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CONFIGURATION OF ECONOMIC PARTNERSHIP AGREEMENTS:
COMPLEMENTARY OR COUNTER TO MARKET INTEGRATION? –AN ANALYSIS
OF THE SADC INTERIM ECONOMIC PARTNERSHIP AGREEMENT

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DECLARATION

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations.

Kahaki Judith Jere

University of Cape Town

DEDICATION

To Isabella Muthoni Ngugi: my mother, friend and biggest fan for always believing in me.

ACKNOWLEDGMENT

It is by God's grace that I have made it this far with all the hurdles along the way.

The writing of this dissertation has been a constant learning, sometimes frustrating experience and my biggest academic challenge so far. I am grateful to the following people for their relentless support without which I would not have completed this work-

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LIST OF ACRONYMS

ACP – African Caribbean and Pacific Countries

AU – African Union

COMESA – Common Market for East and Southern Africa

CPA – Cotonou Partnership Agreement

CU – Customs Union

EC – European Commission

EPA – Economic Partnership Agreement

ESA – East and Southern Africa

EU – European Union

FTA – Free Trade Area

GATT – General Agreement on Tariffs and Trade

IEPA – Interim Economic Partnership Agreement

REC – Regional Economic Community

REPA – Regional Economic Partnership Agreement

SADC – Southern African Development Community

TDCA – Trade and Development Cooperation Agreement

WTO – World Trade Organisation

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CHAPTER 1- INTRODUCTION

The Economic Partnership Agreements (EPAs) that are currently under negotiation between the European Union (EU) and the African Caribbean and Pacific (ACP) have been a cause of controversy.¹ This controversy surrounds the impact that the EPAs may have on development and on regional integration in Africa.² The controversy comes up as a result of the way the EPA negotiating groups are configured. The configuration does not tally with the configuration of the Regional Economic Communities (RECs) in Africa. This has led to scepticism about the implications the EPAs will have on the regional integration that is being pursued by the RECs. The study focuses on the EPAs in the SADC region.

This chapter gives a background to the study, and specifically looks at how trade is regulated by the World Trade Organisation (WTO). It looks at the provisions in the General Agreement on Trade and Tariffs (GATT) on the prescribed conduct of trade. It then discusses regionalism and special and differential treatment of developing countries as exceptions to the general GATT prescribed conduct of trade. It highlights the issues that the study focuses on and gives a layout of the chapters.

1.1 BACKGROUND

1.1.1 Trade, Development and the GATT

International trade is increasingly seen as an indispensable tool for development.³ The process of development is multifaceted⁴ and has economic development as one of its facets. Economic development entails the enhancement of the welfare of lives of people as it seeks to expand the wealth and opportunities that people have.⁵ Countries engage in international trade to promote their economic growth which is supposed to result in economic development and the eventual improvement of lives of their citizens.

Some of the aims of the WTO include the promotion of national welfare and prosperity of member States through the raising of living standards of people by ensuring the

¹ Percy F. Mukombe 'Economic Partnership Agreements and SADC: The Controversy continues' in Economic Justice Network of 27 September 2010. Available at <http://www.ejn.org.za/index.php/ejn-on-the-move/ejn-on-the-move-views/445-economic-partnership-agreement-and-sadc-the-controversy-continues>. Accessed on 14 January 2013.

² Ibid.

³ Isabella D Bunn *The Right to Development in International Economic Law* (2012) 204.

⁴ Also enshrined in the concept of development are social, cultural and economic development.

⁵ Amartya Kumar Sen *Development as Freedom* (1999) 19.

expansion of production and trade in goods with the objective of promoting sustainable development.⁶

The GATT, in its regulation of international trade, prescribes trade liberalisation as a means of promoting free trade through the reduction of tariff and non-tariff barriers to trade between the GATT contracting parties. Trade liberalisation entails the opening up of markets through the removal of barriers to trade like tariffs and non-tariff barriers to trade.

Trade liberalisation is done at a multilateral level. Tariffs are to be applied on a non-discriminatory basis on all like products on importation from or exportation to another contracting party.⁷ This is referred to as the Most Favoured Nation (MFN) treatment. The MFN treatment is of general application but the GATT provides for exceptions to its application by allowing the formation of Free Trade Areas (FTAs) and Customs Unions (CUs), and special and differential treatment of developing countries.

FTAs are customs territories⁸ in which member States of the FTA do not apply tariffs to imports from member States but apply tariffs on imports from States outside the FTA. A CU is a customs territory in which there is no tariff applicable to imports from within the territory but member States of the CU apply a Common External Tariff (CET) to imports from non-member States of the CU. Products from the customs territory are treated differently from like products from outside the customs territory.

The GATT allows for the special and differential treatment of developing countries taking into account the fact that developing countries cannot liberalise trade at the same rate as developed countries.

1.1.2 Regional integration and participation in global trade

Article XXIV of the GATT provides for the creation of FTAs and CUs. CUs are supposed to facilitate trade among members of a customs territory and not raise additional trade barriers to other countries which are not members of the customs territory.⁹ Trade facilitation between member States is done through trade liberalisation.

⁶ Agreement Establishing the World Trade Organisation (WTO Agreement) Preamble.

⁷ General Agreement on Tariffs and Trade (GATT) article 1.

⁸ A customs territory is a territory with respect to which separate tariffs and other regulations of commerce are maintained for a substantial part of trade of the territory with other territories. See GATT article XXIV (2).

⁹ GATT article XXIV (5) (b).

In an FTA, members are supposed to reduce barriers to *substantially all trade* among them.¹⁰ The rationale behind trade liberalisation is that it enhances intra-regional trade and development and eventually enhances the competitiveness of the particular territory in the global market.¹¹

According to Jacob Viner, FTAs and CUs could lead to the improvement of welfare in the countries involved through trade creation in the customs territory.¹² CUs and FTAs are said to be capable of helping developing countries implement domestic reforms, open them up to competitive market pressure at a sustainable pace and facilitate their integration into the world economy.¹³ This is especially true for African RTAs¹⁴.

Africa has lagged behind in both international trade and intra-regional trade¹⁵ and accounts for 3.7 per cent of exports and 3.1 per cent of imports globally¹⁶. These exports are usually raw materials and the imports comprise manufactured goods often made using raw materials exported from Africa since most countries on the continent do not have the capacity to transform most of its raw materials into secondary products.¹⁷ Africa also has the lowest intra-regional trade worldwide which is estimated at about 10 to 12 per cent.¹⁸

In efforts to improve their participation in international trade, African States have embarked on regional integration schemes which have economic integration among their objectives. Trade integration is one of the aspects of economic integration. Among the primary goals of trade integration is the promotion of large-scale production with a view of shifting the trade pattern, from that of trading with external entities, to that of intra-regional

¹⁰ GATT article XXIV (8).

¹¹ Sean Woolfrey 'Boosting intra-regional trade in Africa: An end in itself?' (2012) 1 *Bridges Africa Review* 19. Available at <http://ictsd.org/i/news/bridges-africa-reviw/134375/>. Accessed on 27 November 2012.

¹² John McMillan 'Does Regional Integration foster Open Trade? Economic Theory and GATT'S ARTICLE XXIV' in K Anderson and R Blackhurst (Eds) *Regional Integration and the Global Trading System* (1993).

Available at http://faculty-gsb.stanford.edu/mcmillan/personal_page/documents/Does%20Regional%20Integration%20Foster%20open%20Trade.pdf

According to Viner, an FTA is more beneficial if it is more trade creating than diverting. An FTA or CU is said to be trade creating if production moves to a relatively more efficient producer in the customs territory than to a more expensive producer from within or outside the territory.

¹³ James Thuo Gathii *African Regional Trade Arrangements as legal regimes* (2011) 87.

¹⁴ SADC member States seek to collaborate in the development of different sectors like energy and transport so as to build their capacity to produce and maximise economies of scale. www.sadc.int accessed on 29/08/12.

¹⁵ United Nations Economic Commission of Africa (UNECA), *Assessing Regional Integration in Africa IV Enhancing Intra-African Trade* (2010)

¹⁶ WTO *World Trade Report 2012, Trade and public Policies : A closer look at non-tariff measures in the 21st century*. Available at www.wto.org accessed on 28/08/12.

¹⁷ Regional Indicative Strategic Development Plan (RIDSP) Available at www.sadc.int.

¹⁸ UNECA op cit note 15 at 17.

trade.¹⁹ It is believed that the savings in foreign exchange earnings would then build on the reserves that countries use to pay for imports from outside the continent. These savings would then be used to build trade capacity through industrialisation. The countries in the customs territory would then eventually be able to produce goods that are imported from outside the region.²⁰

Countries endeavour to cooperate in several areas and seek to promote industrial production and product diversification through specialisation, exploitation of economies of scale, coordinated programming and development of infrastructure.²¹ The Southern African Development Community (SADC) pursues some of these goals.

The SADC common agenda has poverty eradication and the integration of the region into the global economy as its ultimate goal.²² The Regional Indicative Strategic Development Plan (RISDP) set economic integration and trade liberalisation as interventions for deeper integration and poverty reduction and lay down strategies for implementation of the SADC common agenda.²³ The RISDP takes a development approach to integration and spells out that all activities that will be undertaken should focus on the economic integration and the improvement of welfare of its people as its underlying goal. Guidelines on market integration aimed at promoting specialisation of production in the region have been set with time frames for the achievement of set goals.²⁴ In essence, its ultimate objective is the realisation of the right to development of the people of the region.

SADC is implementing a market integration approach to regional integration which involves a linear progression from an FTA to a common market.²⁵ Member States are to liberalise trade in goods through the phased elimination of tariff and non –tariff barriers to trade. They have different tariff liberalisation schedules under the SADC Protocol on Trade.²⁶

¹⁹ Gathii op cit note 13 at 10.

²⁰ Ibid.

²¹ Ibid at 21.

²² Treaty Establishing the Southern African Development Community (SADC Treaty) Article 5.

²³ SADC *The Regional Indicative Strategic Plan 23*. Available at <http://www.sadc.int/index/browse/page/104>. accessed on 26/08/12.

²⁴ Ibid.

²⁵ A common market is a customs territory in which there is free movement of goods, and factors of production which include labour and capital.

²⁶ Member States submitted their tariff phase down offers which form annexures to the Protocol on Trade. See SADC Protocol on Trade available at <http://www.sadc.int/index/browse/page/161>.

The principle of variable geometry which allows liberalisation of tariffs at different rates based on the level of development of countries applies in the SADC region.²⁷

The pace of economic integration in SADC has been slow and uneven.²⁸ The SADC FTA was established in 2008 and a CU was supposed to be launched in 2010. However, this failed to take place and the REC is currently working towards the establishment of a CU by a date to be agreed on.²⁹ Among the outstanding issues that need to be resolved are the differences in tariff liberalisation schedules and different rules of origin.

SADC Member States that belong to other RECs have different tariff liberalisation schedules for the goods which they trade in. The issue of different tariff liberalisation schedules will have to be addressed before the region becomes a CU. The GATT requires elimination of duties with respect to substantially all trade between constituent territories of members of a customs territory prior to the formation of a CU.³⁰ This issue will be discussed further in chapter 2.

Goods have to comply with the SADC Rules of origin for them to be eligible for duty free importation into a territory of a member State. This is done in order to avoid the issue of transshipment where goods that originate from outside the FTA enter the region through a country with low import tariffs and eventually find themselves in a country with higher import tariffs. Since the goods are already in the customs territory, they might be mistaken for goods that originate from the region and be exempt from tariff application. This would defeat the purpose of having an FTA. The whole essence of market integration is to foster intraregional trade and support regional industries. This is not to imply that protectionism is encouraged in an FTA but since regional integration also seeks to build production capacity, goods originating from the region should be exempt from import tariffs while goods from outside the region are subject to tariff application on an MFN basis.

The progression of regional integration in SADC becomes further complicated with the proposed Tripartite FTA (TFTA) with the Common Market for East and Southern Africa (COMESA) and the East African Community (EAC). The TFTA is still at negotiation stage

²⁷ The SADC Protocol on trade allows for member States to apply for extension on the time frames for tariff liberalisation. Developed countries in the region like South Africa, Namibia and Botswana have liberalised most tariffs. Other middle income countries are phasing down their tariffs gradually while in Least Developed Countries like Malawi, Zambia and Mozambique, tariff reduction started around 2007-2008. www.sadc.int

²⁸ Clement Ng'ong'ola 'The Legal framework for economic integration in the Southern African Development Community' (2008) 8 *U. Botswana L.J.* 3 at 41.

²⁹ www.sadc.int accessed on 29/07/12

³⁰ GATT article XXIV (8) (a).

but there a number of complex issues that need to be resolved like differences in rules of origin and tariff liberalisation schedules. The TFTA would solve the issue of multiplicity of REC membership but the issues of differences in tariff liberalisation schedules and different rules of origin, among others have to be resolved before the TFTA is established.

1.1.3 The EU SADC trade relationship

The Enabling Clause of 1979³¹ allows developed countries to grant preferential market access to imports from developing countries without granting the same treatment to other WTO members. In line with the Enabling Clause, the EU granted ACP States non reciprocal preferential market access under the Lomé conventions; however, the GATT panel in the *EC bananas*³² case ruled that this trade regime did not comply with the GATT.³³ The EU then sought to change the trade relationship to one in which the Parties would grant each other reciprocal preferential market access under the Cotonou Partnership Agreement (CPA).

In addition to regional integration efforts, SADC member States are negotiating EPAs with the EU. The EPAs are reciprocal trade regimes under which parties shall gradually liberalise trade between themselves. The EPAs aim to establish FTAs between the EU and African Regional groupings which comply with WTO law.³⁴ Among the objectives of the EPAs is the fostering of economic integration of ACP States into the global economy and the support of regional integration.³⁵

The CPA designates ACP member States as parties to the EPAs³⁶. EPAs are being negotiated in regional groupings but ratification will be on a bilateral basis.³⁷ There are currently Interim Economic Partnership Agreements (IEPAs) which aim to progressively liberalise trade on a reciprocal basis in the FTAs between the EU and regions in Africa.³⁸

³¹ The GATT Decision on Differential and more Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries of 1979. Available at http://www.wto.org/english/docs_e/legal_e/tokyo_enabling_e.pdf. Accessed on 28 August 2012.

³² EEC – Member States Import Regimes for Bananas, DS32/R (1993).

³³ The WTO Appellate Body held that the granting of preferential market access to only some developing countries without granting the same to others was in violation of the enabling clause. Furthermore, the EU could not justify its non-reciprocal granting of preferences under article XXIV of the GATT.

³⁴ CPA article 36.

³⁵ CPA article 29.

³⁶ CPA article 37.

³⁷ CPA article 35.

³⁸ Gathii op cit note 13 at 393.

Negotiation for full EPAs is on going and the deadline of 1 January 2014 for completion of negotiations has been recently extended to 2016.³⁹

SADC member States are not negotiating the EPAs as one block. There are currently four EPA negotiating groups among the 15 member States of SADC. There is the East and Southern Africa (ESA) group which includes COMESA member States; the SADC - minus group⁴⁰ which comprises SACU members including Angola, and South Africa joined in at a later stage; Tanzania belongs to the EAC group and the last group comprises member States that have not initialled the IEPAs.⁴¹

As regards the ESA group, there are three sets of rules of origin that come into play, those under SADC, COMESA and the ones that will be agreed on under the EPA. The existence of multiple rules applying to the same members complicates the regional integration process. It entails having to decide on a common set of rules if the integration process is to proceed.

The configuration of the EPA negotiating groups raises questions of their compatibility with the market integration being pursued by SADC. This configuration has a potential to further complicate the progression of the SADC FTA to a CU. The complication comes in when one compares the rules of origin and the tariff liberalisation schedules under the IEPAs with those of SADC. One of the concerns that have been raised is that countries belonging to the same REC may liberalise different baskets of products and so create new barriers to progression of market integration.⁴² Countries in a CU are supposed to have uniform tariffs applicable to imports to the region, the existence different tariffs applicable to EU imports would entail that countries have to harmonise tariffs applicable to the EU imports in addition to harmonisation of tariffs applicable to all other imports. This would delay the tariff harmonisation process which may slow down the progression of regional integration.

³⁹ Agritrade 'EU calls for more time for EPA negotiations' available at <http://agritrade.cta.int/Agriculture/Topics/EPAs/EP-calls-for-more-time-in-EPA-negotiations>. Accessed on 12 January 2013.

⁴⁰ This group comprises the Botswana, Namibia, Lesotho and Swaziland (BNLS). South Africa was incorporated at a later stage.

⁴¹ Sanoussi Bilal and Christopher Stevens *The Interim Economic Partnership Agreements between the E.U and Africa States, Contents, challenges and prospects* (2009) 164.

⁴² Ibid at 26.

1.2 PROBLEM STATEMENT

It has been argued that the reciprocity principle that is being pursued by the EPAs poses a threat to economic integration efforts in the RECs and the United Nations Economic Commission for Africa (UNECA) projected that the resulting surge of European imports could displace intra-regional trade.⁴³ This would run counter to regional integration efforts.

It was initially understood that for EPAs to be pro-development, they have to support regional integration efforts in the ACP region.⁴⁴ On the other hand, it is argued that the EPAs could help resolve the issue of overlapping memberships through the adoption of common tariff regimes by the different EPA groups.⁴⁵

The configuration of the EPA negotiating groups in SADC could add to the complexity of implementation of member States' obligations under the SADC Treaty. In implementation of the obligations under the SADC and EPA trade regimes, one regime may be disadvantaged due to the implementation of the other. This could become further complicated when SADC is amalgamated into the proposed tripartite FTA with COMESA and EAC.

1.2.1 Configuration of EPAs versus regional integration in SADC.

The underlying question that this dissertation seeks to answer is whether the configuration of the EPAs in the SADC region counters the market integration being pursued in SADC. In particular, it examines –

- (a) whether the objectives of the CPA complement or counter those of the SADC treaty and relevant instruments on trade;
- (b) whether the configuration of the EPA groups counters the process of market integration in SADC; and
- (c) whether the CPA and IEPAs are flexible enough to accommodate the proposed incorporation of SADC into the proposed tripartite FTA.

1.3 CHAPTER OUTLINE

The dissertation has five chapters.

⁴³UNECA op cit note 15 at 405.

⁴⁴ ACP-EC Joint EPA Negotiations Joint report on the ACP –EC Joint Report of the First Dedicated Session on the Development Dimension of EPAs 7 April 2003. Available at <http://www.fes.de/cotonou/downloads/official/ACPEU/ACP-EC+EPA+NEGOTIATIONS+-+JOINT+REPORT+EPA+NEGOTIATIONS.HTM>

⁴⁵ UNECA op cit note 15 at 406.

Chapter 1 contains the introduction and lays down the background to the study. It states the research questions and gives the chapter outline.

Chapter 2 lays the historical development of regional integration in SADC and lays the objectives of the SADC treaty, implementation and challenges encountered and new developments in the regional integration agenda of the region.

