTA RoO instrument that has been drafted (first version 2009, second version December 2010), and recognising the extent to which the draft RoO incorporate a number of outcomes and recommendations of previous regional RoO workshops involving the private sector;

References

SADC Protocol on Trade (including Annex on Rules of Origin)

http://www.sadc.int/index/browse/page/161

COMESA Protocol on Rules of Origin

http://about.comesa.int/attachments/059_Protocol_on_the_Rules_of_Origin.pdf

COMESA Rules of Origin procedures manual (includes the Rules of Origin protocol)

http://about.comesa.int/attachments/059_Revised_Procedures_Manual.pdf

Agreement List of Workings and Processes Required to be Carried out leading to a change in tariff heading for the application of rule 2.1(B)(III) of the COMESA protocol on rules of origin.

http://about.comesa.int/attachments/059_Agreement_List_of_Workings.pdf

EAC Rules of Origin

http://www.eac.int/customs/index.php?option=com_content&view=article&id=106&Itemid=135

Tripartite FTA documents including Annex 4 on Rules of Origin

http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=97849&cat_id=1036

(or http://tinyurl.com/3mkejxf)