

Name Wycliffe M. Busieka
Student Number Bskwycoo1
Course of Study Ph.D.
Supervisor Prof. Evance Kalula
Date of Presentation 10th July 2003

Thesis Title

**A Configuration of Trade Regimes in Eastern and Southern Africa
Region: Implication for deeper Integration and WTO Compatibility**

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

**A Configuration of Trade Regimes in Eastern and Southern Africa
Region: Implication for deeper Integration and WTO Compatibility**

By

Mataywa M Busieka

**A thesis submitted in fulfilment of the requirements for the degree of
DOCTOR OF PHILOSOPHY in the Department of Commercial Law in the
Faculty of Law, at the University of Cape Town**

Promoter: Prof. E Kalula

Date Submitted: 10th July, 2003

Declaration by the Promoter

I, Evance Kalula hereby declare that this thesis by Mr. W M Busieka for the degree of
Doctor of Philosophy be accepted for examination

Evance Kalula

Professor of Law and Supervisor

10th July 2003

University of Cape Town

Declaration

I hereby declare that the thesis for the degree of Doctor of Philosophy at the University of Cape Town hereby submitted, has not been previously submitted by me for a degree at this or any other university, that it is my work in design and execution and all the material contained herein has been duly acknowledged.

Mataywa Wycliffe Busieka

10th July 2003

ABSTRACT

This work has examined the implication the proliferation of identical economic groupings portends for the east and southern Africa region. The thrust of the study here has been to interface and interrogate the incidence of the configuration of integration regimes in the east and southern Africa region. The work has investigated the question as to whether the proliferation of trade regimes has prepared a fertile ground for greater and deeper integration in the region.

The thesis has also interrogated the proposition that such proliferation is the very anti-thesis of the desired goal to promote trade harmonization and reach out for deeper integration in the region. Importantly this work has ventured to query the confluence of identical trade regimes in view of the compatibility imperative as enshrined in the WTO legal framework. We have examined the implication this configuration of integration regimes portends for the WTO disciplines.

This work commenced with an extensive examination of current works on regional integration regimes in general and integration initiatives within the east and southern Africa region in particular. The interrogation exercise was premised on works, both economic surveys and legal treatises undertaken on the recently concluded EU-SA free trade agreement, the SADC Trade Protocol, the COMESA Treaty and the Cotonou Agreement. The actual texts of these instruments form the bulk of the sources.

We note that without exception, significant and to that extent costly restructuring programs will have to be undertaken by States in the east and southern Africa region in response to the disruptive EU-SA trade partnership. We have established that these integration regime scores well on the imperative of WTO compatibility. We gather that the present WTO structures are not malleable enough for the cash strapped sub-Saharan Africa trade regimes to reconfigure themselves in such a way as to deepen the integration agenda. We have urged for more flexibility in the WTO framework on this score to augment integration processes currently crowding the regional landscape.

Mataywa W Busieka - 10th July, 2003

Dedication

If the truth were to be told the content of Africa is like a patient with a legion of disease imaginable – political instability, wars and coups, famine, falling investment, disease, diminishing trade, despair and dependency. I would, therefore dedicate this work to those committed to and are relentless in the advocacy for fair terms of trade in the global market and an equitable distribution of the world's resources. Their untiring activism would, hopefully in the long run, help to close the morally indefensible north-south economic divide. This shameful divide is a seething scar on the conscience of those who believe in the dignity and equality of mankind.

I would also dedicate this work to my late sister Dr Petronila Mebble whose pursuit for academic excellence taught us the intricacies of navigating the treacherous academic terrain. Admittedly, a considerable portion of the skills that designed this work derives from this rich bequest. Her untimely departure is a big loss to the community of scholars that are dedicated to a search for new frontiers of knowledge.

Acknowledgement

A work of this magnitude can only come to fruition through the corporate input - either directly or indirectly - of various people and institutions. I am indebted to all those who in anyway, however minor, contributed to the completion of this work. I am however severely handicapped in that I can not single out every contributor for special mention.

I will not have done justice to this work if I fail to specifically thank my supervisor Prof. Kalula who travelled the extra mile to ensure that I was sufficiently capacitated for this task. I recall, quite vividly, that my efforts at securing a supervisor for this work had hit a dead end due mainly to the nature of the subject matter of the thesis. When, however, I walked through Prof. Kalula's door, he not only accepted to supervisor my work but to my utter surprise, he offered to secure a sponsor as well. I thank him heartily for that magnanimous gesture and for his untiring efforts to draw in a variety of expertise that helped to streamline the outlook of this work.

I want to recognise the contribution of the NRF in making funds available to finance this work. In the same vein I am eternally grateful to the International Scholarships Office and the Law Faculty Scholarship Community for their generosity in supplementing my budgetary requirement in this regard. I in particular wish to extend a hand of gratitude to the dean of the faculty Prof. Hugh Corder for his patience with my unending pleas for financial support.

I also wish to acknowledge the enormous support I have received from the Institute of Development and Labour Law. The institute gave me an environment that was conducive for the pursuit of this very demanding research work. In addition to this the institute unreservedly placed all the necessary material support at my disposal. I thank Mrs Sue Wright for her forbearance in the face of my many requests for 'small favours'.

Finally to a colleague and friend Justice Nndateni for being there all the time and to that extend ensuring that the dreaded wind of academic solitude did not engulf and thereby cloud my life. He believed in my potential and that certainly is an edifying attitude from a friend indeed. His honest complements were and still are a great a source of inspiration. To my family who although miles far away did not tire in conveying solid words of encouragement.

The Law and the accompanying legal instruments cited herein are stated as current by December 2002

University of Cape Town

Abbreviation

AFTA	ASEAN Free Trade Area
APEC	Asia Pacific Economic Co-operation
ASEAN	Association of Southeast Asian Nations
AIPs	ASEAN Industrial Projects
CACM	Central American Common Market
CAP	Common Agricultural Policy (of the EU)
CARICOM	Caribbean Common Market
ECJ	European Court of Justice
CEAO	West African Economic Community
CEFTA	Central European Free Trade Agreement
COMESA	Common Market for the Eastern and Southern Africa
CUSFTA	Canada – US Free Trade Agreement
EC	European Community
ECSC	European Coal and Steel Community
EEA	European Economic Community
EEC	European Economic Community
EFTA	European Free Trade Association
EMU	European Monetary Union
EU	European Union
FDI	Foreign Direct Investment
GATS	General Agreements on Trade in Services
GATT	General Agreements on Tariffs and Trade
GDP	Gross Domestic Product
GNP	Gross National Product
GPA	Government Procurement Agreement
IGC	Inter-governmental Conference
ITO	International Trade Organisation
LAFTA	Latin America Free Trade Association
LAlA	Latin American Integration Association
Mercosur	Common Market of the southern cone
MFN	Most-Favoured Nation
NAFTA	North American Free Trade Agreement

NEPAD	New Partnership for Africa Development
NIEs	Newly industrialising economies
NTBs	non-tariff barriers
PTA	Preferential Trade Area
SADC	Southern Africa Development Co- operation
SACU	Southern Africa Customs Union
SEA	Single European Act
UN	United Nations
US	United States
WTO	World Trade Organisation

University of Cape Town

Table of Contents
Chapter One: Introduction

No	Topics	Page
1.1	Introductory Statement	1
1.2	Justification for the Study	3
1.3	The Context	4
1.4	Data Analysis and Field work Surveys	5
1.5	Themes and Organizational Logic	6
1.6	Chapter design and thematic flow	7
1.7	Endnotes to Chapter One	14

**Chapter two: The development, dynamics and characteristic of
Regional integration regimes**

2:1	Introduction	1
2.2.1	The phenomenon of economic regionalism	1
2.2.2	Early development	2
2.2.3	The character of regional integration	2
2.2.4	The impetus for regional integration	6
2.2.5	Pillars of a successful integration initiative	9
2.3	Regionalism the gateway to multilateralism	10
2.4	Regionalism and the external effects	14
2.5	Regionalism and developing countries	17
2.6	Regionalism and the quest for economic welfare	19
2.7	A Critique of regional integration imperatives	25
2.8	Concluding Remarks	27
	Endnotes to chapter two	29

Chapter Three: A Continental Review of Regional Integration Experience

3.1	Introduction	1
3.2.1	Integration in Europe: The European Union	2
3.2.2	The US factor in the EU integration	4

3.3.1	The Treaty of Rome	4
3.3.2	The Customs union and the common external tariff	5
3.3.3	The Common Agriculture Policy	6
3.4.1	The impetus for deeper integration	9
3.4.2	Corporate pressure and the single European Act	12
3.4.3	Supply for regional integration	13
3.4.4	Germany's exemplary leadership	15
3.5.0	Integration in Latin America	17
3.5.1	The first wave of integration	17
3.5.2	The Andean Common Market (ANDEAN Pact)	19
3.5.3	The Central American Common Market (CACM)	21
3.6.0	Integration in North America	22
3.6.1	The North American Free Trade Area (NAFTA)	23
3.6.2	<i>Implications for Mexico</i>	24
3.6.3	<i>Implications for the United States</i>	24
3.6.4	<i>Implications for Canada</i>	25
3.6.5	A brief critique of the NAFTA	25
3.7.0	Integration in Asia	27
3.7.1	Early integration schemes	28
3.7.2	The Association of Southeast Asian Nations (ASEAN)	28
3.7.3	The Asian Pacific Economic Co-operation (APEC)	29
3.8	Concluding Remarks	30
	Endnotes to Chapter Three	32

Chapter Four: The World Trade Organisation's Mandate for Regionalism

4.1	Introduction	1
4.2	The WTO's roots from Havana to Marrakech	4
4.2.1	The centrality the WTO Jurisprudence	6
4.2.2	The tariff restrictions debate	8
4.2.3	The Mechanics of the Rules of Origin	15
4.2.4	The Most Favoured Nation Principle	17
4.2.5	Exceptions to the MFN Principle	

4.2.6	National Treatment	19
4.3.1	Regionalism and the WTO Disciplines	20
4.3.2	The Development of <i>Article XXIV</i>	22
4.3.3	The Jurisprudence of <i>Article XXIV</i>	23
4.3.4	The “Substantially-all-trade Requirement	26
4.3.5	“Not on the whole higher or more restrictive”	28
4.3.6	The improved version of Article XXIV	32
4.3.7	The implications of <i>Article XXIV</i> on regionalism	34
4.4	A critique of <i>Article XXIV</i> Provisions	36
4.5.1	The Dilemma of Reciprocity for Regional Regimes	37
4.5.2	The status of the Enabling Clause	38
4.6	International Trade in Services	55
4.7	The GATT Dispute Settlement Procedures	62
4.8	Concluding Remarks	65
	Endnotes to Chapter Four	69

Chapter Five: The Trade, Development and Co-operation Agreement

5.1	Introduction	1
5.2.0	A broad review of the principle features	2
5.2.1	Tariff dismantling programme	5
5.2.2	Establishment of a free trade area	6
5.2.3	Agreement on trade related issues	10
5.2.4	Transition safeguard measures	12
5.2.5	Agreement on trade in services	16
5.2.6	Agreement on competition policy	19
5.3.1	Technical and development assistance	20
5.3.2	Agreement on intellectual property rights	23
5.3.3	Standardisation and conformity assessment	24
5.4.1	Promotion of regional integration	41
5.4.2	Rules of Origin in the integration equation	42
5.4.3	Dispute settlement and the institutional framework	44
5.5	Compatibility with the WTO disciplines	46

5.6.1	Implication for SACU	51
5.6:2	Implication for the SADC Trade Protocol	51
5.6:3	An assessment of the welfare gains for the region	57
5.7	The viability of the Agreement	60
5.8	Concluding Remarks	65
	Endnotes to chapter five	68

Chapter six : The SADC Trade Protocol in the integration equation

6.1	Introduction	1
6.2	A brief historical overview	2
6.3.1	The Jurisprudence of the SADC Trade Protocol	3
6.3.2	The tariff phase - out timetable	12
6.3.3	The non-tariff barrier regime	13
6.3.4	Differentiation and asymmetry	15
6.3.5	Measures on trade laws	17
6.5.6	General agreements on trade in services	21
6.6.1	Institutional arrangement	27
6.6.2	Dispute Settlement Procedures	30
6.6.3	The right of audience dilemma	31
6.7.1	The Rules of Origin Regime	35
6.7.2	Co-operation in customs administration	37
6.8	Implication of regime configuration	41
6.9	Concluding Remarks	56
	Endnotes to chapter six	59

Chapter seven: Exit Lome enter the Cotonou: Implication of the new trade dispensation for integrative processes in eastern and southern Africa

7.1	Introduction	1
7.2.1	A brief review of the principle features	5
7.2.2	Promotion of regional integration	7
7.2.3	Development of the Economic sector	8
7.2.4	Promotion of the private sector investment	12
7.3	The Rules of Origin regime	13
7.4	Dispute settlement Procedures	33

7.5.1	The quest for the WTO compliance	40
7.5.2	The Significance of the WTO Compatibility	42
7.6.1	The Cotonou in the realm of the EU-SA Agreement	45
7.6.2	The Cotonou and the SADC Trade Protocol	49
7.7	Implications for integration processes in the region	52
7:8	Concluding Remarks	60
	Endnotes to chapter seven	63

**Chapter eight: The Dilemma of regional integration in southern Africa:
Is intra-bloc co-operation the answer?**

8.1	Introduction	1
8.2	Motivation for multiple membership	2
8.3.1	Implication of the SADC-COMESA confluence	5
8.3.2	Regime amalgamation and the donor factor	10
8.4.1	The super-highway to the African economic union	13
8.4.2	The EAC factor in the integration equation	14
8.4.3	The SACU factor in the integration equation	16
8.4.4	The South African factor in the integration equation	19
8.5	Locating areas of common weaknesses	21
8.6	The obtaining integration reality	27
8.7.1	The Case for intra-bloc co-operation	30
8.7.2	Co-operation overtures and the legal framework	32
8.8	Co-operation and the WTO compatibility	34
8.9:1	Trade liberalisation, promotion and development	39
8.9.2	Private sector and investment promotion	43
8:10	Concluding Remarks	50
	Endnotes to chapter eight	53

Chapter nine: Conclusion

9.1	The findings	1
9.2	Suggested recommendations	3
9.3	The epilogue	4

1.1 Introductory Statement

Change is ubiquitous in the contemporary global economy. World markets have set their sights on the fast shrinking global commerce. It is certainly an animated race against time as each trading block restructures to cut out a niche of influence on the coveted global market. The sheer breadth and depth of the global competition for capital, skills, technology and products dictates that the hitherto conservative economies quickly make room for considerable adjustment. In the context of the east and southern Africa region, these measures have assumed a sense of urgency as seen in the recent ambitious tariff dismantling programmes.¹ The numerous multilateral and bilateral instruments concluded by the different economic entity attest to the seriousness with which this venture is attended.²

The incidence of regional economic arrangements is a political, economic, social and legal reality. Nothing sums up this broad subject than a politician's viewpoint captured below. In a recent seminar for Trade, Investment and Infrastructure Co-operation within the SADC region organized by the African European institute, a delegate from Malawi posed some rather vexing questions. He expressed his enthralling dilemma with the imperatives of globalization thus;

" What do we do when the influx of cheap foreign goods result in the closing down of local industries and therefore unemployment for our people? How do I, as a politician explain to these people who have just lost jobs as a result of foreign competition that globalization and trade liberalization are good for them? How can we, as politicians preach the virtues of great productivity when some of our policies appear to discourage local initiatives?"³

Most disturbing questions indeed. Much has been said about the wind of globalization and the attendant North-South polar divide. It appears that the wind of globalization is being played in sub-Sahara Africa in a most vicious and puzzling manner.

¹ It has been noted that sub-Saharan Africa competes only with Latin America in the high concentration of regional groupings in the developing world. Whilst some of the groupings in the sub-Saharan region date back to the colonial times, most integration schemes have been adapted after independence.

² The fact that cross-border economic partnership in the fashion of global commerce is evident in the UN data on the issue. The 24-year period from 1947-1971 witnessed the creation of eighteen such trading instruments of which fourteen were adapted. The following 24-year period from 1972-1996 witnessed a tripling to 55 of such instruments 45 of, which have been adapted².

³ The joint initiative by the South African Chief Whips Forum and AWEPA, Cape Town South Africa

The globalization conundrum that is taking root in the eastern and southern Africa region has been partly triggered by the complexity attending the recently concluded EU-SA free trade partnership. This complicated integration equation is exacerbated by the proliferation of preferential trade regimes in the region. Most countries in this region have overlapping membership and objectives that vary from limited co-operation to full-fledged economic integration. With the addition of the *de-facto* EU-SA free trade area in the region, the legal and economic ramifications of this regional economic polarity is of such complexity as would defy any concerted effort at quantification.

The build-up chronology to regionalism in the eastern and southern Africa region has some interesting patterns. In many instances, the groupings comprise countries, which had shared colonial ties to the same foreign power due mainly to the fact that the colonial ties had created a host of common institutions, a common official language, and a common currency. In other instances, the regional groupings, notably the larger ones, were more in line with the geographic proximity of the member countries.⁴ But as we shall demonstrate later on, this is not all there is to the motivation for regionalism in the eastern and southern Africa region. Other equally important, but new developments have given impetus to the pace and shape of regionalism in this region.

What will interest this work most is the fact that many of the SADC member states are parties to the Cotonou protocol. As pointed out elsewhere in this inquiry, the EU-SA partnership has as one of its principal objects the desire to foster closer ties with the ACP countries. The unique integration configuration created thereby is that on the one hand is the SADC, COMESA, SACU and EAC member States contracting separately with the European Union under the Cotonou whilst South Africa is only admitted as an institutional member. On the other hand, South Africa, which has prior commitments to the SADC regional grouping, has contracted separately on special terms with the European Union.

The configuration of this triangular instrument would tempt one into entertaining the idea that there is indeed a possibility of all these trade regimes -namely the EU-SA,

⁴ This thesis argues, in the main, that sub-Saharan States did well to bite the bullet of trade liberalization. The time to open up the domestic markets was, after all, long overdue. This is the way forward the debilitating ravages of external competition notwithstanding. The upside, in the long run, far outweighs the downside.

SADC, COMESA, SACU, the EAC and the Cotonou Agreement eventually coalescing into one huge market. The unmistakable reality is that, despite the benchmark of regionalism being trade liberalization, there is a marked difference between the economic caucus within the eastern and southern Africa region as contrasted with those in developed economies. This can be explained. The dynamics driving these two systems differ both in substance and setting.

The question perennially nagging the mind can best be framed this way: granted that sub-Saharan countries strive to realize the level of development that developed economies have achieved, how then would one explain the disparity between these two sets of economic arrangements? One would have expected these developing countries to design their trade agreements in line with that of the developed countries such as the European Union. But is that possible? This thesis will seek to demonstrate that the disparity in the level of development and therefore the different economic structures obtaining in the two hemispheres operate from a copy cat model of the developed countries integration arrangements.

There is a complex array of overlapping regional trade liberalization schemes taking shape within the east and southern Africa region, each of which will have a bearing on the other. In a sense, therefore, South Africa's opening up of its market to external trade must have caught many economic interests completely off-guard. Its entry into the crowded global commerce has, for good measure captured the mood of the principal players in this competitive plane. This would explain, in part, the flurry of activities that are currently crowding South Africa's external commerce. This flare of activities has in turn thrown the entire southern Africa region into a sudden economic stampede. This, then is the background scenario from which we build the case for the validity of this work.

1.2 Justification for the study

The spread of regionalism is no doubt one of the most important recent developments in the global system. Nearly every developing country is in, or about the process of discussing a regional integration arrangement. The depth and rapidity characterizing these changes compel a reassessment of the ability of various governance structures to cope and adapt to the beckoning global imperatives. An understanding of the nature of

the changes that are taking place call for a re-appraisal of the paradigms of regional integration and their ability to inform, respond to and even shape change.

This work examines, in some detail, the implication the proliferation of identical economic groupings portends for the east and southern Africa region. The thrust of the study here would be to investigate the impact of these economic blocs and measure the findings to the desire expressed in the EU-SA free trade agreement to encourage closer trade ties among the ACP countries in sub-Saharan Africa. How would such proliferation, as aforesaid, sit in with the shift in policy by the European Community to do business with regional economic blocks in place of individual countries? Other questions we seek to interrogate in this area would be whether this proliferation would prepare a fertile ground for greater and deeper integration in the region.

On the other extreme, should the point be taken that such proliferation is the very antithesis of the desired goal to promote trade harmonization and reach out for deeper integration in the region. Importantly, the confluence of these identical trade regimes begs the question of the compatibility with the world trading system as enshrined in the World Trade Organization (WTO) legal framework. On the legal front, therefore, the germane question that is begging is namely: what implication does the configuration of these integration regimes convey for the WTO disciplines.

1.3 The context

This thesis sets out to define the legal form that regional economic groupings forge in an effort to enhance a region's and ultimately a country's welfare gains. The work, to that extent, encompasses a great measure of economic activity. It does, too, in view of the legal expression that is given to the integration initiatives under review, contain considerable legal terminology. After all, law by itself does not exist in a vacuum. It is therefore important to clarify that the erudition and deep interdisciplinary understanding find their true expression in this work.

The concept of the rule of law which expresses, *inter alia*, the overriding and dominating power of abstract norms, may at times dim the real contours of those factors which are the subjects and objects of the application of the law, namely the individual human endeavour. The accentuation of the fact that human endeavour is composed of a

multitude of variegated extra-legal features has always had a balancing effect and aids in the creation of the right proportion in our outlook. The in-depth exploration of especially of the interface between law and economics in all its aspects broadens our frame of reference and enriches our knowledge on the applicable horizons of the law.

It is a trite fact of life that the law essentially defines and explains away legal relationships. In this very breadth one cannot begrudge the truism that lawyers stand at the interface of commerce, industry, human relations and government. They are properly characterised as lubricants that ultimately facilitate the smooth meshing of these cogs of human existence. What is certain, therefore, is that there is much room for improvement and advancement of the frontiers of the law. This work is a concerted effort, albeit modest, to make a contribution towards this noble goal.

Having said that, it is important to underscore the fact that this thesis is not an economic survey. The subject under review has received a good measure of in-depth scholarly economic treatment from authoritative academic quarters. This work is not about to upstage the immense analytical contribution carried out and accomplished in this direction. It is expedient, however, to note that between the economist and the legal scholar, there is a neutral meeting ground about which neither of the two would be aware that he/she has crossed over to the other discipline. Put in another way, there are legal matters in regional economic arrangements which an economist would not quickly put in perspective. Likewise, there are economic issues that so often get entangled in the labyrinth of legality that a legal scholar would want a quick fix escape root to get extradited from the rigmarole of economic detail.

It follows that the availability of a work, which bridges these two important disciplines, would come in handy to those who are accustomed to exploring the mountains of such trans-national instruments. This work hopes to supply that urge while at the same time creating a forum for both the economist and the legal practitioner to meet on topical issues without being unnecessarily encumbered by the logjam technicalities which so often obscure issues from either perspective of the two disciplines. The work is, therefore, an economist friendly as much as it is a lawyer friendly. It is important to reiterate that the work is not an economic analysis. We would, nonetheless, endeavour, as

much as would be within the strictures laid-out in our outlined methodology heavily draw from recent economic surveys and data analysis carried out in this particular area.

1.4 Data analysis and field work surveys

This research project commences with an extensive examination of current works on regional integration regimes in general and integration initiatives within the east and southern Africa region in particular. Special focus has been paid on works, both economic surveys and legal treatises undertaken on the recently concluded EU-SA free trade agreement, the SADC Trade Protocol, the COMESA Treaty and the Cotonou Agreement.

This being a textual research endeavour, the basic sources for the project are regional integration instruments, International trade law instruments and treatises, The WTO data bank on regional integration regimes, and consumer reviews. Other sources are seminar and symposia reports, governmental reports and documents, archival documents, historical books and documents, Acts of Parliament, draft bills, Parliamentary Committee proceedings, law reports, speeches and policy documents. We have also consulted unreported cases, conference reports, workshops and symposia documents, journal articles, books and texts on international trade law and public international law.

1.5 Themes and organizational logic

This work consists of nine chapters, which are divided into three parts. Chapters one to three comprise of the introductory part. Part one essentially lays a firm foundation on which the thesis is built. Free trade areas, customs unions and the common market are the main solid expression of regional integration. It extensively examines each of these trade instruments in sufficient detail. These trade instruments are the central features in this work and for that very reason its theme resonates throughout the entire thesis.

In a nutshell, part one treats these trade instruments to an extensive introductory detail to clear any iota of ambiguity about them. This part of the thesis explains the nature, character and application of the different structures which regional trade regimes assume. This exercise would help to shed some light on the reality of regional integration and thereby bring clarity to these important tools of regionalism. This clarity is crucial to the subsequent discussion on integration regimes in the east and southern Africa region.

The role of the World Trade Organization as the guarantor of a rule based international trade system is explained in this introductory part of the thesis as well. Part one also takes a continental examination of regional trade instruments further afield. This comparative study seeks to explain their character and applications. This exercise is necessary for purposes of setting the stage for the eventual analytical work that is subsequently undertaken specifically on trade regimes in the east and southern Africa region. Special attention is given to the detail about the motivation for these trade instruments and their legal standing with the multilaterally designed General Agreement on Tariffs and Trade System (GATTTS). It should be noted here that the aim is to merely explain the character and dynamics of regional trade instruments. This exercise is essentially an eye opener to the debate on regionalism, which is our focus area.

Part two is the analytical part of the thesis. This part critically examines the implication of the interface of regional trade instruments in eastern and southern African region. Concomitantly, this part does examine the compatibility of these trade instruments with the WTO disciplines on regionalism. The trade agreements that would be examined in this part are namely; the EU-SA free trade partnership, the SADC - SACU construct the Cotonou Agreement and the SADC-COMESA free trade confluence and its implication for deepening integration in the east and southern Africa region. Each of these principal trade regimes is closely examined in the context of the implication for deepening integration in the region and adherence to the WTO disciplines.

Part three of the thesis will report on the findings and at the same time offer some recommendations on the way forward for the momentous pace of trade integration that is fast gaining speed in the region. This part will report on findings by examining each of the regional trade patterns as laid out in part two. The suggested recommendations cover the entire spectrum of the examined trade regimes. Having laid out the general picture of the thesis, we now move to briefly out-line the pertinent features that define each chapter of the thesis. The foregoing planning is elaborated in the chapter layout provided below.

1.6 Chapter design and thematic flow

(a) Chapter One

This chapter is essentially an introductory phase that rolls out the program for the entire work. The chapter unveils the subject matter, sets out the limitations of the work and outlines the structure of the thesis.

(b) Chapter Two

It is important to understand the dynamics that inform the urge for regional integration and the creation of free trade areas. Chapter two is structured to achieve just that. This chapter seeks to excavate deeper into the imperatives attending custom unions and free trade areas. This chapter is basically an exercise to extensively review the past and present literature on free trade areas, customs unions and common markets. These instruments are the solid expression of regional integration. The chapter comprehensively reviews the characteristics, historical development and application of these trade instruments and the attendant controversy regarding their efficacy or otherwise in trade promotion. Special attention is given to the detail about the motivation for these trade instruments and their legal standing with the multilaterally designed General Agreement on Tariffs and Trade System (GATTTS).

Significantly, the chapter will demonstrate the fact that when properly structured, regional integration initiatives do create a fertile ground for global commercial networking. Where haphazardly concluded, however, such instruments can and do in most cases achieve no more than a negotiated stalemate. The latter spawns unnecessary trade wars that give way to endless strife. This state of affairs saps valuable energy that would otherwise have been channeled toward fostering trade co-operation through the deepening of integration. In the main, however, this chapter introduces terminology and concepts that go with the fascinating phenomenon of regionalism.

(c) Chapter Three

This chapter is in the nature of case studies. The chapter takes a continental tour and samples out some of the notable regional integration regimes notified to the WTO elsewhere around the globe. This survey will be an eye opener as to the dynamics of integration regimes and thereby serve as a yardstick for the performance of regimes in the eastern and southern Africa region. This part helps to shed more light on the North-

South interface as depicted in the EU-SA partnership within the sub-Saharan sphere. In this respect we look at integration regimes in North America, South America, the European Union and East Asia.

The EU has been touted as the best model of a successful integration initiative. On the other hand, the EU is in many ways an active player in the regional integration processes that are taking root in eastern and southern Africa in particular, and in Africa as a whole. For these two reasons, the chapter dedicates more time on the integration experience of the European Union as a true model of a successful integration agenda. It goes without saying that a clear understanding of some of the striking features in the EU's integration efforts is most valuable to this work. The net result is that this discourse explains the important lessons and challenges integration regimes in eastern and southern Africa region have to contend with on their way to maturity.

(d) Chapter Four

The chapter makes the point that the WTO structure supplies the legal framework for the regional integration processes. Of course, the character and content of different regional blocs may, as is expected, differ significantly. The WTO manages the transition from the tariff barrier extremity to tariff dismantling regime. States under the WTO are urged to commit themselves to drastically phase-out the tariff barrier regime on trade with third countries. Suffice to say that the WTO is the principal guarantor of regionalism and multilateral talks. The chapter then takes a critical view of the WTO mandate on regionalism generally and towards the developing world in particular.