Chapter 3 sets out a brief historical development of the EU and Africa trade relationship and narrows down this relationship to SADC. It lays down the objectives of the CPA and the implementation through the IEPAs. It also discusses the configuration of the IEPAs and trade liberalisation there under.

Chapter 4 addresses the issue of whether the configuration of IEPAs is complementary or counter to integration in SADC. In particular, it discusses whether the CPA objectives complement those of the SADC Treaty. It also looks at whether the configuration of the SADC IEPA counters market integration in SADC as laid down in the RISDP. This is done through the examination of the trade liberalisation schedules and the rules of origin. Finally, it examines how flexible the CPA and the SADC-EU IEPA are to accommodate the proposed amalgamation of SADC with EAC and COMESA to form the TFTA.

Chapter 5 contains the findings of the research questions and makes recommendations on how the issues may be addressed based on the analysis and conclusions arrived at in the chapters 1 to 4. It concludes that regional integration and the EPAs could be used as tools for development in the SADC region if member States coordinate their negotiating positions and uphold the regional integration agenda.

CHAPTER 2 – REGIONAL INTEGRATION IN SADC

2.1 INTRODUCTION

This chapter outlines regional integration that is being pursued by SADC and looks at why the region is pursuing regional integration. It highlights the type of regional integration that is being pursued and the focus shall be on economic integration in relation to trade in goods. This will be done through analysis of the objectives of the SADC Treaty. It discusses the progress made and the challenges the region is facing in implementation of these objectives. Some of the solutions being pursued by the REC to address these challenges shall be stated.

The chapter argues that there is need for more concerted efforts and coordination among member States in meeting set targets of the integration process if the objectives of the SADC Treaty are to be achieved. Furthermore, the institutions that have been established under the treaty need to be more vigilant in ensuring that the regional integration plan of the region proceeds as planned.

2.2 ECONOMIC INTEGRATION IN SOUTHERN AFRICA

2.2.1 Economic Integration

Economic integration is defined as a “*state of affairs or process involving the combination of separate economies into larger economic regions.*”⁴⁶ National components function as an entity through the process of elimination of barriers between States.⁴⁷

Ostergaard laid down three classical models of economic integration namely market integration, development integration and neo functionalism.⁴⁸ These models have distinct characteristics which often overlap in practice. The different models are pursued for different expected benefits and outcomes but common among them is the enlargement of market space and pursuit of development.⁴⁹

The market integration model is centred on the elimination of barriers to trade among States so as to widen the market space for goods produced in the States involved.⁵⁰ Integration proceeds in linear stages from an FTA, CU, common market, economic community, monetary union and eventually to a political union in which there is a blend of

⁴⁶ S.K.B Asante *Regionalism and Africa's development* (1997) 19.

⁴⁷ Ibid.

⁴⁸ T Ostergaard ‘Classical Models of regional integration- What relevance for Southern Africa?’ in O Bertil (ed) *Southern Africa After Apartheid, Regional Integration and External Resources* (1993) 27- 48 at 30.

⁴⁹ Ibid at 32.

⁵⁰ Ibid.

economic and political integration. In an FTA, States do not impose import duties on goods originating from member States. The next stage is a CU in which member States adopt a CET for goods imported from outside the region. This is followed by a common market, which is a deeper form of integration in which in addition to the free movement of goods; there is free movement of factors of production like labour and capital. In a monetary union a common currency is adopted. A political union is the highest form of integration in which in addition to integration of economic spaces, there exists policy integration. Member States have common policies and common political institutions and eventually they operate as a single unit.⁵¹

The development integration model focuses on the creation of productive capacity of the States pursuing integration and combines the theory of integration and development.⁵² It is characterised by the conscious efforts by States in a region in promoting cooperation and interdependence.⁵³ Under this model, States do not necessarily combine their markets to expand the market for their goods; instead, they focus on building production capacity in the States involved.

In the neo functional model international cooperation is based on cooperation in areas of interest to the region like trade, transport, security of communication. Progress in cooperation is pushed by interest groups. It takes a sector by sector approach to cooperation and assumes the alienation of economics from politics. It is believed that once development of identified sectors is achieved then political cooperation will follow as a result of the need for an institution to manage the cooperation sectors. This model is was characteristic of development in Western Europe.⁵⁴ The absence or low numbers of interest groups in Africa leaves heads of state at the fore front when it comes to international cooperation.⁵⁵

The model that best describes the integration being pursued in SADC is the market integration model. SADC member States are the ones that are in the forefront in seeking to cooperate and they are in the process of merging their markets through the linear progression from an FTA to an eventual common market. All this is done with the aim of developing the region.

⁵¹ EU Learning 'what is regional integration?' available at <http://www1.carleton.ca/ces/eulearning/eu-learning/introduction/what-is-the-eu/extension-what-is-regional-integration/>.

⁵² Ostergaard Op cit note 48 at 35.

⁵³ Ibid at 36.

⁵⁴ Ibid at 42.

⁵⁵ Ibid.

2.2.2 Why Regional economic integration?

African governments are using regional integration as a strategy to enhance the capacity of their small and fragmented economies, widen their economic space, and build industrial capacity to increase competitiveness of their products in the global market to enhance the welfare of their people.⁵⁶

The exposure of domestic products to foreign products leads to improved capacity to compete which eventually leads to the transformation of goods.⁵⁷ For example, producers of primary products will eventually move towards refining their outputs into secondary goods which will compete better in both domestic and foreign markets. For example, where country X relies on production of oranges for export, the opening up of the economy will expose the domestic producers and consumers to a secondary product from oranges. In this case it could be orange juice. The fact that the domestic producers face competition from orange juice imports will motivate them to start producing orange juice and get more monetary value from the oranges rather than export them as merely fruits for consumption. This would then be a transformation of the domestic products which would lead to a diversity of outputs in the orange industry of country X.

There is evidence of a co-relation between trade openness and economic growth since access to larger markets tends to increase the returns of economies of scale.⁵⁸ It is believed that trade openness has accelerated the growth of the economies of industrialised countries and economies like India and China which have witnessed rapid growth since liberalisation of their markets.⁵⁹ Economic integration has also been a success in the EU.

In view of the economic integration that was taking place globally, it became apparent that small African economies would not survive as independent units facing economic units of larger economies.⁶⁰

The trade situation in sub Saharan Africa is different from that of Western Europe where about 63 per cent of trade takes place intra regionally.⁶¹ The low level of intra African trade has had a negative impact on specialisation and industrial production. Sub Saharan

⁵⁶ UNECA IV op cit note 15 at 1.

⁵⁷ Ibid at 2.

⁵⁸ Ibid at 3. Economies of scale entail the reduction in the cost of production of goods due to the increase in production of goods. See <http://www.businessdictionary.com/definition/economies-of-scale.html>.

⁵⁹ UNECA op cit note 15 at 3.

⁶⁰ Ibid.

⁶¹ Ibid.

African countries produce similar goods and have relatively few goods to trade among themselves. For example most of them are producers of similar agricultural products like maize, cotton, tobacco, and some produce minerals like copper and gold which are mostly destined for Europe.⁶² Regardless of the foreign exchange earnings from these exports, there has not been significant economic development. These foreign exchange earnings are usually expended on paying for imports which are usually secondary products processed from the exported materials and other manufactured products that the region does not process due to lack of capacity.

The lack of industrialisation and lack of diversity of manufactured goods to offer to regional markets remains an obstacle to increased intra-regional trade.⁶³ The imports to the region are mainly capital and intermediate goods.⁶⁴ South Africa and Zimbabwe produce most of the capital and intermediate goods in the region. The region produces significant amounts of metals and minerals for export which form a high percentage of global production. For example, 49 per cent of the world's platinum and 36 per cent of gold come from the region. There is therefore potential for investment and economic growth. The concentration of industrialisation in few countries has had an impact on the development of the region whose members are at different economic levels.⁶⁵

It has been stated that due to their small economies, economic development within Africa will be better attained through the unity of economic spaces among African States.⁶⁶

This leads us then to the regional integration that is being pursued in Southern Africa.

2.2.3 SADC

The Southern African Development Coordination Conference (SADCC) preceded SADC and was established through a Memorandum of Understanding in 1980 among the frontline States.⁶⁷ The main goal of this coordination was to detach the region from economic dependence on the apartheid South Africa and to coordinate pro development activities to

⁶² Ibid at 4.

⁶³ Ibid, at 4.

⁶⁴ SADC RIDSP, chapter 3 available at www.sadc.int accessed on 10 September 2012.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ These countries were Angola, Botswana, Lesotho, Swaziland, Mozambique, Malawi, Zambia and Zimbabwe.

enhance economic liberation of the region.⁶⁸ Trade liberalisation was not among the objectives of SADCC.

Most of the programmes that were set under the SADCC Programme of Action were not achieved due to financial and capacity constraints. The programmes were headed by States which were expected to foot the costs of implementation. Due to underdevelopment and low levels of funding, the programmes depended on donor funding.⁶⁹ Its minimal success was also based on its weak legal framework and institutional set up.⁷⁰

The success of regional integration in Europe influenced the establishment of the African Economic Community (AEC) which prescribes market integration as a mode of formation of the community.⁷¹ If SADCC was to be part of the grand plan of the continent, it had to incorporate market integration in its integration process. Furthermore, factors such as the economic situation in the region showed that it was more practical to include South Africa as the hub of the process of integration.⁷²

The Windhoek declaration of 1992⁷³ expanded the integration agenda to include trade in goods. Trade liberalisation was not the main objective of integration in itself but it is used as a strategy to attract investment to increase trade in the region and international markets.⁷⁴ The objective of the region shifted from reducing dependence on South Africa to cooperation for development of the region.⁷⁵ The objective of the transformation was to broaden integration to address the problems facing the region which was lagging behind in trade with its heavy reliance on trade in primary products.⁷⁶ With the increase in

⁶⁸ SADEX 'Southern Africa: Toward Economic Liberation- A Declaration by the Governments of independent States of Southern Africa Made at Lusaka on the 1st of April 1980' (1980) 2 *SADEX* 1. Available at https://docs.google.com/viewer?a=v&q=cache:uqJG1i7rV6IJ:pdf.usaid.gov/pdf_docs/PNABA682.pdf+&hl=en&gl=za&pid=bl&srcid=ADGEEsSirxoLsgU06lhr9kcXUHNfCxWoUCaEtauWMD_tFF4HmNjA9tdg9-s7IwL_x3a1GvBaUq-xKgNmuBD1gXVva6tOt1nN1sFHZXX5IJ2YtA54sZ8os9piiDM81vlhgTGF2_D4h6Cbh&sig=AHIEtbT2R0hN OJarFuSIOn7ic1Dp-9ZfMg. Accessed on 13 January 2013.

⁶⁹ Clement Ng'ong'ola op cit note 25 at 9.

⁷⁰ Ibid at 10.

⁷¹ UNECA IV op cit note 15 at 2.

⁷² Clement Ng'ong'ola op cit note 25 at 11.

⁷³ The Windhoek Declaration was agreed to on 17 AUGUST 1992 under the title *Towards the Southern African Development Community, A Declaration by the Heads of State or Government of Southern African States* Namibia. The Declaration can be accessed at http://www.sadc.int/documents-publications/show/Declaration__Treaty_of_SADC.pdf.

⁷⁴ Clement Ng'ong'ola op cit note 25 at 14.

⁷⁵ Ibid page 13.

⁷⁶ See www.sadc.int accessed on 10 September 2012.

competitiveness of trade globally, it became imperative for the region to enhance its trade capacity.

SADCC member States could not do this individually and took a cooperation approach which became legally binding under the SADC Treaty. The institutional framework was also strengthened to enable the implementation of the objectives and planning of programmes and projects.⁷⁷

2.2.4 SADC in pursuit of market integration

The SADC Treaty came into operation in 1992 and is premised on the Windhoek declaration of 1992 which called upon the people of Southern Africa to develop a vision of a shared future within a regional community to ensure the improvement of the quality of life of its people among other things.⁷⁸

The underscoring objective of the SADC Treaty is the deepening of integration and promotion of cooperation in various sectors ranging from agriculture, energy and trade to reduce dependence on exports of a few primary products.⁷⁹

2.2.5 The SADC Common Agenda

Article 5 of the SADC treaty forms the common Agenda of SADC and calls for the promotion of sustainable and equitable economic growth and socio economic development that will ensure poverty alleviation with the ultimate objective of its eradication through regional integration.⁸⁰ It seeks to promote self-sustaining development on the basis of collective self-reliance and interdependence of member States. The Treaty provides for maximisation of utilisation of resources in the region and calls for complementarity between national and regional strategies and programmes. In order to achieve this, member States are to harmonise their political and socio economic policies and plans and participate fully in the implementation of plans and projects of SADC.⁸¹

Member States undertook to promote the achievement of the objectives of SADC and refrain from taking measures that are likely to jeopardise application of principles laid down

⁷⁷ SADC op cit note 27.

⁷⁸ SADC *Towards the Southern African Development Community. A Declaration by the Heads of State or Government of Southern African States*. Available at www.sadc.int.

⁷⁹ Ibid.

⁸⁰ SADC Treaty article 5.

⁸¹ Ibid.

by the SADC Treaty.⁸² They are to take steps towards the uniform application of the provisions of the Treaty.⁸³

Member States are to cooperate in all areas necessary to foster regional development and integration⁸⁴ and coordinate their macroeconomic policies and strategies, programmes and projects in trade, industry, finance, just to mention a few. Member States are empowered under article 22 to conclude Protocols spelling out the objectives, scope and institutional framework for cooperation in the various sectors of cooperation identified.

2.2.6 Institutional set up

The SADC Treaty sets up institutions to oversee the implementation of the SADC common agenda.

The SADC Summit is the supreme policy making institution of SADC. It constitutes Heads of State and is responsible for the overall policy direction and control of the functions of SADC.⁸⁵ The Summit has the mandate to adopt legal instruments for implementation of the Treaty under article 22.

The Council comprises Ministers responsible for foreign affairs and is responsible for overseeing the functions and development of SADC, and the implementation of SADC policies and programmes.⁸⁶

The Integrated Committee of Ministers (ICM) oversees the core areas of integration which include trade, industry, finance and investment. The ICM also monitors and controls the implementation of the RISDP.⁸⁷ The ICM gives policy direction to the SADC Secretariat and has powers to create committees that are necessary to cater for cross cutting sectors.⁸⁸

The SADC Secretariat is the principle executive organ of the REC and is responsible strategic planning of SADC programmes.⁸⁹ It is supposed to monitor and evaluate the implementation of regional policies and programmes.⁹⁰

⁸² SADC Treaty article 6.

⁸³ Ibid article 6 (3)

⁸⁴ Ibid article 21.

⁸⁵ Ibid article 10.

⁸⁶ Ibid article 11.

⁸⁷ Ibid article 12.

⁸⁸ Ibid article 12(2)(f).

⁸⁹ Ibid article 14 (1) (a).

⁹⁰ Ibid article 14(1) (i).

These institutions have the mandate to ensure that regional integration which includes trade liberalisation goes in accordance with the instruments that guide the process.

2.2.7 Trade liberalisation

The SADC Protocol on Trade

The SADC Protocol on Trade was signed in 1996 and came into force in 2000 with liberalisation of intra-regional trade in goods as its main objective.⁹¹ It seeks to further liberalise intra-regional trade, advance economic development, diversification, and industrialisation and establish an FTA.

The Trade Protocol provides guidelines for trade liberalisation and takes into account the different levels of economic development of SADC member States.⁹² It provides for the phased elimination of import duties on goods originating from SADC member States.⁹³ Liberalisation of intra-regional trade in goods and services is to be on the basis of fair, mutually beneficial and equitable trade arrangements which will ensure efficient productivity of industries within SADC and contribute towards the investment climate of the region.⁹⁴

Trade liberalisation is to be determined by the Committee of Ministers responsible for trade having regard to existing preferential trade arrangements.⁹⁵ Trade liberalisation was to be achieved within a time frame of 8 years from the entry force of the Protocol.⁹⁶

Export duties are not to be applied to goods destined for another member state within the region and technical barriers to trade are to be eliminated.⁹⁷ There are to be no quantitative export and import restrictions.⁹⁸ There is to be national treatment of goods originating from the region.⁹⁹ Goods originating from the region are the ones eligible for community treatment.¹⁰⁰

⁹¹ SADC Protocol on Trade article 2.

⁹² Ibid article 3.

⁹³ Ibid article 4.

⁹⁴ Ibid article 2.

⁹⁵ Ibid article 3 (1)(a).

⁹⁶ The Protocol entered into force in 2000. This meant that member states were to have reduced tariffs by 2008 in order to establish the FTA. See www.sadc.int.

⁹⁷ SADC Treaty article 6.

⁹⁸ Protocol on Trade articles 7 and 8.

⁹⁹ Ibid article 11.

¹⁰⁰ Ibid article 12.

Member States may enter into trade relationships with other countries outside the region as long as they do not conflict with the provisions of the Protocol.¹⁰¹ Member States are to coordinate trade policies and negotiating positions with respect to relations with third countries.¹⁰²

The Protocol provides for the phased implementation of tariff liberalisation.¹⁰³ Member States made two sets of offers for phasing down of tariffs: one set applies to the region in general and the other to South Africa which is the most developed country in the region.¹⁰⁴

Rules of origin

Rules of origin are important for the determination of goods that are eligible for preferential treatment.¹⁰⁵ The SADC Rules of Origin are contained in Annex 1 of the Protocol on Trade.

Goods are accepted as originating from the region if they have been wholly produced in a member State or incorporate materials from another member State.¹⁰⁶ If they are not wholly produced in a member State, they should have undergone sufficient working process in a member State.¹⁰⁷ Mere assembling, packaging, dilution or any other process that does not affect the character or composition of goods does not suffice to make goods originate from a member State.¹⁰⁸ This means that goods that originate from third States will be subject to tariffs applicable in respective member States.

The RISDP

The RISDP provides strategic direction to SADC plans and objectives. It aligns the strategic objectives and activities with policies to be achieved within a fifteen year period.¹⁰⁹ It is indicative in nature meaning it is not legally binding.¹¹⁰

¹⁰¹ Ibid Article 28.

¹⁰² Ibid Article 29.

¹⁰³ Ibid article 3.

¹⁰⁴ Dirk Hanshom Willie Breytenbach Trudi Hartzenberg (Eds) *Monitoring Regional Integration in Southern Africa Year book* Vol 4 (2004) 20.

¹⁰⁵ Henry Kibet Mutai 'Regional Trade integration strategies in SADC and EAC' (2011) 1 *SADC LJ* 81 at 85.

¹⁰⁶ SADC Rules of Origin Rule 2(1).

¹⁰⁷ Ibid Rule 2 (2).

¹⁰⁸ Ibid Rule 3.

¹⁰⁹ SADC *Regional Indicative Strategic Plan* para 1.6 available at http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf. Accessed on 29 August 2012.

¹¹⁰ Tralac *The Regional Indicative Strategic Plan, How is SADC doing?* (2012) 2. Available at www.tralac.org accessed on 29 August 2012.