What is clear is that *Article XXIV* is the enabling clause for all regional integration regimes. There is a whole range of requirements that regional blocs must comply with under the WTO. This chapter examines the jurisprudential disposition of the WTO framework vis-à-vis the regional integration phenomenon. It is important to point out that the main caveat the GATT law invokes against regionalism is the requirement that these regimes must at no time contradict the WTO disciplines on multilateral trade. One of the main issues which this thesis has had to grapple with concerns the level of compliance which trade regimes in eastern and southern Africa have so far achieved and whether this effort is consonant with the WTO edict on regionalism.

It is essential to investigate and uncover to what depth the eastern and southern Africa trade regimes have structured their trade regimes in their quest to comply with the principal regulator of the integration law - the WTO. There are certainly some interesting areas of conflict between the multilateral obligation and member states' fidelity to regional integration disciplines. This chapter highlights some of these vexing areas of conflict and affords some guarded views thereon. Emphasis is, in particular, on the enabling clause provision, the Most Favoured Nation (MFN) principle, the whole spectrum of the Generalized System of Preferences (GSP), the tariff barrier and non-tariff barrier regime and the rigmarole that is the regime of the rules of origin.

The WTO's legal framework for free trade areas and customs union is dealt with in greater detail with a view to position regional integration processes in the right legal perspective. The chapter identifies some of the vexed issues which free trade agreements must address to ensure proper compliance with the WTO disciplines on regional integration. To delve into these complex issues, it is necessary to look into the guidelines on regional integration detailed in the WTO framework. This discourse lays a strong foundation for the in-depth discussion of the germane issues underlying this work.

(e) Chapter Five

Chapter five supplies the momentum to the focal issues of this survey. In this chapter, we take a critical view of the principal features of the EU-SA trade agreement and put them in the regional integration perspective. We closely examine what the EU-SA agreement portends for the nascent democratic institutions in South Africa. We then interrogate how the EU-SA agreement fares on the score of compatibility with the WTO disciplines on regional integration. In this respect, we take the decided view that the EU-SA agreement has paid good tribute to the multilateral trade imperatives.

The chapter also demonstrates that the motivation for the deliberate move by the European Union to single out South Africa from the ranks of other SADC members for a special trade partnership is no coincidence. The motivation for the EU-SA partnership, we argue, differs both in substance and intent from the motivation for the SADC/Cotonou axis. We undertake an in-depth investigation into some of the considerations that gave impulse to the European union's differential treatment of South Africa away from the mainstream SADC/ Cotonou partnership.

The chapter, too, undertakes an analytical appraisal of how the free trade agreement proposes to go about cementing its relations with other SADC member countries. Whether this effort would be inimical to deepening integration in the eastern and southern Africa region is another issue that calls for further investigation. The nagging question is the one seeking to understand how South Africa would take over the mantle of regional leadership without renegeing on the trade commitments made to the European Union. There is the other question regarding the viability of the EU-SA agreement in view of intensified integration activities in the eastern and southern African region. We conclude that it is expected that the EU-SA agreement will have a disruptive effect for integration processes in the region and that the EU will therefore be called upon to offset the resultant distributional and adjustment costs.

(f) Chapter Six

Chapter six carries with it the theme of chapter five to the SADC-SACU frontier and seeks to investigate the implication of EU-SA agreement on the fledgling integration process in southern Africa. The chapter commences with a background review of the evolution of SADCC to SADC and traces the tortuous way to a free trade area. To give clarity to integration issues that would ensue, the chapter gives a brief rundown on the SADC economic profile, which helps to highlight the teething issues that weigh heavily on regional integration initiative.

The chapter takes a critical view of the SADC Trade Protocol in the light of the imperatives of the WTO integration disciplines. We make a few exceptions but in the main argue that the SADC Trade Protocol has fared well in its compliance with the WTO disciplines. The chapter then examines the implication of the EU-SA agreement on both SACU's common market and the SADC Trade Protocol. We take the view that the implementation of the EU-SA agreement would result in dire economic, social and legal consequences for the fledgling integration process in southern Africa. The chapter concludes that though the effects of the EU-SA agreement on the economies of individual SADC and SACU members are difficult to quantify at present, these will become clear in the implementation phase of the agreement.

(g) Chapter Seven

This chapter examines some of the penitent features of the Cotonou and how such features reflect on regional regimes within the eastern and southern Africa region. The chapter traces the development of various Lome instruments and makes a general commentary on the main features of the Cotonou agreement. The chapter then investigates the implication of the Cotonou Agreement on the EU-SA agreement. This we do in the context of the configuration of preferential regimes in the eastern and southern Africa region. To clarify this important development, the chapter critically examines the implication of the Cotonou agreement for the SADC Trade Protocol and its declared intention to achieve a free trade area in the short term.

The chapter carries the argument further and affords a critical view of authoritative commentaries that have been made regarding the shape and character of the successor to Lome. These arguments are faulted for being too pessimistic and failing to take cognizance of the obtaining scenario in the region, which is set to subsist for some time to come. We then call in question the Cotonou's congruence with the WTO disciplines. This area is steeped in intractable controversy about which we take the view that since the Cotonou is a transitional instrument its successor would no doubt strive to measure up to the WTO disciplines.

Our thinking is that the combined force of the ACP and the EU is enough to alter the WTO rules to give legal expression to suit this uniquely designed trade partnership. We espouse the view that the only downside is the absence of political will on the part of the EU to travel this extra mile. We conclude with a cautionary remark to the SADC and COMESA signatories to the Cotonou. That these states must tread carefully lest they forego so easily, their special and differential benefits under the WTO framework, which to a greater extent were accommodated within Lome's none-reciprocal preferences.

(h) Chapter Eight

The chapter undertakes a critical analysis of the implication of the confluence of the SADC-COMESA integration process. There is definitely a serious jostling and shifting of trade alliances within the eastern and southern Africa region. This activity will no doubt be complicated by the EU-SA free trade partnership. This thesis seeks to throw more

light on the dilemma of trade alliances exercising the wits of the east and southern Africa regional players.

Chapter eight seeks to speculate on how intra-bloc co-operation could be realigned so as to address the latent weaknesses in the regional trade regimes. This discourse forms the basis of our suggested proposition for future partnership between the regional players consisting of the EU-SA, SADC, COMESA, EAC and SACU. Indeed, this thesis' analytical work will be concretized in this chapter.

Our firm view is that the EU-SA-SADC-COMESA trade prism presents an excellent opportunity for resource pooling initiative that carries all the parties on board. The ultimate goal, we argue, should be to redefine regional economic ethos in an effort to achieve congruence of trade objectives. The current isolationist policies obtaining in the region do not augur well for the proposed grand match to the African Economic Community at least not as far as the sub-Saharan regional trade regime conglomeration stands.

(i) Chapter Nine

Chapter nine is appropriately our epilogue under which we make our findings and craft some necessary recommendations on the way forward for the fledgling integration process pervading the entire eastern and southern Africa region. This chapter acknowledges the bare fact that the issues that can be gleaned from the foregoing discussion render one line of conclusion irresistible. That is to say the EU-SA partnership sends mixed and confounding feelers to her eastern and southern Africa regional partners. From the look of things, this is not a far-fetched characterization of the obtaining scenario.

The chapter notes that without exception, significant and to that extent costly restructuring programmes will have to be undertaken by states in the eastern and southern Africa region in response to the disruptive EU-SA trade partnership. Here, then, lies the bitter pill which regional states have dreaded all along. Yet the reality is unavoidable. We also urge that the WTO structure should be revisited with a view to cater for greater flexibility. This is a necessity for the fledgling integration regimes in

developing countries in general, and in particular the ACP states to find a savory economic bearing in the world trading system.

We gather that the present WTO structures are not malleable enough for the cash strapped sub-Saharan Africa trade regimes to reconfigure themselves in such a way as to deepen their integration processes. We recommend that these states should be given a free hand under the WTO legal framework to enter into unique but economically beneficial partnerships so as to stage a meaningful claim on the ever-elusive global market.

Chapter Two: The Development, Dynamics and Characteristic of Regional Integration Regimes

2.1 Introduction

This thesis is about regional integration regimes. These instruments take different shapes and have distinctive characteristics. It is, therefore, important to identify, introduce and define the subject matter of this survey. It is also important to locate and explain various forms of regional integration regimes with a view to achieve clarity regarding their legal standing. This chapter seeks to achieve just that. It is to this extent a foundational chapter. Like we pointed out in the note on caveats, this work avoids the snare of digressing into the complex regional integration theories. An avalanche of literature abounds in that regard. This must be made absolutely clear, that ours is not an economic survey. This chapter then acts as a bridge between the interface of legal and economic issues that form the basis of this work. We, however, must lay bare the main tools of our work before we delve into the substance of the thesis.

In a nutshell, this chapter seeks to identify and explain the dynamics of the regional integration phenomena that would supply clarity to the substantive discussion. The chapter explains what regional integration entails and looks up this identity with a brief historical treatment of its development. The dynamics of regional integration and its impact on regional economies are also examined. The chapter further interrogates the motivation for regionalism and outlines lessons learned thereby. The effects of regional integration are outlined in the light of its failures and success. The complex dilemma of regionalism versus multilateralism is also closely examined. This is the kind of dilemma that has exercised the wits international trade scholars for decades. It is an important

dilemma in view of the hegemonic role played by the USA as the world's market leader. This dilemma also features prominently in the enigmatic north-south polarity.

Free trade areas, customs unions and common market regimes are the main conveyors of regional integration arrangements. This chapter undertakes an analytical examination on each of these instruments and outlines the pertinent characteristics in sufficient detail. Special attention is given to the detail about the motivation for these trade instruments and their legal standing with the multilaterally designed General Agreement on Tariffs and Trade System (GATT). It is important to reiterate here that the aim is to merely explain away the character and dynamics of these regional trade instruments. These trade instruments are the central features in this work and for that reason these themes reverberate through the entire thesis. This chapter, therefore, treats these instruments to an extensive introductory detail to place these regimes in their true perspective.

2.2.1 The phenomenon of economic regionalism

In today's world, no nation exists in economic isolation. All aspects of a nation's economy – its industries, service sectors, levels of income and employment, and living standards – are linked to the economies of its trading partners. This linkage takes the form of international movements of goods and services, labour, business enterprise, investment funds, and technology. Indeed, national economic policies cannot be formulated without evaluating their probable impacts on economies of other countries. In the late 1980's regional integration, often termed as regionalism, emerged as one of the most important developments in world politics.

Regional integration has been defined as the institutional combination of separate national economies into larger economic blocks or communities.⁵ A less technical definition is the merging of countries by forming free trade zones and customs or even economic unions. Examples of Staatenbunde, Bunderstaaten, Eidgrenossenschaften, leagues, commonwealths, unions, associations, pacts, conferences, councils and the like are spread throughout history. Many were established for defensive purposes, and not all of them were based on voluntary assent. Like we pointed out before, this work is confined to regional economic integration efforts within the eastern and southern Africa region. This analysis therefore encompasses regimes that involve the voluntary linking in

⁵ Peter Robson: The Economics of International Integration 4th ed. (Routledge: London, 1998) at p. 1

the economic and political domains of two or more states to the extent that authority over key areas of national policy is vested in the competence of a supranational body.

2.2.2 Early development

An early voluntary regional integration initiative appeared in the nineteenth century. In 1828, for example, Prussia established a customs union with Hesse-Darstadt. The Bavaria Wurttemberg Customs Union, the middle German Commercial Union, the German Zollverein, the North German Tax Unions, the German Monetary Union, and finally the German Reich followed this successively.⁶

This wave of integration spilled over into what was to become Switzerland when an integrated Swiss market and political union were created in 1848. It also brought economic and political union to Italy in the rise of regiments' movements. Integration fever again struck Europe in the last decade of the nineteenth century when numerous and now long forgotten projects for European integration were concocted.⁷ In France, Count Paul de Leusse advocated the establishment of a customs union in agriculture between Germany and France, with a common tariff bureau in Frankfurt.⁸

Other countries considered for membership in the European integration were Belgium, Switzerland, Holland, Austria-Hungary, Italy and Spain. In Austria, the economist and politician Alexander Peez forged a plan for middle European Zollverein that included France.⁹ And Count Goluchowski, the minister of foreign affairs of Austria-Hungary, passionately advocated the idea of a united Europe in his public speeches. Many other politicians, economists, and journalists made proposals for European Union, which circulated through the European capitals during the decade.¹⁰ Ultimately, however, all the projects came to naught. Half a century later, the idea of European integration was

⁶ Walter Mattli: *The logic of Regional Integration; Europe and Beyond*, (Cambridge University Press: 2000) at p. 1

⁷ Mattli, *The logic of Regional Integration* at p.1

⁸ See Paul de Leusse; "D'Union Douaniere Euroeenne" *Revue d'Economic Politique* 4C (1890), 393-401.

⁹ Alexandre Prez. "A propes de la situation Douaniere en Europe", *Revue d'Economic Politique* 5 (Feb; 1891) 121-139; see also his *Zur Meuesten Handelspolitik* (Vienna: Commisionslag V.G. Szelinski, 1895)

¹⁰ See, for example, Paul Leroy - Beaulieu. "De la Necessite de Preparer Une Federation Europeenne", *l'Economiuste Francois* 2(September 1898), 305-307; Gustave de Molinan, "A Zollverein in Central Europe," *Gunters Magazine* 12 (January 1897), 38-46

reinvented and the process of merging the European nations into a prosperous economy and stable policy began.¹¹

2.2.3 The character of regional integration

Regional arrangements are normally classified under two broad categories. First, those that have modest aims at integration and seek only either a preferential trading arrangement (PTA) – lower tariffs on imports from the partners than from the rest of the world. Or a free trade area, which involves zero tariffs among partners and positive, but not necessarily identical, tariffs with the rest of the world. Second, those that aim at ‘deep’ integration with either a custom union (CU) which imposes a common external tariff (CET) by partner countries. Or a Common Market as in the case of a single market that is to be established by the European Union with the so called four (4) freedoms that is to say movement of persons, goods, services, and capital.

Ultimately, however, whichever character a regional arrangement assumes, increased intra-regional trade ranks high among the priorities. With regard to the coverage, in the majority of agreements it was mainly the ‘first freedom’, which was exchanged, that is, for trade in goods, through complete abolition of tariffs, and also of quotas, after a certain transition period.¹² Regional economic integration can and, therefore, loosely be defined as a process of eliminating restrictions on international trade, payments and factor mobility.¹³ Economic integration thus results in the uniting of two or more national economies in regional trading arrangements. It is important, before, proceeding further, to distinguish and explain the features of the types of regional trading arrangements. The most prominent and increasingly resorted to regional arrangements are the customs union and the free trade areas. This work will examine the two in some detail - unlike the more restrictive common market and economic union.

{a) Common Market

This consists of a group of trading nations that permit

- ◆ the free movement of goods and services among member nations,

¹¹Matli, *The logic of Regional Integration*, supra at p. 2

¹² First within the European Community, (now the European Union), and subsequently in the treaty with EFTA on the European Economic Area, all four freedoms were agreed on those for goods, services, capital and people, although with some exceptions, especially for agriculture.

¹³ Matli defines regional integration as a process of providing common rules, regulations, and policies for a region. See Matli, *the logic of Regional Integration* supra, at p. 44

- ◆ the initiation of common external trade restriction against non members, and
- ◆ the free movement of factors of production across national borders within the economic bloc.

The common market thus represents a more complete stage of integration than a free trade area or a customs union.¹⁴

To explain the nature which regional integration regimes assumes, it is appropriate to review some of these features separately. The following sub-section will examine the characteristics of an economic union, a common market, a customs union and a free trade area. This design is deliberate in that it moves from the deepest form of integration to the more loose structure based on preferential treatment.

(b) *Economic Union*

Beyond a common market, economic integration could evolve to the stage of economic union, in which a national, social, taxation, and fiscal policies are harmonized and administered by a supranational entity.¹⁵

Belgium and Luxembourg formed an economic union during the 1920s. The task of creating an economic union is much more ambitious than that of achieving the other forms of integration. The reason for this lie in the fact that whilst a free trade area, custom union or common market results primarily from the abolition of existing trade barriers, an economic union calls for an agreement to transfer economic sovereignty to a supranational authority.¹⁶ The resultant degree of economic union would be the unification of national monetary policies and the acceptance of a common currency administered by a supranational monetary authority. The economic union would thus include the dimension of a monetary union.

Carbaugh says that the USA serves as an example of a monetary union. Fifty states are linked together in a complete monetary union with a common currency, implying

¹⁴The EU single market builds on the previous common market and most of the remaining barriers to trade on the former common market were removed paving the way for the single market. See, for example, the detailed discussion on the development of the EU integration at chapter three below.

¹⁵ Robert I Carbaugh: *International Economics* 7th ed. (South-Western College Publishing : 1998) at p. 270

¹⁶ *Ibid.*

completely fixed exchange rates among the 50 states.¹⁷ Also, the Federal Reserve serves as the single central bank for the nation. It issues currency denominations and conducts the nation's monetary policy. Trade is free among the states, and both labour and capital move freely in pursuit of maximum returns. The federal government conducts the nation's fiscal policy and deals in matters concerning retirement and health programs, national defense, international affairs and the like. State and local governments conduct other programs, such as police protection and education, so that states can keep their identity within the union.

(c) *Customs Union*

A customs union is an agreement among two or more trading partners to remove all tariff and non-tariff barriers to trade among them. In addition, however, each member nation imposes identical tariff restrictions against non-participants. The effect of a common external trade policy is to permit free trade restrictions imposed against outsiders to be equalized. A well-known example is Benelux¹⁸ formed in 1948. In effect, therefore, a customs union entails the formation of a single customs territory in place of two or more customs territories with the result that:

- ◆ duties and the restrictive regulations of commerce are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories; and
- ◆ substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade with outside countries.

A customs union is characterized by the adoption of a common external tariff toward non-members. The theory of the customs union has been said to be of recent origin.¹⁹ The pre-Vinerian literature on customs union has been found to be sparse in the twentieth century and that some of it suggests that before the publication of Viner's study, economists simply regarded customs unions as a step on the road to free trade.²⁰

¹⁷ Ibid.

¹⁸ This consists of Belgium, the Netherlands and Luxembourg

¹⁹ Robson, *The Economics of International Integration* supra p. 7.

²⁰ Ibid.

This is not to say that some of the more sophisticated ideas underlying current orthodoxy cannot be found in earlier writings. Since as many as sixteen customs unions were formed between 1818 and 1924, it would be surprising if this were not the case, for it is hardly to be imagined that the classical and neo-classical economists would have been wholly blind to their implications. O'Brian²¹ (1976), however, takes a more extreme position and has contended that the central feature of the Vinerian analysis of customs unions – namely, trade creation and trade diversion were a matter of essentially correct analysis by classical economist in the nineteenth century.

Classical economists certainly discussed at length the effects of preferential commercial treaties such as the Methuen Treaty of 1703²² and the Cobden (Anglo-French) Treaty of 1860. In their turn, Adam Smith (1776), Ricardo (1817) and McCulloch (1832) each attacked the Methuen Treaty, essentially on the grounds of its trade diverting effects.²³ The Cobden Treaty also generated lively debate on its trade effects, and trade diversion was an issue in that debate.

Moreover, when the German Zollverein, the most notable example of a customs union to be formed in the nineteenth century, was established in 1834, McCulloch²⁴ and others subjected its diversionary trade effects to a critical analysis. In a different analytical tradition, the German economists (1883) clearly viewed customs unions as protective devices for promoting infant industries, and in this way he can be said to have anticipated a stream of modern customs union theorizing initiated by Johnson (1965) and Cooper and Massell (1965). O'Brien²⁵ has sought to explain Vinerian position - by stating that all Viner did was to start from the position of the classical economists of Hawtrey and Lord Robbins. He explains that Viner then simply added to this logical possibility of some trade creation, depending on the relative height of the pre-union tariff and the common external tariff, and (or the possibility) that both countries in the union were producers of the goods in question.

²¹ Robson, *the Economics of International Integration* supra, at p. 8

²² Which admitted Portuguese wines into Great Britain on preferential terms in return for the removal of a prohibition on British woollen exports to Portugal

²³ Robson, *the Economics of International Integration* supra, at p.8

²⁴ Robson, *the Economics of International Integration* supra at p. 8

²⁵ Ibid.

Other economic commentators express the view that strictly speaking the Vinerian postulation may be true, but that the apparently simple addition embodying the concept of trade creation is crucial to the orthodox theory of customs union. This is so, they argue, owing to the fact that it is the sole source of benefit in that context. It is not clear that earlier economists appreciated its significance, as distinct from the idea of trade expansions. In any event, the discussions of customs unions by classical and neo-classical economists were largely incidental to their consideration of broader issues, and any theory was largely implicit.²⁶ Robson,²⁷ on the other hand surmises that it is fair to say that historians of economic thought like Machlup, 1977 have failed to disclose any adequate treatment of the allocation effects of customs unions in the literature prior to the studies of Viner.

(d) *Free Trade Areas*

A free-trade area is a group of two or more customs territories in which internal duties and other restrictive regulations to trade are eliminated on substantially all trade in products originating in such territories. However, each member keeps its own tariffs and other restrictions against non-partners and in consequence, continues to conduct its own trade policy.²⁸ In other words each member, however, maintains its own set of trade restrictions against outsiders. An example of this stage of integration is the North American Free Trade Agreement (NAFTA), consisting of Canada, Mexico and the USA. It has been argued that a free trade area would make the world better off in the short term if, roughly speaking, the amount of trade it creates exceeds the amount it diverts.²⁹

In principle, a free trade area eliminates barriers to trade at the border between the partner countries. Unlike customs unions, however, each country maintains its own restrictions against trade from third countries. As a result, free trade area partner countries receive preferential access to each other's market at the expense of non-members. To protect those preferences, such agreements usually set rules of origin³⁰ to prevent goods from non-members being transshipped through a partner free trade area country with low external trade barrier to another with higher barriers. The subsequent

²⁶ Robson, the Economics of International Integration supra at p. 9

²⁷ Ibid

²⁸ Dickson Yeboah: "Regional Integration and the GATT", 17 *World Competition* 1, September 1993, at p.38

²⁹ The controversial subjects of trade creation and trade diversion effects of regional integration would be gone into presently.

³⁰ See the note on the mechanics of the rules of origin below

chapters will argue, for instance, that the confluence between SADC and COMESA trade regimes runs counter to the spirit of a free trade area since transshipment between non-member states is impossible to put in check. Such agreements are more complicated to negotiate than a product or sector specific pact, but they can accommodate cross- sectoral linkages and thus expand the breadth and depth of potential liberalization.

Free trade areas are considered to be consistent with the WTO disciplines, when they meet the three-part test of *Article XXIV*³¹ relating to notification, trade coverage, and level of barriers to third country trade.³² These provisions require that free trade area obligations affect “substantially all” the merchandise trade between the partner countries.³³ Free trade areas can be self-contained or open to additional signatories. New members can be added either under the same terms of entry as the original partners or subject to negotiated protocols of accession.³⁴ Given the potential of dilution in the value of preferences received by the existing free trade area members upon introduction of new members, there are few examples of open-ended free trade areas. Most of the free trade areas, invariably make provision for new entrants to make additional concessions to compensate for such potential effects.³⁵

The post war period has been marked by numerous attempts to construct free trade agreements. Some have been notable successes such as the European Free Trade Association (EFTA) while many others have not worked. The idea for two or more developing countries being prepared to abolish all trade barriers among themselves and though, not wishing to construct a common tariff toward the rest of the world, originated with a proposal put forward by Lebanon at Geneva in 1947.³⁶

³¹ GATT *Article XXIV* is the enabling clause.

³² See, for example the discussion on this item below

³³For sectors such as services that have now incorporated into the WTO framework, the GATT test do not apply and free trade area coverage need not be comprehensive in this respect. *Article XXIV* of the GATT, See also Article V of the GATS

³⁴ Most free trade areas have provision for entry of new members - see for example the terms of free trade agreements in chapter three

³⁵ Indeed, to guard against such 'delusion' of benefits, the 1988 Trade Act forbids the extension of the free trade agreement benefits to additional countries without new congressional approval.

³⁶ EPCT/W/184-The symbol “EPCT” was used for documents in the second session of the Preparatory Committee at Geneva 1947). This was formerly discussed until it was resubmitted jointly by Lebanon and Syria at Havana. E/CONF.2 (and 3/A/3 (The symbol “E/CONF.2” was used for documents of the UN conference on Trade and Employment, Havana (1947-8).

At Havana, the proposal was referred to a sub committee, together with the Geneva draft customs union provisions. A wide range of proposals was also submitted by developing countries. These were for the right to exchange new preferences among neighbouring countries, among countries within an economic region, among countries having close historical or economic ties and in promoting economic development among other propositions.

As the principal consequence of the work of this particular sub-committee, the text was dramatically broadened to allow for the formation of “free-trade areas”. This, it was suggested, would involve the elimination of duties and restrictions on “substantially all the trade”³⁷ between the constituent territories or interim agreements “subject to the safeguard of “plan and schedule” and reasonable length of time” but not requiring a common external tariff or harmonization of foreign trade regulation. The new text as recommended by the sub-committee was approved without substantive debate.³⁸

Initially framed for developing countries, some delegates at Havana reasoned that this measure could be useful to developed countries as well.³⁹ Indeed the French representative credited with having thus developed and refined the Lebanon-Syria proposal, said it would be of great interest to Europe, which it turned out to be. The EU has, for instance, made full use of this facility to forge unique trade relations with developing countries - the most notable showcase of this pattern being the defunct Lome Convention.⁴⁰ Not many delegates envisioned these provisions being used, as they are today, for fostering closer commercial ties between developed and developing countries.

Haight muses that such a colonial-type pact belonged to the past.⁴¹ He adds that for a backward territory to give better treatment to imports of manufactures from one or more industrialized countries than to those from other possibly cheaper sources of supply was an arrangement sometimes imposed by colonial powers. He regards such ties as neo-

³⁷ As the discussion of this item in chapter four demonstrates, this particular yardstick is notoriously susceptible to abuse by states hell-bent on maintaining protectionist trade barrier regimes. Such regimes are thrown around the so-called 'sensitive sectors' of the economy. The EU for example has consistently crafted a way around this provision to hold onto the loathsome Common Agriculture Policy that maintains expensive subsidy regime that offends both the letter and spirit of the GATT law.

³⁸ E/CONF.2/C. 3 SR.44 and 47

³⁹Ibid.

⁴⁰ The Lome Convention has since been replaced by the Cotonou Agreement, which is in essence a transitional mechanism. See the discussion of the Cotonou at Chapter Seven

colonial arrangement and wonders how an independent developing country could enter voluntarily thereby limiting their freedom to protect their own industrial development. Attempts to bring about reciprocal free trade between sovereign states were not unknown, but it was a grave departure in policy to include provision for such arrangements in commercial treaty and to place them substantially on par with customs union.

Although there is some resemblance, in form, between the customs union and the free trade areas, there is less affinity in substance or purpose.⁴² The insertion of the free trade area provision was undoubtedly a sincere effort to allow measures, which would be helpful in the post war reconstruction of world trade without seriously detracting from fundamental rules in the multilateral trade system.⁴³

In the light of 25 years experience, however, a free trade area should be seen for what it is – a preferential arrangement that does not confer the rights and obligations available to a customs union or an economic union. It is important to note that the record of free trade areas among developed countries has been far better than among developing countries.⁴⁴ The early years of the Central American common market and the Andean Pact are, however, the sole examples of qualified successes and even these free trade areas later failed.⁴⁵

2:2:4 The impetus for regional integration

The question as to what fuels regional trade integration has been a subject of intense academic debate and correctly so.⁴⁶ The obviously fascinating issues highlighted in these debates are, however, largely beyond the scope and reach of this work. We will only confine our discussion to the main arteries that have directly been linked to a flood of regional integration regimes. In our case we consider that the simplest was in which to explain away the impetus underlying the shift from the once revered multilateral system to regionalism is through the historical development of this phenomenon. The conversion of the US from an ardent, nay fanatical multilateralist to a regionalism

⁴¹ F.A. Haight : (1972) *Customs Unions and Free-Trade Areas under GATT : A Reappraisal* 4JWTL.

⁴² See the discussion on these regimes above

⁴³ Ibid

⁴⁴ See chapter three for a detailed examination of north-north regional integration experience

⁴⁵ Some of the successful South American integration regimes are outlined at chapter three below

⁴⁶ See the discussion on 'Regionalism: a veritable vehicle to multilateralism below to gain an insight into some of these arguments

apologist and the attendant enthusiasm that has fueled the animated match to regionalism are all important matters that are clarified in the historical build-up to these events.