The RISDP takes into account the resource constraints of the region and provides for a flexible approach towards integration and implementation of objectives of the treaty.¹¹¹ Trade liberalisation is to proceed on a variable geometry approach which accommodates the different levels of development of member States.¹¹² Its ultimate goal is the promotion of sustainable and equitable growth of member States of the region. It seeks to enhance competitiveness of the region through diversification of production structures and export promotion through promotion of intra-regional trade, investment and technology cooperation.¹¹³

The RIDSP builds on the provisions of the Protocol on Trade which provides for only the establishment of an FTA. It set a time table for integration through the following progressive stages: an FTA to be established by 2008, a CU by 2010, a Common Market by 2015, an economic Community with a central bank by 2016 and the development of a common currency by 2018.¹¹⁴

Chapter four of the RISDP lays down the targets in the trade, finance and investment sector to be achieved within stipulated time frames. Members undertook to phase down tariffs to 85 per cent by 2008 so as to form an FTA.¹¹⁵

2.3 PROGRESS AND CHALLENGES OF TRADE LIBERALISATION

2.3.1 Progress

In its 22 years of existence, SADC has made substantial progress in regional integration.

The SADC Summit mandated the carrying out of a desk top survey in 2011 to monitor the progress made on trade liberalisation in the region to find the challenges being met and propose solutions to these challenges.¹¹⁶

According to the key findings of the desktop research, much progress has been made in the implementation of the set targets the most significant being the establishment of the

¹¹¹ Ibid.

¹¹² Clement Ng'ong'ola op cit note 25 at 18.

¹¹³ SADC RIDSP op cit note 105.

¹¹⁴ Ibid.

¹¹⁵ See <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/>.

¹¹⁶ Ibid at 6.

FTA in 2008 when 85 per cent of flow of trade in goods within the region attained duty free status.¹¹⁷ 12 members are currently participating in the FTA¹¹⁸. There still remains the phasing down of tariffs on sensitive products. As of January 2012, the phase down was largely complete with the completion of the tariff phase down on sensitive products.¹¹⁹

A CU was to be launched in 2010 however, this did not take place. The launch of the CU awaits the resolution of some of the challenges that are being faced in the region.

2.3. 2 Challenges

The challenges facing regional integration in SADC are three dimensional. They are historical in nature, legal, stemming from loosely drafted documents and the rest are implementation related.¹²⁰

Historically, the challenge lay in the lack of coherent policy guidelines for the integration process. The RIDSP provides a road map for integration however, it is merely indicative. Sovereignty stands in the way of integration, with member States undertaking to fulfil objectives that eventually are either not implemented or take long to be implemented. National priorities take precedence over regional ones. It is inevitable that there will be a clash between national priorities and those of the region due to the varying levels of development in the countries of the region. States can only meaningfully participate in the integration process when they have the capacity to integrate their economies with those of others. There still remains a need to align national policies with those of the region.

This leads to the next challenge which is related to the nature of the legal obligations in the SADC Treaty. Some of the provisions are ambiguous. One of the impacts of ambiguity has been the proliferation of multiplicity of membership of States in other RECs. For example, Article 27 of the Treaty does not preclude States from entering into new trade agreements with third parties. One might be tempted to question whether the region is really seeking deeper integration while allowing for the entry into other similar agreements which although may not contradict the provisions of the treaty, may have the effect of slowing down the integration process.

A CU was initially set to be established in 2010 but failed to take place. Despite the launch of the FTA, some countries still lag behind in the implementation of their

¹¹⁷ Ibid at 8.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Henry Kibet Mutai op cit note 106 at 95.

commitments under the Trade Protocol. For example, Malawi is still at the phase down commitment level it had as at 2004.¹²¹ Tanzania got an extension to extend application of tariffs on sugar and paper products until 2015; Zimbabwe was given a derogation to extend its phase down obligations until 2014.¹²² This is just to cite a few examples of the lack of uniformity of implementation of obligations.

The RoO have been stated to be very complex and a hindrance to intra SADC trade.¹²³ A mid-term review conducted in 2004 called for the review of the RoO which were amended by 2008; however, they are yet to be implemented by member States.

Harmonisation of Customs Rules and procedures has proven to be very complex over the years and this has had an impact on the flow of goods in the region. States have varying systems of customs procedures. The Committee of Ministers adopted the SADC Model Act in 2007 to act as a blue print for the Customs Acts of member States.¹²⁴ A common Tariff Nomenclature, Transit Management System and a SADC single administration document have been developed.¹²⁵ This is a step in the right direction towards harmonisation of policies; however, since these developments are fairly new, the impact is yet to be seen.

The failure to launch the CU by 2010 has been a result of the above mentioned challenges. Preparations for launching a CU date back to 2006.¹²⁶ There is supposed to be in place a CET for the region to proceed from an FTA to a CU. The delay in phasing down of tariffs and the multiplicity of membership of member States in other RECs meant that the CU could not be created before these challenges were addressed.¹²⁷ In the linear progression of market integration, the full implementation of one stage triggers the move to the next stage.¹²⁸ The CU can only be launched when the FTA is fully implemented with all member States participating in it.

¹²¹ Tralac op cit note 111 at 7. The major reason for derogation has been cited as reliance on tariff revenue for budget support. For example Malawi had a zero deficit budget in the fiscal year 2010/2011 in which the major source of revenue was revenue collected by the Malawi Revenue Authority which included import and export tariffs. The President however has made commitments to honour Malawi's obligations under the treaty regarding tariff liberalisation. See 2011/2012 budget speech available at <http://www.nyasatimes.com/malawi/2012/06/08/malawi-budget-statement-for-20122013/>. Accessed on 15 August 2012.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid at.11.

¹²⁵ Ibid.

¹²⁶ Paul Kalenga Regional Integration in SADC : Retreating or forging ahead? (2012) 16. Available at www.tralac.org.

¹²⁷ Ibid at 11.

¹²⁸ Ibid at 16.

Another problem relates to the difficulty in harmonising the customs policies of member States. This is one of the problems that sovereignty brings as member States would each like to determine what policies work for their respective countries. The adoption of a single tariff nomenclature would entail giving up their national industrial policies and giving up some of their sovereignty.¹²⁹ The issue of upholding sovereignty of member States is one of the underlying principles of the Treaty.¹³⁰ This brings a clash between the underlying principles of the Treaty and the implementation of the obligations it lays down. The Treaty advocates for upholding State sovereignty and yet the obligations like trade liberalisation and policy harmonisation are supposed to be implemented within a stipulated time frame to ensure the progression of regional integration. States cannot be left to determine their own pace of implementation of obligations under the Treaty. Their policy space is not very wide if they are part of a regional integration scheme. States have to factor in regional integration efforts when formulating national policies in sectors like trade which have a bearing on the progression of regional integration.

Another challenge that remains to be addressed relates to the fact that there already exists a CU in the SADC region. The rest of the members outside SACU would have to come to the level of SACU if a CET applicable to the region is to be formulated.¹³¹ On the other hand, it could be considered as an advantage, since it would serve as a starting point for the formulation of the CET.

Regarding the formulation of the CET, the Summit has to decide whether the CET will be used to protect the region from foreign competition or whether it should be low so as to help facilitate the integration of the region into the global economy.¹³²

The Summit announced in 2010 that the establishment of the CU would have to be postponed. A High level expert group was set up to consolidate work on the establishment of the future CU and come up with a proposed model of the CU to be established. As of March 2012, a report of the work of the expert group was submitted to the Council of Ministers.¹³³ The recommendations can only be implemented when approved by the SADC summit.

¹²⁹ Ibid at 12 .

¹³⁰ SADC Treaty article 4.

¹³¹ Gathii op cit note 13 at 221.

¹³² Tralac op cit note 111 at 12.

¹³³ Ibid.

Trade relations with countries from outside the region raise another complication in the progression of market integration. This relates to both south-south relationships and north-south relationships. Regarding the south-south relationships, there is overlapping membership of RECs. Some SADC member States are also members of COMESA and this is an issue that should be resolved before the FTA progresses into a CU. The overlapping membership creates a duplication of efforts in the integration process and further complicates the attainment of the CU. This is because members in the different RECs have different tariff phase down schedules and different RoO.¹³⁴ In an attempt to resolve this issue of multiplicity of membership of RECs, COMESA, EAC and SADC resolved to merge and form a tripartite FTA which will eventually lead to the formation of a CU.¹³⁵ Negotiations are still underway. The launch of the FTA will address the issue of failure to trade as a block which has had negative impacts on integration and development of the region.

The north-south relationship involves the negotiation of EPAs with the EU. SADC member States are negotiating the EPAs into two groups. There are currently IEPAs in place and as of March 2012, none of the groups had completed the negotiating process.¹³⁶ Chapter 3 discusses the relationship between the EU and SADC regarding the EPAs.

Inherent in all the challenges highlighted is the problem of capacity constraints to implement the obligations laid down by the SADC treaty. This has resulted in the failure or delayed implementation of regional integration obligations. In addition to this is the lack of an effective monitoring mechanism over the integration process. It has been proposed that SADC should establish an effective implementation and monitoring mechanism that will hold member States accountable for failure to implement undertakings that have been made at the regional level.¹³⁷ The lack of implementation of obligations has characterised the integration process in the region.¹³⁸

The RIDSP has been criticised for setting ambitious and unrealistic targets and hence it is not guaranteed that the implementation will be to the letter.¹³⁹ This criticism is based on the evaluation of the progress made between 2005 and 2010. It is proposed that since it is a flexible document, there is need to revise the targets and set more realistic deadlines.

¹³⁴ Mutai op cit note 106 at 85.

¹³⁵ UNECA op cit note 15 at 16.

¹³⁶ Tralac op cit note 112 at 18.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

2.3.3 Political will for integration versus implementation of Treaty obligations

The major question that arises is whether SADC member States have the political will to pursue the integration process further than political commitments that have been made at the regional level.

Research has shown that there is a mismatch between the regional integration and individual state's economic ambitions which is reflected in the slow implementation of obligations under the Treaty and their pursuit of trade relations with third parties.¹⁴⁰ For example, the member States agreed to launch the CU by 2010, however, the tariff phase down is still on going. While they are implementing treaty obligations, they are also negotiating EPAs which have different tariff liberalisation schedules to those under SADC. This issue will be discussed further in chapter 3. These variations are indicative of the fact that SADC member States do not share economic common interests. Under the Trade Protocol, member States are to harmonise their policies and negotiating positions when it comes to relations with third countries.

Difficulty on measuring implementation progress due to lack of appropriate data from member States has resulted in the failure to identify the products whose tariffs have been liberalised.¹⁴¹

The protocol on trade has provisions which ensure that regional integration is not frustrated. Article 27 provides for the entry into trade arrangements with non members of the region but calls for member States to ensure that the arrangements are consistent with the Trade Protocol. This obligation is misplaced, should have been given to the institutional mechanisms like the council of Ministers. Article 29 calls for coordination of trade policies and cooperation in relations with third countries. There is a need to ensure that article 29 is upheld when it comes to member States relations with third States.

2.4 CONCLUSION

SADC evolved from SADCC and is pursuing the market integration model of economic integration in order to address the problem of marginalisation of the region in the global trade arena. The SADC Treaty provides for the deepening of integration through increased trade liberalisation and harmonisation of economic policies. Institutions have been set up to ensure

¹⁴⁰ http://www.southerntimesafrica.com/news_article.php?id=7060&title=Where%20there%20is%20a%20will%E2%80%A6%20SADC%20accused%20of%20lacking%20political%20will%20for%20integration&type=93

¹⁴¹ Ibid.

implementation of the Treaty. The RISDP drew a road map for implementation of the objectives of the Treaty.

An assessment of progress that has been made in its 22 years of existence shows that in general, much progress has been made in trade liberalisation with the launch of the FTA in 2008. Despite the progress made, there are several historical, legal and implementation issues that need to be addressed which are delaying the establishment of the CU. A number of steps are being taken to address these issues; however, there is need for an effective implementation and monitoring mechanism to ensure States implement their obligations. For the region to deepen integration there is need to harmonise activities of member States especially relating to trade relations with third States. Furthermore, the SADC institutions ought to be more vigilant in exercising their mandate of ensuring that regional integration goes on as planned.

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CHAPTER 3 – THE EU AND SOUTHERN AFRICAN TRADE RELATIONSHIP

3.1 INTRODUCTION

The trade relationship between Europe and southern Africa spans over a fifty year period. The EU has given preferential market access to African commodities. This chapter looks at why the EU gives preferential market access to African commodities and how the trade relationship has evolved over the years.

The chapter lays down the WTO rules on trade regarding developing countries and then looks at the regulatory framework that has governed the EU and Africa trade relationship. It briefly discusses the Yaoundé and Lomé Conventions. The provisions relating to trade as laid down in the currently amended CPA will be discussed to show how the relationship has evolved. It discusses the IEPAs and highlights the challenges that are being met.

The chapter discusses the negotiating groups in SADC and the IEPAs in the region with focus on the SADC IEPA. It briefly looks at the ESA IEPA because some SADC member States belong to this group.

The main argument advanced is that there is a need for more coordination of policies and negotiating positions between SADC member States. This will enable them to have common positions when negotiating trade agreements with third States and therefore strengthen regional integration.

3.2 DEVELOPING COUNTRIES IN THE INTERNATIONAL TRADING SYSTEM

International trade is supposed to be carried out on an MFN basis within the WTO context.¹⁴² Since not all countries are at the same level of economic development, there was a need to take into account the differences in levels of economic development of the GATT contracting parties in implementation of obligations under the WTO.¹⁴³ For this reason, international trade law makes provision for the different treatment of developing countries.

¹⁴² GATT article 1.

¹⁴³ WTO Agreement Preamble.

3.2.1 Special and differential treatment of developing countries

(a) The WTO Agreement

The WTO Contracting Parties recognised that their relations in the field of trade and economics should be conducted with a view of raising the living standards of people and expanding the production of trade in goods.¹⁴⁴ They further recognised the need for positive efforts to ensure that developing countries secure a share in world trade commensurate with the development needs of their economies.¹⁴⁵ In pursuit of goals which would be mutually advantageous to their trade relationships, the contracting parties adopted the WTO Agreement. These aspirations are also reflected *inter alia* in the GATT.

(b) The GATT

The original GATT text of 1947 did not contain provisions for the special treatment of developing countries. Part IV on trade and development was subsequently included in 1965¹⁴⁶ and makes provision for the special treatment of developing countries. It recognises that there is a need for positive efforts which are to be designed to ensure that the less developed contracting parties secure a share in the growth of international trade while taking into account their economic and development needs.¹⁴⁷ Since most of the less developed contracting parties depend on the exportation of primary products, developed countries are to provide market access for these products.¹⁴⁸

One of the main features of this preferential treatment is the element of non-reciprocity. In granting preferential treatment to less developed countries, developed countries do not expect reciprocity from less developed countries.¹⁴⁹ In carrying out their obligations, developed countries are to accord high priority to the removal or reduction of barriers to products originating from less developed countries.¹⁵⁰

¹⁴⁴Ibid para 1.

¹⁴⁵ Ibid para 2.

¹⁴⁶ Patricia Michelle Lenhagan 'Trade Negotiations on African Capitulations: An African Experience' 17 *Berkeley La Raza Law Journal* 117 at 118.

¹⁴⁷ GATT Article XXXVI (3).

¹⁴⁸ Ibid para (4).

¹⁴⁹ Ibid para (8).

¹⁵⁰ GATT Article XXXVII (3) (c).

(c) The Enabling Clause

The Contracting Parties waived the application of the MFN principle in 1971 for a period of ten years in order to allow the operation of the Generalised system of Preferences (GSP).¹⁵¹ The waiver allowed for developed countries to accord preferential tariff treatment to products originating from developing countries without extending the same preference to developed countries.¹⁵²

The adoption of the Enabling clause in 1979 provided the legal basis for the unilateral granting of preferences by developed countries to all developing countries. There was thus no need for developed countries to seek permission from the contracting parties to grant preferential treatment to developing countries.¹⁵³ This was to be done through the GSPs in order to facilitate trade in developing countries and respond positively to development, financial and trade needs of the developing countries.¹⁵⁴ The contracting parties acknowledged the fact that with time, the situation of less developed countries would change and that they would ultimately reach a position which would enable them to participate more fully in the framework of the GATT.¹⁵⁵ However, it ought to be noted that preferential treatment that is available to only a few developing countries is not covered under the Enabling clause.¹⁵⁶ This issue will be discussed under the section that discusses the EC Bananas cases.

3.3 THE EVOLVING TRADE RELATIONSHIP BETWEEN THE EU AND AFRICA

The trade relationship between the EU and Africa has evolved through the years. The legal framework regulating this relationship has been responsive to the changes in Africa and the global context at large.¹⁵⁷

(a) From Yaoundé to Cotonou

The relationship between the EU and the ACP countries dates back to 1957 when the European Common Market was established under the Treaty of Rome. The objective of the

¹⁵¹ 1971 WTO Waiver for the Generalised System of Preferences. Available at http://www.wto.org/english/tratop_e/devel_e/anexi_e.doc.

¹⁵² Ibid.

¹⁵³ Patricia Michelle Lengan, op cit note 147 at 118.

¹⁵⁴ Enabling Clause paras 3 and 5.

¹⁵⁵ Ibid para 7.

¹⁵⁶ Op cit note 4 at 118

¹⁵⁷ Sanoussi Bilal *The E.U. and Africa the Policy context for development* (2010) 5. available at [http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/3355884C1EE2D093C12577E700482338/\\$FILE/EU%20and%20Africa%20policy%20context%20for%20development_BOND&ECDPM.pdf](http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/3355884C1EE2D093C12577E700482338/$FILE/EU%20and%20Africa%20policy%20context%20for%20development_BOND&ECDPM.pdf) (last accessed on 09/11/12)

Treaty was to eventually establish a common market among the European countries.¹⁵⁸ This would have resulted in complications in the granting of preferences to overseas territories with which some members had colonial ties. For example, when the common market was established, there would be applied a CET to all imports into the region inclusive of imports from former colonies.

At the insistence of France, Part IV was added into the Treaty and it formed the legal basis for the granting of preferential treatment to imports from former colonies. The customs duties applicable to imports from former colonies and other countries with a special relationship with the European countries were supposed to be progressively abolished together with the elimination of tariffs applicable to goods originating from European member States.¹⁵⁹

The trade relationship has since been regulated by several conventions from the Yaoundé I to the CPA.

The Yaoundé Agreements preceded the Lomé Conventions and were aimed at fostering economic cooperation between the European Common Market and the Associated African and Malgache Countries (EAMA).¹⁶⁰ These agreements created an aid and trade regime which granted goods from former European colonies free market access to the European market.¹⁶¹ The joining of Britain into the European Economic Community led to the signing of the first Lomé Convention in 1975 between the Community and ACP States.

(b) The Lomé Conventions

The Lomé Conventions span from Lomé I to Lomé IV and incorporated trade as a tool for development.¹⁶² Under these conventions, trade preferences were given to imports of bananas, sugar, beef and veal from the ACP countries. After Lomé IV, the Protocol on bananas and sugar entered into force and ensured duty free entry of imports of bananas from some ACP countries.¹⁶³

¹⁵⁸ Treaty of Rome article 2.

¹⁵⁹ Ibid article 133.

¹⁶⁰ The European Commission 'From Lomé I to IV' available at http://ec.europa.eu/europeaid/where/acp/overview/lome-convention/lomeitoiv_en.htm

¹⁶¹ The goods from former colonies would be granted duty free access into the EC market or the same tariffs applicable to other members of the EC. SEE article 133 of the Rome Treaty.

¹⁶² The European Commission op cit note 161.

¹⁶³ Ibid.

The EU continued with the system of unilateral preferential treatment of ACP States under the Lomé Convention until the *EC Bananas* case when the trade relationship came under scrutiny.

The EEC Bananas Cases¹⁶⁴

The EEC maintained a common 20 per cent *ad valorem*¹⁶⁵ tariff on banana imports. Under Protocol 5 of the Lomé Convention, the EC granted preferential market access to ACP banana imports. Individual European countries maintained national restrictions on banana imports from non ACP countries.¹⁶⁶

The complaint in this case related to the imposition of restrictions on imports of bananas from Latin America. The complainants¹⁶⁷ alleged violations of the MFN principle. The complainants argued that the application of the 20 per cent *ad valorem* duty to non ACP members was a violation of the MFN principle since ACP like products were admitted duty free. They claimed that the EC could not discriminate between developing countries when granting preferential market access.

The EC argued that it could grant preferential market access to the ACP suppliers under article XXIV of the GATT. The EC argued that since this arrangement had gone unchallenged by the contracting Parties of the GATT after they had been notified of the arrangement, the complainants could not contest the arrangement. Furthermore, no notice to modify the Lomé convention had been given to the EU by the contracting Parties. The EC stated that if reciprocity was required, it would then be impossible to create an FTA between developed and developing countries.¹⁶⁸ The EC argued that in accordance to part IV of the GATT, taking into account their development needs, it had accorded preferential market access to ACP countries.¹⁶⁹

The GATT Panel ruled that the granting of preferences to banana imports from ACP countries and not to other developing countries could not be justified under article XXIV. The Lomé Convention did not require reciprocity of granting of preferential market access

¹⁶⁴ First Case : EEC –Member States’ Import Regimes for Bananas DS32/R (1993).

¹⁶⁵ Ad valorem tariffs rates that are a percentage of the price of a product.

¹⁶⁶ These countries included France, Italy, UK, Portugal, Spain and the UK. The EC Council adopted Reg. 404/93 to establish a common market organisation for bananas and there was a new import regime to be effective from July 1993. These countries | See James H. Mathis *Regional Trade Agreements in the GATT/WTO* (2002) 88.

¹⁶⁷ Colombia, Venezuela, Guatemala, Nicaragua, Costa Rica were the main complainants.

¹⁶⁸ DS32/R para 221.

¹⁶⁹ Ibid paras 227 and 228.

from the ACP States.¹⁷⁰ The lack of obligation on the part of the ACP States to eliminate trade barriers made this trade regime different from that of an FTA envisaged under article XXIV.¹⁷¹ The preferences were granted on a unilateral basis because the EC did not expect the ACP States to reciprocate the market access preference. The EC could not therefore raise Article XXIV as a defence. In this case, the EC granted the preferences to ACP States only without granting the same preference to non ACP States. This was held to be a violation of the MFN principle.

The EC then sought a GATT/WTO waiver to allow it to continue granting preferences to the ACP States. The waiver was granted in 1994 and was to expire in 2000.¹⁷² The parties to the Lomé Conventions sought to make their relationship WTO compliant and this resulted in into the CPA in 2000. The EU maintained that the non-reciprocal trade relationship had not produce satisfactory results because the ACP countries underperformed in comparison to other developing countries in terms of attracting investment and participating in global trade.¹⁷³

The CPA

(a) Objectives

The Agreement altered the relationship between the ACP countries and the EU by introducing the concept of reciprocity in granting of preferential market access of goods traded between the parties. It formed a new framework for trade and development cooperation and is said to be the largest financial and political north-south cooperation.¹⁷⁴

The parties to the Agreement committed themselves to working together to eradicate poverty, achieve sustainable development and ensure the integration of the ACP countries

¹⁷⁰ Lomé Convention articles 168 and 174 provided that there was no need for reciprocity in the granting of preferences by States as regards free market access.

¹⁷¹ DS38/R, para 159.

¹⁷² Waiver of the Fourth ACP-EEC Convention of Lomé of 9 December 1994 BISD 41S/26 . Initially it was due to expire after the Uruguay round in 1996. However, it was extended to 2000. See Fourth ACP-EC Convention of Lomé - Extension of waiver pursuant to paragraph 2 of the Understanding in respect of waivers of obligations under GATT 1994 WT/L/186 which was granted on 14 October 1996 and was to expire 29 February 2000. Available at http://www.wto.org/english/tratop_e/dispu_e/246r_f_e.pdf.

¹⁷³ International Food and Agriculture Policy Council *Economic Partnership Agreements and African Regional Integration: Have negotiations helped or hindered integration?* (2011) 9.

¹⁷⁴ http://ec.europa.eu/europeaid/where/acp/overview/documents/devco-cotonou-consol-europe-aid-2012_en.pdf. Accessed on 12 January 2013.

into the global trading economy.¹⁷⁵ The CPA aims to support regional integration efforts in trade and investment that will eventually lead to the integration of the ACP region into the world economy.¹⁷⁶

The original actors in the Agreement were the ACP States and the EU. In the amended version of 2010, the actors now include regional and sub-regional organisations, the AU and non-State actors.¹⁷⁷ It should also be noted from the outset that the meaning of regional organisation is not provided.

The ACP countries are to determine their own economic principles and objectives and models of their economies. The parties shall pay due regard to the political choices of the ACP States which are to formulate cooperation programmes together with the EU.¹⁷⁸ The political dialogue between the parties is to be geared towards retaining the concept of multilateralism while upholding the objectives of regional and continental integration. The objectives are to be pursued through strategies that are locally owned and among other things, aimed at promoting regional cooperation and integration.¹⁷⁹

The EU is to support the participation of LDCs in regional integration efforts and mitigate the cost implications of trade liberalisation.¹⁸⁰

The ultimate objective of trade cooperation is poverty reduction, sustainable development and the gradual integration of the ACP countries into the world economy.¹⁸¹ This is to be done through the support of regional integration goals that are already being pursued among the ACP countries.¹⁸² In supporting these efforts, the cooperation shall build the production, supply and trading capacity of the ACP countries to reduce their dependence on primary products and promote more diversified economies.¹⁸³ The cooperation shall be in full conformity with the prevailing WTO rules and shall take cognisance of the mutual

¹⁷⁵ Partnership Agreement between the African Caribbean, Pacific Group of States on the one part and the EU and its member States on the other part (CPA). Preamble. Available at http://ec.europa.eu/europeaid/where/acp/overview/documents/devco-cotonou-consol-europe-aid-2012_en.pdf.

¹⁷⁶ CPA article 1.

¹⁷⁷ Ibid article 6(1) (b).

¹⁷⁸ Ibid article 4.

¹⁷⁹ Ibid article 20 (1) (aa).

¹⁸⁰ Ibid article 29

¹⁸¹ Ibid article 19.

¹⁸² Ibid article 20.

¹⁸³ Ibid.

interests of the parties.¹⁸⁴ Due regard shall also be had to preference erosion which is in conformity with multilateral commitments under the WTO.¹⁸⁵

The partnership is to take into account the different levels of development and needs of the ACP countries and give special and differential treatment to LDCs.¹⁸⁶

The CPA shall take precedence where there is an inconsistency with another Agreement that may exist between any of the parties.¹⁸⁷

The CPA shall be in force for 20 years from 1 January 2000 and is subject to review every five years with a possibility of amendment. The CPA has so far undergone two reviews in 2005 and 2010. The current text that is under consideration is the version that incorporates the 2010 amendments.

(b) The EPAs

EPAs aim at progressive trade liberalisation between the EU and ACP countries to create FTAs making the trade relationship more WTO compatible.¹⁸⁸ This is aimed at the gradual integration of the ACP countries in the world economy by making use of the already existing regional integration schemes and south-south trade.

The EU shall negotiate EPAs with ACP countries that consider themselves capable to negotiate and at the level that they consider appropriate to do so.¹⁸⁹ The negotiations are to be in accordance with the procedures agreed on with the ACP group with a view to supporting regional integration efforts. Market access of the ACP products into the EU is to be improved through the review of RoO.¹⁹⁰

The negotiations are to take into account the socio economic impacts that trade liberalisation may have on the ACP countries and their capacity to adjust their economies during the liberalisation process. In light of these issues, the negotiation process is supposed to be flexible in establishing sufficient transition periods and product coverage in the trade agreements.¹⁹¹

¹⁸⁴ Ibid article 34.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid Article 35.

¹⁸⁷ Ibid Article 91.

¹⁸⁸ Ibid article 36 makes provision for negotiation Of EPAs.

¹⁸⁹ Ibid article 37(3).

¹⁹⁰ Ibid article 37 (4).

¹⁹¹ Ibid article 37(4).

Once ACP States have concluded the EPAs with the EU, the ACP countries that are not party to the Agreements can accede to the EPAs at any time.¹⁹²

3.4 EPA NEGOTIATIONS

(a) EPA negotiating groups

Negotiations of EPAs were launched in Brussels on 27 September 2002¹⁹³ and were to be completed by 2008.

Negotiations are pursued with countries that consider themselves in a position to do so with the aim of supporting regional integration efforts.¹⁹⁴ The CPA did not lay down the negotiating fora for ACP countries. ACP countries were to decide their negotiating forum which was to be a political decision based on economic analysis and clear criteria.¹⁹⁵ This was to be done through the conduct of regional studies and mobilisation of political forces to come up with common negotiating positions.¹⁹⁶

ACP Position

Initially, the ACP States were supposed to come up with the preferred negotiating scenario by 2001.¹⁹⁷ The ACP developed guidelines¹⁹⁸ for the negotiation of EPAs which set the approach to be taken and principles that were to guide the negotiations. The guidelines lay down specific and general objectives to be pursued by the negotiating groups.

The guidelines noted that the EPA negotiations entailed building negotiating capacity and analytical capacity to assess the impacts that trade liberalisation would have on the ACP region, regional groupings and at national level.¹⁹⁹

The ACP proposed negotiating the EPAs in two phases.²⁰⁰ Phase 1 would be at an all ACP-EU level for the parties to agree on the objectives, scope and content, special and differential treatment, modalities and phasing of negotiations and implementation issues, financing and cost of adjustment and principles of the EPAs and issues of general concern to

¹⁹² Ibid article 37(7).

¹⁹³ Africa Trade Policy Centre *EPA Negotiations: African Countries Continental Review* (2007) 1.

¹⁹⁴ CPA article 37(3).

¹⁹⁵ Sanoussi Bilal 'Who will negotiate with the EU? In search for an ACP-EU Negotiating Framework' 1 *Trade Negotiations Insights* 5.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ ACP *ACP Guidelines for the negotiation of Economic Partnership Agreements* (2002).

¹⁹⁹ Ibid para 11.

²⁰⁰ Ibid para 12.

ACP countries.²⁰¹ Phase 2 would be negotiation between the EU and regional groupings or individual countries in order for country specific issues to be taken into account.²⁰² Issues for discussion under this phase included tariff negotiations and any other sectoral commitments at country or regional level.²⁰³

The ACP countries were to be guided by the principles of unity and solidarity in their approach to the EPA negotiations which them to secure a better deal with the EU than if they were to negotiate the EPAs individually.²⁰⁴ Under the Lome trade regime, the ACP negotiated as one group as there was no creation of FTAs and no need for reciprocity of commitments.²⁰⁵

The EPAs were to build on regional integration initiatives in the region²⁰⁶ and not undermine them. The guidelines highlighted the fact that the ACP States were also involved in regional integration among themselves. The guidelines proposed that in order to ensure that the integration efforts are not undermined, regional integration should take precedence over any trade liberalisation commitments with the EU under EPAs.²⁰⁷ On the issue of flexibility, the ACP States were to be allowed to first consolidate their integration positions before making commitments under EPAs.²⁰⁸

The guidelines did not lay down the configuration of the negotiating groups. These groups would be constituted after the categories of subjects that would be agreed on with the EU.²⁰⁹ The membership of the negotiating groups would be based on a decision by the ACP taking into account the best interests of all ACP States.

The ACP decided that the negotiating groups would be based on regional groupings but advocated for the ACP Secretariat to act as a coordinating mechanism between the regional groupings to ensure coherence between EPA negotiations and regional integration initiatives.²¹⁰

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid para 30.

²⁰⁵ Ibid.

²⁰⁶ CPA article 35(2).

²⁰⁷ ACP op cit note 194 para 30.

²⁰⁸ Ibid para 30.

²⁰⁹ Ibid para 42(d).

²¹⁰ Ibid para 42(f).

EU Position

The EC Green Paper of 1996 proposed negotiating the EPAs with regional groupings of the ACP countries.²¹¹ It acknowledged that the ACP group is neither an economic or legal entity but was established in the framework of the European and ACP relations for purely historical reasons.²¹² The ACP countries have divergent economic interest based on their level of economic development and appeal to foreign investment.²¹³ The Green paper questioned whether the ACP was a suitable partner for negotiating the agreements and lay down four considerations for the partnership. It acknowledged the fact that largely, the decision on the negotiating forum lay with the ACP countries whose choice was going to be a reflection of their willingness to step up the ACP cooperation, define their common objectives and enhance their negotiating skills.²¹⁴ The paper acknowledged that the divergence of the group called for a different approach to cooperation so as to take into account the needs of countries that were at lower levels of development. The objective of the CPA would change not only the content of the cooperation framework, but also the geographical configuration of the parties to the parties under the framework.²¹⁵ It acknowledged that there was need to devise an appropriate framework for trade relationship or else it would result in the disintegration of the ACP group.²¹⁶

The new arrangement contemplated negotiation of the agreements in four tiers. These would have either been region to region FTAs, bilateral FTAs with willing ACP countries, non-reciprocal preferences with LDCs, or graduation into GSPs for the countries that were not willing to negotiate EPAs.²¹⁷

The EU lay down its preference of geographical configuration principles for ACP countries. It envisaged negotiating the EPAs with main regional groups of ACP countries and introduced the concept of Regional Economic Partnership Agreements (REPAs). The EU regarded regional integration as a stepping stone towards full liberalisation and integration of

²¹¹ Commission of the European Communities *Green Paper on the relations between the European Union and ACP countries in the eve of the 21st Century challenges and options for a new partnership* (1996) . Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1996:0570:FIN:EN:PDF>. Accessed on 12 January 2013.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid 64.

²¹⁷ Ibid 65.

the ACP countries into the global arena.²¹⁸ The EU concurred with the CPA position on the need to use the EPAs as a means foster the smooth integration of the ACP into the world economy.

The EC adopted proposed directives for the negotiation of EPAs in 2002.²¹⁹ These directives were termed as the negotiating mandate and they gave the EC the framework within which to negotiate the EPAs with the ACP States. It provided that the EPAs were to be instruments for development.²²⁰

In terms of the ACP- EPA negotiating groups, the EU's proposal to negotiate with regional groups of countries was problematic because of the ACP countries' overlapping membership of regional groupings. The EU encouraged the ACP countries to negotiate in configurations of their choice. At the time of the formation of these groups, the African continent was still facing leadership challenges which resulted in minimal coordination among the negotiating groups.²²¹ The African countries then proceeded to form four groups. The configuration of these groups with the exception of the EAC does not match the configuration of the existing RECs.

The ACP States decided the group under which they would negotiate the EPAs.²²² States which belonged to more than one REC could only align themselves with one negotiating group. This has resulted in the apparent fragmentation of the RECs where negotiation of EPAs is concerned.

The joint ACP-EU Ministerial Trade Committee meeting that was held in St Lucia in February 2003 was concluded with outstanding issues on EPA negotiations.²²³ The Ministers

²¹⁸ Sanoussi Bilal op cit note 198.

²¹⁹ Ibid.

²²⁰ Commission of the European Communities 'Recommendation for a Council Decision authorising the Commission to negotiate Economic Partnership Agreements with the ACP countries and regions SEC (2002) 351 final, 9 April 2002.

²²¹ AU *Brief on Negotiations for Economic Partnership Agreements* 26 May 2007 Paragraph 31 of the available at http://www.africa-union.org/root/au/AUC/Departments/TI/EPA/DOC/EPA_brief_2_AUC_May07.pdf (accessed on 2 October 2012).

²²² ECDPM *Overview of the EPA Negotiations: ESA-EU Economic Partnership Agreement* (2006) available at http://www.ecdpm.org/Web_ECDPM/Web/Content/Navigation.nsf/index2?readform&http://www.ecdpm.org/Web_ECDPM/Web/Content/Content.nsf/0/C4BF8353DAE26EEBC12572330044D04A?Opendocument. See also Marieke Meyn 'Are Economic Partnership Agreements likely to Promote or constrain Regional Integration in Southern Africa? Options, Limits and Challenges Botswana, Mauritius Mozambique are facing' (2004) NEPRU WORKING PAPER NO,16 16 .available at http://www.acp-eu-trade.org/library/files/Meyn-M_EN_072004_EPAs-regional-integration-Southern-Africa.pdf.

²²³ Kathleen Van Hove and Melissa Julian 'EPA Negotiations Update: State of Play of the Negotiations' (2003) *2 Trade Negotiations Insights* 6.

failed to agree on the modalities for concluding phase 1 of the EPA negotiations. On one hand, the ACP advocated for coming up with a conclusive agreement at the end of phase 1, but the EU was not in agreement with this proposal. Secondly, there was no agreement on the parties to be signatory to the EPAs, whether they would be States or an all ACP group.²²⁴

The AU Commission was later given the mandate to monitor, coordinate and harmonise the EPA negotiations. The AU Ministers of Trade called for coherence in the positions taken by the negotiating groups.²²⁵ The Commission directed that EPA negotiating groups were to compare the texts of the IEPAs before concluding them.²²⁶ The AU further called on the EU to respect the existing African integration and regionalisation efforts and not to encourage divergences in the IEPAs.²²⁷

(b) IEPA Negotiations

The EU obtained a second waiver from the GATT contracting Parties for the continuation of granting of preferences which was to expire on 31 December 2007.²²⁸ As the expiry date was approaching, it was clear that the negotiation for full EPAs would not be possible before the expiry of the waiver. This was due to the fact that there was lack of preparation on the part of the ACP regional groupings.