We will now briefly review these historical events so as to properly trace the roots of regionalism and hereafter be in a position to explain the motivation for the relentless clamour to go the regional integration way. Regional trading arrangements, be they vehicled through the customs unions, free trade areas or common markets or even interim arrangements, are pursued for a variety of reasons.⁴⁷ A motivation of virtually every regional trading arrangement has been the prospect of enhanced economic growth. It is hoped that an expanded regional market would allow economies of large-scale production, foster specialization and learning by doing, and attract foreign investment.⁴⁸

Commentators have offered a variety of reasons as to what gives impetus to the proliferation of regional blocs.⁴⁹ There is, however, general agreement that the defining movement for the move from multilateralism to regionalism was the abrupt change of policy by the US in favour of regionalism.⁵⁰ In spite of the multiplying number of countries adopting trade liberalization and the growing globalization of markets, the 1990s saw a shift of emphasis away from global trade negotiations towards regional groupings.⁵¹ The weakening of multilateralism, or at least the emergence of compelling modes of association, can be *prima facie* attributed to the metamorphosis of the United States.⁵²

From being a brazen one-track multilateralist adopting regionalism as a second timer strategy, American policy has indeed made a big U-turn.⁵³ This shift in the US policy has triggered recommendations for more free trade areas elsewhere.⁵⁴ Some commentators

⁴⁷ Ibid

⁴⁸ See for example the views espoused on regionalism and the external effects below

⁴⁹ See, for example, Jaime De Melo and Arvind Panagariya: *The New dimensions in regional integration*, (eds.)(Centre for Economic Policy Research, Cambridge University Press: 1995) at pp. 5-6, See also Schott (1989), *infra*, at p. 2

⁵⁰ Ibid

⁵¹ See the arguments advanced on regionalism and multilateralism below

⁵² Ibid

⁵³ It started with the negotiations for the US-Canada Free Trade Area (CUSFTA) and then the North American Free Trade Area (NAFTA) - see chapter three below for a discussion of NAFTA

⁵⁴ This point has been made often by EU officials and commentators alike; see for example, Giovanni and Mayer (1991: 1-2) and Geoffrey Fitchew (Director General AG XV: Financial Institutions and company law, commission of European Government studies, University of Edinburgh, 15 January 1988.

opine that it has created the breathing space that had often been lacking in multilateral talks.⁵⁵ It ought to be kept in mind that before this change of policy, regionalism and integration everywhere save for Europe were at best a dream in the face of the blinding military and economic opposition from the United States.⁵⁶

Again the transmutation of the US is, however, the last response to a chain of long-standing factors. Particularly significant to the gravitating forces of regionalism is that the present multilateral system has lost spirit. Pundits have pointed out that by and large, despite the successful ending of the Uruguay Round and the establishment of the WTO, the feeling has been that multilateralism is pedaling very slowly against the backdrop of very rapid changes.⁵⁷ In a nutshell, regionalism is being resorted to because the old multilateralism did not satisfy the expectations of many of its members.⁵⁸

For instance, the European Union has concentrated its energies in the creation of a single European market. For the EU members, the elimination of trade barriers within the EU seems to overshadow in importance the gains likely to be achieved in the WTO framework. This, in spite of the fact that there are specific linkages in specific areas between the common market incentive and the Uruguay Round negotiations. Meanwhile Japan focuses on ways to better manage its bilateral trading relationship's with the United States and with other countries in the Pacific Basin.⁵⁹

The US, the sponsor of the Uruguay Round, threatens to pursue bilateral or plurilateral trade pacts with 'like-minded countries' if it's objectives for the GATT talks are not met.⁶⁰ If indeed the recent Quebec summit of the Americas is anything to go by, then this threat seems to have taken root. In essence, the United States has been using

⁵⁵ Panagariya, et al - The New Dimension in regional integration Ibid

⁵⁶ The hegemonic influence of America in fueling regionalism in the world trading system is clearly understood given its prominent role as the promoter and guarantor of the staggering process of multilateralism. As a leader of multilateralism in the 1960s and 1970s, the US worked assiduously to resist any efforts at closer regional ties, particularly in Latin America and Asia, which were seen as potential challengers to American predominance.

⁵⁷ Panagariya et al, The New Dimension in regional integration supra, at p. 6

⁵⁸ The major trading nations appear to be distracted from the task at hand in the GATT talks in Geneva. Many countries have sought to complement the multilateral GATT process with a variety of bilateral and regional trade initiatives. Concern about the efficiency of the GATT process has led some countries to focus more on regional arrangements than on their participation in the multilateral negotiations.

⁵⁹ See the discussion on the trade frolics that Japan has been making in the Asian markets in Chapter Three below

⁶⁰ Schott JJ: More Free Trade Areas , infra

bilateralism as both a carrot and a stick to further the process of trade liberalization. Bilateralism has been used to close the leaks in the multilateral system until solutions could be negotiated in the GATT and to establish building blocks for broader multilateral accords that could be negotiated in the new round of GATT negotiations.

If the GATT talks falter, however, the United States has threatened to resort to bilateral agreements as a substitute rather than a complement to the GATT.⁶¹ Critics charge that the current US policy, based on the open trade principles of the GATT, has failed because US firms have faced stronger and stronger foreign competition at home and abroad, as evidenced by the string of record US trade deficits in the 1980s.⁶² These concerns have led to increasing calls – particularly in the Congress, the US labour movement, and the US business community – for a more aggressive trade policy involving both unilateral actions and bilateral negotiations, to try to “level the playing field” and remedy the persistent trade deficit.⁶³

The role of multinational enterprises with global, rather than national network in fueling regionalism and multilateralism cannot be under-estimated. The character of these multinationals has exposed the limitations of nationally based policies and increasingly confronts governments with the urgency to liberalize and characterize policies, standards and regulations with other countries, including but not limited to trade and trade related areas.

Over the years the GATT system has been eroded by excessive use of rights and disregard of obligations emerging from the set of rules originally agreed on. So far the GATT has been seriously weakened in dealing adequately with the changing patterns of world trade and retaining control of the policy tools resorted to by national governments or regional blocks in pursuit of their national objectives. Thus the multilateral trading system is viewed to be in jeopardy in the light of the creation of regional blocks – a move that seems to be brought about by the following reasons.

⁶¹ Schott JJ: More Free Trade Areas, (Institute for International Economics, Washington, DC May , 1989) at p. 2

⁶² See for example Schott JJ: More Free Trade Areas, Ibid.

⁶³ Schott JJ: More Free Trade Areas, Ibid.

Due to concerns about the efficiency of GATT rules and procedures⁶⁴, the founding of regional units has been promoted as a complement, if not a substitute, for multilateralism. It is in this context that numerous changes have been introduced against exceptions to agreed rules.⁶⁵ Most of these changes, it has been alleged, run counter to the spirit if not the letter of the GATT treaty. Second, the increased weight of the EU, as the core unit of the EEA on the one hand, and Japan on the other, have brought about the relative decline in the role of the US exports on a world wide scale. This restructuring among the main actors in world trade may have an impact on the kind of trading system that evolves.

An excessively long period of multilateral talks in the Uruguay round has only brought limited results. The thrust of protectionism has not been curtailed, and the erosion in multilateral trade disciplines will probably continue. This state of affairs is encouraging unilateral actions for survival and hence the replication of regional integration trade blocs.

The completion of the single European market (SEM) and the signing of the NAFTA have given support to the positive connotation of regional trading blocs and negative gesture to the multilateral forces. Consideration of national arrangements in East Asia and the Pacific has been vigorously promoted. This campaign is adding to the concerns of third countries and causing them also to propose new or seek membership in the existing regional integration agreements. Ironically, however, and as pointed out earlier, third countries, in particular, have a crucial stake in the multilateral system.

Harmonization and liberalization in response to the challenges posed by globalization is in some instances being conducted in the context of regional arrangements. Finally, one other reason for regionalism can be glimpsed from *Article XXIV* of the GATT, which provides as follows: -

“The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economics of the

⁶⁴ Complexity of talks, cumbersome decision-making process, consensus rule, tardy implementation, soft enforcement measures among others. Schott JJ: *More Free Trade Areas*, supra at p. 2

⁶⁵ Some of these changes are; Multi-Fiber Arrangements (MFA), the sequences of language with respect to regulations affecting sensitive items (agriculture, subsidies), and the inventiveness with regard to ‘new instruments’ and their proliferation voluntary export restraints (VER).

government were unable to agree on who was to produce what. The very same conditional dilemma doomed industrial development projects within the Association of Southeast Asian Nations (ASEAN)⁷¹.

Examples, too, abound of how an absence of market pressure for integration leads to failure. For instance, members of ASEAN export the bulk of their primary commodities and manufactured goods to the same world markets. Most of their economies are not complementary. Excluding Singapore, intra-ASEAN exports have amounted to only 5 percent of total ASEAN trade since the late 1960s.⁷²

Similarly, members of the Andean Pact send most of their exports, consisting primarily of agriculture and mineral products, to the United States and Europe. The share of intra-regional trade in total trade of Andean countries amounted to only 1.2 percent in 1970 and to 2.5 percent in 1988.⁷³ Indeed, the major success stories all satisfy the two strong conditions espoused by Mattli. They include the European union and the Zollverein; their respective leaders being Germany and Prussia. NAFTA, led by the United States, stands a good chance of succeeding as well. It has been suggested that integration schemes that satisfy these conditions stand a good chance of survival.⁷⁴

SACU is one excellent example where South Africa has been on hand to bankroll and offer leadership to the fledging union.⁷⁵ Compared to the EU, however, South Africa's intervention has not been developmentally speaking that much rewarding. This is partly due to similar social-economic pressures weighing heavily on South Africa's fiscal budget. For the EU, Germany played the leading role and apart from supplying the much-needed strong leadership to the union, it swiftly and relentlessly moved in to allay distributional pressures that plagued the union from time to time. At the polar end are very many integration prospects, most of which are examples of what Mattli⁷⁶ calls "second integrative response." He points out that in this group, none that failed to satisfy the two strong prerequisites of integration process has ever succeeded.

⁷⁰ See chapter three

⁷¹ See Chapter three

⁷² See the discussion on these regimes at chapter three below

⁷³ See chapter three below; indeed, as shown in the following chapters, this situation is reflected in many cases

⁷⁴ See the following empirical discussion on the experiences of various leading regional arrangements duly notified under the GATT system.

⁷⁵ See Chapter Six for the detailed treatment of this trade regime

No doubt, the point about strong leadership and demand for integration as prerequisites to a successful integration initiative cannot be gainsaid. One has to look at the numerous challenges that integration regimes in the east and southern Africa region have to grapple with to applaud this crystal reality.

2.3 Regionalism: a veritable vehicle to multilateralism

The crisp question here is whether; indeed, regional trading arrangements are building or stumbling blocks to a multilateral trading system? This question becomes important in view of the pre-eminent perception that the world trading system is geared and aspires to the goal of contracting into a global market place. The hope and desire of all trading nations is to see a shrinking world market devoid of trade barriers and open to all and sundry.⁷⁷ Are these concerns really justified?

Under regional trading arrangements, nations scale down trade barriers only for a selective small group of partner nations thus discriminating against the rest of the world. Yet under the WTO framework, trade liberalization by any one nation is extended to all WTO member states on an unconditional MFN basis. In the latter framework, there is essentially no discrimination. The recent proliferation of regional integration arrangements and proposals, and the difficulty of concluding the Uruguay Round, has fuelled fears that international trade is becoming more of a regional affair in ways that will diminish global welfare.⁷⁸

Intense debate has been generated between those who take the view that there is a constructive and creative tension between regional economic integration efforts and the multilateral liberalization and those who opt for the opposite view. The latter take the view that regional integration efforts can be corrosive and even cancerous to the multilateral trading system.⁷⁹ The other school of thought thinks otherwise.

⁷⁶Mattli, *The Logic of Regional Integration*, supra, at p. 65

⁷⁷ Traditionally, economists have expressed concerns that increasing the emphasis on regional integration might detract from the realization of the trade imperatives of a global village, which is the stated destination for the multilateral talks. Trade liberalization under a regional trading arrangement is very different from the multilateral liberalization embodied in the World Trade Organization (WTO).

⁷⁸This fact is underscored by Lorenz who describes the regionalism approach as the outcome of 'a natural' location phenomenon leading to closer economic ties while multilateralism is seen as the creation of preferential trading arrangements. See Lorenz D (1993): 'Europe and East Asia Economics, Vol. 26, No. 1, Hamburg: Weltarchiv

In general, regional trading blocs that decrease the discretion of member nations to pursue trade liberalization with outsiders are more likely to become stumbling blocks to multilateralism. For, instance, members of a customs union or common market are unable either to negotiate tariff reductions with non-members individually or to reduce external tariffs unilaterally⁸⁰. Moreover, as a regional trade block expands, its bargaining power in international negotiations and its market power in global commerce grow, especially if it imposes a common external tariff (CET). The trade bloc may thus consider it beneficial to increase barriers to outsiders thereby raising a stumbling block to multilateral trade liberalization.⁸¹

Two other factors suggest that members of a regional trading arrangement may not be greatly interested in global liberalization. First, trade blocs members may not realize additional economies of scale from global trade liberalization, which often provides only modest opening to foreign markets. Regional trade blocs that often provide more extensive trade liberalization may allow domestic forms sufficient production run to exhaust scale economies.⁸²

Second, trade bloc members may want to invest their time and energy in establishing strong regional linkages rather than invest them in global negotiations. That was true for the European Union in the 1980s when it wanted to complete the common market stage of integration and considered the Uruguay Round of multilateral trade negotiations to be of secondary importance.⁸³

Proponents of regional trading arrangements maintain that blocs of nations with many similar interests are more likely to liberalize trade dramatically than large, heterogeneous groups of nations involved in multi lateral negotiations at the World Trade Organization (WTO).⁸⁴ That may be true. One should keep in mind, however, that regional trade arrangements might be beneficial or harmful to their members as well as to outside

⁷⁹ See for example Lloyd, *supra*, at p.29

⁸⁰ This accepts South Africa, which reduced tariffs with the EU without formal approval by the other SAU members.

⁸¹ Carbough, *International Economics*, *supra*, at p. 301

⁸² Dissatisfied with the looseness in Adam Smith's theory, it was David Ricardo (1772-1823), who, however, developed a principle to show that mutually beneficial trade can and do occur even when one nation is absolutely more efficient in the production of all goods. David Ricardo, *The principles of Political Economy and Taxation* (London: Cambridge University Press, 1966) Chap. 7

⁸³ Robson, *The Economics of International Integration*, *supra*, chapter four

⁸⁴ Check

nations. Ultimately, it all depends on the welfare gains derived by a state from such trade regimes. A regional trading arrangement is unlikely to be beneficial unless it has significant trade-creating effects.

The case in point here is integration regimes in eastern and southern Africa region that are the focal area of this work. As we shall demonstrate in the subsequent chapters, despite the proliferation of trade regimes in this region, there is very little intra-regional trade generated thereby. Due to the colonial legacy that has structured the production factors in these nations to favour exports mainly to Europe, not much structural changes have taken place to reconfigure these structures to spur intra-regional trade.

Carbaugh⁸⁵ argues, and forcefully so, that when structured according to principles of openness and inclusiveness, regional blocks can be building blocks rather than stumbling blocks for global free trade and investments. There are, he continues, several ways in which regional blocs can foster the opening of global markets. In the first instance, regional agreements may achieve deeper economic integration among members than do multilateral accords because of greater commonality of interest and simpler negotiating processes. This position is, of course very much debatable.

Second, a self – reinforcing process is set in place by the establishment of a free trade area as the market encompassed by a free-trade area enlarges. It becomes increasingly attractive for members to join to receive the same trade preferences as member nations. Third, regional liberalization encourages partial adjustment of workers out of import-competing industries in which the nations comparative advantage is weak and into exporting industries in which it's comparative advantage is strong. As adjustment proceeds, so goes the argument, the portion of the labour force that benefits from liberalized trade rises, and the portion that loses falls: this promotes political support for trade liberalization in a self-reinforcing process.

For all of these reasons, when regional arrangements are formed, according to principles of openness, they tend to overlap and expand, thus promoting global free trade from the bottom up. Some innovative commentators have drawn up the map to multilateralism

⁸⁵ Carbaugh, *International Economics*, supra, at p.269

via the regional integration route.⁸⁶ It has been suggested that if America's regionalism is not to turn into piecemeal, world trading system – fragmenting force, it is necessary to give it a programmatic world trade system unifying format and agenda.⁸⁷ One possibility, it is suggested, is to encourage, not discourage, Japan to line up the Asian countries into an Asia Free Trade Area (AFTA), with the US bringing up the South Americans into the NAFTA, on a schedule, say of 10 years. Then Japan and the United States, the two 'hubs' would meet and coalesce into a larger free trade area at that point⁸⁸.

Finally, so goes the theory, the enlarged US-Japan economic bloc would negotiate with the European Union and its associate countries to achieve the ultimate objective of a multilateral free trade for all in Geneva.⁸⁹ It is suggested further that only such 'programmatic' regionalism, in one of several possible variants, would ensure that the United States' newly found regional momentum is not perceived by Asia to be hostile and fragmenting.⁹⁰ No doubt such an initiative would make regionalism less harmful to the Multilateral Trade Negotiations (MTN) and the GATT and more supportive of the cause of multilateral free trade for all.

2.4 Regionalism and the external effects

Historically, the most important is relative loss of market access. Countries outside an integrated group may face temporary or lasting discriminatory trade policies. Even in the absence of a high common external tariff (CET), discrimination may become lasting because rules of origin associated with a free trade area can give protected firms a vested interest in maintaining protection. As a result this would reduce the ability of members of a free trade area to engage in external trade liberalization. However, there is a simple argument why the negative effects of discrimination may be temporary. If trade liberalization within a group has dynamic effects enhancing economic growth, or if scale economies stimulate the demand for imports from outside the region. The sum total of

⁸⁶Schott JJ: More Free Trade Areas, *supra*, pp.49-54

⁸⁷Ibid.

⁸⁸ This would require discarding the extreme Japanophobia that characterizes the so called 'revisionist' who are really 'regionalist' twice over: they simple-minded regressions to condemn Japan for its closed markets (e.g. that Japan's manufacturers import share is stagnant and or low compared to other and they also wish to return the US to the Japan basking of the pre war period that had given way to sense and sensitivity in the post war years – see Schott JJ *infra*

⁸⁹Schott JJ: More Free Trade Areas, *supra*, at pp.34-39

⁹⁰ Ibid.

this eventuality is that income effects in liberalization may more than offset trade diversion, thus helping outsiders to raise their welfare.⁹¹

Another effect is investment diversion. Its importance has grown with the liberalization of capital markets. Rapid economic growth in a union may increase the share of international investments directed to union members at the expense of outsiders. Furthermore, improved competitiveness of the industries in a union could lead to increased production and lower prices, thus putting at a competitive disadvantage products outside the union that do not experience comparable productivity gains and resulting in a reduction of external trade within the union.⁹² The EU, upon integration pursued an aggressive Common Agriculture Policy (CAP) that later came to haunt it in the form of surplus production. The incidence of surplus production has given way to lower prices forcing the EU to opt for an expensive subsidy regime to protect its farmers. This regime is a heavy drain on the EU's taxpayer.⁹³

Again, whenever a partner country contracts a bilateral new free trade area, this would undercut the value of concessions obtained by partner countries in previous free trade area because the preferences in the partner market will have to be shared, and thus diluted, by the new free trade area partner. For instance, Canadians were concerned when the USA proposed to contract a free trade area with Mexico. To safeguard its interests, Canada opted to join NAFTA. Canada does have the right under the US-Canada free trade agreement- to consult with the US if such a pact adversely affected Canadian trade interests, but Canada's recourse is unclear except to initiate a bilateral dispute procedure.

Alternatively, or concurrently, Canada could negotiate new pacts with third countries that trade in both markets, as is now being considered between Canada and Australia-New Zealand.⁹⁴ The same should be said of the EU-SA partnership, which has adversely affected the economies of other Southern Africa Customs Union (SACU).⁹⁵ The EU-SA free trade partnership has effectively imposed a *de-facto* membership unto other SACU states.⁹⁶

⁹¹ Lawrence Roberts, *Regionalism, Multilateralism and Deeper Integration*, (Washington: Brookings Institution, 1996) at p.26

⁹² Mattli, *The Logic of Integration* supra, at pp.46-50

⁹³ See chapter three for a detailed discussion on the CAP policy instrument

⁹⁴ Holmes et al 1988.

⁹⁵ SACU's Common Market is discussed at chapter six

⁹⁶ See chapter five for the discussion of this complicated trade relations

Regional trade pacts could also generate trade frictions when perceived that the new partner got a better deal than the other did in the regional arrangement. Such problem has already occurred with Israel, which deems the provisions on trade in services and on dispute settlement in the Canada –US free trade agreement to be much more desirable than the benefits accorded in its free trade area with the United States. The ACP states⁹⁷ are wary about the commutative effects of the EU-SA free trade partnership and for a good measure.⁹⁸

Scholt suggests that one solution to this problem would be to negotiate an open-ended regional arrangement, that is, an arrangement whose rights and obligations could be extended to any country willing to pay a common entry price.⁹⁹ He adds that the US congress has not favoured such an approach because of the uncertainty about which countries would join and thus what the anticipated adjustment pressures and trade effects would be. In fact, under US law only self-contained free trade agreements may qualify for “fast-track” implementing provisions. It is instructive that when South Africa applied for membership to the Lome Convention, this application was turned down. South Africa was instead allowed an amorphous status of a qualified membership. Opposition came especially from developing countries, which feared that South Africa, given its advanced level of economic structures would wipe out their benefits under the Lome Convention.¹⁰⁰

Finally, to the extent that integration requires a dominant state to assume the role of paymaster¹⁰¹ dispensing funds to ease distributional frictions within the union¹⁰², fewer funds may flow to needy outsider states. In other words, integration could have the effect of aid diversion. As the value of integration outgrows its price, rational outsiders will seek to become insiders. In the early eighties the EU was composed of only nine states. Owing to its meteoric growth, it has spread its empire to the rest of Europe. There is a long list of applicants seeking membership with the EU predominantly from the former Soviet domain of Eastern Europe.

⁹⁷ The new agreement signed between the EU and the ACP countries is the Cotonou – see Chapter Seven

⁹⁸ See chapter seven for the detailed treatment of this issue

⁹⁹ Schott JJ: More Free Trade Areas supra, at p.25

¹⁰⁰ See the full discussion at Chapter Seven on the South African membership

¹⁰¹ See also chapter three on the role played by Germany in the EU integration

¹⁰² A detailed account of this feature is given at chapter three on the EU's integration experience

One of the main arguments advanced in chapter eight to explain the overlapping membership of the east and southern Africa states in COMESA and SADC is the scramble for the donor pegs these regimes attract. The lure of free project money drives states in the east and southern Africa region to stamp their presence in both organizations with a hope tap on the benefits of project aid that accrue to either of these regimes.

It is trite that regional integration process is like a bush-fire. It sets a chain reaction that is often times difficult to predict wither way the shape will assume. It would, therefore, be a gross case of over-simplification to attempt to confine integration effects to a specific regional bloc. The truth of the matter is that the impact resulting from the creation of one regional bloc reverberates across the trade regimes' borders.

2.5 Regionalism and developing countries

It has been said that in view of the importance of the multilateral system for developing countries, it is not clear why they are scrambling for preferential and reciprocal trading arrangements among themselves and with the predatory inclined developed countries. It would appear that developing countries see important elements of economic and political co-operation in regional trade arrangements. Regional trade arrangements, for example cover broad areas like foreign direct investment hitherto not provided for under the WTO framework. Secondly, for developing countries that have already liberalized trade substantially on a unilateral basis, regional trade arrangements might serve to 'lock-in' liberalization and protect them from domestic protectionist pressures at home.¹⁰³ Mexico and the NAFTA are the case in point here.¹⁰⁴

Thirdly, developing countries might enter these arrangements defensively to hedge against the risk of rising protectionism in industrial countries. That is why, in this context, the reciprocity of trade preferences is most puzzling. Industrial countries with which developing countries might wish to enter into preferential trade arrangements in most cases account for a major share of the latter's trade. This implies that a free trade area – that is comprehensive¹⁰⁵ would be tantamount, from the developing country point

¹⁰³ Or as Schott figuratively put it, "free trade areas are seen as a way to goad other countries to the negotiating table in Geneva and to 'keep their feet to the fire' during the GATT negotiations". See Schott JJ: *More Free Trade Areas*, supra, at p.12

¹⁰⁴ Of course, this objective can also be achieved by "binding" such liberalization in the GATT

¹⁰⁵ as required by *Article XXIV* of GATT

of view, too broadly based unilateral liberalization. In these circumstances, there would seem no reason for a developing country to circumscribe its reciprocal concessions by making them available only to the industrial partner in the free trade area rather than extending them on a most-favoured nation basis.¹⁰⁶

There are political undercurrents that explain regionalism as well. Governments are, therefore, pursuing regionalism for different reasons, which of course, differ in substance depending on the position of their economic structures as measured to the global economy. In South Africa, for instance, regional integration is seen as a strategy to redress the gross imbalances within the region, but also between the region and the rest of the world. Some commentators hold the view that southern African governments in general are hoping to create an interim 'breathing space' within which to develop and diversify their economies.¹⁰⁷

Regional integration dynamics in the Asian markets are driven by a desire to counter the dominance of Japan in this region. South East Asian governments have formed a pragmatic grouping, the Association of Southeast Asian Nations (ASEAN) in response to actual or potential domination of the region by industrialized countries such as Japan and Japanese multilateral enterprises. In North America, the Mexican government has actively pursued membership of the NAFTA to benefit from potential dynamic effects such as 'lock-in' its economic policy reforms and thus attracting more investment into Mexico.

Keet is of the view that globalization is not a superhuman process created by abstract and unchangeable market forces, or by intangible and uncontrollable technological forces.¹⁰⁸ Regionalism is therefore practiced differently throughout the developing world and arises from 'policy-makers' assessment of the needs and interests of individual countries. It also stems from groups of countries such as those in southern Africa, which have mostly drawn on the short end of economic globalization.

¹⁰⁶ Dickson Yeboah Regional Integration and the GATT supra at p 43, this discussion is captured in detail at chapter four below

¹⁰⁷ Dot Keet, Globalization and Regionalism: Contradictory Tendencies, Counteractive Tactics, or Strategic Possibilities? FGD Occasional Paper No. 18, Braamfontein 2017, South Africa, April 1999, at p.2

¹⁰⁸ Ibid.

A more curious view that Keet espouses goes that the emerging global system is a societal construct, driven and shaped by national, international and transnational processes. These processes, she argues, are economic, technocratic and political. As such, the new global order, as manifested in regionalism, is characterized in the economic sphere, by unrelenting competition between enterprises, utilizing diverse economic and political strategies and not only 'market place' struggles for pre-eminence. Keet contends that in the political sphere, intensive pressures, and lobbying and financial aid to governments by powerful corporations characterizes it. To our mind, Keet's observation is solid reality in the momentum of regionalism.

True, the global system is also characterized by the determined defense of business interests usually in the name of national economic interests by governmental representatives. This is increasingly being carried out, although not solely, through the active championing of their national, sectoral, or corporate advantage in intergovernmental negotiations and multilateral institutions. This is why, Keet concludes that such institutions are sites of complex tactical maneuvers, alliances and continuous political battles, both overt and covert.¹⁰⁹

The seminal views expressed by Keet find confirmation in the fact that the dynamics driving the new wave of integration among developing countries. This new wave that began in the 80s, is taking place in the context of the widespread adoption of trade liberalization initiatives as these countries move to outward-looking and competitive oriented trade policies. That context, together with a better understanding of the sources of benefit and of the operational issues of integration, suggests that the schemes of the new wave have the potential to perform far better than the earlier ones.

The question whether developing countries achieve their economic potential through regionalism is a hard school altogether. It is, however, safe to state that success of regionalism in the developing world would depend, to a considerable extent on the ability of the new initiatives to implement policy-deepening measures in regional integration. Such measures would ultimately contribute to cost reduction and investment creation in these markets. This is the area where the thrust of this work truly resides. The

¹⁰⁹ Keet *Globalization and Regionalism*, supra at pp.6-7

subsequent chapters will explore the implication of the confluence of integration regimes in east and southern Africa in the context of the quest to deepen trade integration.

The process of deepening integration in the main seeks to achieve enhanced economic welfare for the participating countries. The begging question is, however, whether indeed such initiatives operate within the parameters set by the WTO framework. In a nutshell, how will regional regimes in east and southern Africa strike a balance between deepening integration and ensuring fidelity to the WTO disciplines? The welfare creating effects of regional integration has been questioned on a large scale. Some argue that economic welfare benefits spurned by regional integration - particularly for developing countries are dismal hence not worth the effort.¹¹⁰ The following section reviews these searching issues.

2.6 Regionalism and the quest for economic welfare

One of the most powerful arguments advanced against regionalism is that it creates isolationist clubs of closed economies. In the first place, a union may simply have no interest in accepting new members. If an outsider is not a desirable candidate in the sense of being able to make a net positive contribution to the Union¹¹¹, the union is unlikely to accept it, unless, of course, exclusion of such a candidate is costlier to the Union than accepting it.¹¹²

Secondly, the price of membership of the EU, for example, requires that an applicant be willing and able to accept the so-called *acquis communautaire*.¹¹³ Membership of the LAFTA is similarly costly. A Latin American applicant must accept what John Williamson dubs the “Washington consensus”, which includes reducing fiscal deficits, shifting expenditure priorities, tax reforms, interest – rate reform, exchange rate

¹¹⁰ See the discussion on the quest for economic welfare below

¹¹¹ Such as through net payments into the common budgets, or by offering obvious commercial advantages)

¹¹² Richard Baldwin, “ A Domino Theory of Regionalism”, Working Paper no. 4465 (Cambridge, mass: NBR, 1993)

¹¹³ Mattli, explains that this is a body of rules that comprise not only union law as enshrined in the Treaty of Rome, but also a very extensive body of secondary laws as defined in the European Union Directives and Regulations, see Mattli The Logic of Integration, supra, at p. 63

adjustment, liberalization of rules governing foreign direct investment, privatization, deregulation, and protection of property rights.¹¹⁴

Or consider the nineteenth-century example where Russia required prospective members of the Zollverein to adapt Russian customs law, tariffs and auditing procedures. In some cases Russia – even demanded that a newcomer agree to restrict its participation in future changes of the common legislation as well as in negotiations of Commercial treaties between the Zollverein and neighbouring states.¹¹⁵ Historically, therefore, both rejection by a union and prohibitive membership price have led outsiders to experiment with their own regional schemes. Remarkably, however, the overwhelming majority of these schemes have failed.¹¹⁶

The negotiation of more free trade areas would also have important implications for non-participating “third countries”. Many third countries are likely to be debt-ridden and/or developing countries that would be less able to take advantage of the trade-creating effects of the free trade areas. As the weaker members of the GATT system, they would stand to lose the most from erosion in the discipline of the multilateral system.