The EU then resolved to split the negotiations into two so as to have interim EPAs covering trade in goods and later on comprehensive EPAs would be concluded after the interim EPAs were in place.²²⁹ The countries that would not have initialled the IEPAs by the time the waiver expired would be eligible to access the European Market under the GSPs and the Everything But Arms (EBA) initiative for LDCs.²³⁰

Negotiations moved from an All-ACP group to regional groupings which further went to country level as the 2007 deadline was approaching. As a way to get the EPAs in place before the deadline, the EC made offers to both regional groupings and individual countries. The IEPAs were negotiated with a view to beating the deadline of the expiry of the waiver.²³¹

²²⁴ Ibid.

²²⁵ AU Ministerial Declaration on EPA negotiations done at Cairo on 9 June 2005 available at http://www.africa-union.org/root/au/AUC/Departments/TI/EPA/DOC/de/EPA_Decl_Cairo_EN.pdf. Accessed on 2 October 2012.

²²⁶ Ibid.

²²⁷ Ibid. para 34

²²⁸ ICSTD 'EC-ACP waiver finally granted' (2001). Available at <http://ictsd.org/i/news/bridgesweekly/6664/>.

²²⁹ Sanoussi Bilal and Christopher Stevens op cit note 41 at 14.

²³⁰ Ibid at 15.

²³¹ Ibid.

The EPA negotiations have been characterised by tensions on both sides.²³² There were conflicts in terms of content of the EPAs and the parties were unable to reach a common understanding and approach on the new trade arrangements in terms of the development and regionalism aspects of the agreements.²³³

The ACP countries have claimed that the EU bullied their way into getting them to signing IEPAs before agreeing on contentious issues. The ACP States have claimed that they had no option but to enter into the IEPAs rather than risk losing market access to the EU.²³⁴

The stance of the EU on EPAs is that they will foster development through trade liberalisation.²³⁵ On the other hand, ACP countries see EPAs as an opportunity for development through the use of regional integration and trade liberalisation as only some of the elements.²³⁶ The main interest of the ACP countries is the assurance of financial support to curb supply side constraints to build up the markets in the ACP region. This has been a point for departure between the parties and has escalated the tensions throughout the negotiation process.²³⁷ The EU maintained that the issue of development financing would be negotiated in Regional Preparatory Frameworks which were mandated to discuss issues of financing.²³⁸

African countries grouped themselves into five negotiating groups. There are two EPA negotiating groups in the SADC region. Angola, Botswana, Lesotho, Namibia, Swaziland and Mozambique are negotiating under the SADC EPA group. The other six countries namely DRC, Madagascar, Mauritius, Malawi, Zambia and Zimbabwe are negotiating an EPA under the ESA group which contains other COMESA member States.²³⁹

Regardless of outstanding issues in the negotiating process, the parties entered into IEPAs with plans of concluding full EPAs.

The IEPAs that have come out of these negotiations are different. It has been stated that no clear pattern can be ascertained among them and that there is no clear indication that

²³² Ibid at 13.

²³³ Ibid.

²³⁴ Aurelie Walker 'The EC-SADC EPA: The Moment for Truth for Regional Integration' in ECDPM *Trade Negotiation Insights* (2009) 1. (Quoting Daniel Moroka Minister of Trade Botswana).

²³⁵ Sanoussi Bilal op cit note 195 at 33.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Ibid at 34.

²³⁹ Ibid.

poorer countries have been given more flexible periods of adjustment than the richer ones.²⁴⁰ There are differences in the content of the trade liberalisation schedules. This difference has been attributed to the negotiating capacities of the respective countries.²⁴¹

Countries entered these negotiations as groups, however, their respective tariff liberalisation schedules and exclusion baskets are different. These liberalisation schedules are negotiated at country and not group level and do not contain the same baskets of goods that are excluded from tariff liberalisation.²⁴²

Negotiation of full EPAs will cover issues not covered in the IEPAs like trade in services, and other trade related issues like competition law, investment, government procurement, intellectual property, environmental issues among others.²⁴³

(c) IEPAs in SADC

Due to their overlapping membership of RECs, countries had to decide under which grouping they would negotiate the EPAs.

(i) The SADC IEPA

EPA negotiations were launched in Windhoek in 2004 and the Minister of Trade of Botswana led the SADC group in the negotiations with the Commissioner of Trade representing the EU.²⁴⁴

When the negotiating process began, SADC had problems bringing together all the fifteen member States to come up with a common stand.²⁴⁵ The REC was split into several groups in order to enforce national interests of States instead of coming up with a regional position.²⁴⁶

SADC member States that belonged to other RECs could not negotiate the EPAs under all the regional groupings to which they belonged. They had to choose one EPA

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid at 16.

²⁴³ ECDPM *EPA Negotiations: Where do we stand?* (2008) 3.

²⁴⁴ African Trade Policy Centre *EPA Negotiations : African Countries Continental Review* (2007) 24. available at http://www.africa-union.org/root/au/AUC/Departments/TI/EPA/DOC/Comprehensive_Review_of_EPAs_Negotiations_in_Africa_ACP_Final_Report.pdf

²⁴⁵ Erik Grunke *The Economic Partnership Agreements between SADC and EC Regional Integration of SADC and Namibian interests within EPA negotiations* (2011) 17.

²⁴⁶ Ibid.

negotiating fora.²⁴⁷ Madagascar, Malawi, Mauritius, Zambia and Zimbabwe chose to negotiate under the ESA group; Tanzania, which is also a member of COMESA, chose to negotiate under the EAC group; DRC chose to negotiate under the CEMAC group; The rest of the countries Botswana, Namibia, Lesotho, Swaziland, Mozambique and Angola negotiated under the SADC group; South Africa did not fall under the CPA regime because it already accessed the EU market under the TDCA which came into force in 2004.²⁴⁸

Negotiations were stalled and restarted in 2007 after the SADC group proposed that the EU consider including South Africa in the negotiations which did not fall under the CPA regime but traded with the EU under the TDCA.

Progress on negotiations was slow due to disagreements on trade related issues and trade in services. The parties disagreed on the extent and schedules of trade liberalisation, and protection of infant industries from foreign competition.²⁴⁹ SADC did not want to conclude binding commitments on these issues and agreed to negotiate on competition policy and investment when the right negotiating capacity had been developed in the region.

The SADC IEPA was initialled in 2009 by Botswana, Lesotho, Mozambique, Namibia and Swaziland. Namibia made reservations and raised some issues regarding the IEPAs.²⁵⁰ This will be discussed further under challenges.

The IEPA objectives include poverty eradication through trade partnership; promotion of regional integration among the SADC EPA States and their eventual integration into the global economy in conformity with their political choices and development priorities.²⁵¹ The parties to the Agreement are to conduct their activities with the aim of achieving sustainable development in the SADC region.²⁵² The Agreement is to promote commercial and economic relations between the parties in conformity with WTO law and support implementation of the SADC Trade Protocol while liberalising trade between the EU and SADC EPA States.²⁵³

²⁴⁷ European Commission *Fact Sheet on the Interim Economic Partnership Agreements SADC Group* (2010)

²⁴⁸ SA Department of International relations and Affairs 'The Trade Development and Cooperation Agreement' Available at <http://www.dfa.gov.za/foreign/saeubilateral/tdca.html>.

²⁴⁹ Ibid.

²⁵⁰ Agritrade 'EPA negotiation issues between SADC and the EU' (2010) 2.

²⁵¹ Interim Agreement with a view to Economic Partnership Agreement between the European Community and its member States of the one part and the SADC EPA States on the other part(SADC IEPA) article 1.

²⁵² Ibid article 3.

²⁵³ Ibid article 1.

The IEPA recognises the importance of supporting regional integration and provides that the pace and content of regional integration shall be determined by the SADC EPA States in exercise of their sovereignty.²⁵⁴

The aim of trade cooperation is the enhancement of trade in goods between the IEPA parties through trade liberalisation, proper implementation of rules of origin and eventual improvement of the SADC EPA States' capacity to trade.²⁵⁵

Article 19 establishes an FTA between the parties and takes into account the principle of asymmetry in the implementation of trade liberalisation obligations by the parties. This means that the tariff liberalisation schedules will vary depending on the development levels of the States.

Article 23 contains the standstill clause which provides that import and export tariffs that are applied to goods traded between the IEPA Parties at the time of entry into force of the IEPA shall not be altered at a later stage. This is one of the issues of contention that has emerged in the negotiating process and shall be discussed in greater detail under challenges.

Products originating from the SADC EPA States shall have duty free and quota free access to the EU except for those that have been excluded.²⁵⁶ Goods originating from the EU shall be subject to the various tariff schedules of the SADC EPA States. On entry into the SADC region, EU imports shall not be subject to any further taxation and where they are re-exported from the SADC EPA territory and the tax collected shall be refunded because the goods would then be subject to import duty in the importing country.²⁵⁷

The parties shall cooperate in customs and trade facilitation with the aim of ensuring implementation of the Agreement.²⁵⁸

The SADC EPA States shall have a five year transition period to bring their customs and trade facilitation procedures into conformity with their obligations under the IEPA.²⁵⁹ The harmonisation of customs procedures at regional level shall be encouraged but the modalities of doing this shall be determined by each party.²⁶⁰ This provision gives SADC

²⁵⁴ Ibid article 4.

²⁵⁵ Ibid article 10.

²⁵⁶ Ibid article 25.

²⁵⁷ Ibid.

²⁵⁸ Ibid article 31.

²⁵⁹ Ibid article 46.

²⁶⁰ Ibid article 44.

member States the option of liberalising tariffs applicable to EU imports at either national or regional level.

The IEPA parties agreed to continue with negotiation of comprehensive EPAs in 2008. The SADC EPA States include Botswana, Lesotho Swaziland and Mozambique and leave out Namibia and South Africa who may join in the negotiation process subject to notifying the SADC IEPA parties.²⁶¹ The current negotiations cover trade in services, competition, investment and government procurement.²⁶²

With the exception of development cooperation under the CPA, any inconsistency between the two Agreements shall be resolved in favour of the SADC IEPA.²⁶³

The Agreement was to enter into force when signed, ratified or approved in accordance with the relevant constitutional procedures of the parties. The EC passed the EU Council Regulation 1528/2007 December 2007 which granted the SADC EPA States duty free market access to the EU.²⁶⁴ SADC EPA States initialled the IEPA in 2007.²⁶⁵ Namibia initialled the IEPA and entered reservations which contended that there were contentious issues that needed to be resolved prior to their initialling of the EPA.²⁶⁶

The Agreement shall be valid in perpetuity unless it is denounced by the parties.²⁶⁷ Subject to the negotiations towards a comprehensive EPA, the IEPA shall be subject to review every five years and any of the parties may propose amendment to the Agreement.²⁶⁸

Tariff liberalisation schedules

EU shall liberalise 100 per cent of tariffs on imports from SADC EPA countries with transition periods of liberalisation of tariffs on sugar and rice imports to the EU market from the SADC EPA States. The tariff liberalisation schedules are split for the SADC EPA countries.²⁶⁹

²⁶¹ Ibid article 67.

²⁶² Ibid.

²⁶³ Ibid article 103.

²⁶⁴ Agritrade op cit note251.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid article 107.

²⁶⁸ Ibid article 109.

²⁶⁹ See Annex 3 to the SADC IEPA.

The BNLS shall liberalise 86 per cent of its tariffs on goods,²⁷⁰ 44 tariff lines on sensitive products are to be liberalised by 2015 and three more tariff lines shall be liberalised by 2018.²⁷¹ The tariff liberalisation schedules are similar to those under the TDCA.²⁷²

Mozambique was to liberalise 80.5 per cent of goods at the initialling stage and 100 more tariff lines are to be liberalised by 2018.²⁷³

Goods excluded

Tariffs were maintained on agricultural products and some processed agricultural products. These goods include fish, beef, fruit nuts, vegetables, cut flowers, coffee and Sugar.²⁷⁴ This was done in order to protect infant industries.²⁷⁵

Rules of origin

Goods are eligible for preferential market access if they originate from either the EU or SADC EPA States. The rules of origin form part of the IEPA and are currently being negotiated with a view to reaching workable and simplified RoO. However, this will be a complex venture taking into account the fact that the group comprises countries that belong to more than one REC which have different RoO.

(ii) The ESA IEPA

The group is worth mentioning because some of the SADC members are negotiating an EPA under this group. The ESA IEPA has been implemented since 14 May 2012 by Mauritius, Madagascar, Mozambique and Seychelles.²⁷⁶ These countries will open up their markets gradually over a 15 year period. It is the first among the IEPAs in Africa to be implemented.

3.5 CHALLENGES AND CONTENTIOUS ISSUES

The challenges in the EPA negotiations apply to both the SADC region and ACP States in general. They relate to the limited capacity of ACP and SADC States in the preparation, negotiation, implementation and adjustment of the ACP and SADC countries to the reciprocal granting of preferences under the IEPAs.

²⁷⁰ ECDPM op cit note 230 at 35.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ See SADC IEPA APPENDIX I B: PRIORITY PRODUCTS AND SECTORS FOR EXPORT FROM SADC EPA STATES TO THE EC.

²⁷⁵ Global Europe 'Trade Policy in Practice Update Interim Economic Partnership Agreements (2007) 2. Available at http://trade.ec.europa.eu/doclib/docs/2007/november/tradoc_136959.pdf.

²⁷⁶ European Commission 'ESA and EU start to put into practice their interim Economic Partnership Agreement' .available at http://trade.ec.europa.eu/doclib/docs/2012/may/tradoc_149435.pdf.

With regard to preparation for negotiations, article 35 of the CPA puts the onus of ensuring that regional integration is upheld on the SADC States. There was lack of preparedness to negotiate the EPAs and the SADC IEPA States' focus was more on preserving market access than on the regional integration efforts.²⁷⁷ SADC was able to agree on the main modalities of the negotiations. However, countries had to come up with their own market access schedules prior to which they were to carry out sustainability impact assessment of the EPAs on their economies.²⁷⁸ This has been equated to the failure to address the development issues on the part of the negotiators because the resulting IEPAs do not fully address the development issues in the region.²⁷⁹

The contentious issues regarding the IEPA were raised by Namibia when it initialled the IEPA because of the impact the issues may have in regional integration.²⁸⁰ The EC said the issues would be addressed after the IEPA was signed and if the IEPA members shared national concerns.²⁸¹ This led to the formation of the ANSA group which included Angola, Namibia and South Africa which pushed for the resolution of some of the following issues in the IEPA which poses challenges to regional integration -

Trade liberalisation: the CPA, which is the legal basis for EPA negotiation requires ACP and SADC States to grant 80 per cent of EU products duty free access within a fifteen year period. African countries called for a more flexible implementation period because trade liberalisation entails revenue losses especially for LDCs.²⁸² SADC member States would have to adjust their economies to make do without import tariffs as a source of revenue. The gradual removal of tariffs has been symbolic of the integration process in SADC so either way, member States will also incur revenue losses from trade liberalisation in SADC. However, since SADC members import more from the EU than from the SADC region, the tariff cuts on EU imports will entail more national revenue losses. In light of this, SADC member States called for a more flexible approach to be taken by the EC in the EPA negotiations regarding implementation of trade liberalisation. The EC acknowledged the need

²⁷⁷ African Trade Policy Centre *EPA Negotiations : African Countries Continental Review* (2007) 7 available at http://www.africa-union.org/root/au/AUC/Departments/TI/EPA/DOC/Comprehensive_Review_of_EPAs_Negotiations_in_Africa_ACP_Final_Report.pdf

²⁷⁸ Africa Trade Policy Centre op cit note 190 at 30.

²⁷⁹ Ibid.

²⁸⁰ Agritrade op cit note 258.

²⁸¹ Ibid.

²⁸² Erik Grunke op cit note 239 at 21.

for flexibility and undertook to incorporate changes to address the SADC proposals in EPA negotiations and in the texts of the full EPAs.²⁸³

The MFN clause which requires SADC EPA States to grant the EU the same preferences they would grant to another party that they enter into a trade Agreement has been criticised for reducing the policy space of SADC States.²⁸⁴ For example, if the EPA members were to enter into a Preferential Trade Agreement (PTA) with China, they would have to offer the same preferences under the PTA to the EU. The EU has been accused of trying to retain its position as Africa's most important trading partner but the EU has maintained that the MFN clause is based on fairness and non-discrimination.²⁸⁵

The requirement for the complete removal of export restrictions and duties on products from SADC to the EU will entail revenue losses because Member States use export duties as a source of revenue and for protection of domestic markets.²⁸⁶ This might also have an impact on food security. Most countries in SADC are agrarian economies. States put restrictions on exports of food items for example Malawi and Mozambique put restrictions on the export of maize.²⁸⁷ The removal of export restrictions and duties on food items like maize would make it easier for farmers to export maize which is a staple food in most countries and this may eventually lead to a reduction on food reserves and increase in food prices. Furthermore, the Trade Protocol allows for the restriction of exports for the sake of ensuring food security.²⁸⁸

The implementation of the standstill clause: SADC applied tariffs are lower than the bound rates under WTO. ACP States have argued that the standstill clause is contrary to WTO obligations under which Contracting Parties are given the leeway to adjust their tariffs subject to WTO rules as long as they do not exceed their bound tariffs.²⁸⁹ The EC has argued that the objective of the EPAs is to liberalise trade in goods, and the applied rates would be starting point²⁹⁰.

The issue of free circulation of goods originating from the EU once they gain entry into the EPA region has to be resolved before the CU is launched. This undermines regional

²⁸³ Africa Trade Policy Review Centre op cit note 264 at 18.

²⁸⁴ Erik Grunke op cit note 239 at 22.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Sothern Africa Trade Hub *Technical Report : Trade and Food Security in SADC* (2011) 16.

²⁸⁸ SADC Trade Protocol article 9.

²⁸⁹ Ibid at 67.

²⁹⁰ Ibid.

integration and does not take into account the fact that SADC will proceed to a CU with an applicable CET.

A clear picture that emerges from the trend of negotiations is that regional integration is not such a high priority under the IEPAs. States are advancing their national interests in negotiating the EPAs. One then ought to look at the monitoring and implementation institutions that have been established by the SADC Treaty and examine the extent to which they are pushing the regional integration agenda.

According to the findings of a survey carried out by the African Trade Policy Centre, the SADC Secretariat has limited human and financial capacity to negotiate the EPAs.²⁹¹ There were insufficient resources to train relevant stakeholders in the EPA negotiating process. Furthermore, even though the CPA makes provision for training of ACP negotiators, the EC funds are difficult to access.²⁹² There still remains a need to address the capacity constraints at the regional level with regard to EPA negotiations.

The IEPAs, in their current form and issues that they have brought about regarding implementation, do raise questions about their compatibility with the regional integration agenda in SADC. This matter will be addressed in chapter four.

Efforts to prioritise regional integration and development are being made at the ACP level. At the meeting of ACP States held in Brussels in 2012, the Kenyan delegate stated that focus should be on concluding the substance of the EPAs and not meeting deadlines.²⁹³ There is indeed a need to agree on the substance of the contentious issues before concluding the EPAs. The deadline has now been shifted from 2014 to 2016.²⁹⁴

3.6 CONCLUSION

The WTO recognised the need to treat developing countries differently and to not expect them to reciprocate the trade preferences given to them which are commensurate to their economic and development needs. The EU and Africa trade relationship has evolved over the years. It has transformed from a donor recipient relationship to a partnership which has resulted in the IEPAs while negotiation of comprehensive EPAs is ongoing.

²⁹¹ Ibid at 38.

²⁹² Ibid at 38.

²⁹³ Report of the ACP Council of ministers meeting held in Brussels on 10 December 2011 available at <http://www.acpsec.org/content/acp-ministers-resist-unilateral-deadline-wrap-epas>.

²⁹⁴ See <http://www.endacacid.org/fr/index.php/mp-axes-strategiques/linformation-et-la-communication-2/ateliers-thematiques/161-ateliers-thematiques/vote-du-parlement-europeen-en-faveur-des-acp/227-epas-postponed-from-2014-to-2016-by-europarl>.

The configuration of the EPA negotiating groups was decided by the ACP States. They do not tally with the configuration of the existing RECs because the States are members of more than one REC. The resulting IEPAs from these configurations have different tariff liberalisation schedules which might have an impact on progression of regional integration in SADC.

Regional integration is in the best interest of the ACP States but the trend in progress of negotiations shows that regional integration has not been a key element under consideration by the ACP States when entering into these agreements. National interests seem to take precedence over regional plans.

In light of the challenges that have been met in negotiating the IEPAs, the region ought to have a more unified position for negotiating the EPAs. The SADC institutions ought to ensure that there is coherence in the negotiations if the objectives of the SADC treaty are to be achieved. Furthermore, there is need to build human capacity for negotiations and the EC ought to honour its undertaking under the IEPA to build negotiating capacity in the ACP and SADC States.

CHAPTER 4 - COMPATIBILITY OF EPAS WITH THE REGIONAL INTEGRATION AGENDA IN SADC

4.1 INTRODUCTION

The immediate effect of the EPA negotiations was the splitting of SADC into four negotiating groups: the SADC, ESA, TDCA and the EAC groups. These groups have resulted in the signing of IEPAs which have different tariff liberalisation schedules. This is contrary to Article 29 of the SADC Trade Protocol which calls for cooperation and coordination of policies between member states in their trade relations with third parties.

The chapter discusses the impacts the configuration of the EPA negotiating groups may have on market integration in SADC by highlighting the objectives, progress and challenges of regional economic integration under the SADC Treaty and CPA.

The Chapter is divided into three main parts that seek to answer the main research questions set out by this dissertation and focuses on the SADC IEPA. Although the ultimate impact of the configuration of the EPAs is yet to be seen, this Chapter argues that the configuration of the IEPAs may be a big stumbling block to progress in regional integration in SADC and may disrupt the progression of SADC from an FTA to a CU.

4.2 DO THE OBJECTIVES OF THE CPA COMPLEMENT THE SADC TREATY?

(a) The SADC Treaty

The SADC common agenda seeks to promote sustainable and equitable economic growth and socioeconomic development with the ultimate objective of poverty eradication in SADC. In the area of trade, it calls for cooperation and harmonisation of trade policies through market integration. Member States are to harmonise their political and socio economic policies and plans and participate fully in the implementation of plans and projects of SADC.²⁹⁵ Member States are to refrain from taking measures that are likely to jeopardise sustenance of principles and achievement of objectives and programmes under the SADC Treaty.²⁹⁶

The RIDSP set the pace for the achievement of these objectives through market integration. The region is currently an FTA and has postponed the launch of a CU which awaits the development of a CET.

²⁹⁵ SADC Treaty article 6.

²⁹⁶ Ibid.

(b) The CPA objectives

The ultimate objective of the CPA is that of poverty eradication in the ACP States and their eventual incorporation into the global economy.²⁹⁷ The CPA focuses on economic and trade cooperation and development cooperation within a political dimension.²⁹⁸

The trade cooperation is based on two principles: the use of regional integration as an instrument for integration of ACP States into the global economy and ACP ownership of regional integration agenda.²⁹⁹

The partnership created by the CPA in trade for development incorporates issues of market access and aid for trade³⁰⁰. The economic and trade cooperation is supposed to build on regional integration initiatives of the ACP States.³⁰¹ The partnership shall be implemented in full conformity with the WTO rules.³⁰²

The objectives of the two treaties are complementary. They have the same ultimate goal of poverty eradication in the region with the eventual integration of the region into the global economy. Article 35 of the CPA emphasises the importance of regional integration as an instrument for the inclusion of the ACP States into the world economy. However, it is not clear which, among the objectives takes precedence over the other: support for regional integration or integration of ACP countries into the global economy.

The slight divergence in the wording of the objectives of the CPA and SADC Treaty shows divergent objectives between the two legal instruments. While the SADC treaty has regional integration as an end, the CPA regards it as a means to an end.³⁰³ The EU and SADC share a common vision of regional integration is an object of the EPAs.³⁰⁴ However, it is questionable whether the CPA parties shared the same understanding of how integration should be promoted. The point of divergence comes up on the implementation of the objectives of the two treaties.

²⁹⁷ CPA Article 1.

²⁹⁸ Bond and ECDPM *EU and Africa Policy Context for development* (2010) 12.

²⁹⁹ International Food and Trade Policy Council op cit note at 14.

³⁰⁰ *OPPD ECONOMIC PARTNERSHIP AGREEMENTS BETWEEN EU AND ACP : FACTS AND KEY ISSUES UPDATED AND EXTENDED VERSION SPRING 2012 (2012)* 14.

³⁰¹ *Ibid* article 35.

³⁰² *Ibid* 36 (4).

³⁰³ *Ibid* 16.

³⁰⁴ *Ibid*.

Implementation of objectives under the SADC Treaty and the CPA

The SADC Treaty trade objectives prioritise market integration of the member States.

Under the CPA, economic and trade cooperation is implemented through the EPAs. The EU advocates for open regionalism EPAs aimed at opening up the economies of the SADC States.³⁰⁵ The focus of the SADC IEPA is not on the regional integration in SADC, but on trade liberalisation between the parties to the CPA. It does make provision for the promotion of regional integration according to the priorities of the SADC IEPA States. It is therefore up to the SADC EPA States to prioritise their interests if they are to be taken into account in the trade relationship.

The question that follows is: if this is a partnership agreement, which of the parties has the onus of ensuring that market integration is prioritised in SADC and not undermined? It is trite in the law of Treaties that the doctrine of *pacta sunt servanda* applies.³⁰⁶ The doctrine provides that parties to a Treaty are bound by the Treaty obligations which are to be performed in good faith.

SADC States have the onus of prioritising regional integration initiatives and the EU, as a partner, has a duty to respect the priorities of the SADC EPA States. This has not been the case as SADC States have not prioritised regional integration initiatives in EPA negotiations and this has resulted in the IEPAs which do not seem to prioritise regional integration.

The EC has been blamed for fragmenting the SADC region as evidenced by the configuration of the IEPAs in the SADC region. The Commission has always stated that it has no offensive interest in the ACP markets.³⁰⁷ Some authors are of the view that the EC cannot term its actions as based on pure benevolence, the truth is that States, always almost act in their own national interests and this also applies to the EC.³⁰⁸ The EC is more focused on concluding WTO compatible agreements and not about supporting the pan African movement which is aimed at building solidarity of the African region.³⁰⁹ Regional integration would lead to harmonisation of policies at regional level which is a step towards integration at the continental level.

³⁰⁵ Stephen Hurst 'The EU-SADC Negotiations: "locking in the neo liberal development model in southern Africa?" (2012) *Third World Quarterly* 495 at 507.

³⁰⁶ Vienna Convention on the Law of Treaties 1969 United Nations, Treaty Series, vol. 1155, p. 331. Article 26.

³⁰⁷ Gerhard Erasmus *Deeper Integration in SADC : Do EPAs undermine the Process?* (2012) 3.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

It has been stated that although the EU has a good development policy agenda, it ultimately has its own interests to address among which is the widening of markets of EU products which will be beneficial to their producers.³¹⁰

Gerhard Erasmus puts forward the following thesis –

*“It will, however, be a mistake to view SADC as a tightly consolidated and effective legal arrangement which will now be disrupted by the SADC-EPA. [...] There was no sinister EC plan to divide and rule Africa through the EPAs. We still lack clear schemes and firm rules for the RECs qua integration Arrangements.”*³¹¹

So at the end of the day, the EU is not entirely to blame for the potential disintegrating effects of the SADC IEPA. SADC member States chose their EPA negotiating fora. To promote regional integration, SADC as a REC should be on the forefront in ensuring that the EPAs do not undermine regional integration.

What will the economic impact of IEPAs in their current configuration be?

Many ACP States felt that the timetable for conclusion of the IEPAs was rushed and the content of the IEPAs would have a negative impact on their economies.³¹² The EPAs are about trade creation and promotion of the competitiveness of the SADC region in trade.

However, economists have projected that the surge of European products into the SADC region may bring more economic losses than gains to the region. There is likelihood that trade diversion will occur by around 58 per cent.³¹³

It has been stated that full reciprocity of trade liberalisation shall be costly for Africa in terms revenue losses from tariff liberalisation and adjustment costs ensuing from the revenue losses that will result from the removal of import tariffs which are a source of income for many States.³¹⁴ The gains that have been attained from free market access by the

³¹⁰ Ibid.

³¹¹ Ibid at 6.

³¹² Adrian Flint ‘The end of a Special Relationship? The New EU-ACP Economic Partnership Agreements’ in *Review of the African Political Economy* 79 at 85. Available at <http://www.tandfonline.com/doi/pdf/10.1080/03056240902863595>.

³¹³ United Nations Conference on Trade and Development *Trade and Development Report 2006 (2006)* 193.

³¹⁴ Stephen Karingi Rémi Lang Nassim Oulmane et al *Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements* available at <https://www.gtap.agecon.purdue.edu/resources/download/2152.pdf>. (accessed on 14 November 2012)

SADC States may be undermined by the trade diversion that may come about as a result of the EU imports into the region.³¹⁵

The EPAs have been criticised for taking a neo-liberalist approach that seeks to sustain neo-colonialism or bring in new dimensions of imperialism and ‘lock in’ neo liberalism within SADC.³¹⁶ Neo liberalism calls for minimal State intervention in the economy.³¹⁷ This is being done through the reduction of the policy space available to member States to develop effective policies that will spur economic development.³¹⁸ The conclusion of comprehensive EPAs which cover other trade related issues like competition law may complicate the process of regional integration in SADC by undermining the coherence of policies within the region and restricting the ability of diversification of the SADC economies.³¹⁹ Progression of regional integration in SADC is already being hindered by the lack of political will and capacity of member States to implement their obligations under the Trade Protocol.

A survey carried out by UNCTAD suggests that the EPAs will stifle the policy space in which the ACP States and SADC have to address trade related issues in the region. States will be bound by EPA obligations. When they do gain momentum to speed up the integration process, SADC EPA States will have to take into account EPA obligations in harmonising their trade policies. This might accelerate integration into the global economy, but there is likelihood that SADC market integration may be negatively affected.

The EC is of the view that IEPAs will facilitate the development of IEPA regions and their integration into the global economy.³²⁰ The Taubira report states otherwise and condemns the EPAs for being anti-developmental and a threat to food security to the ACP region which includes SADC and calls on the EC to take a pro development approach on the EPAs.³²¹

³¹⁵ Ibid.

³¹⁶ Stephen Hurst ‘ The EU-SADC Negotiations: ‘locking in the neo liberal development model in southern Africa?’ (2012) *Third World Quarterly* 495 at 507.

³¹⁷ John Baylis Steve Smith and Patricia Owens *The Globalisation of World Politics* (2008) 134-136.

³¹⁸ Ibid at 495.

³¹⁹ Ibid.

³²⁰ Ibid 27.

³²¹ France commissioned Taubira to find out the impact of implementation of the EPAs on development in the ACP countries. Available at <http://www.ipsnews.net/2008/07/trade-french-report-condemns-epas-as-anti-development/>

4.3. DOES THE CONFIGURATION OF THE SADC IEPA COUNTER MARKET INTEGRATION IN SADC?

The EPAs in SADC are among one of the issues that affected the progression of the SADC FTA to a CU in 2010.³²² The Configuration of the IEPAs may pose a challenge to market integration through the implementation of the different tariff liberalisation schedules under the IEPAs and the application of the rules of origin.

The main reason that has been cited for the breaking up of the region into different groupings is that of trying to resolve the issue of multiplicity of membership of RECs.³²³

The initialling of the IEPAs is not problematic *per se*; the main problem is the implementation of the IEPA in light of regional integration. The following are the problematic areas that may arise regarding implementation.

(a) Potential conflict areas with the regional integration agenda

The SADC IEPA is not a major threat to regional integration in SADC in its current state as an FTA. Member States still apply tariffs on imports at national level and decide on their applicable tariff rates so long as they do not exceed their bound tariffs under the GATT. The challenge that member States may face hinges on their capacity to fulfil obligations under both the SADC trade regime and the IEPAs.

The following are some of the problematic areas that may pose challenges to the progress of integration.

(i) Trade liberalisation in SADC and the SADC EU IEPA

Members of a customs territory ought to have a common set of tariffs applicable to most imports for an FTA to become a CU. SADC member States are still gradually liberalising their tariff schedules in and are in the process of harmonising tariffs in order to come up with a CET and it is expected that the CU will be launched in 2013.

Under the SADC IEPA, member States have different tariff liberalisation schedules for imports from the EU. The IEPA calls for 86% liberalisation of goods by value by the

³²² Christopher Stevens 'The impact of the SADC EPAs on regional integration' in Institute for Global Trade *Liberalisation of Trade in Southern Africa: Challenges of the 2008 FTA and beyond* (2008) 63.

³²³

BNLS within fifteen years and makes provision for 80.5% liberalisation of tariffs by Mozambique.³²⁴

The difference in liberalisation schedules might raise complications when the SADC FTA progresses to a CU. One CU member cannot have zero tariffs on EU imports by virtue of an EPA and another member cannot apply tariffs to the very same import that has duty free importation in a territory of another CU member.

The fact that some member States will have liberalised tariffs applicable to products originating from the EU or have different exclusion baskets might prolong the process of formulating the CET. For example, SADC member States that still apply tariffs to EU products which may have duty free importation status in the SADC IEPA States, may still want to retain the tariffs applicable to the EU products. SADC IEPA member States on the other hand will be bound by the tariff lines under the IEPA. This issue may be resolved through the harmonisation of trade liberalisation time frames under the IEPA and SADC.

(ii) Rules of origin

Under the SADC IEPA, EU products that are eligible for duty free access into the SADC region are those that wholly originate from the EU or have undergone sufficient working in the Community.³²⁵ In the EU, goods that originate wholly from the SADC IEPA States or have undergone sufficient working in the region are eligible for duty free market access in the EU. The principle of cumulation under which products incorporate materials originating from either of the two regions qualifies the products as wholly originating from either region.³²⁶ Goods are eligible for duty free status on importation in either region, upon proof of origin. In this case, EU imports into the SADC EPA region shall be imported duty free where it is proved that they originate from the EU.

In SADC, goods are eligible for preferential treatment on proof that they were wholly produced in a SADC member State, or that if not wholly obtained in a member State, underwent sufficient working or processing in the member state.³²⁷

³²⁴ European Commission *The EU/SADC INTERIM ECONOMIC PARTNERSHIP AGREEMENT*. Available at http://trade.ec.europa.eu/doclib/docs/2010/march/tradoc_145931.pdf.

³²⁵ Protocol 1 to the SADC-EC IEPA article 2.

³²⁶ *Ibid* article 4.

³²⁷ The Rules Of Origin For Products To Be Traded Between The Member States Of The Southern African Development Community Rule 2 (1).

The CU requires the member States to have a CET applicable to imports into the region. The existence of the FTA under the SADC IEPA means that goods from the EU will have duty free access into the SADC EPA States. The CET is supposed to be applicable to all imports to the CU. This will become an issue when goods that have duty free status under the EPA are imported into the CU in which some member States will not have liberalised tariffs on that particular EU import.

(iii) The standstill Clause

The SADC IEPA standstill clause precludes members from raising tariffs above the ones agreed on with the EU.³²⁸ This means that the CU will have to take into account the tariff lines agreed on by the EPA States. This might unnecessarily inhibit the rest of the SADC members in formulating a CET of their choice which may still be compatible with their obligations under the GATT.

The standstill clause cannot be used to prevent SADC from applying a CET that is higher than the tariffs agreed on in the SADC EPA. The GATT does not preclude contracting Parties from raising tariffs on the formation of a CU, article XXIV makes provision for negotiations to achieve satisfactory adjustment for affected parties where tariffs are raised in the formation of a CU.³²⁹

Will the SADC IEPA strengthen regional integration in SADC?

During negotiations, the SADC IEPA States raised the issue that the configuration was not complementary to SADC and SACU integration process.³³⁰ The SADC group asked for a halt in the negotiations to take South Africa on board. The EU accepted the proposal. South Africa said that it joined the negotiation so as not to further divide the region.³³¹

Despite joining in the negotiations, South Africa still accesses the EU market through the TDCA. This is problematic for SACU as a region to which South Africa is a member. According to the SACU agreement, no member State may unilaterally negotiate a trade agreement since the member States apply a CET to goods from third States. The TDCA complicated the SACU trade scheme which has its own tariff schedules for third States and rules of origin applicable to imports into the region. One positive feature of the SADC IEPA

³²⁸ EU - SADC IEPA art 23.

³²⁹ GATT article XXIV (6).

³³⁰ Ibid at 148.

³³¹ Department of Trade and Industry *SADC EPA Group- EC Negotiations : Assessment of the emerging outcomes* (30 January) 2008 available at <http://www.thedti.gov.za/parliament/EPAoutcomes.pdf>.

is that it aligns its objectives and implementation of tariff liberalisation with that of the TDCA which is a step towards the harmonisation of trade policies in the region.³³²

When it comes to implementation of the EPAs, the configuration may have a fragmenting effect on the SADC region if the configuration remains the same.³³³

The pressure by the EU to complete negotiations is causing undue pressure on the ACP States which are still highly underdeveloped. It has been suggested that it would be more helpful if the regional groupings came up with a common position and work on their regional development before opening up their markets to the EU.³³⁴ Due to the differences in levels of development, adjustment costs on the part of the SADC States will be more than those that the EU will incur. It is important for the SADC States to strengthen their industrial base and promote intra-regional before opening up their markets. However, under article XXIV, the reasonable time frame for formation of an FTA is ten years with room for extension given by the contracting Parties. If SADC were to focus more on its own market integration before implementing the EPAs, the implementation of the EPAs might take a longer time. However, this issue surrounding EPA compatibility with article XXIV and the GATT in relation to implementation time frames is still an issue for discussion by the WTO contracting parties.³³⁵

If the SADC IEPA becomes a full EPA it may have a destabilising effect on integration in the region.³³⁶ The development of the manufacturing industry might be tampered with due to the new partnership agreements and may impact on alternative development strategies available to the countries.³³⁷ One of the objectives of market integration is the industrialisation of SADC. The competition from European products might stifle the growth domestic industries.