In principle, these countries would continue to receive benefits under the GATT, but the value of the MFN concessions as well as applicable preferences under the GSP, would diminish as more countries receive discriminatory preferences under the free trade area or the customs union. Mattli is of the view that such affected outsiders can pursue two integration strategies.¹¹⁷ First, they can seek to merge with the area generating the external effects. Second, outsiders can respond by creating their own regional group.

Indeed, like we pointed out earlier, the establishment of the EC triggered numerous integration projects, most notably the European Free Trade Association (EFTA) and the Latin American Free Trade Association (LAFTA). Likewise, efforts to keep integration

¹¹⁴ See John Williamson (ed.) *Latin American Adjustment. How much has happened?* (Washington: Institute for International Economics), p7; quoted in Stephan Haggard, *Developing Nations and the Politics of Global Integration* (Washington, D.C. Kings Institute 1995) p.79.

¹¹⁵ Mattli *The Logic of Integration*, supra at p.63.

¹¹⁶ Accordingly to Mattli, this result can be explained in all cases by the absence of the two strong integration conditions which he has espoused. These are undisputed leadership and strong market pressure for integration, see Mattli, *ibid*

¹¹⁷ *Ibid*.

through the single European Act raised fears of a “Fortress Europe”, triggering, in the process, a veritable tidal wave of integration projects throughout the world in the late 1980s.

The proliferation of regional arrangements does, again, create the problem with regard to the sequencing of trade concessions and the elaboration of rules of origin. In other words, how would the rights and obligations of subsequent free trade areas affect the provisions of existing agreements?¹¹⁸ And how would one deal with the transshipment of goods through free trade area partners to determine which goods are eligible for the free trade area preferences, especially when these preferences differ among the various partners? The east and southern Africa states' overlapping membership in both SADC and COMESA discussed in chapter eight brings shades more light on this problem. Given that the two blocs draw membership from one pool of states in the region, it becomes almost impossible to check the problem of transshipment of goods from one regime to the other.

Mattli argues that the failure to insure transactions against the vagaries of foreign market exposure can stifle growth in many ways.¹¹⁹ For example, technological change may involve new production techniques that make products cheaper to produce. Holding constant the product valuation by marginal buyer and the delivery cost per unit distance, cheaper goods will cover larger markets. Mattli argues further that an inadequately integrated governance structure will deter firms from expanding production to the full potential of new production methods.¹²⁰ In other words, the new production technology will not be able to operate to capacity. This may even deter the adoption of new techniques and result in the deterioration of economic conditions as compared to integrated countries.¹²¹

¹¹⁸ This item forms the gem of this work,. It features prominently in the subsequent analysis of the sub-Saharan regional arrangements.

¹¹⁹ He adds that the costs of these externalities increases as new technologies raise the potential for gain from market exchange, thus increasing the pay-off to regional rules, regulations and policies Supra, at pp. 44-58

¹²⁰ See, for example, Joel Mokyr, *The lever of Riches: Technological Creativity and Economic Progress* (New York: Oxford University Press, 1990), at p. 245

¹²¹ For excellent discussion of the relationship between the size of a country, new technologies, and economic growth, see essays by Simon Kuznets and Tiberschitovski in E.A.G. Robinson (ed) *Economic consequences of the size of relations* (London Macmillan, 1960).

In Mattli's view the ensuing growth gap may widen for two reasons. First, firms in competitive industries will leave inhospitable jurisdictions and settle where the institutional environment is most conducive to profitable trade and investment. For such firms to exit is not just an option but is a question of survival. Exit of capital, entrepreneurship, and tax base will naturally depress economic growth.¹²²

Secondly, foreign investors deciding whether to operate in the large and well-integrated market of a community or the functionally insufficiently integrated economy of a non-community country are likely to opt for the former, *ceteris paribus*. Mattli¹²³ is of the view that such capital inflows strengthen the competition – enhancing effects of market integration and thus help economic growth. Indeed robust growth, in turn may attract further capital investment, thereby accelerating growth.

Regional and multilateral negotiations are time-consuming and skill-intensive. They both compete for the scarce – and often the same human and administrative resources. The obvious concern is that the current proliferation of regional trading arrangements that have high priority in governments agendas may be diverting these scarce resources away from multilateral negotiations, precisely when concentrated negotiating energy and political commitment are required to complete the Uruguay Round successfully. Moreover, an excessive number of preferential trading arrangements would lead to significant frictions, political pressures and practical problems. Each new arrangement would inevitably undermine the value of the preferential access and lead to increased tension.

Chapter five would demonstrate that the EU-SA free trade partnership has taken its toll on the already strained human resource capacity in the latter's nascent democratic institutions. Whilst the more battle hardened EU negotiation machinery was up to the task, their South African counterpart had to contend with novel trade negotiation challenges that were simply mind-boggling. Equally, SADC and COMESA states are involved in numerous regional, bilateral and multilateral trade talks. It is in fact due to concerns about trade negotiation capacity that under the Cotonou instrument, provision

¹²² Mattli *The Logic of Integration*, supra, at p. 58

¹²³ *Supra*, at p. 59

is made for donor assistance to ACP countries to address the perennial problem of capacity building.¹²⁴

The trade diversion effects of regional arrangements may also lead non-participants to retaliate with preferential arrangements of their own, possibly triggering a damaging chain reaction. A proliferation of preferential trading arrangements would give rise to a host of technical problems including mismatches in the phasing of tariffs reductions under overlapping arrangements. There would also be inconsistency of rulings under different dispute settlement mechanisms and confusion and conflicts in implementing and enforcing different rules of origin under separate free trade areas.¹²⁵

Theoretically, rationalization could have adverse spill over effects since it may induce “subsidies” who bear the brunt of trade diversion to retaliate by seeking preferential trade arrangements among themselves so as to offset their loss of markets and strengthen their bargaining power. This process of competitive rationalization may undermine the multilateral trade regimes similar to those that prevailed in the 1930s. In reality, however, the bargaining power of the affected countries outside the emerging groupings is quite limited.¹²⁶

Free Trade Areas are by definition discriminatory. They affect the multilateral system in a number of ways. One concern is that they could lead to retaliatory actions or even to trade wars. Larger countries (or economies) or blocs could start off trade wars at the expense of small countries. Another aspect is the possible spread of preferences to third countries. Schultz¹²⁷ warns that these systematic effects may be the most serious consequence of the spread of regional arrangements. As a consequence, one would have to resist them on the argument that regional negotiations will lead to a weaker set of multilateral trade institutions and will produce exclusive and inefficient solutions¹²⁸

¹²⁴ See chapter five and seven for a detailed treatment of this item

¹²⁵ All these issues are identified and discussed in the analytical part of this work starting at Chapter Five

¹²⁶ For a good review of the theoretical and empirical literature on the growth effects of market integration, see Richard Baldwin and Anthony Venable, "Regional Economic Integration," in G. Grossman and K. Rogoff (eds.), *Handbook of International Economics 3* (New York: Elsevier, 1995), pp.1597-1644; See also Paolo Cecchini, *The European Challenge 1992 - The Benefits of a Single Market* (Aldershot, UK: Wildwood House, 1988); and Commission of the European Community, *The Impact and Effectiveness of the Single Market* (Luxembourg: Office for the Official Publication of the EC, 1996)

¹²⁷ Supra at p. 31

¹²⁸ This issue is captured in detail in the subsequent chapters reflecting on regional arrangements within the sub-Saharan Africa region.

2.7 A critique of regional integration theories

Robson¹²⁹ is of the view that, ultimately, international economic integration has to be viewed as a state or process for enabling its participants to achieve a variety of common goals more effectively by joint or integrated action than they could by unilateral measures. In this light, he notes that as Tinbergen's pioneering contribution emphasized, it is concerned with the problem of policy optimization in a broad sense within the integrated area. Robson adds that the contribution of international economic integration to the more effectual attainment of policy objectives can thus be appraised only in terms of a cost-benefit analysis. This, he says reflects the weight attached to all relevant dimensions of welfare and the terms on which they can be traded off against one another. The role of economic integration in that context in any case must be viewed in its proper dimensions.

The question of the static effects of preferential trade arrangements such as FTA's and CU's is quite simply, the question raised by Viner.¹³⁰ Would not such discriminatory arrangements be trade diverting rather than trade creating?¹³¹ It is important to raise this question because as Viner¹³² taught us, free trade areas and customs unions are two faced. They liberate trade (among members), but they also discriminate (against outsiders). The important issue, therefore, is which aspect of a free trade area or a customs union is dominant?¹³³ Or, to put it in an economist's language, is a particular free trade area or customs union trade diverting¹³⁴ or trade creating.¹³⁵

The first premise is that a regional arrangement is more likely to create trade and thus raise welfare. Given a country's volume of international trade the higher is the proportion of trade with the country's regional partners and the lower is this proportion with non-member countries.¹³⁶ The second premise is that countries sharing borders, or

¹²⁹ Robson *The Economics of International Integration*, supra, at p.6

¹³⁰ Discussed by Robson *The Economics of International Integration*, supra, at pp.39-49

¹³¹ Defined in Vinerian fashion, a trade-diverting free trade area can still improve member country welfare but will generally harm outside countries. This appears to be the intention of *Article XXIV's* injunction not to raise the average external tariff.

^{*} Krueger Robert (1990) *liberalization and consequences*; Ballinger Publishing Company, 1978.

¹³² Viner, J (1950) *The Customs Union issues*, New York: Carnegie Endowment for International Peace

¹³³ See a detailed discussion of this aspect by Bhagwati, J (1992): *Regionalism and Multilateralism: An Overview*, Columbia University Discussion Paper Series, No. 603; New York

¹³⁴ That is, taking trade away from efficient outside suppliers and giving it to inefficient member countries

¹³⁵ That is, generating trade from one more efficient member at the expense of another less efficient member?

¹³⁶ Robson *The Economics of International Integration*, supra at p. 8, supra

closer geographically to one another, have higher proportions of trade with one another than countries further apart.

It should, however, be noted that for specific regional arrangements, the actual welfare effects would depend, not merely on the trade and expenditure shares but also on the substitution at the margin between commodities.¹³⁷ Save, however, for isolated successful integration regimes like the EU all the foregoing premises have been proven wrong. This is more so in the east and southern Africa region where despite a sustained campaign to promote regional trade the volume of external trade far outstrips intra-regional trade.

Thus, for instance, the substitution between non-member goods and domestic goods may be very high, so that the costs of discrimination would tend to be high as well, *ceteris paribus*.¹³⁸ In short, it is important to guess at substitution elasticity. This would be among goods as well as trade shares, with and between members and non-members of custom union and free trade area, to arrive at a better picture of the likely affects of specific customs union and free trade area that may be proposed.¹³⁹

Compare, for instance, the trade throughout the 1960s between India and Pakistan with that between India and the United Kingdom or the then USSR. The trade volume for the former has been smaller than the latter. Borders can and do breed hostilities and undermine trade, just as alliances among distant countries with shared causes can promote trade.¹⁴⁰ Bhagwati¹⁴¹ puts it more succinctly when he posits that the flag follows trade; and trade equally follows the flag, which, at least in the 19th century European expansion was not directly across the European national borders. The best illustration of this postulation is the effects on regional trade on the onset of democratic rule in South Africa. We indicate in chapter five that South African trade with the region more than doubled after the 1994 democratic elections.

¹³⁷ See Bhagwati, (1992) on the analysis of converting preferential customs unions and free trade areas into (geographically) regional blocs, in J De Melo and A Panagariya: *New Dimensions in Regional integration*, supra, at pp. 34-35

¹³⁸ Bhagwati *New Dimensions in Regional integration* (1992) Ibid., at p 34

¹³⁹ Ibid.

¹⁴⁰ Gowa J and E. Mansified (1991) 'Allies, Adversaries, and International Trade', paper presented to the American Political Science Association Meetings, Washington, DC (mimeo)

¹⁴¹ Supra, at p.35

Bhagwati argues further that presumptions to confine custom unions and free trade areas to geographically proximate countries only are not defensible.¹⁴² This is to the realization, he adds, that both premises have unique problems. The former is, at best, a likelihood proposition that should not be opted to specific situations where the welfare impact depends initially on other variables as well, whereas the latter does not have a firm empirical or conceptual basis.

Bhagwati opines that the most damaging criticisms that one can make of such a presumption is that it concentrates, at best, on the static impact effect question and ignores the more important dynamic time–path question.¹⁴³ By prescribing that we must rule out ‘distant’ country unions, as between the US and Chile and Israel, we would make the custom unions and free trade areas more exclusive and less open to new members. This would be undercutting the objective of moving speedily towards the shared objective in multilateral free trade for all. That would be tragic indeed.

It has been said that regionalism is preferred because it is quick footed and that unlike the unwieldy negotiations at the GATT it offers an opportunity for more manageable discussions. Indeed regionalists have coined the GATT as the General Agreement to talk and talk. Bhagwati counters this criticism by explaining that, historically, at least, the first Regionalism failed whereas the GATT oversaw the effective dismantling of fewer tariffs.¹⁴⁴ This was in the Organization for Economic Cooperation and Development (OECD) countries and the enlargement of the descriptions over non-tariff barriers (NTB) at the Tokyo Round and beyond.

Bhagwati sites the experience of the EU to fault the regional protagonists who claim that regionalism is much faster. The European Union started almost four decades ago (1957) and is now into 2001.¹⁴⁵ The ‘transition’ has not, therefore, been instantaneous any more than negotiated reductions of trade barriers at the GATT Rounds. And this happens too, despite the enormous political support for a United Europe. Before, however, we are gone further into these intractable issues, it is a timely measure to catch a glimpse of the general disposition of the GATT edict on regional instruments. This is what the following section is all about.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Bhagwati *New Dimensions in Regional integration supra*, at pp.40-41

2.8 Concluding Remarks

The object of this chapter was to gain a broad insight into the advent, characteristics and general debates concerning regional economic integration processes. Giving clarity to and thereby understanding the fundamentals underpinning integration regimes would, no doubt, lay a good foundation upon which the forthcoming analytical work on these regimes could be built and fortified. This discussion has highlighted a number of features that are attributable to regional integration patterns. These features will replicate themselves in the forthcoming discussions on specific regional integration regimes in the global commerce and ultimately those straddling the eastern and southern Africa region.

We have in the main established that regional integration consists of regimes that involve the voluntary linking in the economic and political domains of two or more states to the extent that authority over key areas of national policy is vested in the competence of a supranational body. We have traced the roots of regional integration to the early nineteenth century. We have identified two broad categories of regional regimes - that is free trade areas and customs unions.

We have also established that the spirit of regionalism lies in the promotion of trade through liberalization and rapid dismantling of trade barriers. It has, however, been shown that there are other factors that have fueled the unending stampede to go the regional integration way. The discussion has, in particular, demonstrated that the main reasons for regionalism fever are twofold. The snail motion characterizing the multilateral process and the conversion of the US from an ardent multilateralist to an active participant in regionalisation are the main reasons behind the renewed integration processes.

The discussion has noted that in fact the regional integration processes, where well structured, would facilitate progress in the multilateral talks. In the same breadth, the discussion has demonstrated that the impact resulting from the creation of one regional bloc reverberates across the trade regimes' borders and multiplies its effects into the global realm.

¹⁴⁵Bhagwati New Dimensions in Regional integration supra at p. 41

This discussion has shown that regionalism, in spite of its many advantages is not a smooth running affair and that it has its own muted challenges to contend with. We have also noted that in spite of the clear conflict between the premier MFN rule with regional arrangements, the GATT allows the latter under specific conditionalities. We have, however, argued for more flexibility in the WTO framework to create space for more innovative arrangements between the north-south and south-south economic divide. By so doing, we have argued, the struggling developing economies would be fully integrated in the world trading system hence fulfill the WTO agenda.

We have also argued that one area that must be revisited is *Article XXIV* - the enabling provision for regional agreements. This discussion has shown that the vagueness of this provision is the root cause of chaos in the character assumed by the different integration regime vis-à-vis the WTO disciplines. This discussion has examined the difficult issue of economic welfare benefits that regional integration process brings forth. We have established that such welfare benefits are not easy to quantify and that only time would tell whether the new wave of regionalism has hit the free trade jackpot or is off the mark once again.

We had the occasion to examine the validity of the charge that creates isolationist clubs of closed economies. In this regard we noted that, in fact, regionalism has a great potential to spread preferences to third countries. This discussion has, nonetheless, demonstrated that whether the emergence of regional trading blocs leads to more or less effective global negotiations is an open question. Existing empirical evidence is limited with respect to coverage and thus inconclusive. With regard to the other key aspects of the regionalism - multilateralism debate, that is, the 'value' of regional blocs, it looks like they are a reasonable answer to the prevailing difficulties in the multilateralism trade talks.

Chapter Three: A Continental Review of Regional Integration Experience

3.1 Introduction

There are many regional arrangements notified to the World Trade Organisation (WTO). Some are alive and running whilst others have long lost the steam of functionality and yet others have for all intents and purposes fallen into disuse and been abandoned. Regional arrangements within the east and southern Africa region are at the core of this work. These regimes are examined, in depth, in separate chapters and, therefore, they are not included in this chapter. This chapter identifies and examines some of the prominent integration initiatives in the world for purposes of highlighting their main organisational features and characteristics.

This chapter, therefore, basically chronicles regional integration arrangements in a brief empirical survey. The chapter singles out some of the high profile regional integration arrangements that have been notified to and registered with the WTO. In particular, the EU has been lauded as a model of a successful integration initiative. Again the EU as an economic bloc plays a central role in the integration process that is taking root in the east and southern Africa region. It is noteworthy, too, that the EU is the main trading partner with the countries in the region. In this regard, and by that marked distinction, the EU's trade policy directly affects the interests of countries in the east and southern Africa region. For the stated reasons, the EU's integration experience is given deliberate prominence in this chapter.

The rest of the regional blocs are of minimal significance to our survey and hence a brief mention of them by way of identification and introduction would suffice. Notably NAFTA, ASEAN and the APEC are treated to an introductory brief due to their mixed experience and strategic importance in the world trading system. Our main objective in looking at the other regional blocs is to highlight some of the features that define the north-south and south-south trade partnerships. The wealth of experience accumulated in these partnerships would go along way in placing our forthcoming analysis in a global context. This chapter is, therefore, significant in so far as it gives a glimpse into both failed and successful regional integration efforts across the globe. The experience of regional integration schemes elsewhere would, no doubt, argument the analytical work on the fledging integration efforts within the eastern and southern Africa region.¹⁴⁶

¹⁴⁶ This chapter will not cover all the regional integration efforts that have come into being in the world trading system. There are multitudes of them to be conveniently treated in the limited scope of

3.2.1 Integration in Europe: The European Union

The creation of the European Community is not easily captured by any simple theoretical argument. It appears as a phenomenon *sui generis*. The beginning of European integration is taken as given. It is commonly thought that the community's main function is to preserve peace and security in Europe. After the Second World War, there was deep-seated opposition to restoring sovereignty to West Germany- a country blamed for aggression in 1870, 1914 and 1939.

Policy makers in the west, however, faced a quandary in the 1950s as the cold war intensified. The Soviet Union had just acquired the atomic bomb, Euro-Communism was on the rise, and in 1950 the Korean War broke out. A strong Germany was essential for the security of the West. But would a revitalised Germany not pose a renewed political and military threat to its neighbours? To pre-empt this possibility, a new European institution needed to be created which could cement the economies of its member countries into an inter-dependent maze out of which independent aggressive action by a single country would be impossible.

The Schuman Plan of 1950 constituted the first step in this direction. It proposed to place the entire French and German coal and Steel industry under a common High Authority and to abolish all tariffs restricting free exchange of coal and Steel products. France, Germany, Italy, Belgium, the Netherlands, and Luxembourg signed the treaty establishing the European Coal and Steel Community (ECSC) for fifty years in 1951. The preamble to the treaty stresses the concern for peace as a driving force of European integration. It reads:

“The six governments considering that world peace may be safeguarded only by creative efforts equal to the dangers which menace it; convinced that the contribution which an organised and vital Europe can bring to civilisation is indispensable to the maintenance of peaceful relations; desirous of assisting through the expansion of their basic production in raising the standard of living and in furthering the works of peace; resolved to substitute for historic rivalries a fusion of their essential interest (and) to establish , by creating an economic community

this work. Some are high profile while others dimly obscure. A compressed table will be crafted at the end of this work to summarise these instruments as notified to the World Trade Organisation.

among peoples long divided by bloody conflicts... have decided to create a European Coal and Steel Community".¹⁴⁷

Past plans designed to bring peace to Europe, however, have been many.¹⁴⁸ None came to fruition. The peace motive was insufficient to assure success for these plans. It may explain the establishment of the ECSC and has certainly helped European integration in the way suggested by Robert Jervis when he wrote that;

"Expectations of peaceful relations were a necessary condition for the formation of the European Common Market... Had the Europeans thought that there was a significant chance that they would come to blows, they would not have permitted their economies to grow so interdependent".¹⁴⁹

Other motives were also important in accounting for the creation of European integration. Consider, for example, external developments in Europe. Once the world's focus, Europe found itself in danger of being eclipsed to the point of insignificance after the Second World War in a universe controlled by two superpowers. The Suez crises provided a particularly sobering demonstration of how limited the freedom of action of European States had become.¹⁵⁰ The 1956 Spaak Report which served as a blueprint for the Treaty of Rome establishing the European Communities, contain the following nostalgic note in its forward:

"Europe, which once had the monopoly of manufacturing industries and obtained important resources from its overseas possessions, today sees its external position weakened, its influence declining and its capacity to progress lost in its divisions."¹⁵¹

Even more revealing is the following statement by Walter Hallstein, first president of the European Commission:

"It may be said, in all frankness that an essential factor in the establishment of the European Community has been egoism, European insistence on self-assertion... The Old World has awakened; it is shaking off its feeling of second-rate and is ready to

¹⁴⁷ Treaties Establishing the European Communities {Brussels: Office for Official Publications of the European Communities, 1987}

¹⁴⁸ These include the Abbe de St. Pierre's Project of Perpetual Peace, Immanuel Kant's Perpetual Peace, Count Richard Coudenhove-Kalergi's Paneuropa, and Aristide Briand's projects in the 1920s and the 1930s for lasting European peace.

¹⁴⁹ Robert Jervis, "The Future of World Politics: Will it resemble the Past". *International security* 15, no.3 {Winter 1990/1991}, at p.51

¹⁵⁰ It was felt that if Europe were to become something more than a footnote to history, the individual nations would have to combine their power and speak with a united voice. Laurence Krause {ed.}, *The Common Market: Progress and Controversy* {Englewood cliffs, N.J: Prentice Hall, 1964}, p.4

¹⁵¹ Comité Intergouvernemental Cree par la Conference de Messine, Rapport des Chefs de delegation aux Ministres des Affaires Etrangères {Brussels, Secretariat, April 21, 1956}, p.9

play the game of world economics according to the rules of its traditional liberalism.”¹⁵²

To restore its influence, Europe had to unite and create a “third force” between the two superpowers.¹⁵³ This reasoning applied not only to the political realm but particularly to trade relations. A united Europe was bound to be in a stronger bargaining position in trade negotiations. Pierre Uri, a long time collaborator of Jean Monnet and presumed author¹⁵⁴ of the economic section of both the Schuman plan and the Spaak Report acknowledged as much. He proclaimed that;

“We could not conceal the fact that one reason for setting up the Common Market was to enhance the bargaining power in tariff negotiations of all member countries taken together. It was all to the good that bargaining power of “the six” would match the power of the United States in tariff negotiations and would make more likely the lowering of the US tariff which would be trade creating. We should think, not in static terms, or of effects on paper, but of reality”.¹⁵⁵

3.2.2 The US factor in the EU integration

The US role as a security guarantor was a crucial factor in the beginning of European integration. The US presence in Europe contained Germany, giving France sufficient confidence in their security building bilateral relationship with Germany, and allowed West European governments to avoid questions of West European foreign policy and defence letting them be absorbed into the Atlantic Alliance Under American leadership.¹⁵⁶

Why, then, did the US support plans for European integration? There are three main reasons. First, it was thought that only a strong ally is a good ally. Economic integration would strengthen the United States’ European partners and thereby improve the overall military position of the West vis-à-vis the Soviet bloc. Second, Americans assumed that

¹⁵² Foreword by Walter Hallstein in Elizabeth Marting {ed.}, *The European Community Market: New Frontier for American Business* {New York: American Management Association, 1958}, p.12-13

¹⁵³ This thinking was particularly prevalent in the writings of Jean Monnet, the pro-American “founding father of the European Community. See Sophie Meunier, “The Paradox of Unity: European Integration and US-EC Trade negotiations, 1958-1993,” dissertation in progress {MIT, Department of Political Science}

¹⁵⁴ See Richard Mayne, *The Community of Europe* {London: Victor Gollancz, 1962}, p.90 and pp.117

¹⁵⁵ Pierre Uri made this statement during a conference of economist held in Lisbon in 1958. The proceedings of the conference are collected in E.A.G. Robinson {ed.}, *Economic Consequences of the Size of Nations* {London: Macmillan, 1960}, pp 430. For an excellent account of the effectiveness of the united European bargaining front during the Kennedy Round negotiations, see Thomas Zeiller, *American Trade and Power in the 1960s* {New York: Columbia University Press, 1992}.

¹⁵⁶ William Wallace, *Regional Integration: The West European Experience* {Washington: Brookings Institution, 1994}, at p.9

integration would produce economic growth in Europe and thus increase the demand for American products and investments.

Third, the United States hoped that a prosperous and United Europe would accept a larger share of common defence spending, increase aid to developing countries, and take a more active role in solving international currency and commodity problems. It was expected that member States would merge their economies and develop their capacity for acting as a unit. They will for the first time be able to play the role of an equal partner, sharing equitably in the responsibilities and burdens which have hitherto rested mainly upon the United States.¹⁵⁷ What emerged from this unique conference of security, political, and economic motives was an ambitious blueprint for merging individual European economies into an “ever” closer union.”¹⁵⁸

3.3.1 The Treaty of Rome

The Treaty of Rome establishing the European Communities came into force on January 1, 1958. It committed the six founding members namely: Germany, France, Italy, the Netherlands, Belgium and Luxembourg to a far-reaching exercise in economic integration which envisaged free movement of goods, services, capital, and labour, aided by common policies in agriculture, transport, regional development and external commerce, economic cohesion and other domains. By the end of the transition period in 1969, the basic ingredients of the customs union, elimination of internal tariffs and quotas and erection of a common external tariff – were established.¹⁵⁹

William Wallace¹⁶⁰, a perceptive student of European integration has made a helpful distinction between formal and informal integration.¹⁶¹ Formal integration, he says, refers to the institutional framework established by the various treaties of European Integration. It is by definition a discontinuous process, preceding treaty by treaty.

¹⁵⁷ Robert Bowie and Theodore Geige, *The European Community and the United States*, Report of the sub-committee on Foreign Economic Policy of the joint Economic Committee, Congress of the United States { Washington, D.C: US Government Printing Office, 1961}, p. 12

¹⁵⁸ Objectives as stated in the preamble of the Treaty of Rome of 1957. See *European Communities, Treaties Establishing the European Communities* {Brussels: Office for Official Publications of the European Communities, 1978}, p.2113

¹⁵⁹ The member States agreed to deepen integration on two further occasions: in the mid-1980s by signing the Single European Act, and in the early 1990s by agreeing to the Maastricht Treaty on European Union

¹⁶⁰ Wallace: *Regional Integration* p.22. see also Jacques Pelkmans, Alan Winters, and Helen Wallace, *Europe's Domestic Market* (London: Routledge, 1988), p. 22

¹⁶¹ Wallace, *Regional Integration* {supra}

Informal integration, on the other hand, refers to the patterns of interactions and exchanges triggered by the formal framework and amplified by technological advance and market dynamics.

Wallace argues that informal integration, in turn, “creates pressure for further deepening of the formal structures of rules and institutions in order to manage their impact.”¹⁶² This idea is akin to the “logic of demand” elaborated in the previous chapter. The phenomenon of ‘logic of demand’ would become clearer when we examine the ingredients that oil the demand for deepening integration, which is what the next section, is all about.

3.3.2 The customs union and the common external tariff

The customs union and the common external tariff did not come into existence immediately after signing the Treaty of Rome. Some tariffs were cut on January 1959 but a long transitional period was necessary to negotiate and implement the full programme. Differences in national interest- especially between France and the Federal Republic of Germany- ensured that this was a troublesome process, but it was successfully completed in 1968, eighteen months ahead of schedule.¹⁶³

In retrospect, it seems that the dismantling of tariff barriers was assisted by favourable external circumstances.¹⁶⁴ There was a global economic boom in the 1960s. This meant that if some of the industries of member states proved to be uncompetitive in the single market for products, there were favourable opportunities for national resources to be switched into other growth sectors. In other words, the unemployment implications of restructuring rarely had to be faced in the 1960s.

Secondly, despite some divergence, the six founder member states had broadly similar competitive positions and trading interests in 1958. The exception was Southern Italy, but it was expected that this region would benefit from special assistance programmes.

¹⁶² Ibid. , p. 5

¹⁶³ Allan Williams, *The European Community: The Contradictions of Integration*; Blackwell Oxford UK & Cambridge USA at p. 32

¹⁶⁴ The efficiency view of integration also holds that the extension of the Union’s rules and enforcement mechanisms through EU membership will mitigate the risks of investing in the periphery. And as these institutional safeguards lower the risks, the flow of transactional capital into the periphery should increase. What is the evidence? Is EU membership positively related to growth in capital inflows holding other factors constant?

This commonality of interest greatly assisted the process of political compromise.¹⁶⁵ Finally, the broad consensus of economic interests was under laid by a strong international convergence of tastes and culture during the consumer boom of the 1950s. Of course, the creation of the customs union did not remove all barriers to trade between the Six. Most importantly, it only applied to industrial goods.¹⁶⁶

Article 59 of the Treaty of Rome had also specified that there should be progressive abolition of restrictions on the freedom to provide services within the Community, especially with respect to finance, insurance and banking. Yet 'for more than twenty-five years after the EEC Treaty was signed, progress in the financial integration was discontinuous, uneven and on the whole modest'¹⁶⁷ Furthermore, the liberalisation of trade was restricted even with respect to industrial goods, for there were still non-tariff barrier to be overcome.

Unlike the EU's experience, differences in competitive positions in the east and southern Africa region have put a tremendous strain on the integration process. The current external factors do not favour a smooth integration exercise either. Add to this handicaps the disastrous effects of dislocation such as job losses and one begins to see why integration regimes in the east and southern Africa region proceed haltingly in comparison to the EU's experience.¹⁶⁸

3.3.3 The Common agriculture policy

The European Community was conceived of as more than a customs union and a common market for capital and labour. There was also a commitment to developing common policies. As these were not specified in detail in the Treaty of Rome, they were to be worked out in practice during the early years of the Community's existence. As the common policies would have to be forged in the contest of inter-governmentalism and entrenched national interests, it was inevitable that the process would be characterised by

¹⁶⁵ See Williams; The European Community supra at p.32

¹⁶⁶ Ibid

¹⁶⁷ Williams; The European Community supra at p.32

¹⁶⁸ Failure is attributable to either because regional economies lack complementarity or because the small size of regional markets does not offer significant economies of scale. Matli (2000) offers examples of such failed European counter-unions, which include the European Free Trade Association (EFTA), of 1960. Its members traded primarily with the Community rather than with each other. The group was neither compact nor contiguous. Matli explains that its members were strewn in a loose circle around the Community. Further, EFTA's cohesion was repeatedly

political compromise. This was clearly evident in relation to the Common Agriculture Policies (CAP), the most politicised as well as the most important of the common policies.¹⁶⁹

However, nothing underlines the importance of the CAP as much as the significance that de Gaulle attached to it. Soon after his election to French presidency in 1958, he called an executive meeting to decide whether France should remain a member of the EC. The critical argument, accepted by de Gaulle, was that the potential benefits of the CAP would compensate for any industrial trade losses, especially with Germany.¹⁷⁰ The detailed CAP negotiations were fraught with difficulties.

The Treaty of Rome had set down the aims of the CAP as to increase productivity, to provide a fair standard of living for the agricultural community, to stabilise markets, to assure the availability of supplies and to supply consumers at reasonable prices.¹⁷¹ These aims were contradictory and had numerous ways in which they could be implemented. However, the three main features of the policy framework were quickly identified. These were free trade within the EC and common customs barrier against the rest of the world, guaranteed prices and structural reforms. This division, however, still left considerable detail to be finalised.

Probably the major obstacle was the very different national farm policies, which had evolved in the member States since the nineteenth century.¹⁷² The inter-war depression had led to greater protection throughout Europe, but there were still major differences in the agricultural interests of the member States in the 1950s. The Netherlands wished to expand a modern, exporting farm sector whilst Belgium wanted defensive farm subsidies. Germany, France and Italy, on the other hand sought to protect their marginal, fragmented farms.¹⁷³

weakened by successive defections of members to the Community, most notably when the UK, the group's potential leader, left in 1973.

¹⁶⁹ It is noteworthy that when the Treaty of Rome was signed, agriculture was still a major industry in most of the European states. For example, it accounted for 35 percent of all employment in Italy, and 25 percent in France.

¹⁷⁰ Williams; *The European Community* supra at p.41

¹⁷¹ Ibid

¹⁷² For example, France, Germany and Italy had highly protectionist policies, while the Netherlands and Belgium had liberalised trade, which had resulted in increased specialisation and competitiveness. See Williams; *The European Community* supra at p.41

The diverse interests within each of these countries further complicated the negotiations. The French government, for example, had to balance the requirement of large-scale farming in the Paris basin against those of still predominantly peasant agriculture in the South and West. Negotiations became quickly embittered, especially between the two leading members of the Community. By 1961, de Gaulle was threatening that France would not agree to the proposed cuts in industrial tariffs until the framework for the CAP had been established. Not for the last time, the CAP seemed to threaten the very existence of the EC.¹⁷⁴

By January 1962, the EC had to engage in 'clock-stopping' to maintain the deception that it was still adhering to the agreed timetables for the CAP negotiations. However, the general principles of a price system were eventually agreed in January 1962.¹⁷⁵ The guarantee system established target prices for farm products, and if these were not achieved in the market, then the EC would buy up the surpluses at interventional prices. There were also thresholds to bring the prices of imports up to the guarantee levels, and export restitution to subsidise exports.

By 1965, the Community was again in political crisis as France refused to accept the principle of majority voting by the member states, especially in relation to the thorny question of the CAP. This led to the 'empty chair policy', as France refused to sit at the negotiating table until qualified majority voting was accepted in the 1966 Luxembourg compromise. Thereafter, rapid progress was made in finalising the CAP. The cereal price regime came into existence in 1967 but with prices set much higher than both the EC average and current world levels.¹⁷⁶

Common agricultural markets were then established in rapid succession for milk, sugar beet, fruit and vegetables. However, the political compromise, which had established such high prices for cereals, had set an important precedent. High prices would also have to be set for all other farm products, if only to maintain price differentials. The last major

¹⁷³ Williams; *The European Community* supra at p.42

¹⁷⁴ Ibid

¹⁷⁵ The January 1962 agreement covered about 40 percent of the product of the EC including dairy and pigment products. However, in order to secure Germany acceptance of the CAP, prices had been set close to those prevailing in its national system, and these were much higher than world market prices. The CAP saga was still not yet over, for individual prices and intervention mechanisms had to be agreed for each separate farm product.

price agreement-covering wine-was reached in 1970 so that in total, it took almost a decade to flesh out the CAP. The CAP policy, therefore, came into existence as a high cost policy, and this has been a constant feature subsequently.¹⁷⁷

3.4.1 The impetus for deeper integration

Mattli¹⁷⁸ contends that a first illustration of the demand logic is provided by the critical role played by private firms in bringing about legal integration in Europe, that is, in constitutionalizing the Treaty of Rome. This was the process by which the Treaty of Rome evolved from a set of legal arrangements binding upon sovereign state, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the European Union. These actors were assisted by what Mattli refers to as key “commitment institutions” on the supply side, notably the European Court of Justice (ECJ).¹⁷⁹

A quick perusal of the Treaty of Rome articles suggests that the founders intended the court and its staff to interact primarily with other community organs and the member States. *Articles 226 (169) and 227 (170)* provide for claims for non-compliance with community obligations to be brought against member States by either the commission or other member States.

Article 230 (173) gives the court additional jurisdiction over a variety of actions brought against either the commission or the council by a member state, by the commission, by the Council, or by specific individuals who have been subject to a Council or Commission decision directly addressed to them. Almost as an afterthought, *Art. 234 (177)* authorise the court to issue “preliminary rulings” on any question involving the interpretation of Community law arising in the national courts. Lower national courts can refer such questions to the ECJ at their discretion.

¹⁷⁶ This reflected, above all, the interests of Germany farmers, although they still had to accept 15 percent price cuts –see Williams; *The European Community supra* at p.43

¹⁷⁷ Indeed, the CAP has been a major source of headache for the EU in the multilateral trade talks. This policy is a veritable a bunching bag conveniently available for countries with frivolous grievances to shoot a broadside against the EU. See Williams; *The European Community supra* at p.43

¹⁷⁸ See Walter Mattli: *The Logic of Regional Integration Europe and Beyond*; Cambridge University Press 2000 at p.73

¹⁷⁹ *Ibid*

In practice, *Article 234 (177)* procedure served as a channel of corporate pressure and demands for deeper integration. It established the framework for the constitutionalizing of the Treaty by providing links between the court and sub-national actors – private litigants, their lawyers, and lower national courts. Referrals to the ECJ under *Article 234 (177)* rely on the initiative of private actors who deem governmental regulation incompatible either with existing Community rule or with the spirit of the Treaty or Rome. Without individual litigants, there would be no cases presented to national courts and thus no basis for legal integration. The various identities, motivations, and strategies of litigants have inevitably influenced the nature and pace of integration.

An early example of this influence is provided by the famous *Van Gend & Loos case of 1963*. Through an *Article 234 (177)* reference, a private Dutch importer raised the question whether he was entitled to invoke directly the Common Market provision of the Treaty of Rome against the Dutch authorities from Germany. Over the explicit objections of the Member State, the court proclaimed that:

“the Community constitute a new order... for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member States but also their nationals... Community law, therefore, not only imposes obligations on individuals but it also intended to confer upon them rights which became part of their heritage”.¹⁸⁰

The effect of this case was that firms and private individuals who stood to gain from the European integration could now push their governments through the *Article 234 (177)* procedure, to live up to paper commitments by pointing to treaty provisions that supported an activity they wished to undertake. A national court would then certify the question of how community law should be applied to the European court of Justice, and if the court’s interpretation of a Treaty obligation implied a conflict between national law and Community law, national courts would have to set aside the offending domestic rule.

Another example of the importance of business in pushing legal interpretation is given by the role played by big French firms in forcing the Conseil d’Etat, the politically influential supreme administrative court in France, to accept the judge made doctrines of

¹⁸⁰ Case 26/62, *N.V. Algemene Transport & Expeditie Onderneming Van Gend & Loos V. Nederlandse Administratie der Belastingen*, ECR, 1963 p. 12

direct effect and supremacy of Community law.¹⁸¹ Until the beginning of the 1980s, the French Council d'Etat felt little pressure to endorse direct effect and supremacy.

Two of its major partners, Germany and Italy, had supreme courts that refused to comply fully with the ECJ's jurisprudence. In 1984, however, the Italian Constitutional Court authorised lower national judges to declare national law incompatible with treaty obligations without having to refer the case to the Constitutional Courts.¹⁸² The German Federal Constitutional Court announced in 1986, in *the Solange II* case, that it would no longer control the Constitutionality of Community legal acts.

The legal context in which corporate interests in France now found themselves put them increasingly at a competitive disadvantage relative to firms operating in member States where supremacy and direct effect doctrines were fully accepted. According to Jens Plotner¹⁸³,

“solid economic reasons [existed rendering]... full integration of Community law into French law paramount. How could the project of 1992 become effective if the almost three hundred directives intended to transform it into legal reality were not to be directly enforced by the Couceil d'Etat?”

Plotner¹⁸⁴ adds that the impossibility of referring to certain community regulations was bound to represent a serious economic disadvantage (to French firms) in comparison to their European competitors. In the long run, this could have led to a movement of forum shopping, combined with some delocalization of head offices.

To remedy this situation, major import-oriented and export-oriented companies in France launched systematic attacks on government decisions that they felt were contrary to Community law. Their aim was to provoke a chain of verdicts by the ECJ condemning France for breach of Community law. These sustained manoeuvres increased the pressure on the French government and the Council d'Etat to comply with Community

¹⁸¹ Walter Mattli and Anne-Marie Slaughter: “Revisiting the European Court of Justice” *International Organisation* 52 {1998}, 177-209: “Direct effect” means that EU law can confer on individuals legal rights that public authorities must respect and national courts protect. The supremacy doctrine states that in any conflict between community and national law, the former must be given primacy

¹⁸² Italian Constitutional Court decision 170/84, *Granital*, [1984] CML Rev 756

¹⁸³ Jens Plotner, *The European Court and National Courts – doctrine and jurisprudence: legal change in its social Context – Report on France*, Working Paper, RSC No. 95/28 { Florence: European University Institute, 1996, pp. 29 and 24

rule. It is no coincidence that the decision by the Council d'Etat to comply with Community directives in France was initiated by Phillip Morris and Rothmans, firms with sufficient resources to engage in repeat litigation strategies.¹⁸⁵

Stone and Caporaso have confirmed the importance of *Article 234 (177)* as a channel of corporate pressure and demands for deeper integration in recent study.¹⁸⁶ The study examines whether the pressure by private litigants for supranational rule increases as the number of cross-national transactions rises. They conclude their study by noting, based on their evidence, that governments do not control the integration process in any determinative sense. Governments behave reactively rather than proactively. They act to ratify transfers of governing authority from the national to the supranational level that have already begun or to slow down the pace at which these transfers are made. In other words, this behaviour can be seen as a response to sub-national level demand for integration.¹⁸⁷

3.4.2 Corporate pressure and the single European Act

The introduction of computers, microelectronics, fibre optics, satellites, cable television, digital switches, lasers, electronics reproduction, and many other innovations deeply transformed the economy of Europe and the developed world in the 1970s and 1980s. The consequences of these advances has been, in a sense, to “shrink” distances and put pressure on governments to adjust the scale of political and economic organisation to the level implied by the new technologies. Major manufacturers who began in those years as

¹⁸⁴ *Ibid*

¹⁸⁵ See Jens Plotner, *Ibid* at p. 27 reporting on the Netherlands, Claes and de Witte note similar pressures by Dutch business companies seeking to enforce in the early years of the Community the competition rules of the Treaty of Rome before national courts. See Monica Claes and Bruno de Witte, *The European court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context – Report on the Netherlands*, working paper, RSC No. 95/26 (Florence: European University Institute, 1995). p.7

¹⁸⁶ Alec Stone and James Caporaso, *From Free Trade to Supranational Policy: The European Court and integration*, Working Paper No. 2.45 (Berkeley: Centre for German and European Studies, University of California, 1996); see also Alec Stone and Thomas Brunell, “Contracting a Supranational Constitution: Dispute Resolution and Governance in the European Community,” *American Political Science Review*. The data set comprises 2,978 *Article 177* references by national courts to the European Court of Justice. Strikingly, the authors find that the relationship between references and intra-EU trade is nearly linear, with litigants in countries that trade more with other EU countries generating higher levels of references

¹⁸⁷Second, Stone and Caporaso examine whether there is any relationship between these references and Community legislation (regulations and directives). They find that the relationship is positive and significant, suggesting that references lead to legislation. More refined tests remain to be done. As the authors note, further implication of their main proposition is that levels of integration are expected to vary across economic sectors, depending on the differential rates of Trans-national exchange.

produce and market on a European rather than a nation-by-nation basis were confronted with burdensome obstacles.¹⁸⁸

Impediments to free trade gave European big business, struggling to compete with their American and Japanese rivals, reason to think of ways to reduce the cost of producing and transacting in Europe. One solution promoted by big business was the completion of a truly single European market.¹⁸⁹ To increase its clout in European economic affairs, a group of the largest and most influential corporations, including Philips, Siemens, Olivetti, GEC, Daimler, Volvo, Fiat, Bosch, ASEA formed the Round Table of European Industrialists.

This remarkable flurry of initiatives notwithstanding, the political will in the EU to carry out plans for further integration cooled markedly in 1995. Mattli identifies two reasons, both of which are consistent with the logic of the externality argument for this lull in integration activities.¹⁹⁰ First, the early market concessions of the EU were successful in warding off the threat of mass migration. The Union's share of the former COMECON countries' exports and imports rose from 20 percent in 1988 to almost 50 percent in 1992 and has grown continuously ever since.¹⁹¹ Increased trade, in turn, led to a brisk export-led economic growth that helped to re-establish a semblance of order and stability in the East. Second, in view of this success it was not clear why the EU would have had an incentive to deepen integration with the East.

The price of continuing the process of enlargement no longer appeared worth the marginal benefit. The European Commission calculated that it would cost an enormous sum of \$ 47 billion in aid to extend regional and social policies of the EU to the countries of the east and central Europe.¹⁹² This meant that Greece, Ireland, Spain, and Portugal risked losing generous payments from Brussels, and that taxpayers, particularly in Germany, would be asked to foot the additional bill for the enlargement. The cost

¹⁸⁸ Different national tax regimes that necessitated detailed paper work and check on fuel and goods at each frontier, resulting in lengthy border delays for trucks moving parts from plant to plant, and different regulation on axle weight, truck safety, vehicle exhaust emissions, and hours permitted behind the wheel. Wallace: *Regional Integration* p.22. see also Jacques Pelkmans, Alan Winters, and Helen Wallace, *Europe's Domestic Market* (London: Routledge, 1988), p. 22

¹⁸⁹ Sandholtz and Zysman, "1992: Recasting the European Bargain," 116-120.

¹⁹⁰ See Mattli, *Logic of Integration* supra at p.99

¹⁹¹ See Eurosta, *Balance of Payments, Monthly Statistics*, various issues

¹⁹² Lionel Barber, "Brussels Keeps Shut the Gates to the East," *Financial Times* {Nov. 16, 1995}, p.17

promised to increase significantly if the Common Agriculture Policy (CAP) were extended, because subsidies would have to be paid to farmers in the Eastern Europe.

Alternatively, the EU would have to reform the CAP, reducing farmers' reliance on price support before proceeding with enlargement. However, such a move was likely to be foiled by powerful farmer's lobbies in the west. Enlargement would also necessitate institutional reforms including the widening of majority voting, a change that was vehemently opposed by Britain. None of these steps were politically palatable. Unsurprisingly, senior Commission officials noted in the mid-1990s that "the [current] level of seriousness about enlargement is not minimal, it simply does not exist."¹⁹³ The enlargement scenario has taken a rapid turn with a wave of new members having been admitted to the Union for the period 2004/5.¹⁹⁴

3.4.3 Supply for regional integration

Mattli¹⁹⁵ argues that there are two primary supply conditions for integration processes. First, "commitment institutions" such as centralised monitoring and third-party enforcement enhance the chances of sustained co-operation by acting as constraints on member states in circumstances where self-help measures alone are insufficient to prevent renegeing on contractual obligations. Second, the presence of an indisputable leader state among the group of countries seeking closer ties as a focal point in the coordination of rules, regulations, and policies. Such a hegemon does help to ease distributional tension by assuming the role of regional paymaster.

According to Mattli the European Union satisfies these conditions.¹⁹⁶ The EU possesses the most far-reaching commitment institutions of any recent regional integration scheme and it benefits from the presence of Germany, which, in the process of deepening, has provided critical institutional leadership and has been willing to ease distributional tensions through generous side payments. Two EU institutions, in particular, are

¹⁹³ See Mattli, *Logic of Integration* supra at p.99

¹⁹⁴ Six countries (Belgium, Germany, France, Italy, Luxembourg and the Netherlands) joined from the very beginning. Today, after four waves of accessions (1973: Denmark, Ireland and the United Kingdom; 1981: Greece; 1986: Spain and Portugal; 1995: Austria, Finland and Sweden) the EU has 15 Member States and is preparing for the accession of 13 eastern and southern European countries. The candidate countries are Bulgaria, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Romania, Slovenia, Slovakia and Turkey. See <http://europa.eu.int/abc-en.htm> 2003-02-14

¹⁹⁵ The *Logic of Integration* supra at supra, at pp. 99 - 102

¹⁹⁶ Ibid

responsible for monitoring and enforcing Community obligations. These are the Commission and as noted earlier, the efficacious European Court of Justice.

(a) The European Commission

An important task of the Commission is to see that individuals, companies, and member states do not act in ways, which run counter to the treaties or EU secondary law. Treaty and secondary law has been considerably broadened in scope over the years. It was originally confined to issues dealing with trade in a narrow sense. Today it regulates a wide range of areas, including competition, intellectual and commercial property, public procurement, state aid, telecommunications, banking, financial services, company accounts and taxes, indirect taxation, technical rules and standards, consumer protection, health and safety, transport, and even political participation¹⁹⁷

For example, if firms enter into an agreement that restricts competition, the Commission may seek a voluntary termination of such an agreement or issue a formal decision prohibiting it and inflicting fines on the parties to the agreement. It can also take member States to task by demanding termination of an infringement, or by taking the matter to the Court of Justice for final decision.¹⁹⁸ Besides the Commission, member states also have the right to bring cases to the Court. In practice, however, legal proceedings initiated directly by member States against each other are relatively rare.

(b) The European Court of Justice

The court also plays a key monitoring and enforcement role in the integration. Most notably, it has improved the effectiveness of the EU enforcement mechanism through two judge-made doctrines: supremacy and direct effect".¹⁹⁹ The supremacy doctrine holds that EU law has supremacy over national legislation; and the direct-effect doctrine provides that the EU law is directly applicable to the citizens of the member States without prior intervention by their governments. Direct effect authorises private parties both firms and individuals to seek enforcement of treaty obligations against member

¹⁹⁷ See Mattli the Logic of Integration supra at p.100

¹⁹⁸ Swan, The Economics of Common Market, p. 50. See Ulrich Everling, The Member States of the European Community Before their Court of Justice," *European Law Review* 9 {1984}, 215-241.

¹⁹⁹ See Burley and Mattli, "Europe before the Court: A Political Theory of Legal Integration".

governments (“vertical” enforcement) and against private parties (“horizontal” enforcement).²⁰⁰

This direct participation of private parties in the enforcement of the Treaty of Rome, a treaty of international law, is without precedent. It has greatly improved the court’s role as central monitoring agent. For the same reason, it has increased the Court’s caseload. In response, the EU, in 1988, added a new institution, the court of First Instance, to its enforcement system. This new court was established to hear and give judgement on a number of specific types of legal action, particularly on complaints or disputes arising from the EU’s competition policy.²⁰¹ Finally, in a notable step to further the Court’s effectiveness, the EU empowered the ECJ to impose heavy penalties upon member states that fail to comply with Court rulings.

3.4.4 Germany’s exemplary leadership

The second supply condition identified by Mattli for deepening integration refers to institutional leadership.²⁰² Here Germany has played a key role, particularly since the mid-1970s. By then Germany had begun moving into the league of world economic powers of which the only other members were the United States and Japan.²⁰³ Germany had withered the economic crisis triggered by the oil-shocks considerably better than any other European economy. The picture that emerged was one with Germany firmly at the top rather than one of an association of more or less equal states progressing harmoniously and happily towards a Union.²⁰⁴

Germany played a central role in the initial outline of the budget compromise at the Stuttgart Council summit in June 1983. It also gave leadership in re-launching the EMU at the Hanover summit in June 1988 and in calling for an inter-governmental conference

²⁰⁰ See case 36/74, *B.N.O. Walrave and L. J. N. Koch v. Association Union Cycliste Internationale*, European Court Reports, {ECR}{1974}, 1405; and case 149/77, *Cabrielle Defrenne v. Societe Anonyme Belge de Navigation Aeriennne Sabena*, ECR {1978}, 1365. However, the EU has recently, has empowered individuals, through its secondary legislation, to pursue legal action against member States that fail to implement community directives correctly or in a timely fashion. See case 152/84, *Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching)*, *Common Market Law Review* 1 (1986), p.688; and case 152/84. ECJ (1986), 737

²⁰¹ Clive Archer AND Fiona Butler, *The European Community Structure and Process* {New York: St. Martin’s Press 1992}, p. 37.

²⁰² See Mattli the Logic of Integration supra at p. 101

²⁰³ Peter Ludlow, *The Making of the European Monetary System* {London: Butterworth, 1982}, p.8.

²⁰⁴ Ibid.

(IGC) on political union paralleling the proposed EMU.²⁰⁵ Germany's contribution to the institutional architecture of the Union further includes the strengthening of common macroeconomic, social, and environmental policies, as well as the introduction of concepts such as subsidiary²⁰⁶ and muttered governance.

Germany's leadership has largely been gentle rather than imposing.²⁰⁷ Germany strongly prefers to build consensus from within the Union and, if necessary, offers concessions to preserve that consensus.²⁰⁸ To avoid the risk of political isolation in Brussels, Germany has been careful to launch nearly all its initiatives in tandem with other major EU partners.²⁰⁹

It however, goes without saying that Germany depends economically on its European partners as much as they depend on Germany, and thus any measure that improves stability and security in trade and investment in Europe is likely to suit Germany.²¹⁰ Leadership is also expressed by Germany's willingness to ease distributional tensions and act as regional paymaster. German is by far the largest net contributor to the EU budget.²¹¹ It redistributes substantial resources, notably through the European Regional Development Fund. The primary beneficiaries of these funds are the poor EU members.²¹²

²⁰⁵ Peter Katzenstein, "United Germany in an Integrating Europe," in Peter Katzenstein (ed.), *Tamed Power: Germany in Europe* (Ithaca: Cornell University Press, forthcoming).

²⁰⁶ Subsidiary means that the Community should take action only if the objective of the proposed action cannot be sufficiently achieved by the member states at the domestic level.

²⁰⁷ "Gentle giant" is how Simon Bulmer characterises Germany in his writings. See p.103, note 116.

²⁰⁸ For instance, Chancellor Helmut Kohl's letter of April 1990 to the Irish presidency, calling for an IGC on political union, was co-signed by the then French President Mitterand.

²⁰⁹ Jeffrey Anderson, "Hard Interests and Soft Power, and Germany's Changing Role in Europe", in Katzenstein (ed.), *Tamed Power*. The EMS was presented as a Franco-German project, as were proposals for an intergovernmental treaty on foreign policy co-ordination, tabled at the 1985 Milan Council summit. The German initiative for reviving the integration project, originally put forth by Foreign Minister Hans-Dietrich Genscher in 1981, became the Genscher-Colombo initiative, once Italian support was canvassed. Bulmer, "United German and European Integration: Toward Economic and Political Dominance?"

²¹⁰ For instance, in the late 1970s, German industrialists expressed serious concern over the continuing appreciation of the Deutsche Mark against other European currencies. Such a trend posed serious risk to German exports. The EMS, however, did promise to rid the European economies of monetary disturbances that tend to give rise to protectionist pressures, hurting German export interests. Ludlow, *The Making of the European System*, pp.35-47 and 73

²¹¹ Measured both in absolute and per capita terms

²¹² The co-existence of funds depends much on continuing Germany prosperity and generosity. Germany's net contribution to the budget has increased from DM 10.5 billion in 1987 to DM 22 billion in 1992. It is estimated to exceed DM 30 billion by the end of this decade. In 1996, Germany's financial contribution to the EU amounted to about two-thirds of the net income of the Union, double the relative size of the German GDP in the EU. Katzenstein, "United Germany in an Integrating Europe", at p. 32. See also Michael Shackleton, "The Budget of the European

Later, participation in the deepening process of integration reinforced commitment to values such as support for basic human rights, democracy, social justice, and the rule of law.²¹³ Interestingly, Germany has been promoting these same values vigorously of late at the supranational level, pressing for greater transparency and accountability, insisting that human and social rights be respected, and pushing for greater empowerment of the European Parliament.

No doubt, and appropriately so, integration features discussed above the very themes that are resonating in similar regimes in the eastern and southern Africa region. It is, also, no coincidence that the premier Africa economic revival blue print - Nepad - has fully embraced these very key values. Obviously South Africa has a lot to learn from the leadership genius that Germany has displayed if it expects to take the leadership mantle in the region - which in any case it is obligated to should.

3.5.0 Integration in Latin America

3.5.1 The first wave of integration

Commercial Unions have been established in Latin America as collective responses to external shocks that threatened to inflict severe damage on the economies of the region. One such external event was the creation of the European Community. The EC's common external tariff and protectionist agricultural policy sent shock-waves through out the Latin America a continent that heavily depended on free access to the markets of industrialist countries for its primary commodity exports.²¹⁴

Another discriminating feature was the EC's extension of preferential arrangements of individual colonial powers to the whole Community. As a result, the dependant territories of France, Belgium, Italy, and the Netherlands in Africa and Asia had preferential market access to all the member States of the community after 1958.²¹⁵

Community," in Juliet Lodge {ed.} *The European Community and the Challenge of the Future* {London: Printer, 1989}, pp. 129-147

²¹³ Rudolf Hrbek and Wolfgang Wessels, "Nationa-Interessen der Bundesrepublik Deutschland und der Integrationsprozess", in R. Hrbek and W. Wessels {eds.}, *EG-Mitgliedschaft: Ein Vitales Interesse der Bundesrepublik Deutschland?* {Bonn: Europa Union Verlag, 1984}, pp. 29-69

²¹⁴ See Matli the Logic of Integration supra at p. 140

²¹⁵ Sidley Dell, *Trade Blocs and Common Markets* {New York: Alfred Knopf, 1963}, p.187. Thus for example, cocoa and coffee exported from French colonies in Africa were admitted duty free to the entire common market after the creation of the EC, while cocoa supplied by Honduras or coffee supplied by Brazil now faced a uniform external tariff.