The negotiation of full EPAs includes trade in services and other trade related issues. The conclusion of these EPAs will leave very little policy space for the SADC region to come

³³² Ibid.

³³³ Gerhard Erasmus 'Deeper Regional Integration in SADC : Do the EPAs undermine the process?' (2011) 4.

³³⁴ Stephen R Hurst 'the EU-SADC EPA Negotiations : 'locking in' the neoliberal development model in Southern Africa?' (2012) Third World Quarterly 33:3 495 at 505.

³³⁵ See www.wto.org.

³³⁶ Ibid 506.

³³⁷ Ole Elgostrom and Jess Pilegaard 'Imposed Coherence : Negotiating Economic Partnership Agreements' in 30 (3) European Integration 363 at 351. Available at <http://www.tcd.ie/iis/documents/discussion/pdfs/iisdp224.pdf>

up with its own regional policies. The member States will be bound by the obligations undertaken in the EPAs.

From the preceding paragraphs, it is clear that the current configuration of the SADC IEPA might have a negative impact on market integration concerning trade in goods.

4.4. IS THE CPA FLEXIBLE ENOUGH TO ACCOMMODATE THE TRIPARTITE FTA?

The plans of SADC to merge with COMESA and EAC to form the TFTA may be complicated with the existence of the EPAs in their current configurations in the respective regions.

Article 36 of the CPA makes provision for flexibility in the negotiation of EPAs. The flexibility covers provision of a sufficient transitional period, a degree of asymmetry in terms of timetable for tariff dismantlement, and the final product coverage. The flexibility in article 36 is narrow in scope and only comes into play once the negotiations are already in process. So in essence, it applies to the current configuration of the negotiation of the EPAs.

Article 95 of the CPA provides for the review of the CPA every five years of its twenty year duration. The party seeking consideration of review of a provision is to notify the other party of the issue of concern with a possibility of amendment of the agreement. So far there have been two reviews.

The EPA negotiations are supposed to be flexible enough to take into account the level of development and the socio economic impact that the EPAs may have on the ACP region.³³⁸ The negotiations are also supposed to take into account the capacity of the ACP States to adjust to the effects implementation of the EPAs.

Members of the TFTA can negotiate for changes in the IEPAs to tally with the on-going regional integration agenda. This can be done through the review process under article 95 of the CPA.

A brief look at the past reviews and what changes have been effected in trade related provisions will show the extent of flexibility of the CPA to address issues of interest to the parties.

³³⁸ CPA article 36 (4).

The 2005 review

The amendments that were made after the review were mainly political and hinged on security issues. The review also reflected the change in development policy of the EU.³³⁹

The 2010 review

The second review was aimed at preserving the relevance of the partnership and to adapt the Agreement to changes that had taken place in the international and EU-ACP relations.³⁴⁰ As regards trade, the agreement now recognises the important role of regional integration in the ACP States and amendments were made to Title II which covers economic and trade partnership. The original text had initially only designated member States as actors of cooperation.³⁴¹ The 2010 revision identifies ACP regional organisations and non-state actors as actors in the relationship.³⁴² The AU is now recognised as a key player in the relationship and is now legible to receive funding from the EDF. However, the key players in the EPA negotiations still remain member States.

The new trade chapter recognises the role of the EPAs as tools for the gradual integration of the ACP States into the global economy.³⁴³ The review was considered as a 'light review' by both parties and they did not incorporate major contentious issues in the EU-ACP relationship.³⁴⁴

Negotiation of the EPAs indicates that there exists a power imbalance in the EU-SADC trade relationship. The ACP States claim to have been bullied by the EU into signing the interim EPAs to beat the December 2007 expiry deadline. The ACP States had initially wanted the EU to extend the deadline for the conclusion of the EPAs because they felt that the timetable set for the conclusion of the EPAs was too short and would have an impact on their economies.³⁴⁵ However, the EU refused to extend the cut-off date of December 2007 on which the Lomé preferences were to cease. In defence of the EC position, the Trade Commissioner at that time stated that the deadline was not a creation of the EC but a waiver

³³⁹ The European Commission *The Cotonou Agreement*. Available at http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/index_en.htm.

³⁴⁰ Bond and ECDPM *EU AND Africa Policy Context for Development* (2010) 13.

³⁴¹ CPA article 6.

³⁴² Ibid 6(1)(b).

³⁴³ European Commission *The Revised Cotonou Agreement*. Available at http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/cotonou_trade_en.htm.

³⁴⁴ BOND and ECDPM op cit note 311.

³⁴⁵ Adrian Flint op cit note 298 at 85.

given by the WTO.³⁴⁶ The CPA makes provision for negotiation for EPAs with States that consider themselves in a position to do so.³⁴⁷

The ACP States expected the EU to consider alternative possibilities for those States that could not negotiate the EPAs but emphasis was put on conclusion of the EPAs despite the availability of alternatives under the EBA initiative for LDCs and GSPs for non-LDC States.³⁴⁸ Some authors are of the view that the ACP States had a right to state that the EC acted in bad faith.³⁴⁹ However, as much as this seemed unfair to the ACP States, they knew that the deadline of the waiver was coming. They ought to have started organising themselves for the change in the trade partnership.

The ACP States ought to come up with a common negotiating base. This would have helped address the issues that have arisen with the IEPAs. If they had a common agenda, they would have managed to negotiate similar terms regardless of the different fora used for negotiating the EPAs.

The negotiations were not as flexible as the ACP States wanted them to be. The EU stood its ground and the deadline was not extended.

What does the CPA revision entail for SADC?

The negotiations for full EPAs are still under way in the ESA and SADC groups. The CPA text still recognises the member States of the region as actors to the agreements.

The mere recognition of the AU and regional organisations as actors in the relationship is not of much significance if the negotiations are still proceeding in the current SADC and ESA EPA configurations. This does not do much to support the regional integration that is being pursued in SADC.

A new article 30 was introduced to strengthen the capacity of regional integration institutions and the AU. In response to the perceived adverse impacts of the EPAs on regional integration, the mandate of the Joint Ministerial Council was expanded to include the monitoring of EPA negotiations and implementation.³⁵⁰

³⁴⁶ Ibid.

³⁴⁷ CPA article 37 (5) and (6).

³⁴⁸ Lotte Drieghe 'The European Union's trade negotiations with the ACP : Entrapped in its own rhetorical strategy?' 4-5. Available at <http://www.jhubc.it/ecpr-riga/virtualpaperroom/135.pdf>.

³⁴⁹ Adrian Flint op cit note 298 at 89.

³⁵⁰ Ibid.

The CPA provides for the support of inter-regional and intra-regional cooperation involving one or more ACP regional organisations even at continental level.³⁵¹ This provision was included after the 2010 review.

One would assume that the review would take into account the proposed TFTA that SADC is planning on establishing in conjunction with COMESA, and EAC.³⁵² The word ‘support’ is rather vague. It is yet to be seen how this support shall be implemented in addition to the financing of the RECs’ activities.

The second review was done after the proposal of the TFTA. One would assume that since SADC was planning on merging with COMESA and EAC, the review and subsequent amendment would reflect the role of the RECs as active partners in the Agreement.

Does the CPA really support regional integration?

There are various references in the CPA which talk about either ‘recognising the importance of regional integration’ or ‘supporting regional integration’. The configuration of the IEPA groups has brought about division rather than deeper integration. The CPA is now viewed as not very relevant for regional integration but may play an important role in the financial support of the RECs through the EDF.³⁵³ The CPA reviews have not brought significant changes in terms of supporting regional integration.

The SADC position on EPA negotiations

The problem of incompatibility of the EPA agenda with the SADC regional integration comes about as a result of weak monitoring and implementation mechanisms in the REC.

The SADC treaty established the SADC summit and vested policy and decision making powers in it. The Summit should play a role in ensuring coherence in negotiating positions. The Treaty also gave the Secretariat power to ensure the implementation of regional integration initiatives.

It has been argued that the EU is not wholly to blame for the apparent fragmentation of the region as seen from the EPA configuration.³⁵⁴ SADC is not a tightly consolidated legal

³⁵¹ CPA article 28 (3)(a).

³⁵² The TFTA was launched in 2008 which was before the second CPA revision.

³⁵³ BOND AND ECDPM *The EU and Africa Policy context for Development* (2010) 27.

³⁵⁴ Gerhard Erasmus *Deeper Regional integration in SADC : Do the EPAs undermine the process?* (2011) 4.

arrangement. It has about thirty legal instruments many of which are not being implemented due to lack of a strong monitoring and implementation mechanism.³⁵⁵

Furthermore, although SADC has a legal basis in form of the SADC treaty, the implementation of obligations by member States has not been to the letter of the Treaty. Member States have not fully implemented their obligations under the SAC trade legal instruments. If there existed cohesion in national interests of member States in SADC, the problem of IEPAs incompatibility with market integration would not have arisen. The member States would have refrained from making undertakings that would counter the market integration.

The SADC member States are legally bound by the SADC Treaty as signatories to it. They are to refrain from entering into agreements that undermine the regional integration agenda. The SADC treaty preceded the IEPA. It is also worth mentioning that the SACU Treaty of 1910 also precedes the IEPA. SADC member States should have given priority to the regional integration objectives under these treaties in the negotiation of the IEPAs in order to uphold regional integration in SADC.

The IEPA does not preclude the members from entering into other trade agreements so long as they do not undermine the obligations under the IEPA.³⁵⁶ This provision is problematic. It is obvious that the establishment of the SADC CU will have an impact on FTAs under IEPAs. The CET to be applied may be higher or lower than the tariff lines that have been agreed on in the SADC IEPA. For example SADC member States may agree on a higher CET than the tariff lines that have been agreed on in the SADC IEPA. The issue of which tariff regime will take precedence over the other ought to be addressed before the IEPAs are concluded. This is why the issue of flexibility should take into account the possibility of changing the configuration of the IEPAs if both partners to the CPA are to stand to benefit from the trade relationship.

Partnership for development

The right to development still remains an aspiration and not a legally enforceable right clouded with vagueness as to who the duty bearers of the right are and how the right can be enforced.³⁵⁷ The United Nations Declaration on the Right to Development (UNDRD)

³⁵⁵ Ibid.

³⁵⁶ SADC IEPA article 31.

³⁵⁷ Isabella D Bunn, op cit note 1 at 111.

focuses on the duties of States at both the national and international level. Article 3 of the UNDRD puts the responsibility for the creation of national and international conditions favourable to the realisation of the right to development. States are to cooperate to ensure development and eliminate obstacles to development.³⁵⁸

The EU has stated time and again that its actions are aimed at development of the ACP and SADC region and that the relationship is based on partnership and equality however, the power relationship still remains one sided with the EU emerging the stronger of the two parties.³⁵⁹ This is reflected in the negotiation of the IEPAs and the reviews of the CPA. As much as the text of the CPA makes room for flexibility, the implementation of article 95 to lays in the capacity of the parties to negotiate for change and prioritising regional integration.

As to whether the CPA and the SADC IEPA leave room for flexibility, the answer is yes. However, implementation of its provisions shows that there is need for SADC to build on its capacity to negotiate for what is workable for the region. In addition to this, the EU ought to take into account the development needs of the SADC IEPA States which lack capacity to effectively negotiate for their development needs.

Possible fora for addressing IEPA issues

SADC could use various fora to ensure that the regional integration agenda is not undermined by the EPAs.

The Summit of the Heads of State could come up with a common position that will be reflected in the negotiation process. The member States ought to consider what their priorities are regarding development and market integration.

There is a need for establishment of a monitoring and implementation mechanism to ensure that member States implement FTA obligations. SADC, on the establishment of the FTA left the monitoring of the implementation of the tariff phase down in member States to the Trade, Industry, Finance and Investment Directorate of SADC.³⁶⁰ However, actual

³⁵⁸ United Nations Declaration on the Right to Development article 3(3).

³⁵⁹ Stephen Kinga 'The Revised Cotonou Agreement between the European Union and the African Caribbean and Pacific States :Innovation on Security, Political Dialogue, Transparency, Money and Social Responsibility' (2006) 50 (1) Journal of African Law 59 at 69. Available at <http://journals.cambridge.org/action/displayFulltext?type=1&fid=433887&jid=JAL&volumeId=50&issueId=01&aid=433886&bodyId=&membershipNumber=&societyETOCSession=> (accessed on 13 November 2012)

³⁶⁰ The SADC FTA available at <http://www.sadc.int/english/regional-integration/tifi/sadc-free-trade-area/documents-and-resources/fta-brochure/>.

implementation lies with the member States. It was envisaged that the SADC Secretariat would establish a Trade Compliance and Monitoring Mechanism for monitoring the implementation of the FTA.³⁶¹ It is high time that SADC took a step towards the establishment of this mechanism. This might help in ensuring that States comply with their market integration obligations under SADC.

The AU could be used as a forum for coming up with common African positions. The AU called on African member States negotiators to safeguard the interests of regional integration in EPA negotiation.³⁶² It further called for the EPA groups to coordinate their negotiating positions and for EPAs to take into account emerging issues.³⁶³

Member States of the TFTA suggested that the AU should negotiate a common African position on EPAs with the EU and then let every African country enter the EU's EPA framework on the basis of the common position.³⁶⁴ It is of interest to note that there has not been much discussion for the reconfiguration of the EPA groups. One would assume that in the event of the TFTA being established, plans would also be underway to align the EPA groups to the TFTA configuration.

The next CPA review is in 2015. This could be used as a forum to address the issue of the problems that have come about due to the configuration of the EPAs.

4.5 CONCLUSION

The CPA and the SADC treaty complement each other and have the same ultimate goal of poverty eradication and the gradual integration of the SADC and ACP member States into the global economy. The point of divergence comes up on the implementation of their respective objectives. Whereas the SADC Treaty uses market integration to achieve the objectives of the treaty with aim of developing the region and build its capacity to integrate into the global economy. The CPA advocates for open regionalism in which it uses EPAs to foster the integration of SADC into the global economy.

³⁶¹ Ibid.

³⁶² African Union EPA Report of Negotiations Coordination Committee held on 17-18 May 2012 9 Available at <http://www.au.int/ar/sites/default/files/Final%20EPA%20Report%20Eng.pdf>

³⁶³ Ibid.

³⁶⁴ United Nations Economic Commission for Africa *FINAL REPORT : STUDY ON THE ESTABLISHMENT OF INTER-RECs' FREE TRADE AREAS IN AFRICA DRAWING ON LESSONS FROM THE COMESA-SADC-EAC FTA EXPERIENCE* (2011) 36. Available at http://new.uneca.org/Portals/ctrci/7th/Tripartite%20COMESA_EAC_SADC_FTA%20Study%20FINAL%20REPORT.pdf.

The configuration of the EPAs in SADC may be a challenge to the progression of market integration in SADC. It will be difficult to align the implementation of the EPAs when SADC becomes a CU especially where tariff liberalisation and rules of origin are concerned.

The proposed T-FTA entails the existence of three EPAs in the FTA. It would be counterproductive for all the three to be retained when the TFTA is established. It would be less costly if there would be one EPA. Although this will not be an easy process, due to the different levels of progress in regional integration, the TFTA members could consider working towards harmonisation of their respective EPA obligations.

The CPA makes room for negotiation of matters of interest to the parties. SADC ought to come up with a strong implementation and monitoring mechanism if the regional integration agenda is to move forward. After solidifying their negotiating base, they can negotiate for changes in the CPA that will not undermine regional integration. Although there still remains a power imbalance in the EU- SADC relationship, if SADC were to have a common negotiating position and member States uphold their regional obligations, the regional integration agenda could progress.

CHAPTER 5 – CONCLUSION

The impact of the configuration of the IEPAs in SADC is yet to be seen but there is likelihood that they might pose challenges to regional integration and the progression of the SADC FTA to CU.

5.1 REGIONAL INTEGRATION AS A TOOL FOR DEVELOPMENT

The importance of regional integration cannot be overemphasised in the multilateral trading system. Both developed and developing States have used economic integration to further advance their economies and increase their wealth for the welfare of their people.

Southern Africa is no exception. SADC was formed in 1992 to coordinate and harmonise policies between member States of the region with the aim of poverty eradication and the eventual integration of SADC into the global economy.

The SADC common agenda on trade seeks to integrate markets of member States through tariff liberalisation and it is implementing the market integration model of regional integration. SADC has its own rules of origin and tariff liberalisation schedules.

In its current state as an FTA, SADC still faces challenges of implementation of market integration obligations by member States which has delayed progression of the FTA to a CU. This has been attributed to weak monitoring and implementation mechanisms that would ensure compliance with obligations undertaken by member States. However, the main obstacle that remains is the actual implementation by member States of their obligations under the Treaty. In its efforts of further integration in accordance with Treaty establishing the African economic Community, the region agreed to merge with COMESA and EAC to form the TFTA. The discussions are still underway and the TFTA is yet to be implemented.

5.2 THE EU AS A DEVELOPMENT PARTNER OF SADC

The trade relationship between the EU and SADC has shifted from a donor-recipient relationship to one of partnership for development. The coming into operation of the CPA symbolised a shift in the trade relationship from non-reciprocity in granting of preferential market access of goods to a relationship characterised by reciprocity. The EPA negotiations seek to implement the new trade relationship.

5.3 Complementarity of the CPA with the SADC Treaty

The CPA trade objectives complement those of the SADC Treaty and they both aim to reduce poverty in the SADC States and incorporate them into the global economy.

The point of divergence is the implementation of the respective Treaties. The SADC Treaty calls for market integration of member States while the CPA provides for EPA negotiations with the aim of establishing FTAs with member States which consider themselves in a position to do so.

There are two IEPAs in the SADC region. These are the SADC IEPA and the ESA IEPA which have different tariff liberalisation schedules and exclusion baskets for goods.

5.4 CONFIGURATION OF THE SADC IEPA AND ITS IMPACT ON MARKET INTEGRATION

(a) Economic impact

The ultimate goal of the SADC IEPA is to integrate the SADC IEPA States into the global economy and it takes cognisance of the fact that regional integration plays an important role in the SADC region. The IEPA is supposed to build on the regional integration agenda.

The SADC IEPA members have different tariff liberalisation schedules under the IEPA. The implementation of the SADC IEPA may undermine regional integration and have an adverse economic impact through trade diversion and trade deflection. Studies show that the EPAs may undermine the economic integration that aims to build the industrial base and production capacity of goods in SADC.

(b) Legal implications

The CPA and the SADC treaty complement each other to a certain extent but the point of divergence comes in the implementation of the objectives.

Whereas the SADC treaty calls for deepening economic integration in the region through market integration, the CPA calls for open integration through the EPAs.

The EPA will bring in complication in the regional integration process in the following areas as regards trade liberalisation-

(i) RoO

The RoO applicable to the SADC IEPA differ from those that are applicable to SADC. The SADC RoO grant goods that originate from the SADC region duty free market access to a market of another SADC member State.

Under the SADC IEPA goods that are eligible for duty free market access are those that originate from the SADC IEPA States and the EU. When the CET is formulated, its application to EU imports by States that are not members of the SADC EPA might contradict with the tariffs applicable under the EPA. This is because EU products will already have duty free access to the SADC EPA States.

(ii) The standstill clause in the SADC IEPA

The standstill clause precludes SADC IEPA member States from raising tariffs above the rates applicable under the IEPA. This will become an unnecessary restraint on the EPA States when the region is formulating the CET for the CU. The CET that might be agreed on may be higher than tariffs applicable under the EPA. The raising of tariffs is allowed under the GATT on formation of CU.

(iii) Tariff liberalisation schedules

The SADC IEPA member States have different tariff liberalisation schedules and different exclusion baskets. This may complicate the formulation of the CET which calls for a uniform application of tariffs to imports. The fact that the member States have different sensitive products in their exclusion baskets might further complicate the formulation of the CET which will slow down the progression of SADC to a CU.

(iv) The MFN Clause

The MFN clause unnecessarily restrains SADC member States from negotiating partnerships which have better conditions than those under the IEPA. This interferes with the policy space of the SADC States.

Recommendation

As the SADC IEPA members proceed with the negotiation of a full EPA, they ought to take into account the market liberalisation that is being pursued in the region. They need to come up with common positions and strive to harmonise their undertakings that are made under the EPAs. The full EPAs incorporate trade in services and trade related issues. There is need to

tread carefully to ensure that they do not unnecessarily reduce their policy space for making decisions on matters like competition law for the region.

5.5 FLEXIBILITY OF THE CPA AND IEPA TO INCORPORATE THE TFTA

The CPA makes provision for flexibility in the negotiation of EPAs regarding product coverage and liberalisation schedules. This applies to existing IEPAs.

The provision for flexibility in the negotiation process is rather narrow since it only covers product coverage and liberalisation schedules.

Article 95 provides for review of the CPA every five years to adjust the partnership to changes in the international trade regime and changes that occur in the partnership. The CPA has undergone two reviews so far to preserve the relevance of the trade relationship.

The first review did not do much to change the economic and trade cooperation. It dealt political cooperation issues, financing and security issues. The second review recognised the importance of regional integration and designated regional trade organisations as actors in the partnership.

The CPA makes room for flexibility in the EPA negotiations and amendment of the Agreement. The main challenge has been the power imbalance between the EU and the SADC and ACP States in general. However, the halting of the SADC IEPA negotiations to enable the inclusion of South Africa is an indication that there exists flexibility that might allow for changes in the configuration of the EPA groups.

Recommendation

SADC should use the flexibilities under the CPA to negotiate for amendments to the CPA that will take into account the proposed establishment of the TFTA.

5.6 GENERAL RECOMMENDATIONS

The following general cross cutting issues in both the implementation of the market integration in SADC and the EPA negotiations should be addressed -

(a) Strengthening of monitoring and implementation mechanisms

Member States undermine the regional integration agenda through their failure to implement obligations under the SADC Treaty and by entering into agreements that undermine regional integration. Member States should uphold their regional integration obligations and align their relationships with third States to their SADC obligations.

The SADC Secretariat should work on operationalisation of a mechanism to ensure the implementation of the regional integration obligations by member States. It is the very same member States that wear different hats in different fora and end up making undertakings to implement different and sometimes contradictory obligations to their obligations under the SADC treaty.

(b) Cohesion of negotiating fronts

The divergence in negotiation outcomes is a result of the lack of cohesion of policies and priorities by member States. The fact that the region has limited capacity in terms of human resource personnel to negotiate the EPAs can be addressed by having a common negotiating stance in the negotiating fora.

5.7 WAY FORWARD

Regional integration ought to move forward in SADC as it advantageous to the region and would help build its industrial base so as to enable it to compete globally. SADC member States should uphold their regional obligations and not undermine market integration.

The monitoring and compliance mechanism would only work if States feel obliged to uphold their obligations. The on-going negotiations of the EPAs are flexible enough to incorporate issues that will advance regional integration. All it takes is to have a common negotiating position. If the EPAs are aligned to the regional integration agenda, they could be used as tools for development as they were initially intended to be and complement the market integration being pursued for development of SADC. To quote the sentiments of some EU States in a letter to Baroness Ashton -

‘..We have much to do to ensure that EPAs genuinely live up to the goals formulated in the Cotonou Partnership Agreement. We therefore need to ensure that EPAs will actively support regional integration and contribute to a regulatory framework that will stimulate economic development.’³⁶⁵

³⁶⁵ Letter from Denmark, Ireland and the Netherlands to Baroness Ashton on EPAs, 7 November 2008. Available at www.tralac.org.

BIBLIOGRAPHY

PRIMARY SOURCES

TREATIES/ DECISIONS/PROTOCOLS

1971 WTO Waiver for the Generalised System of Preferences available at http://www.wto.org/english/tratop_e/devel_e/anexi_e.doc

Agreement Establishing the World Trade Organisation (WTO Agreement) Preamble.

Partnership Agreement between the African Caribbean, Pacific Group of States on the one part and the EU and its member States on the other part. Available at http://ec.europa.eu/europeaid/where/acp/overview/documents/devco-cotonou-consol-europe-aid-2012_en.pdf.

SADC Regional *Indicative Strategic Plan*
http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf

SADC Protocol on Trade. (1996) available at <http://www.sadc.int/index/browse/page/161>.

SADC *The Regional Indicative Strategic Plan 23*. Available at <http://www.sadc.int/index/browse/page/104>. accessed on 26/08/12.

SADC Trade Protocol Concerning the Rules Of Origin For Products To Be Traded Between The Member States Of The Southern African Development Community

The GATT Decision on Differential and more favourable Treatment, Reciprocity and Fuller Participation of Developing Countries of 1979.

Treaty Establishing the Southern African Development Community. Available at www.sadc.int.

Treaty of Rome (1957) available at http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf.

United Nations Vienna Convention on the Law of Treaties 1969 United Nations, Treaty Series, vol. 1155, p. 331.

Waiver of the Fourth ACP-EEC Convention of Lomé of 9 December 1994 BISD 41S/26 . Available at http://www.wto.org/english/tratop_e/dispu_e/246r_f_e.pdf

SECONDARY SOURCES

BOOKS

Asante, S K B *Regionalism and Africa's Development* (1997) Macmillan Press Ltd London.

Baylis John, Smith Steve and Owens Patricia *The Globalisation of World Politics* (2008) Oxford University Press.

Brigid Gavin *The EU-ACP Economic Partnership Agreements What Impact on Development?* (2007) Institute for Integration Studies. Available at <http://www.tcd.ie/iiis/documents/discussion/pdfs/iiisdp224.pdf>

Bunn, Isabella D, *The Right to Development in International Economic Law* (2012) Hart Publishing Limited.

Gathii, James T *African Regional Trade Arrangements as legal regimes*, (2011) Cambridge University Press.

Karingi, Lang S, Perez, Romain, et al *Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements* available at <https://www.gtap.agecon.purdue.edu/resources/download/2152.pdf>. (accessed on 14 November 2012).

Sen, Amartya K *Development as Freedom* (1999) Oxford University Press.

ARTICLES

Bilal Sanoussi and Stevens Christopher *The Interim Economic Partnership Agreements Between the E.U and Africa States, Contents, challenges and prospects* (2009) European Centre for Development Policy Management.

Bilal Sanoussi *The E.U. and Africa the Policy context for development* (2010) European Centre for Development Policy Management 5. Available at [http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/3355884C1EE2D093C12577E700482338/\\$FILE/EU%20and%20Africa%20policy%20context%20for%20development_BOND&ECDPM.pdf](http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/3355884C1EE2D093C12577E700482338/$FILE/EU%20and%20Africa%20policy%20context%20for%20development_BOND&ECDPM.pdf) (last accessed on 09/11/12)

Bilal Sanoussi 'Who will negotiate with the EU? In search for an ACP-EU Negotiating Framework' (2002) 1 *Trade Negotiations Insights* 5.

Bond and ECDPM *EU and Africa Policy Context for development* (2010) European Centre for Development Policy Management

Department of Trade and Industry *SADC EPA Group- EC Negotiations: Assessment of the Emerging outcomes* (30 January) 2008 available at <http://www.thedti.gov.za/parliament/EPAoutcomes.pdf>.

Drieghe Lotte 'The European Union's trade negotiations with the ACP: Entrapped in its own Rhetorical strategy?' (November 11, 2008). *Romanian Journal of European Affairs*, Vol. 8, No. 4, December 2008. Available at SSRN: <http://ssrn.com/abstract=1299648>

ECDPM *Overview of the EPA Negotiations: ESA-EU Economic Partnership Agreement*

(2006) available at
[http://www.ecdpm.org/Web_ECDPM/Web/Content/Navigation.nsf/index2?readform
&http://www.ecdpm.org/Web_ECDPM/Web/Content/Content.nsf/0/C4BF8353DAE2
6EEBC12572330044D04A?Opendocument](http://www.ecdpm.org/Web_ECDPM/Web/Content/Navigation.nsf/index2?readform&http://www.ecdpm.org/Web_ECDPM/Web/Content/Content.nsf/0/C4BF8353DAE26EEBC12572330044D04A?Opendocument).

Elgostrom Ole and Pilegaard Jess 'Imposed Coherence: Negotiating Economic Partnership Agreements' in 30 (3) *European Integration* 363 at 351.

Erasmus Gerhard *Deeper Integration in SADC : Do EPAs undermine the Process?* (2012) Tralac. Available at www.tralac.org

Erasmus Gerhard 'Deeper Regional Integration in SADC: Do the EPAs undermine the Process?' (2011) Trade law Centre. Available at www.tralac.org

European Commission 'ESA and EU start to put into practice their interim Economic Partnership Agreement' .available at
http://trade.ec.europa.eu/doclib/docs/2012/may/tradoc_149435.pdf.

European Commission, *The EU/SADC INTERIM ECONOMIC PARTNERSHIP AGREEMENT*. Available at
http://trade.ec.europa.eu/doclib/docs/2010/march/tradoc_145931.pdf.
European Commission The Revised Cotonou Agreement available at
[http://ec.europa.eu/europeaid/where/acp/overview/cotonou-
agreement/cotonou_trade_en.htm..](http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/cotonou_trade_en.htm..)

Flint, Adrian 'The end of a special relationship? The New EU-ACP Economic Partnership Agreements' in *Review of African Political Economy* 36:119, 79-92 University of Bristol. Available at <http://www.psa.ac.uk/journals/pdf/5/2008/Flint.pdf>.
<http://www.tandfonline.com/doi/pdf/10.1080/03056240902863595> (accessed on 13 November 2012).

Grunke, Erik *The Economic Partnership Agreements between SADC and EC Regional Integration of SADC and Namibian interests within negotiations* (2011).

Hurst, Stephen 'The EU-SADC Negotiations: "locking in the neo liberal development model in southern Africa?' (2012) *Third World Quarterly* 495 at 507.

Kinga, SStephen 'The Revised Cotonou Agreement between the European Union and the African Caribbean and Pacific States: Innovation on Security, Political Dialogue, Transparency, Money and Social Responsibility' (2006) 50 (1) *Journal of African Law* 59 at 69. Available at
[http://journals.cambridge.org/action/displayFulltext?type=1&fid=433887&jid=JAL&
volumeId=50&issueId=01&aid=433886&bodyId=&membershipNumber=&societyE
TOCSession=](http://journals.cambridge.org/action/displayFulltext?type=1&fid=433887&jid=JAL&volumeId=50&issueId=01&aid=433886&bodyId=&membershipNumber=&societyE
TOCSession=) (accessed on 13 November 2012)

Lenhagan Patricia Michelle 'Trade Negotiations on African Capitulations: An African

Experience' 17 *Berkeley La Raza Law Journal* 117 at 118.

McMillan John 'DOES REGIONAL INTEGRATION FOSTER OPEN TRADE ECONOMIC THEORY AND GATT'S ARTICLE XXIV' in K. Anderson and R. Black Hurst, (eds) *Regional Integration and the Global Trading System* (1993). Available at http://facultysb.stanford.edu/mcmillan/personal_page/documents/Does%20Regional%20Integration%20Foster%20open%20Trade.pdf.

Meyn Marieke 'Are Economic Partnership Agreements likely to Promote or constrain Regional Integration in Southern Africa? Options, Limits and Challenges Botswana, Mauritius Mozambique are facing' (2004) NEPRU WORKING PAPER NO,16 16 .available at http://www.acp-eu-trade.org/library/files/Meyn-M_EN_072004_EPAs-regional-integration-Southern-Africa.pdf.

Mutai, Henry Regional Trade integration strategies in SADC and EAC' (2011) 1 *SADC LJ* 81 at 85. Konrad –Adenauer Stiftung.

Ng'ong'ola Clement 'The Legal framework for economic integration in the Southern African Development Community' (2008) 8 *University of Botswana Law Journal*.

Office for Promotion of Parliamentary Democracy, *ECONOMIC PARTNERSHIP AGREEMENTS EU AND ACP: FACTS AND KEY ISSUES UPDATED AND EXTENDED VERSION SPRING 2012* (2012). Dick Toornstra, Brussels. Available at <http://www.ipsnews.net/2008/07/trade-french-report-condemns-epas-as-anti-development>.

Ostergaard Tom 'Classical Models of regional integration- What relevance for Southern Africa?' 27-47 in Oden Bertil (ed) *Southern Africa After Apartheid, Regional Integration and External Resources* (1993) The Scandinavian Institute of African Studies.

Senona Joseph M. , 'EPAs and the Doha round: development or discontent ?' (2009) 8(1) *Journal of International Trade Law* 60 at 79.

The European Commission, *From Lomé I to Lomé IV* available at http://ec.europa.eu/europeaid/where/acp/overview/lome-convention/lomeitoiv_en.htm#1.

Tralac, *The Regional Indicative Strategic Plan, How is SADC doing?* (2012). Tralac, Stellenbosch. Available at www.tralac.org accessed on 29 August 2012.

United Nations Economic Commission for Africa *FINAL REPORT: STUDY ON THE ESTABLISHMENT OF INTER-RECs' FREE TRADE AREAS IN AFRICA DRAWING ON LESSONS FROM THE COMESA-SADC-EAC FTA EXPERIENCE* (2011) 36. Available at

http://new.uneca.org/Portals/ctrci/7th/Tripartite%20COMESA_EAC_SADC_FTA%20Study%20FINAL%20REPORT.pdf.

Walker, Aurelie 'The EC-SADC EPA: The Moment for Truth for Regional Integration' in ECDDPM *Trade Negotiation Insights* (2009) European Centre for Development Policy Management.

REPORTS

ACP-EC Joint EPA Negotiations Joint report on the ACP –EC Joint Report of the First Dedicated Session on the Development Dimension of EPAs 7 April 2003. Available at <http://www.fes.de/cotonou/downloads/official/ACPEU/ACP-EC+EPA+NEGOTIATIONS++JOINT+REPORT+EPA+NEGOTIATIONS.HTM>

African Trade Policy Centre EPA Negotiations: African Countries Continental Review (2007) 24. Available at http://www.africa-union.org/root/au/AUC/Departments/TI/EPA/DOC/Comprehensive_Review_of_EPAs_Negotiations_in_Africa_ACP___Final_Report.pdf

African Union EPA Report of Negotiations Coordination Committee held on 17-18 May 2012 Available at <http://www.au.int/ar/sites/default/files/Final%20EPA%20Report%20Eng.pdf>

AU Brief on Negotiations for Economic Partnership Agreements 26 May 2007 Paragraph 31 of the available at http://www.africa-union.org/root/au/AUC/Departments/TI/EPA/DOC/EPA_brief_2_AUC_May07.pdf (accessed on 2 October 2012).

International Food and Agriculture Policy Council *Economic Partnership Agreements and African Regional Integration: Have negotiations helped or hindered integration?* (2011) International Food & Agriculture Trade Policy Council.

Report of the ACP Council of ministers meeting held in Brussels on 10 December 2011 available at <http://www.acpsec.org/content/acp-ministers-resist-unilateral-deadline-wrap-epas>.

The Commission of the European Communities 'Recommendation for a Council Decision authorising the Commission to negotiate Economic Partnership Agreements with the ACP countries and regions SEC (2002) 351 final, 9 April 2002.

United Nations Conference on Trade and Development *Trade and Development Report 2006* (2006). United Nations, Geneva.

United Nations Economic Commission for Africa *Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade* (2010). Available at <http://www.uneca.org/aria4/ARIA4Full.pdf>

WTO, *World Trade Report 2012, Trade and public Policies: A closer look at non- tariff Measures in the 21st century*. Available at www.wto.org accessed on 28/08/12.

INTERNET SITES

www.sadc.int.

www.wto.org.

www.acp-eu-trade.org.

http://ec.europa.eu/trade/index_en.htm.

www.acp.int.

http://ec.europa.eu/europeaid/where/acp/overview/documents/devco-cotonou-consol-europe-aid-2012_en.pdf.

NEWS ITEMS

Felix Njini ‘where there is a will...SADC accused of lacking political will for integration’ 30 April 2012 in Southern Times available at http://www.southerntimesafrica.com/news_article.php?id=7060&title=Where%20there%20is%20a%20will%E2%80%A6%20SADC%20accused%20of%20lacking%20political%20will%20for%20integration&type=93.

Percy F. Mukombe ‘Economic Partnership Agreements and SADC : The Controversy continues’ in Economic Justice Network of 27 September 2010. Available at <http://www.ejn.org.za/index.php/ejn-on-the-move/ejn-on-the-move-views/445-economic-partnership-agreement-and-sadc-the-controversy-continues>

Malawi Budget Statement for 2012/13 available at <http://www.nyasatimes.com/malawi/2012/06/08/malawi-budget-statement-for-20122013/>. Accessed on 15 August 2012.

<http://www.endacacid.org/fr/index.php/mp-axes-strategiques/linformation-et-la-communication-2/ateliers-thematiques/161-ateliers-thematiques/vote-du-parlement-europeen-en-faveur-des-acp/227-epas-postponed-from-2014-to-2016-by-europarl>

OTHER

Letter from Denmark, Ireland and the Netherlands to Baroness Ashton on EPAs, 7 November 2008. Available at www.tralac.org.

EU Learning ‘what is regional integration?’ available at <http://www1.carleton.ca/ces/eulearning/eu-learning/introduction/what-is-the-eu/extension-what-is-regional-integration/>.

ACP ,ACP Guidelines for the negotiation of economic partnership agreements (2002)

AU Ministerial Declaration on EPA negotiations done at Cairo on 9 June 2005 available at http://www.africa-union.org/root/au/AUC/Departments/TI/EPA/DOC/de/EPA_Decl_Cairo_EN.pdf (accessed on 2 October 2012).

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