This threat of trade diversion caught Latin America at a particularly inopportune moment. Latin America's trade gap with industrialised countries had been rapidly widening and its terms of trade deteriorating.²¹⁶ The president of the Uruguay captured the general sense of panic well when he noted that:

“ the formation of a European Common Market... constitutes a state of near war against Latin American exports. Therefore, we must reply to one integration with another one, to one increase of acquisitive power by internal enrichment by another, to inter-European co-operation by inter-Latin American co-operation.”²¹⁷

Successive economic integration, it was hoped, would improve Latin America's bargaining power and thus raise the price of its exports. Some countries urged the formation of a Latin American economic bloc not only to face the European threat more effectively, but also to have greater leverage in dealing with the United States.²¹⁸ Chile's president called for a powerful and progressive union that would contribute to import substitution industrialisation at the regional level by forcing national economies to specialise within the framework of the expanded and protected regional market.²¹⁹

3.5.2 The Latin American free trade association (LAFTA)

A first Latin American response to the European Common Market was the creation of a Latin American Free Trade Association (LAFTA). The Treaty of Montevideo, which was signed in February 1960 by Argentina, Brazil, Chile, Mexico, Paraguay, Peru, and

²¹⁶ The terms of trade of developing countries declined from 1950 to 1962 by 12%; Latin America's terms of trade dropped 21 percent in the same period, due in great part to adverse movements in coffee prices. See Sidle Dell, *A Latin American Common Market?* (London: Oxford University Press, 1966), p.9. Furthermore, the average annual growth rate of Latin America economies had fallen from approximately 5 percent between 1950 and 1955 to only 1.7 percent between 1956 and 1959.

²¹⁷ The Observer (London: Oxford University Press, 1966), p.9

²¹⁸ Grunwald, Wionczek, and Carnoy; for example, noted that Very few Latin American leaders were ready to speak openly. The feeling of many were, however, echoed by Chile's president Eduardo Frei in 1964, when he called for ' the twenty poor and disunited [Latin American] nations [to] form a powerful and progressive union which can deal with the United States as an equal". See Joseph Grunwald, Miguel Wionczek, and Martin Carnoy, *Latin American Economic Integration and US Policy* (Washington, D.C: Brooking Institution, 1972), pp.8-9

²¹⁹ Miguel Wionczek, "The Rise and Decline of Latin American Integration," *Journal of Common Market Studies* 9 (September 1970), 49-66. The idea of import substitution industrialisation at the regional level was most forcefully propagated by Raul Prebisch, the executive secretary of the United Nations Economic Commission for Latin America. Policies of import substitution at the national level had already been implemented after the Second World War in countries such as Australia, Brazil and Chile. See RAUL Prebisch, *The Economic Development of Latin America and its principal problems* (New York: United Nations Economic Commission For Latin America, 1950)

Uruguay, established this bloc. Ecuador and Colombia joined LAFTA in 1961, Venezuela in 1966, and Bolivia in 1967.²²⁰

The signatory governments expressed their determination “to establish, gradually and progressively, a Latin American common market” and “to pool their efforts to achieve the progressive complementarity and integration of their economies on the basis of an effective reciprocity of benefits”.²²¹ In pursuit of these goals, the treaty provided for the establishment of a free trade area. Tariff reductions were to be effected according to two schedules. First was the common Schedule listed products whose tariff rates were to be eliminated by 1973. The National Schedules, on the other hand, included products on which individual member States granted concessions in annual bilateral negotiation sessions.²²²

The treaty permitted temporary trade restrictions in case of payment imbalances or if import competition damaged an industry of strategic importance to a member’s economy. Special provisions were made to assist the development of the more backward members of the Association. The LAFTA agreement also encouraged closer co-ordination of industrial policies. The implementation of the treaty provisions, however, was arduous and remained unfinished. Chile’s president, Eduardo Frei, complained in early 1965: “The advance towards economic integration has become slow and cumbersome. The possibilities of making further headway... seem to be exhausted”.²²³

Trade expansion failed to materialise while the average share of intra-regional trade in the total trade of LAFTA countries was 8.7 percent from 1952 to 1960, the average from 1961 to 1964 was only 7.9 percent, despite a slight increase in total trade from 1960. Intra-regional trade ceased to grow in 1967 while extra-regional trade continued to boom. This is pretty much the same pattern regional regimes in the east and southern

²²⁰ See Mattli the Logic of Integration supra at p. 141

²²¹ The text of the Treaty of Montevideo is reprinted in Dell, *A Latin American Common Market?*, pp228-256. Dell’s book is an excellent early description and analysis of LAFTA. See also Miguel Wionczek {ed.}’ *Latin American Economic Integration* {New York: Praeger, {1966}; Ernst Haas and Phillippe Scmitter, *The Politics of Economic in Latin American Regionalism*, Monograph Series in World Affairs {Denver: University of Denver, 1965}; Edward Gale, *Latin American Free Trade Association: Progress, Problems, Prospects* {Washington: Office of External Research, US Department of State, 1969}; Edward Milenky, *The Politics of Regional Organisation in Latin America: The Latin American Free Trade Association* {New York: Praeger, 1973}

²²² See Mattli the Logic of Integration supra at p. 141

Africa have taken. Whilst there has been much activity to regionalise, extra-regional trade still outstrips intra-regional trade.²²⁴

Attempts to revive the process of integration by creating a LAFTA Council of Ministers proved unsuccessful. Failure was publicly acknowledged at LAFTA's 1969 Annual Conference. The ensuing Carcass Protocol postponed the deadline for free trade from 1973 to 1980. It also suspended the Common Schedule, and made only token references to the idea of a common market. For all practical purposes, LAFTA was shelved.²²⁵ In 1980, LAFTA was replaced by the Latin American Integration Association (LAIA), a considerably more flexible trade liberalisation arrangement that granted tariff preferences to only about 10 percent of all goods traded.

Another stubborn problem emerged over industrial policy. Brazil wanted a higher common external tariffs, in order to protect its high technology and capital goods industries. Argentina, which is less industrialised, insisted on low tariffs.²²⁶ Distributional concerns have been voiced particularly in the context of investment. As capital flows into richer and larger Brazilian economy, smaller and less developed members will demand assistance to cope with dislocational and payment imbalances.²²⁷

Like is the case with South Africa in the SADC region,²²⁸ Brazil is the dominant economy boasting approximately 75 percent of total regional GDP and for 80 percent of its industrial manufactures. Unlike South Africa, however, Brazil has been reluctant to use its economic and political position to assume active regional leadership. Whenever short-term national interests have been at stake, Brazil has relegated regional issues to second

²²³ Quoted from a letter by Frei dated January 6, 1965, addressed to Raul Plrebisch, Jose Antonio Mayobre, Felipe Herrera, and Carlos Sanz de Santa Maria; reprinted in Dell, *A Latin America Common Market?*, Appendix II, p.280

²²⁴ See, for example, chapters six and eight below

²²⁵ On LAFTA's demise, see Miguel Wionczek, "The rise and the Decline of Latin America Economic integration". Especially 54-58; "Latin American Integration in United States Economic Policies," in Robert Gregg {ed.}, *International Organisation in Western Hemisphere* {Syracuse University press, 1968}, pp91-156, especially pp.105-125: Keith Griffin and Ricardo French-Davis, "Customs Unions and Latin America Integration," *Journal of Common Market Studies* 4 {October 1965}, 1-2; and Bela Balassa, "Regional Integration and Trade Liberation in Latin America," *Journal of Common Market Studies* 10 {September 1971}, 58-77.

²²⁶ John Barham and Agnes Forester, "Teething Troubles Continue to Nag at Mercosur Market" *Financial Times* {January 7, 1994}, see also "Mercosur Deadline Slips By", *Latin- American Monitor- Southern Cone* 11 {January 2, 1994}, 2

²²⁷ Canute James, "American Free Trade Area Easier Said than Done", *Financial Times* December 21, 1994, at p. 3

²²⁸ See chapter six below

place.²²⁹ In addition, Brazil has staunchly opposed plans to establish an EU style Commission or supranational court.²³⁰

3.5.3 The Andean common market (ANDEAN Pact)

Besides LAFTA, there was another major integration scheme launched in the late 1960s, known as the Andean Common Market (also called the ANDEAN Pact).²³¹ Displeased with the laissez-faire attitude of the three “giants”²³² the countries on the western coast of South America began in 1967 to contemplate the creation of their own commercial grouping. By uniting, they hoped to increase their voices in Latin American affairs.²³³

Two years later, Bolivia, Chile, Colombia, Peru, and Ecuador signed the Cartagena Agreement establishing the Andean Common Market. Venezuela joined in 1973.²³⁴ The Cartagena Agreement called for free trade, a common external tariff by 1980, joint planning and execution of industrial projects, harmonisation of economic and social policies, improvement of regional transportation, and a regional foreign investment code. The founding countries were intent on avoiding mistakes and shortcomings – particularly with regard to the thorny issues of redistribution and co-ordination.²³⁵

²²⁹ For example, it has decreed investment incentives with little regard to their effects on the other members States, and has unilaterally imposed tariff and non-tariff barriers on imports whenever domestic developments demanded such actions. See Mattli the Logic of Integration supra at pp.147-151

²³⁰ Similarly, it has refused to pay heed to calls for regional redistribution schemes, which may be of little surprise in a country that is used to one of the world's least equitable distribution of domestic wealth.

²³¹ For the studies on the Andean Pact, see the analysis by Kearns, Avery, and Cochrane mentioned above, and Edward Milenky, “From Integration to Development Nationalism: The Andean Group 1965-1971,” *Inter-American Economic Affairs* 25 {Winter 1971}, 77-91; Kenneth Switzer, “The Andean Group: A Reappraisal,” *Inter-American Economic Affairs* 26 {Spring 1973}, 69-81; Jose Luis Galvez and August Llosa, *Dinámica de la Integración Andina* {Lima: Ediciones Banco Popular del Peru, 1974}; Rafael Vargas-Hidalgo, “The crisis of the Andean Pact: Lessons for Integration Among Developing Countries,” *Journal of Common Markets Studies* 27 {March 1979}, 213-226; Elisabeth Ferries, “Foreign Investment as an Influence on Foreign Policy Behaviour: The Andean Pact,” *Inter American Economic Affairs* 33 (Autumn 1979), pp 45-67; and George Koopmann, “Ten Years Andean Pact: A Re-examination,” *Intereconomics* (May/June 1979), 116-122

²³² Referring to the semi-industrial countries of Brazil, Argentina, and Mexico

²³³ The bargaining power motive is highlighted in Grunwald, Wionczek, and Camoy, *Latin American Economic Integration and US Policy*, p. 56. Avery and Cochrane also acknowledge its importance but note that it was “not... emphasised in the public statements of the [Andean Pact] member-governments” {Avery and Cochrane, “Innovation in Latin America Regionalism,” p.183}

²³⁴ Mattli is of the view that the creation of the Andean Pact does not follow the “logic of the second integrative response” and thus must be viewed as an exception to the general integrative logic. He contends that it is a response to the internal failings of LAFTA, not a response to negative externalities of integration elsewhere. See the Logic of Integration supra at p. 148

²³⁵ To this purpose, they set up the Andean Development Corporation (Corporation Andina de Fomento). Despite its good intentions, the Andean integration came to naught.

The pact was afflicted by structural weaknesses similar to those of LAFTA. The Andean countries were not natural trading partners, and thus the potential for gain from integration was relatively limited.²³⁶ The bulk of their exports consisted of agricultural and mineral products such as bananas, sugar, coffee, copper, and iron ore. Eighty percent of these exports went in approximately equal share to the United States and Europe.²³⁷ Most of their imports, in turn, originated in the US and Europe and consisted overwhelmingly of machinery equipment, manufactured goods, and chemicals. This is the very same malaise that afflicts integration regimes in the eastern and southern Africa region. Like we have argued below, these regimes' economies are not complementary and being net agricultural producers their economies are not well diversified to cater for the matrix of economies of scale.²³⁸

The share of intra-regional trade in total trade for Andean countries amounted to a very modest 1.2 percent in 1970. By 1988, the share had grown to only 2.5 percent.²³⁹ Naturally high transactional costs in the region were another reason why the potential for mutual gains, and thus the demand for integration, were weak.²⁴⁰

Indeed, our treatment of integration regimes in eastern and southern Africa shows that lack of functional infrastructure is the biggest handicap that obstructs the smooth progression to integration efforts. It is apparent that the Andean integration also failed to satisfy supply conditions. Most notably, he says, it lacked a regional leader. This led to insurmountable problems of policy co-ordination.²⁴¹ A case in point is the failure to agree on common external tariff. Peru favoured an effective protection rate no higher than 40

²³⁶ See Mattli the Logic of Integration supra at p. 148

²³⁷ The source of the data is International Monetary Fund, *Directions of Trade, Year book 1960/70* {Washington, D.C :IMF}

²³⁸ See, for example, chapters six, seven and eight below

²³⁹ OECD, *Regional Integration and Developing Countries*, p.46, table 5

²⁴⁰ Geographer Kevin Kearns wrote: "In theory... integration... and free flow of trade work well, but in practice it is somewhat more difficult- and especially so in the Andean region. Nowhere can the resistance to sub-regional cohesion been seen more lucidly than in the physical realm. The utterly discordant physiography of Western South America is among the most stringent and restrictive on earth. The land is fraught with barriers. The high ranges of the Andean cordillera, heavily forested selva plains, and broad and treacherous rivers work at keeping people and resources apart rather than joint." Kevin Kearns, "The Andean Common Market," 239.

²⁴¹ See Rafael Vargas-Hidalgo, "The crisis of the Andean Economic Integration," 213-226 and Kevin middlebrook, "Regional Organisation and Andean Economic Integration, 1967-75", *Journal of Common Market Studies* 17 {September 1978}, 62-82.

percent, Colombia proposed a 60 percent tariff. Ecuador and Venezuela, however, insisted on a rate lower than 80 percent.²⁴²

No country was willing to compromise or able to bribe the others into acquiescence on the tariff differentials.²⁴³ As a result, the Protocol of Arequipa was signed on April 21, 1978, postponing the deadline for completing the customs union until December 31, 1989.²⁴⁴ The region's share of foreign investment in Latin America dropped from 34 percent to 20 percent between 1967 and 1975.²⁴⁵ A final factor contributing to the coordination difficulties of Andean countries was the unending political instability plaguing political regimes in the area. Newly formed governments frequently reversed the policies of the previous administration, thereby jeopardising regional consensus.

The question of political stability has been given more emphasis in trade instruments establishing integration regimes in the east and southern Africa region. This is entirely expected in view of the political volatility of the region. At present, some countries are still enmeshed in intractable civil strife whilst others are slowly emerging from the sordid woods of a debilitating internal conflict and coming to terms with the resultant devastation of war.²⁴⁶

3.5.4 The Central American common market (CACM)

Launched in the early 1960s, the CACM was established by the Treaty of Managua signed in December 1960 by El Salvador, Guatemala, Honduras, and Nicaragua.²⁴⁷ Costa Rica joined CACM in 1963. The treaty provided for immediate free trade in all products

²⁴² David Hojman, "The Andean Pact: Failure of a model of Economic Integration?" *Journal of Common Market Studies* 20 {December 1981}, 147.

²⁴³ Another example is the Andean Pact's Sectoral Programs of Industrial Development (Spins). Governments could not agree on who was to produce what, and they were unwilling to close down existing plants, fearful of drawing the ire of entrenched local interest or worried about the political consequences of rising unemployment.²⁴³ In light of these problems, it may seem surprising that the member governments of the Andean Pact were able to agree on a regional investment code

²⁴⁴ "Decision 24", as the code was called, provided for the transformation of foreign subsidies into mixed companies and national firms according to a fixed timetable. New foreign investment projects had to give local partners an equity share of at least 51 percent and participation in the management of new firms. Stringent restrictions were placed on profit remittances and reinvestment. But the success of the investment code proved ephemeral. Individual countries relaxed the restrictions on foreign investment when foreign capital became scarce.

²⁴⁵ See Elizabeth Ferries, "Foreign Investment as an influence on Foreign Policy Behaviour: The Andean Pact," 67.

²⁴⁶ Angola and Mozambique are smarting from the aftermath of civil strife and the DRC is still turn apiece by an unending civil war.

²⁴⁷ The text of the Treaty can be found in Dell, *A Latin American Common Market?*, pp.256-269

originating in the region except for those listed. Trade in the excluded products, which comprised approximately 50 percent of intra-regional trade, was to be free by 1966.

The signatories also agreed to adopt a common external tariff without specifying the dateline, to establish a Central American Bank for Economic Integration to serve “as an instrument for financing and promotion of... regional balanced... economic growth.” And to ensure as soon as possible a reasonable equalisation of the relevant laws and regulations in force with a view to establishing uniform tax incentives towards industrial development”.²⁴⁸

Like LAFTA, before it, the CACM was triggered by external events: fear of protectionist common market in Europe and deteriorating terms of trade.²⁴⁹ Another event of importance was Fidel Castro’s victorious revolution in Cuba. Schmitter notes that “ the pervasive fear of Castroide subversion after 1959 added a desperate sense of urgency, making the elite much more willing to experiment with policy innovations.”²⁵⁰

Unlike LAFTA, but like the East African Community,²⁵¹ CACM proved highly successful during its first decade. It quickly set up a Permanent Secretariat, directed by a Secretary-General, and other bodies including the Central American Economic Council, an Executive Council, the Central American Integration Bank, a Monetary Clearing House, and an advisory Central American Monetary Council.

²⁴⁸ See chapters 7 and 8 of the Treaty of Managua

²⁴⁹ See Mattli the Logic of Integration supra at p. 143

²⁵⁰ Phillippe Schmitter, *Autonomy or Dependence as Regional Outcomes: Central America* {Berkeley: Institute of International Studies, University of California [Berkeley], 1972}, p.18. Studies on CACM include Rodger Hansen, *Central America: Regional Integration and Economic Development*, Studies in Development Progress, no. 1 {Washington: National Planning Association, 1967}; James Cochrane. *The Politics of Regional Integration: The Central American Case* {New Orleans: Tulane Studies in Political Science, 1969}. Alberto Fuentes Mohr, *La Creacion de un Mercado Comun; Apuntes historicos sobre la experiencia de Centroamerica* {Buenos Aires: Instituto Para la Integracion de America Latin [intal], 1972. Stuart Fagan, *Central America Economic Integration: The Politics of Unequal Benefits*, Research series, no 15 {Berkeley: Institute of International Studies, University of California [Berkeley], 1970; Carlos Castillo, *Growth and Integration in Central American Integration* {New York: Praeger, 1966}; Joseph Nye, “Central American Regional Integration,” *International Conciliation* 562 {March 1967}, 1-66. The studies by Hansen, Cochrane, Castillo, and Nye were reviewed in Gary Wynia, “Central American Integration: The paradox of success,” *International Organisation* 24 {Spring 1970}, 319-334.

²⁵¹ See chapter eight below for a note on the EAC Integration experience

By 1966, tariffs were removed on 94 percent of intra-regional trade, and 80 percent of extra-regional imports were covered by a common external tariff.²⁵² The dramatic change in intra-regional trade between 1958 represented 5.9 percent of the total trade then. In the span of only ten years, the number had increased to 24.2 percent, a stunning 18.3 percent leap.²⁵³ In the same period, the relative importance of CACM's two major trading partners declined.

Trade with the United States decreased by 8.7 percent, from 47.8 percent to 39.1 percent, in 1968, and trade with Europe fell from 29.8 percent to 20.8 percent.²⁵⁴ Equally significant was the change in the composition of intra-regional trade. In the late 1950s, most trade was in food products and raw material. A decade later, two thirds of regional trade consisted of manufactured (mainly consumer) goods and chemicals.²⁵⁵

The CACM's success story came to an abrupt end when El Salvadorian army attacked neighbouring Honduras on July 14, 1969. Some commentators point out that this attack cannot plausibly be attributed to the integration process but appears to be the result of other and more complex causes.²⁵⁶ The ensuing "Soccer War"²⁵⁷ lasted only 100 hours but left several thousands dead on both sides, turned 100,000 into refugees, and destroyed half of El Salvador's oil refining and storage facilities. Attempts to renew economic integration in the following years were thwarted by lingering hostilities.²⁵⁸ The share of CACM states' integrational trade represented only 11.9 percent in 1988 a sharp decline from the 24.2 percent twenty years earlier.²⁵⁹

3.6.0 Integration in North America

²⁵² OECD, *Regional Integration and Developing Countries*, p.56. See also Sebastian Edwards and M. Savastano, "Latin American's Intra-regional Trade: Evolution and Future," in David Grenaway, Thomas Hyclak, and Robert Thornton {eds.} *Economic Aspects of Regional Trading Arrangements* {New York: Harvester Wheatsheaf, 1989}.

²⁵³ See Mattli the Logic of Integration supra at p. 143

²⁵⁴ See Mattli the Logic of Integration supra at pp. 143-145

²⁵⁵ See W.T. Wilford and G. Christou, "A Sectoral Analysis of Desegregated Trade Flows in the Central American Common Market, 1962-1970". *Journal of Common Market Studies* 12 {December 1973}, 159-175

²⁵⁶ See Mattli the Logic of Integration supra at p. 145 - 146

²⁵⁷ For a good account of the causes of the Soccer War, see William Durham, 'Scarcity and Survival in Central America: *Ecological origins of the Soccer War* {Stanford: Stanford University Press, 1979}, p.1

²⁵⁸ For example, in 1993 Argentina boasted a growing economy with inflation running at an annual rate of 7.4 percent. Brazil, however, was plagued by annual inflation of 2,500 percent and an under valued currency. As a result the trade gap quickly widened in Brazil's favour and the ensuing tensions between the two countries brought trade negotiations to the brink of collapse. See Mattli the Logic of Integration supra at p. 147

3.6.1 The North American Free Trade Area (NAFTA)

In essence, the NAFTA is a new, improved, and expanded version of the Canada-U.S free trade area. In large part, the agreement involves commitments by Mexico to implement the degrees of trade and investment liberalisation promised between its northern neighbours in 1988. However, the NAFTA goes further by addressing unfinished business from the free trade area, including protection of intellectual property rights, rules against distortions to investment,²⁶⁰ and coverage of transportation services.

The NAFTA provides for the faced elimination of tariff and most non-tariff barriers (NTB) on regional trade within 10 years, although a few import sensitive products will have a 15-year transition period.²⁶¹ In addition the NAFTA extends the innovative dispute settlement procedure of the free trade area to Mexico. This is in return for a substantial revamping of Mexican trade laws that injects more transparency into the administrative process and brings Mexican anti-dumping and other procedures closer to those of the U.S and Canada. Quite clearly the NAFTA boosts of precedent-setting rights and obligations regarding services and investment and takes an important first step in addressing cross-boarder environmental issues.

The agreement contains notable commitments on the liberalization of trade and investment. First, the NAFTA establishes within 15 years free trade in agricultural products between the U.S and Mexico.²⁶² The accord immediately converts key US and Mexican agricultural restrictions into tariff-rate quotas and sets a maximum 15-year period for the phase-out of more than a quota of the tariff which is an impressive achievement considering the dismal track record of other trade talks in reducing long-standing farm barriers.²⁶³

Second, the investment obligations of the NAFTA and the related dispute settlement provisions accord national treatment to NAFTA investors, remove most performance requirements on investment in the region, and open up new investment opportunities in

²⁵⁹ For a detailed study of CACM's evolution in the 1980s, see Juan Alberto Fuentes, *Desafios de la Integracion Centroamericana* (San Jose, Costa Rica: Instituto Centroamericano de Administracion Publica [icap], 1989).

²⁶⁰ Local-content and export performance requirements

²⁶¹ US-Canada bilateral tariffs were to continue to be phased out according to the free trade area schedule, that is, by January 1988.

²⁶² JJ. Scott et al NAFTA: An Assessment: Institute for International Economics; Wshington, DC Feb. 1993 at p. 2

key Mexican sectors such as petrochemicals and financial services. The investment provisions provide a useful model for future GATT trade accords despite the notable exceptions for primary energy and Canadian cultural industries.²⁶⁴ Third, the pact sets important precedents for future regional and multilateral negotiations by substantially opening the financial services market in Mexico to US and Canadian participants and by removing significant obstacles to land transportation and telecommunication services.

Finally, the NAFTA offers a comprehensive result in textiles and apparel. On the one hand, the pact calls for the elimination of all tariffs and quotas on regional trade in textiles and apparel products.²⁶⁵ Schott²⁶⁶ notes that this is the first time in this heavily protected sector that imports from an important developing-country supplier have been significantly liberalised by the US and Canada. He, however, faults the rules of origin established to qualify for duty free treatment, which he terms as being highly restrictive. Indeed if these rules are coupled with prospective GATT reforms, the cumulative result could be strongly trade diverting.

3.6.2 Implications for Mexico

For Mexico, the NAFTA reinforces the extensive market-oriented policy reforms implemented since 1985. These reforms have promoted real annual growth of 3 to 4 percent in the 1990s and a falling rate of inflation.²⁶⁷ The NAFTA portends a continuation of this fast pace of change in the Mexican economy by extending the reform process to sectors such as autos, textile and apparel, finance, telecommunications, and transportation. Mexican exporters will also benefit in two distinct ways: the relatively unfettered access to the US Market they already enjoy under various unilateral US programs will be sustained, and the few remaining US trade barriers will be liberated.

The prospect of NAFTA implementation has already generated a strong expectational effects, with capital inflows to Mexico estimated at about \$18 billion in 1992 of which

²⁶³ Ibid.

²⁶⁴ The Cotonou Agreement makes fairly extensive provisions on investment promotion matters – See Chapter Seven below.

²⁶⁵ Except for a special US quota for Canadian apparel producers that do not meet the strict regional rules of origin.

²⁶⁶ J.J. Scott et al NAFTA: An Assessment: supra at p. 3

²⁶⁷ Ibid.

about \$5 billion was probably foreign direct investment.²⁶⁸ These large inflows are the financial counterpart to the growing Mexican current account deficit generated by imports of machinery, equipment, and other capital goods- all essential ingredients for the sustained development of the Mexican economy.

3.6.3 Implications for the United States and Canada

For the US, the NAFTA reforms should enhance an already important export market. US exports to Mexico have grown sharply since 1986 and now run at an annual rate of about \$42 billion.²⁶⁹ US suppliers of intermediates, capital goods, and high-technology products should continue to reap large benefits as prime suppliers of the growing Mexican market. Over time, the NAFTA should impel industrial reorganisation along regional lines with firms taking advantage of each country's ability to produce components and assembled products and thus enhancing competitiveness in the global market place.

As for Canada, the NAFTA reinforces, and in some cases strengthens, its free trade area preferences in the US market. Canada achieved many of its specific objectives in the negotiations, such as clarifying the method used to calculate the regional content for autos and retaining the Canada-US free trade area provision that exempts Canadian cultural industries from external competition.²⁷⁰ In addition, the NAFTA improves Canada's access to the Mexican market. Although Mexico is a relatively small export market for Canada under \$1 billion at present, the NAFTA will expand export opportunities for Canadian firms in several key sectors, such as financial services, automobiles, and government procurement.

3.6.4 A brief critique of the NAFTA

Despite its attraction, the NAFTA is not entirely without shortfalls.²⁷¹ While the Clinton administration was busy pushing for a new GATT agreement globally, it was simultaneously helping to support the NAFTA and Asian Pacific Economic Co-

²⁶⁸ Investment has anticipated trade reforms in Mexico, just as it did in Europe after the passage of the Single European Act in 1986, which presaged the internal market reforms of the EC 1992 process.

²⁶⁹ JJ. Scott et al NAFTA: An Assessment: supra at p. 4

²⁷⁰ Ibid

²⁷¹ Commentators have, for example, sited basic energy as an area that remains immune to free trade, progress on labour and environmental issues proceed in half steps, and the accession clause is no more than a hortatory statement.

operation (APEC) economic trade blocs. This he did so that the two blocs could counter the European Union and to benefit from bloc privileges within the GATT. Some commentators have argued that this two-tier strategy was the trade equivalent of the Clinton strategy of attempting to reduce nuclear arms proliferation globally, while supporting the rapid increase in all other kinds of weapon sales to the Third World.²⁷²

NAFTA negotiations began under the Bush administration in 1991. The aim was to counter the clout of the European Union by creating a free trading bloc of 364 million consumers in the United States, Canada, and Mexico with a total output of \$6 trillion which is 35 percent more than the EU's output.²⁷³ In the NAFTA initiative, President George Bush saw NAFTA as a way to support the open economic reforms and trade liberalisation of Mexican President Carlos Salinas that were initiated in 1987.²⁷⁴

Proponents of NAFTA viewed the agreement as a natural evolution of an emerging architect of North America that was happening anyway and as the first step toward a larger North American bloc.²⁷⁵ Opponents of NAFTA, on the other hand, argued that after the initial upsurge in exports of the three countries with tariffs removed, factories would be tempted to move from the U.S. (and eventually Canada) to Mexico, which would result in lower wages and looser environmental regulations.²⁷⁶

Although the Clinton administration incorporated side agreements to help equalise environmental standards and enforce existing labour laws, sceptics noted that the money allocated for these activities was minimal- particularly in the case of labour law

²⁷² It is noteworthy that during this period the US share of arms sales in the third world meteorically shot from less than 13 percent in 1987 to 57 percent in 1992.²⁷² The aim in both cases was to boost American economic growth and employment in the short-term post-cold-war era regardless of the long-term negative consequences for the world community. The potential trade bloc wars and conventional regional wars in other countries were equally ignored.

²⁷³ Since Canada's trade with Mexico was but 1 percent of its trade with the U.S., the controversy surrounding the final passage of NAFTA in the U.S Congress in November 1993 centred on trade-offs between the U.S and Mexico. In 1992, the U.S had a \$5 billion trade surplus with Mexico, in contrast, for example, to a \$75 billion trade deficit with East Asia. About 70 percent of Mexico's imports came from the U.S. See David Hale, "The Trade Revolution," *The Wall Street Journal*, November 3, 1993

²⁷⁴ Moreover, without the international investor confidence generated by NAFTA, it is hard to imagine how Mexico would have covered an unusually heavy external savings deficit of 5-6 percent of its gross domestic product in 1993

²⁷⁵ See, for example, Stephen Blank, "The Emerging Architecture of Northern America," *The North-South Agenda*, Paper One, March 1993 (Coral Gables, FL.: North-South Centre, University of Miami ,

²⁷⁶ Ibid

enforcement.²⁷⁷ The incidence of unskilled labour is widely expected to shift to Mexico, hitting hardest those in the U.S who need the work most. Americans have probably underestimated the existing training and skills of Mexicans who could fill high level jobs as well.

Even if not, so goes the argument, it is undoubtedly cheaper to train and retrain workers in Mexico than in the U.S. Another problem is that many Mexican corn farmers will be put out of work as the lowered tariffs let through a wave of highly competitive agricultural goods from the U.S and Canada.²⁷⁸ Larger companies, particularly financial services, benefit immensely from NAFTA. And NAFTA may help to stem the tide of Mexican seeking to emigrate to the U.S. The ultimate question is who will benefit the most from the redistribution of benefits, both short-term and long-term? Or will it be a positive-sum game of greater benefit to all?

The main area, however, where the NAFTA is open to criticism is its enunciation of restrictive rules of origin. These arcane trade provisions have been aptly labelled “tools of discrimination.”²⁷⁹ Origin rules are used to determine which goods qualify for preferential treatment under the NAFTA and to deny NAFTA benefits to those goods that contain significant foreign-sourced components.

Rules of Origin are an integral part of all free trade pacts. The NAFTA provisions have, however, been faulted on two counts. First, to an undue extent, they penalise regional producers by forcing them to source from less efficient suppliers located in the region, thereby undercutting the global competitiveness for the buying firms. Second, the NAFTA rules could establish an unhappy precedent for other preferential trading pacts, which may choose to emulate the restrictive practices articulated in the NAFTA to the disadvantage of the original perpetrators.²⁸⁰

²⁷⁷ JJ. Scott et al NAFTA: supra at p. 7

²⁷⁸ See Timothy Koechlin and Mehrene Larudee, “The High Cost of NAFTA,” *Challenge*, September-October, 1992, pp. 19-26. Also see Sheldon Friedman, “NAFTA as Social Dumping,” in the same issue, pp. 27-32

²⁷⁹ JJ. Scott et al NAFTA: An Assessment: supra at p. 5

²⁸⁰ The impact of the Rules of Origin in limiting trade liberalisation is suggested by comparing actual and hypothetical duty collections on US imports from Canada.²⁸⁰ Based on 1991 data, duty collections from Canada will eventually drop to about 18 percent of the most-favoured-nation (MFN) duty rates rather than the zero level that would occur without rules of origin. In other words, about, 18 percent of US imports from Canada will not benefit from the free trade area.

Clearly, the stricter the rules of origin, the higher this residual percentage on trade terms would be. In general, the NAFTA adopts a standard rule that goods containing foreign components qualify for preferential treatment only if they undergo a “substantial transformation” in the region that results in a change in tariff classification of the product.²⁸¹ In addition, however, complex value-added tests and requirements that products should not be contaminated by key components sourced abroad have encumbered the NAFTA rules of origin for several key sectors.²⁸²

The intense lobbying that prompted these restrictive NAFTA rules presages the industry’s counterattack against the proposed global reform of the Multi-Fibre Arrangement in the Uruguay Round of GATT negotiations. The reform would phase out all quotas over 10 years. For autos, the NAFTA adopts a “net cost” approach for origin calculations. By itself, this method is an administrative improvement.²⁸³ However, the NAFTA value-added test is much higher than, and supersedes, the 50 percent requirement of the Canada-US free trade area.²⁸⁴

Moreover, the NAFTA includes tracing requirements to ensure that the foreign component of engines, transmissions, and other specified parts are subtracted when determining whether a vehicle meets the new content requirements. Together these rules substantially raise the overall regional-content requirements for preferential trade in automotive products.²⁸⁵

In the whole, NAFTA is a noteworthy achievement, but its implications for Mexico, Canada and the United States should not be exaggerated. By widening the scope of the market and enlarging the range of available labour skills, the NAFTA enables North

²⁸¹ Concerns about restrictive NAFTA rules of origin arise most prominently in two sectors: textile and apparel and autos. In textile and apparel, the agreement establishes a triple transformation test that makes the already-protectionist rules of origin in the Canada-US free trade area seem liberal by comparison.

²⁸² For most products, the NAFTA establishes a “yarn forward” rule, which requires an item to be produced from yarn made in a NAFTA country to qualify for regional preferences. The impact of this rule is somewhat softened, however, by the exemption of a small number of fabrics. Such products only need pass a single transformation test to qualify for preferential treatment and by special quotas under which products that do not meet the origin requirements would still qualify for preferential tariff treatment.

²⁸³ The net cost approach subtracts specified administrative expenses from the transaction price to determine the base for calculating the ratio of foreign to regional content. See JJ. Scott et al *NAFTA: An Assessment*: supra at p. 6

²⁸⁴ 62.5 percent for autos, light trucks, engines, and transmissions; 60 percent for other vehicles and parts
ibid

²⁸⁵ JJ. Scott et al *NAFTA: An Assessment*: supra at p. 6

American firms and workers to compete more effectively against foreign producers both at home and in the world markets. But the ability of the NAFTA partners to gain maximum benefits from the pact with minimum adjustment cost depends, as is the case with countries in the east and southern Africa importantly on maintaining domestic economic policies that ensure growth. Firms will still look first and foremost at the macroeconomic climate in each country in setting their investment priorities.

3.7.0 Integration in Asia

3.7.1 Early integration schemes

The early history of the Asia-Pacific region confirms that many proposals for integration are triggered by external events that threaten to undermine economic prosperity in the region. One such attempt was Japan's proposal in the 1960s for a free trade pact with the developed economies of the Pacific rim, namely the United States, Canada, Australia and New Zealand. The project was motivated by the fear that the fledgling European Community and American ideas for an Atlantic Community" would shut Japan out of the export markets it needed in order to rebuild its war-wrecked economy.²⁸⁶ The project failed on American opposition.

3.7.2 The Association of Southeast Asian Nations (ASEAN)

The most notable example of regional grouping in Asia is the Association of Southeast Asian Nations (ASEAN). Unlike most other integration attempts in Asia, particularly those of the latest wave, it is not an example of the second integrative response.²⁸⁷ The ASEANS creation was triggered by a war in neighbouring Indochina that threatened the stability in the area. Indonesia, Malaysia, the Philippines, Singapore, and Thailand founded this group in 1967.²⁸⁸ ASEAN defined its main tasks as ensuring the members' stability and security from any external interference and laying down "the foundation for a prosperous and peaceful community of South East Asian Nations."²⁸⁹ Concrete steps to promote intra-ASEAN co-operation were only taken, however, some eight years later, when the Americans were defeated in the Vietnam War.

²⁸⁶ See Kiyoshi Kojima, *Japan and a Pacific Free Trade Area* (London: Macmillan, 1971); Pekka Korhonen, *Japan and the Pacific Free Trade Area* (New York: Routledge, 1994)

²⁸⁷ Mattli is of the view that this aspect points to a limitation of his analytical framework, that is, it cannot be explained as an integration effort triggered by negative externalities that arise from community-building elsewhere. He adds that his framework, nevertheless, remains useful for understanding the fate of ASEAN. See Mattli the Logic of Integration supra at p. 163

²⁸⁸ The oil rich Sultanate of Brunei joined ASEAN in 1984; Vietnam joined in 1995; Burma and Laos joined in 1997

The Security threat posed by the Vietnam War and the threat of communist insurgency confronting all ASEAN members galvanised the group into action.²⁹⁰ Economic prosperity through closer commercial links was seen as the most promising way to deal with the new challenge to regional stability.²⁹¹ At their first summit conference held in Bali in 1976, the ASEAN leaders decided to accelerate the process toward regional co-operation in the economic and political domains.

To this end, these approved the ASEAN Preferential Trading Arrangements (PTAs) one year later, under which ASEAN member States agreed to exchange tariff preferences on approved imports. The Bali summit also brought about the ASEAN Industrial Projects (AIPs),²⁹² large-scale, capital-intensive public private sector projects in which all ASEAN members held equity stakes. The outputs of these projects enjoy tariff preferences within the ASEAN.²⁹³

Most of these initiatives, have, however, made very little progress.²⁹⁴ ASEAN's Preferential Trading Arrangement have had a minimal impact on intra-ASEAN trade because most member states exclude products deemed "sensitive" from the PTA list.²⁹⁵ Agreements to extend PTA coverage to a broader range of goods remain a dead letter. In the early 1990s PTA products accounted²⁹⁶ for less than 1 percent of total intra-ASEAN trade.²⁹⁷ Likewise out of the five initial ASEAN industrial projects, only two have become fully operational, and much of their success is due to Japanese financing and technology.²⁹⁸ The AIC has so far succeeded only for automotive parts and components

²⁸⁹ Mattli ; The Logic of Integration, supra at p.164

²⁹⁰ Mattli ; The Logic of Integration supra at p. 165

²⁹¹ Mattli ; The Logic of Integration supra at p. 166

²⁹² Mattli ; The Logic of Integration supra at p. 167

²⁹³ Other projects for regional industrial co-operations adopted over the years include the ASEAN Industrial Complementation (AIC) and the ASEAN Industrial Joint Venture {AIJV} SCHEMES. The AIC sought to promote complementary trade in selected manufactured products within the ASEAN.²⁹³ The AIJVs were introduced in 1983 to provide tariff reduction of up to 90 percent for products from joint ventures in which ASEAN firms held at least a 40 percent share and representative firms at least one other ASEAN country hold a 5 percent share. Mattli; The Logic of Integration, supra at pp. 163 & 165

²⁹⁴ Mattli ; The Logic of Integration, supra at p. 170

²⁹⁵ *ibid*

²⁹⁶ Mattli ; The Logic of Integration supra at p.171

²⁹⁷ *Ibid*

²⁹⁸ Mattli ; The Logic of Integration supra at p.172

under the brand to brand complementation scheme approved in 1988.²⁹⁹ As for the AIJVs, it had approved only twenty-three projects by the end of 1994.

Excluding Singapore, intra-ASEAN exports amounted to approximately 5 percent of total ASEAN trade in 1990.³⁰⁰ This number actually represents a slight decline since the late 1960s. Similarly, interregional investment accounts for only a very small fraction of total foreign direct investment in ASEAN countries. Apart from Malaysia, intra-ASEAN investment amounts to less than 10 percent of total foreign investments, with over 90 percent of this coming from Singapore alone.³⁰¹

3.7.3 The Asian Pacific Economic Co-operation (APEC)

As soon as NAFTA was passed in November 1993, President Clinton went to a meeting of the Asian Pacific Economic Co-operation (APEC) group in Seattle. His mission was to counter the overselling of NAFTA as an exclusive North American trade bloc and to keep the U.S. from being excluded from an emerging Asian bloc. APEC as a consultative forum is made up of Australia, Canada, New Zealand, and the U.S plus the Asian nations, of Japan, the Republic of Korea, Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand.

Soon the People's Republic of China, Hong Kong, and Taiwan (or "China Taipei") joined the organisation. It has an annual budget of \$2 million and a small secretariat based in Singapore (paid for largely by the government of Singapore). High-level ministerial meetings are held once a year according to the APEC charter, aimed at trade liberalisation and co-operating on issues such as investment regulations, technology transfer, telecommunications, and energy.³⁰² Prime Minister Mahathir Mohamad of Malaysia boycotted the APEC meeting in Seattle advocating an exclusive all-Asian grouping called the East Economic Caucus he devised in 1990.³⁰³ He envisioned the

²⁹⁹ Mattli ; *The Logic of Integration* supra at p.173

³⁰⁰ Ibid

³⁰¹ Mattli ; *The Logic of Integration* supra at p.176

³⁰² See Frank B. Gibney, "Creating a Pacific Community," *Foreign Affairs*, Nov./Dec. 1993, Vol.72, no. 5, pp.20-25

³⁰³ More recently, Mahathir successfully organised a group of fifteen developing nations to block a U.S-European move to link preferential access to their markets to workers' rights.

caucus, which has failed to develop support, as a counterweight to the EU and NAFTA blocs.³⁰⁴

APEC's November 1994 meeting in Jakarta consolidated an investment code drafted by APEC subcommittees –common rules for investing in eighteen nations around the Pacific Rim. As a South Korean Diplomat put it, abolishing protective laws is “a necessary evil” in order to expand the trade of the East Asian countries. Although APEC is a thin, young, and fragile organisation, it may assume growing importance as a trading group, particularly since more than 40 percent of U.S trade is with the Pacific region. Given the commonality of the Chinese written language (upon which Japanese is based) in many of the APEC countries, it could easily be that a core Chinese-language based trading bloc will emerge. In this regard, it is well to keep in mind that the major source of direct foreign investment in China is offshore Chinese in other countries.³⁰⁵

3.8 Concluding Remarks

The objective of this chapter was to survey and analyse some of the notable integration regimes that have cropped up in different locations of the globe. One objective was to highlight the pertinent features attending these trade regimes and the challenges they have had to grapple with in their integration experience. The other object was to demonstrate that regional integration experiences all over the world are coupled with similar dynamics which may or may not work for their success.

What has come out clearly in the foregoing discussion is the indisputable fact that for the most part, external integration processes trigger the creation of regional regimes. Such processes tend to jolt regional partners into self-preservation counter unions. In this respect we have seen that trade blocs may perhaps be best understood as buffer zones in the turbulent process of creative destruction that characterises global capitalism. This discussion has shown that such buffer zones provide time for political-economic adjustment for member nations inside the zone. The security zone also helps members to

³⁰⁴ Phillip Shenon, “Boycot in Order, Malaysian Says,” *The New York Times*, Nov.21, 1993. And see “Malaysian’s Mahathir: Leading A Crusade Against the West,” *Business Week*, April 25, 1994

³⁰⁵ Rong-pin Kang, “Technology Import Policy of China in 1990s”, Paper presented at International Symposium on Networking of Human Relations and Technology, at Tokyo Keizai University, Tokyo, October 25, 1993

co-ordinate policies in order to maximise the advantage of members in the economic competition with nations outside the bloc.

Most importantly, the chapter has identified two characteristics that mark out a successful integration initiative. One of these elements is the availability of commitment institutions such as centralised monitoring and third party enforcement mechanisms. These institutions, we have noted, help to enhance the chances of sustained co-operation by acting as constraints on member states in circumstances where self-help measures alone are insufficient to prevent renegeing on contractual obligations. The second central feature is the presence of an indisputable leader state among the group of countries seeking closer ties as a focal point in the co-ordination of rules, regulations, and policies. We have seen that such a hegemon does help to ease distributional tension by assuming the role of regional paymaster.

This chapter has demonstrated that the extra-ordinary success of the EU and the OPEC were preconditioned by unusual sets of fortunate historical circumstances. This fact reinforces the proposition made in the previous chapter that for integration regime to succeed there must be demand factors for such an initiative. We have seen that in the case of the EU, a long and deep educational, cultural, and technological infrastructure was not difficult to resurrect after World War II, particularly given the Marshall Plan aid aimed to shore up Western Europe against the cold war threat from the Soviet Union.

The chapter has established that the US and the UK over-learned a lesson from the settlement of World War I- not to break the back of Germany economically, but to help the country reconstruct and be accepted in the family of nations. In the main, however, this chapter has clearly demonstrated that the challenges which integration efforts have had to grapple with elsewhere in the world are replicated in the integration experience within the eastern and southern Africa region.

It remains to be seen, however, whether the freeing up of trade globally will help to stimulate economic growth in both developed and developing countries. Meanwhile, the post-liberal trading blocs will determine which regime benefits most from this growth and which gets the lion's share of the global market. In the following chapter, we shift

the focus to examine the legal framework within which integration regimes operate in the world trading system.

Chapter Four: The World Trade Organisation's Mandate for Regionalism

4.1 Introduction

The WTO structure supplies the legal framework for the regional integration arrangements. Of course, the character and content of different regional blocs may, as is expected, differ significantly. What is clear is that *Article XXIV* and the so-called enabling clause form the juridical basis for all regional integration regimes. There is a whole range of requirements that regional blocs must comply with under the WTO framework. This chapter examines the jurisprudential disposition of the WTO framework vis-à-vis the regional integration phenomenon. It is important to see how, if at all, the eastern and southern Africa regional blocs operate within the enabling ambit of WTO framework.

Knowledge of *Article XXIV* and the problems associated with its application are important inputs into the discussion of both the compatibility of regional integration agreements with the world trading system, and the possible improvements in the rules and procedures that have been suggested by trade experts.

There are certainly some interesting areas of conflict between the multilateral obligation and fidelity to covenanted regional integration disciplines. This chapter will highlight some of these pointed areas of conflict and afford some guarded views on them. Emphasis will be placed on *Article XXIV*, the enabling clause, the MFN principal, and the whole spectrum of Generalized System of Preferences (GSP) -which facility is specifically reserved for the utility of developing countries. Other important areas this chapter covers are tariff barrier and non-tariff barrier regime and the critical question of government procurement processes. The chapter will examine the background and operational efficacy of the WTO framework on regionalism. The relevant law regarding free trade areas and customs union will be dealt with in greater detail with a view to placing regional integration processes in their proper legal perspective.

The chapter will deal with some of the vexed issues that the free trade agreement must grapple with to ensure proper compliance with the WTO protocol on free trade areas.

To go into these begging issues, it is necessary to look into the guidelines promulgated by the WTO on regional integration regimes. This discourse aims to lay a sound legal foundation upon which an in-depth discussion of the germane issues underlying regionalism in the east and southern Africa region would take shape. After all, free trade instruments and customs unions do not operate in a vacuum. The WTO is the legal vehicle by which these instruments are vested with international competence. It is, therefore, of critical importance to cover as much ground of the principal law so as to lay a solid foundation upon which to examine the relevant regional integration instruments.

4.2 The WTO's roots from Havana to Marrakech

The GATT agreement helped establish a strong and prosperous multilateral trading system that became more and more liberal through rounds of trade negotiations. But by the 1980s the system needed a thorough overhaul. This led to the Uruguay Round, and ultimately to the birth of the WTO. From 1948 to 1994, the GATT³⁰⁶ provided the rules for much of world trade and presided over periods that saw some of the highest growth rates in international commerce. It seemed well established, but throughout those 47 years, it was simply a provisional measure.³⁰⁷

The World Trade Organisation has now replaced GATT the institution. GATT - the agreement - has been amended and incorporated into the new WTO Agreements. GATT deals only with trade in goods. The WTO Agreements now cover services and intellectual property as well. The GATT is now subsumed in the WTO and represents one of its important pillars.

The World Trade Organisation (WTO) is the main multilateral institution dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These documents provide the legal ground-rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits. Although negotiated and signed by governments, the goal is to help producers of goods and services, exporters, and importers conduct their business with less restrictions.

³⁰⁶ One would wonder whether the WTO and the GATT are not one and the same thing. The answer is no they are not. The WTO is GATT plus a lot more. GATT (the institution) was small and provisional, and was hardly ever recognised in law as an international organisation.

The WTO began life on 1 January 1995, but its trading system is half a century older. Since 1948, the General Agreement on Tariffs and Trade (GATT) had provided the rules for the system. Before long it gave birth to an unofficial, de-facto international organisation, also known informally as GATT, and over the years GATT evolved through several rounds of negotiations. The latest and largest round was the Uruguay Round, which lasted from 1986 to 1994 and led to the creation of the WTO³⁰⁷.

Whereas GATT had mainly dealt with trade in goods, the WTO and its agreements now cover trade in services, and in traded inventions, creations and designs (intellectual property). Given its disposition in the international economic-political arena, the WTO has, no doubt, assumed the status of one of the most powerful legislative and judicial bodies in the world. Legislative through the enactment of international trade rules and judicial through its powerful dispute settlement organ. Unlike United Nations treaties, the International Labour Organisation conventions, or multilateral environmental agreements, WTO rules and rulings can be enforced through sanctions. This gives the WTO more power than any other international body and even national governments.

The WTO is said to be both new and old³⁰⁸. It is new in the sense that the Marrakech Agreement establishing the WTO only entered into force in January 1995. However, the WTO is the continuation of an old idea that originated in the 1940s and was formalised in 1947 in the form of General Agreement on Tariffs and Trade - the GATT. The creation of the WTO on 1 January 1995 marked the biggest reform of the regime of international trade since after the Second World War. It also brought to reality — in an updated form — the failed attempt to create an International Trade Organization in 1948. Up to 1994, the trading system came under GATT, salvaged from the aborted attempt to create the ITO.³⁰⁹

4.2.1 The centrality of the WTO Jurisprudence

The WTO is premised on the rationale that an open and liberal trading system, underpinned by mutually agreed and legally binding rules, is the sure recipe for the growth of the global economy. The underlying principle is that an open and liberal trading system is the foundation of economic development. This would ensure the

³⁰⁷ Saleem, et al *infra*

³⁰⁸ Saleem, et al *infra*: "The WTO: Its Origin, Basic Principles, and Main Rules" The OPEC Fund Pamphlet Series; Vienna, Austria, April, 1999 pp. 9-21

expansion of investment and production, job creation and, consequently, of an increase in global living standards and greater prosperity. This has, however, not been the case more so for the economically limping developing world.

To realise these objectives there must, of necessity be the stability and predictability in the trading environment. These are the conditions pursued by the WTO through its various built-in mechanisms. In a stable and predictable trading environment, businesses, investors, traders, importers and exporters can and do plan their activities on a long-term basis. These merchants rest in the knowledge that conditions governing competition and access to markets will not change suddenly. An open trading system is based on a free market philosophy. In such a scenario, government intervention in trade is considered undesirable. It is important to caution, however, that economic theory has to face the stark practical realities that are played on the ground. Thus, while the WTO system basically frowns upon government intervention in global commerce, it does not totally disallow it.

The intervention by government is ordinarily to be avoided where, however, it is considered essential to national economic interests, it has to be subject to certain agreed disciplines. What needs to be acknowledged here is the fact that the WTO rules do constrain the freedom of governments to use specific trade policy instruments. A number of simple, fundamental principles run throughout all the WTO agreements. They are the foundation of the multilateral trading system. The basic WTO norms are the principles of non-discrimination the "most-favoured-nation" treatment and "national" treatment, more free trade, predictable policies, encouraging competition, and extra provision for less developed countries. The bottom-line for these norms is to reduce protectionism in global commerce.

Briefly summarised, the WTO contains two general principles, which are part of the background essential to understanding the discussion on regionalism in east and southern Africa region. One of the WTO's overriding preoccupation is the reduction of the level of protectionism, notably through the prohibition of quantitative restrictions, and the decrease of existing tariff rates via reciprocal tariff reductions. In this context, *Article II* introduces the concept "schedule of concessions".

³⁰⁹ Ibid.

Each Contracting Party has a schedule of concessions that lists the detailed item-by-item tariff concessions negotiated during the WTO's rounds of tariff negotiations. In accordance with *Article II*, the WTO Contracting Parties undertake the commitment to levy no more than the tariffs listed in the schedule. Article II has been referred to as the WTO's "central obligation" since it ensures the solidity of the tariff reducing agreement concluded during the negotiating rounds.³¹⁰ Hence it also fosters the ability of the Contracting Parties to make credible commitments in the first place.

Two principles govern the negotiation rounds³¹¹ one is that of 'Reciprocity' and the other the 'Most Favoured Nation' (MFN) treatment. The former is under *Article XXVII*, which means that a contracting State concedes to a third State's preferences of the same order as preferences such a State has obtained for itself. This also means that, for instance, after acceding to the WTO, new contracting States have the benefit of preferences already in existence but must in turn also grant preferences to the other contracting States. The MFN principle is covered under *Article 1* and it has as a consequence that every tariff concession granted by one contracting State to another contracting State must unconditionally apply to other Contracting States.

The system's overriding purpose is firstly to help trade flow as freely as possible — so long as there are no undesirable side effects. That partly means removing obstacles. It also means ensuring those individuals, companies and governments know what the trade rules are around the world, and giving them the confidence that there will be no sudden changes of policy. In other words, the rules have to be "transparent" and predictable. Since the agreements are drafted and signed by the community of trading nations, often after considerable debate and controversy, one of the WTO's most critical function is to serve as a forum for trade negotiations.

A third important side to the WTO's work is dispute settlement. Trade relations often carry interests that conflict. Contracts and agreements, including those painstakingly negotiated in the WTO system often call for interpretation. The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal

³¹⁰ John H. Barton and Bart S. Fisher, *International Trade and Investment: Regulating International Business*, Boston: Little, Brown, 1986, p. 143

foundation. That is the purpose behind the dispute settlement process written into the WTO agreements.

4.2.2 The tariff restrictions debate

The WTO does not prohibit the imposition of customs duties. It merely states that duties which are applied to imported goods must be in the form of customs duties and not, for instance, in the form of discriminatory internal taxes (*Article III*), exorbitant import fees (*Article VIII*) or quantitative restrictions (*Article XI: para.3.26*). However, the WTO does impose an obligation on the contracting States to negotiate regularly on the reciprocal granting of tariff concessions, i.e. on the lowering of customs duties (*Article XXVIII bis*). So far eight trade negotiations rounds have been held in this regard.

The main regional and multilateral agreements in the field of trade have very largely the same policy agenda in the sense that they cover tariffs, non-tariff barriers and the regulatory barriers to trade. The degree of coverage differs in every pact. Tariffs were the first trade barriers to be addressed and are covered by all regional agreements and by the WTO. The result has been that there has been a major reduction in tariffs in international trade. Tariff reduction and removal are the main component of regional arrangements as well. To this extent, one is inclined to say that regional agreements have contributed to reductions in tariffs whilst the multilateral negotiations have by and large kept up with the pace.

4.2.3 The Mechanics for the Rules of Origin

The final task in calculating the appropriate duty on imported goods is establishing the country of origin of imports. Tariff treatment is often dependent on the country of origin of the imports. In order to qualify for a particular tariff treatment an importer must establish the product's origin. Establishing origin is often difficult. Goods may be processed, assembled, packaged or finished in a variety of different countries, or shipped to the importing country via another country where they may or may not enter the commerce of that country.

³¹¹ See *inter alia* M.Broszkamp, *Meistbegünstigung und Gegenseitigkeit in GATT* (Carl Heyman, 1990, Cologne)

The determination of origin rules is a particularly controversial issue in the examinations of free trade areas has been the Rules of Origin.³¹² This is the criterion established for products to receive free trade area treatment in instances in which intermediate goods imported from third countries are used in the production process. Since there are more and less restrictive ways of designing and administering Rules of Origin, third countries have been concerned that such rules create new trade barriers to their trade with member countries.³¹³

There are presently no comprehensive multilateral rules that govern the determination of rules of origin. Moreover, in many countries, rules of origin are not internally harmonised. That is, there are different rules for establishing origin within the country depending on the context, for example, for tariff purposes or during dumping investigations. This could and does often subject its exporters to considerable inconvenience and expense. For instance, goods that originated from country A may pay the tariff rate for country B, where it was processed, but face anti-dumping duties levied against goods from country A. Even within one context, rules are often imprecise as exemplified by the rules of origin laid out in a free trade agreement. For the purposes of the free trade area, goods are deemed to originate in the territory of a Party if they are wholly produced or obtained in that particular country.³¹⁴

The Uruguay Round Agreement on Rules of Origin contains a similar approach to the free trade area with some important differences. First, the agreement sets out plans for transition to a harmonised system of origin determination to be developed by a Committee on Rules of Origin and Technical Committee assisting it within three years of the acceptance of the agreement. The first step requires all countries to harmonise their

³¹² Members of free trade elaborate rules of Origin due to the fact that each retains its own external trade policy in contrast to members of customs unions. See full discussion on this item below

³¹³ Third country members of the working parties on the 1973 free trade agreements between the EC and individual EFTA member States, for example, indicated that the effect of their Rules of Origin would be to raise barriers to third country trade in intermediate products. Third countries, too, argued that the Rules of Origin were too complex and cumbersome as to present a barrier to trade in and among them. Another view was that the absence of the GATT guidelines on Rules of Origin for regional integration agreements left Contracting Parties free to adopt whatever rules they may deem appropriate. See also BISD 20S/145. 20S/171. 20S/183. 20S/196

³¹⁴ See the discussion on NAFTA at Chapter three above

own rules of origin.³¹⁵ During this period the rules applied by each country must be based on a positive standard - what confers origin not what does origin confer.

Once this harmonisation is achieved countries will be required to base determination of origin either on the country where the goods were wholly obtained or the country where the goods underwent its last substantial transformation. This rule of last substantial transformation is not fully defined in the Agreement³¹⁶ but it combines the change in tariff classification method with supplementary criteria based on percentage of value added or specific manufacturing or processing operations. The NAFTA also contains a number of new and complex rules of origin designed to clarify and harmonise determination of content.³¹⁷ This has, however, been criticised for being too unwieldy and complicated.³¹⁸

Rules of origin are different from subsidies and technical barriers, in that they are a direct consequence of the trade preferences in general and of regional integration agreements in particular. Non-preferential rules of origin, which are used to apply special trade instruments, also raise problems but much less acute. The various regional or national rules of origin have retained common elements. They all built on the foundations of last substantial transformation and use a combination of value-added, change-of-tariff heading and process-based determination of origins. It does not, therefore, seem impossible to achieve some approximation of those rules at the multilateral level. This was illustrated by the progress achieved in the Uruguay Round.

The issue was whether stronger GATT provisions could be developed and whether they could prevent the misuse of the flexibility, which is necessarily built into these rules of origin. It establishes a work programme on common rules of origin. Possibly more important, it requires all Contracting Parties to have effective speedy review proceedings³¹⁹. Enhancing transparency could considerably help to contain the abuse of rules of origin as an instrument of trade policy. The strengthened GATT dispute

³¹⁵ This provision applies to all rules of origin used in non-preferential commercial policy instruments including application of : MFN treatment, anti-dumping and countervailing duties, safeguard measures, origin marking requirements and any discriminatory quantitative restrictions

³¹⁶ A Technical Committee was established to develop a definition of this and other terms.

³¹⁷ See Jon Johnson, 'The NAFTA Rules of Origin - A New Approach?' Canadian Law Newsletter, American Bar Association, OCT. 1992.

³¹⁸ See the discussion of the NAFTA trade agreement at chapter three above

³¹⁹ These do not currently exist in the EC

settlement³²⁰ mechanism will also apply to rules of origin. The EU-SA trade partnership makes provision for an elaborate regime on rules of origin. The anticipated complexity, here, has been avoided by cumulating products from the SACU and to some extent tolerating inputs from the ACP countries. Trade regimes in the east and southern Africa region make extensive provisions on origin rules. The problematic area of the confluence between SADC and COMESA as far as the implementation of the rules of origin is one very pointed issue treated at chapter eight below.

4.2.4 The Most Favoured Nation principle

The MFN principle in *Article 1* (the Article), is the premier WTO rule upon which all other trade regulations derive their competence. This principle has its clearest application to tariff concessions. Under the Article any concessions made by one country to another must be immediately and unconditionally extended to like products originating from other Contracting Parties. Although the MFN rule has a long history controversy still dogs the purpose served by the rule.³²¹ At one level, it seems to encourage rampant free-riding by countries on concessions negotiated between other countries, and at the limit might encourage every country in turn to withhold concessions made by others, thus paralysing the process of trade liberalisation.³²²

On the other hand, it could be argued that trade or specifically tariff concessions could be more readily negotiated between country A and country B. This is only so if each country is assured that the other country will not subsequently negotiate more generous concessions with third countries and thus undermine the benefits associated with the initial exchange of concessions.³²³ This scenario is more prevalent in free trade area arrangements. Like we have pointed out in chapter seven below, the EU-SA vis-à-vis Cotonou configuration is one such example.³²⁴ Whatever the strength of these offsetting arguments, the bargaining structures which the WTO member countries have employed in negotiating tariff concessions clearly reflect sensitivity to the free-rider problem. And the importance, at least politically if not economically, of extracting reciprocal

³²⁰ See the discussion on this item below

³²¹ See J.M. Finger, 'Trade Liberalisation: A Public Choice Perspective', in R. Amacher, G. Haberler and T. Willett (eds.) *Challenges to a Liberal International Order* (Washington DC: American Institute Enterprise, (1979); See also Richard Snyder, *The Most Favoured Nation Clause* (New York: Columbia University Press, 1948)

³²² Trebilcock et al supra, at p. 75

³²³ Ibid

³²⁴ See the discussion at chapter seven below

concessions from other countries who stand to benefit from importing countries' concessions is clearly apparent.

There are a number of significant exceptions to the MFN rule, which should be highlighted here. Foremost, the historical preferences in force at the time of coming into effect of the GATT are grand-fathered under *Article 1*. These are, however, made subject to the requirement that the margin of preferences cannot subsequently be altered in such a way as to exceed the differences between the MFN rate and preferential rates existing as of the 10th April, 1947. The provision contemplates that absolute, not proportional difference between the MFN and preferential rates must be maintained when the MFN rates are reduced or raised.³²⁵

4.2.5 Exceptions to the MFN Principle

The Generalised System of Preferences (GSP)³²⁶ provided for in *Part V* of the GATT, which are in favour of developing countries obviously entails preferences that would otherwise violate the MFN rule. Though an exception to the MFN rule, they are to be phased out under the Uruguay Round negotiated programme. Another exemption is in the area of Antidumping and Countervailing duties imposed by countries pursuant to *Article VI* of the GATT. This measure³²⁷ clearly involves duties that are selective and discriminative thereby going against the MFN grain.

Quantitative restrictions³²⁸ imposed pursuant to *Article XII* or *Article XVII* of the GATT for balance of payment reasons may, by virtue of *Article XIV*, temporarily deviate from the MFN principle. This is so in respect of 'a small part of a country's external trade' where the benefits to that country substantially outweigh any injury which may result to the trade of other countries. Also National Security exceptions, recognised in *Article XXI* of the GATT, may justify the imposition of trade restrictions on a discriminatory basis.

Again, where retaliation is authorised under the nullification and impairment provision of the GATT under *Article XXIII* or the safeguard provision under *Article XIX*, such

³²⁵ For example, if the MFN rate is 20 percent and the preferential rate one is 10 percent on imported widgets, and the MFN rate is subsequently reduced to 15 percent (a 25 percent reduction). The preferential rate can be reduced to 5 percent and not merely 7.5 percent (which would be a 25 percent reduction).

³²⁶ See the discussion on this item below

³²⁷ See the discussion on this item below

³²⁸ See discussion below

measures would typically be selective and hence running counter to the MFN rule. The various non-tariff codes negotiated at the Tokyo Round were essentially bargained on a Conditional MFN basis. This means that only Contracting Parties who were prepared to become signatories to the codes and thus accept the obligations so entailed were entitled to the correlative benefits. Under the Uruguay Round Agreements, these codes would be fully integrated into the GATT, and membership in the WTO would entail adherence to them³²⁹.

It is generally recognised that the Enabling Clause³³⁰ and *Article XXIV* are the most fundamental exception to the MFN principle. Subject to the conditions set under these provisions constituent territories are permitted to establish more favourable duty and other arrangements amongst themselves that pertain to trade with non-member countries. The avalanche of literature that is committed to this item underscores the importance of the exception.³³¹ The MFN principle does, however, derive support from the National Treatment (NT) under *Article III* of the GATT as far as tariff concessions go. In the absence of the National Treatment it has been observed that negotiated tariff concessions could be easily sabotaged. The next section examines this secondary principle albeit in brevity.

4.2.6 National Treatment

The second component of the MFN principle, the national treatment principle, outlaws discrimination between domestically produced goods and those, which have been imported. The opposite view would suggest that the country of import may be pursuing protectionist measures, in aid of its firms, so as to avoid competition from foreign firms. This rule centres on fixing the same conditions for domestic goods as well as foreign imported goods so that the latter are not discriminated against at the expense of the former

Article III (4), in this respect provides that “the products of the territory of any Contracting Party imported into the territory of any other Contracting Party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting internal sale,

³²⁹ Trebilcock et al supra at p.77

³³⁰ See the discussion that follows below

³³¹ The Enabling Clause is discussed in detail below

purchase, transportation, distribution or use.” Reaffirming this view, Hercules Booyesen states that in this clause, “a state promises to apply to another State and its citizens the most favourable import charges applicable to imported goods from other countries”.³³²

What this position means is that levying a sales tax on imported goods while locally produced goods were not subjected to the same tax would be tantamount to discrimination and therefore a violation of the national treatment principle. Allowing domestic producers of alcoholic beverages, for instance, to establish their own distribution schemes while requiring that imports of the like product be distributed through a state- managed scheme, would amount to a violation of this principle. Protectionist measures such as unnecessary internal tax and regulation affecting internal sales are governed by this principle.

In a nutshell, the principle forbids discrimination between foreign products and locally produced goods. So that here, non-discrimination is promoted, as advocated by this principle, which abhors discrimination between domestic and foreign goods. Thus, in April 1949, France lodged a complaint against Brazil for the latter’s discriminatory internal taxes against imported articles at inordinately excessive rates for like domestic products. These products were brandy and watch industry products. After a series of lengthy and complicated consultations held by the then GATT Dispute Settlement Board (DSB) in 1955, Brazil was found to contravene the MFN *Article III* of the GATT.³³³

4.3.1 Regionalism and the WTO disciplines

Like we noted in the previous chapters, most countries in the world, on all continents, are now members of regional trade agreements — customs unions, free trade areas or other preferential arrangements. Overall, more than 200 Regional Trade Agreements (RTA’s) have been notified to the GATT or WTO over time. Currently over 130 agreements are in force³³⁴. Most have been concluded in the past 10 years. Since 1995, 90 agreements covering trade in goods or services, or both, have been notified to the WTO. The Committee on Regional Trade Agreements has the task of monitoring developments.³³⁵

³³² International Transactions and the International Law Merchant (1995), at p. 87

³³³ Booyesen, International Transactions and the International Law Merchant supra, at p. 100

³³⁴ Ibid.

³³⁵ The committee’s duties are to examine individual regional trade agreements; to consider the systemic implications of these agreements for the multilateral trading system, and the relationship between

The network of regional trade agreements throughout the world is now highly complex and many countries are members of several agreements, sometimes with very differing rules. One of the most frequently asked questions is therefore whether the growth of regional groups helps or hinders the development of the WTO's multilateral trading system³³⁶. When a WTO member enters into a regional integration arrangement, it grants more favourable conditions to its trade with other parties to that arrangement than to other WTO members as a whole. This is definitely a departure from the guiding principle of non-discrimination defined in *Article I* of GATT and *Article II* of the General Agreement on Trade in Services (GATS). WTO members are however permitted to enter into such arrangements³³⁷ under specific conditions, which are spelled out in three sets of rules.

Paragraphs 4-10 of *Article XXIV* of GATT³³⁸ provide for the formation and operation of customs unions and free-trade areas³³⁹. On the other hand, the so-called Enabling Clause³⁴⁰ refers to preferential trade arrangements between developing country Members and *Article V* of GATS governs the conclusion of regional integration agreements in the area of trade in services. All notified customs unions and free-trade areas, as well as some of the regional trade agreements in the service area and of the preferential arrangements concluded among developing countries, undergo in-depth examination by WTO members. Such reviews are undertaken in the Committee on Regional Trade Agreements.³⁴¹

There is a wide range of views on whether the world is moving inexorably towards integration on a global scale. And that there is evolving a geographic concentration of trade, with the attendant risk of trade conflicts among the regional groups. In the face of

them. In February 1996, the WTO General Council established the Committee on Regional Trade Agreements. Its duties include examining individual regional agreements and considering the systemic implications of the agreements for the multilateral trading system and the relationship between them. Once the examination of an agreement is concluded, the committee prepares a report on it, which is submitted to the relevant. At present, 81 regional agreements are under examination in the committee superior body for adoption

³³⁶ See Chapter two for a detailed discussion on this item

³³⁷ Regional trade agreements, or RTAs

³³⁸ as clarified in the Understanding on the Interpretation of *Article XXIV* of the GATT 1994

³³⁹ A section on the Enabling Clause is outlined below

³⁴⁰ i.e., the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries)

³⁴¹ In the GATT years, these were conducted in individual working parties.

all these speculation the only sensible course of action is to accept that there is movement along both tracks. The factors that favour global integration and co-operation have, nonetheless, come out with definite winners with the success of the Uruguay Round on trade talks.

The seamless and mutually supportive coexistence of regionalism and multilateralism requires, however, an improved understanding of their relationship. There is also need for understanding on how the GATT/WTO provisions can best contribute to that mutual support. Moreover, even if there is an affirmative answer to the question of whether regional integration agreements have been complimentary to the multilateral process, experience cautions against assuming that the post Uruguay Round rules and procedures will be sufficient to guarantee that this will be the case with future agreements. Or indeed, for that matter, with the evolution of current agreements.

Through such examination, members seek to obtain from the parties to such individual RTA information on legal and procedural aspects of the implementation of the agreement, and on the economic and the trade magnitude involved in the arrangement. Members also endeavour to gauge the agreement's conformity vis-à-vis the relevant WTO rules. The basic rules for trade in goods Text of GATT is *Art XXIV* and its updates, including the 1994 "Understanding" Enabling Clause for developing countries Text of 1979.³⁴² The following section will examine the WTO jurisprudence on regionalism in some detail. This treatment will set out clearly the legal requirements for the establishment and thereby help to vindicate our analysis on the compatibility of regional regimes in the east and southern Africa region to the WTO disciplines.

4.3.2 The development of *Article XXIV*

Article XXIV is the principle instrument authorising the establishment of customs unions and free trade areas. It should, therefore, be seen in the context of the general

³⁴² Examples of regional trade agreements among the best known are the European Union (EU), the European Free Trade Association (EFTA) and the North American Free Trade Agreement (NAFTA). Others are the Southern Common Market (MERCOSUR), the Association of Southeast Asian Nations Free Trade Area (ASEAN), and the Common Market for Eastern and Southern Africa (COMESA). See chapter three for a detailed discussion on these regional arrangements

elimination of trade preferences, which the US government was aiming at, when it put forward its Proposals for Expansion of World Trade and Employment (1945). And with the suggested Charter for an International Trade Organisation (1946), the exception made in *Article XXIV* deserves an explanation. Firstly, the customs union exception had, already, during the inter-war period, been generally accepted. As the League of Nations' Economic Committee stated in 1929, "...customs unions constitute exceptions, recognised by tradition, to the principle of most favoured nation treatment."³⁴³

Secondly, after Secretary of State George Marshall's famous "Marshall Plan" speech on 5th June 1947, the unification of Western Europe became one of Washington's central policy goals. As a result, banning customs unions became inconceivable. This was considered as an adequate means by which Europe could achieve economic integration.³⁴⁴ Thirdly, as Clair Wilcox, the Director of the Department of State's Office of International Trade Policy explained, America's refusal to accept new preferential arrangements on the one hand and its encouragement of customs union on the other hand had an economic reason too.

A customs union, Wilcox said, creates a wider trading area, removes obstacles to competition, makes possible a more economic allocation of resources, and thus operates to increase production and raise planes of living. He added that a preferential system, on the other hand, retains internal barriers, obstructs the economy in production, and restrains the growth of income and demand. It is set up for the purpose of conferring a privilege on producers within the system and imposing a handicap on external competitors. In summary, Wilcox said, "...a customs union is conducive to the expansion of trade on the basis of multilateral and non-discrimination, a preferential system is not."³⁴⁵

³⁴³ Cited in *Customs Union: A League of Nations Contribution to the Study of Customs Union Problems*, New York: United Nations Department of Economic Affairs, 1947, p.31. Although the United States was not a member of the League of Nations, it, too, had accepted the customs union exception during the inter-war period, see *The Policy of the United States with respect to Customs Unions and Regional Preferential Trade Arrangements*, Washington, DC: Advisory Committee on post-war Foreign Policy, Trade Barrier Subcommittee, 1943

³⁴⁴ Minutes of a Meeting of the US Delegation, Geneva Switzerland, July 2, 1947, in *Foreign Relations of the US 1947*, Volume 1. Washington, D.C: U.S Government Printing Office, 1976, at p.960: and T. Alfred, *Tariff Preferences in Mediterranean Diplomacy*, London: MacMillan, 1977, at pp. 15-26

The GATT rules in this area reflect the drafters' desire to provide for such agreements while at the same time ensuring that the trading interest of third countries are fully respected. More generally is the fact that such agreements are compatible with a rules based and progressively more open world trading system. For this reason, the provisions of *Article XXIV* establish a number of conditions, which the agreements must satisfy, as well as transparency requirements in order to monitor whether those conditions are being met.

Article XXIV derives its authority from *par. 2 of Article I* of the GATT, which explicitly exempts (grandfathers) certain regimes from the MFN requirement. This refers to preferential arrangements, which were in place at the time the GATT came into force. Bethlehem³⁴⁶ opines that the introduction of the MFN with the existing preferences tolerated but capped laid the foundation for future growth of world trade on the basis of non-discrimination. This, of course, as noted in chapter two was the central goal, in particular, of the United States - that is to widen frontiers to unrestricted global commerce.

4.3.3 The Jurisprudence of *Article XXIV*

Under *Article XXIV* (herein after, 'the Article'), custom unions and free trade area agreements are permitted exceptions to the cardinal principle of non-discrimination because it is recognised that such agreements have the potential to further economic integration without necessarily adversely affecting the interests of third countries. *Par. 4* sets out the parameters of trade liberalisation both internally and externally. The paragraph states *inter alia* that: "the purpose of a custom union or a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Contracting Parties."

Par. 8 of the Article defines the characteristics of customs union and free trade areas, which in effect amounts to this. That a party to a custom union and free trade area must eliminate duties and other restrictive regulations on commerce with respect to substantially all the trade between their constituent customs territories. The requirement to eliminate duties and other restrictions on mutual trade is nonetheless not absolute.

³⁴⁵ Clair Wilcox, *a Charter for World Trade*, New York: MacMillan, 1977, pp. 7071. The logic behind Wilcox's economic argument is criticised in Richard Pomfret, *Unequal Trade: The Economics of Discriminatory International Trade Policies*, Oxford: Basil Blackwell, 1988, at pp.62-63

Apart from the flexibility implicit in the “substantially all-trade” requirement, members may still “where necessary” exercise their rights to maintain duties or restrictions under GATT *Article XI* –for quantitative restrictions, *Article XII*–for non-discriminatory administration of quantitative restrictions, *Article XV*– for exchange arrangements and *Article XX* for general exceptions. A further criteria which applies only to custom unions is that its members must apply substantially the same duties and other regulations of commerce to trade with non-members.³⁴⁷

Bhagwati (1995)³⁴⁸ holds the view that an important rationale for the substantially all trade requirement is that it helps governments resist the inevitable political pressures to avoid or minimise tariff reductions in inefficient import-competing sectors. A wider sectoral coverage does enhance the trade-creating effect of such agreements. The requirement also ensures that regional agreements are limited to those, which have sufficient political support in member countries to overcome protectionist opposition to more or less complete free trade among the participants. It also ensures that such agreements are not abused as a cover up for narrow (sectoral) discriminatory arrangements.

The criterion thereby helps “differentiate between politically unavoidable and containable deviations from the MFN rule by determining the point where trade policy is allowed to give way to foreign policy.”³⁴⁹ Recast to emphasise its incentive effect, the argument is that “the rule of *Article XXIV* attempt to limit discrimination by imposing a high (political) cost on it. Strictly interpreted, they would only allow it when the parties are really serious about favouring each other...[thus] the high political cost of establishing such preferential arrangements acts as a deterrent to their formation.”³⁵⁰

Par. 5 of Article XXIV spells out the conditions to be met by customs unions and free trade areas so as to avoid adverse effects on the trade of third countries. There is one

³⁴⁶ Daniel Bethlehem : *Regionalism and the World Trading System: WTO*, Geneva, April 1995 at p.7

³⁴⁷ In other words, have a common external tariff and more generally a common trade policy

³⁴⁸ Jagdish Bhagwati : " *Regionalism and Multilateralism: an overview*" in Jaime de Melo and Arvind Panagariya (eds.): *New dimension in regional integration* , Cambridge (Cambridge University Press, 1995) at pp. 25 -27

³⁴⁹ *Ibid*

³⁵⁰ However, interpretation of *Article XXIV* has lowered this cost for all countries while the Enabling Clause has reduced the cost for developing countries even further. The plethora of pseudo-free trade agreements now being implemented or proposed and the threat which they provide to an efficient, liberalising, multilateral system, suggest that the cost may now be too low”.

major constrain placed on customs unions. That is the requirement that the common external tariff, and other trade measures imposed at the time of the formation of a customs union, be set at a level that is not “on the whole” higher or more restrictive than was imposed by the constituent territories prior to its formation. If the level of the common external tariff is such that any of its individual members’ bound tariffs are raised, *par. 6* states that “the procedure set forth by *Article XXVIII* shall apply.”

Article XXVII procedure provides for the withdrawal or modification of previously negotiated tariff concessions, with the possibility for compensatory tariff reductions, taking into account the new market access opportunities created for the same product by decreases in tariffs of other members of the customs union.³⁵¹ Members of free trade areas, even though they do not adopt a common external tariff or common trade policy, are subject to similar obligations. *Par. 7* contains requirements to ensure transparency of the proposed agreements. Agreements are to be promptly notified to the WTO for examination by the Contracting Parties, which must make appropriate recommendations.

Since customs unions and free trade areas are ordinarily established over a fairly long period of time to avoid the economic dislocation of a rapid move to free trade among the members, *Article XXIV* provides explicitly for Interim Arrangements. But to avoid the danger that such interim arrangements are used as a pretext for introducing discriminatory preferences, *par. 5(c)* requires that they incorporate “a Plan and Schedule for the formation of such a customs union or free trade area within a reasonable length of time.”

Where the Contracting Parties, acting jointly, find that the plan and schedule in the interim arrangements are not likely to lead to the formation of such a customs union or such a free trade area, or not to do so within a reasonable period, the Contracting Parties are to make recommendations. The agreement is not to be maintained or put into force unless it is amended in accordance with such recommendations. In 1972, it was decided that notification should be made following the signature of the agreement.³⁵² The practice has been for the parties to the agreement to provide trading partners with a text of the

³⁵¹ The decision on “Procedures for Negotiations under *Article XXVIII*” (*BISD 27S/26*) confirm that these are in relevant parts also valid for negotiations under *Article XXIV:6*

³⁵² The 1972 decision states that “the Council decides to invite Contracting Parties that *sign* [emphasis added] an agreement falling within the terms of *Articles XXIV*, *par. 5-8* to inscribe the item on the agenda for the first meeting of the Council following such signature...” (*BISD 19S/13*)

agreement, so that they may consider in detail its implications for their trade and economic interests.³⁵³

Par.10 states that proposals for free trade areas or customs union not meeting the criteria described above may be approved by a two-thirds majority of the Contracting Parties provided that such proposals eventually lead to the formation of a customs union or free trade area. The drafting history indicates that the provision on free trade areas and customs unions was agreed upon despite the fact that not all participants were GATT Contracting Parties.

4.3.4 The “substantially-all-trade requirement

Differences of opinions among participants in working parties regarding the interpretation of the ‘*substantially-all-trade*’ requirement in *Article XXIV* have been a major reason why parties have not reached a consensus on the WTO compatibility by individual agreements. This requirement refers to the scope of liberalisation to be achieved by members of a customs union or free trade area. Discussions in the WTO working parties have centred on whether this concept should be understood in qualitative terms (no exclusion of major sectors) or in quantitative terms (percentage of trade of members covered). With regard to the qualitative perspective, third countries have questioned whether agreements that explicitly excluded trade in unprocessed agriculture products – the case of most agreements – met the substantially-all trade requirement.³⁵⁴

³⁵³ During the EU-SA trade negotiations, SADC members were constantly consulted and updated at various stages. In practice, again, notification is generally followed by the establishment of a working party with the terms of reference “to examine in the light of the relevant GATT provisions [name of agreement] and report to the Council. Participation in working parties is open and the countries who are parties to the agreement are always members of the working party and have the same status as other delegations. The working party’s report is sent to the Council’s governing body of the Contracting Parties who represent the views of all participants and therefore records different views if necessary. The report of the working party is adapted by the Council and may form the basis on which the Contracting Parties acting, jointly, may take a final decision on conformity of the agreement with *Article XXIV* or formulate recommendations to members of interim agreements. As was noted in the preceding paragraphs, *Article XXIV* provides in several instances for recommendations and findings to be made by the Contracting Parties in particular as regards interim agreements. *Article XXV par. 4* provides that; “decisions of the Contracting Parties shall be taken by a majority of the votes cast.” Where a formal objection to the decision is made by a delegation at the meeting when the issue is taken up then this condition is deemed to have been fulfilled. By tradition, however, decisions in GATT which have required a positive action to be taken by the Contracting Party or Parties have been taken by consensus

³⁵⁴ For example, the working party, which examined Sweden’s free trade agreement with the Baltic States, failed to agree on the full conformity of these agreements with *Article XXIV*. This was despite the fact that the contents and provisions of the rest received broad acceptance. Agreement would

The signatories defending their agreement in this particular instance, and more generally, members to agreements which exclude agricultural products, have maintained that the criteria of *Article XXIV* is that obstacles be eliminated on substantially-all-trade between the parties and not on trade in substantially all products or sectors. These members thus believe that the language does not preclude the exclusion of a sector of the economic activity such as agriculture, provided that the overall trade coverage of the agreement meets the criteria laid down in *Article XXIV*.³⁵⁵

This *quantitative* interpretation of the relevant provisions of *Article XXIV: 8(b)* thus argue that the percentage of trade on which obstacles are eliminated by the agreements should be considered in determining whether the provision has been respected.³⁵⁶ The counter-argument is that the observed value of trade in a given sector may be low as a result of impediments to trade and not because of its having an intrinsically lesser economic or trade importance. These differences of opinion demonstrate the subjective nature of the interpretation of *Article XXIV:8 (b)* in the absence of further guidance or agreed and other alternative interpretations.³⁵⁷

Whereas *Article XXIV: 8* contains the definition of a customs union and free trade area, the determination of whether a particular customs union or free trade area is in conformity with the WTO disciplines must also be based on other provisions of *Article XXIV*.³⁵⁸ Regarding these criteria of judgements, the following imperative problems have arisen:

- the relationship between *Art. XXIV:4* and other provisions in *Article XXIV*:
- The interpretation of the phrase "... and not to raise barriers to the trade of other Contracting Parties with such territories" in *Art. XXIV:4*
- the interpretation of the requirement of *Art. XXIV:5(a)* that in the case of a customs union, the duties and other regulations of commerce imposed at the institution of any such union in respect of trade with Contracting Parties not

have been reached had some members of the working party not claimed that the exclusion from the agreements proper (and separate treatment) of agricultural trade prevented full conformity of the agreements with the obligation of *Article XXIV*. The exclusion for agricultural products are generally due to the restrictive trade policy regimes most governments maintain in this sector as part of domestic programs to support farmers' incomes. Although this exclusion is typical of a free trade area, it is more exceptional for customs unions, GATT document L/7338

³⁵⁵ This is the argument the EU has all along advanced in defence of its offending CAP policy

³⁵⁶ The report of the working party on the "European Economic Community" records the proposal of EEC that "a free trade area should be considered as having been achieved for substantially all the trade when the volume of liberalised trade reached 80 percent of total trade"

³⁵⁷ Bethlehem, *Regionalism and the World Trading System*, supra at p.14

³⁵⁸ Dickson Yeboah: "Regional Integration and the GATT", 17 *World Competition* 1, September 1993, at p. 38

parties to such a union should not, on the whole, be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such a union.

Another issue on which differences of opinion have been frequent is the *scope of liberalisation in the notified agreement in terms of measure rather than sectors covered*. In particular, the extents to which non-tariff as well as tariff measures on intra trade are dismantled. As was noted earlier, *Article XXIV:8* specifically provides that members of a free trade area or customs union may exercise their rights to maintain duties or restrictions on intra-trade under a list of certain GATT Articles. If this were to be interpreted as being an exhaustive list, it would disqualify agreements where members have retained the right to apply restrictions on intra-member trade under GATT provisions not explicitly mentioned in the list.

This would be, for example, safeguard measures (under *Article XIX*) or restrictions for national security reasons (under *Article XXI*) or even to apply anti-dumping or Countervailing measures (*Article VI*). In this regard, the EEC argued before the committee, which examined the Treaty of Rome, that national security (*Article XXI*) was not mentioned in the list. But that it would be difficult, however, to dispute the right of Contracting Parties to avail themselves of that provision which related *inter alia* to traffic in arms fissionable materials etc.³⁵⁹

A related issue is whether parties to a free trade area or a customs union are entitled (or indeed, can be required) to exempt the other members from safeguard actions in the form of quantitative restrictions (for example under *Article XIX*). This would otherwise be administered in a non-discriminatory manner according to a historical trade share (*Article XIII and XIV*). Is a member of an agreement permitted to introduce such restrictions only on imports from non-member even though the alleged source of the problem is imports from all sources?

In particular, members of certain free trade agreements have sometimes exempted regional trade partners from safeguard actions.³⁶⁰ Third countries have often, however, taken issue with an interpretation of *Article XXIV* that permits a departure from all

³⁵⁹ BISD 6S/ 70

³⁶⁰ See Bethlehem, Regionalism and the World Trading System, *supra*

obligations requiring non-discriminatory treatment. The not on the whole higher or more restrictive requirement for regional regimes is a rather controversial edict that deserves a penetrating investigation. We venture a few observations in the following sub-section.

4.3.5 “Not on the whole higher or more restrictive”

A major constraint is placed on customs unions under *par. 5* of Article XXIV. This is the requirement that the common external tariff and other restrictive regulations imposed at the time of the formation of the union not be on the whole higher or more restrictive than those imposed by constituent territories before its formation. As was with the Treaty of Rome, the method in which the common external tariff of customs unions is elaborated from individual member tariffs –i.e. simple averaging, trade weighting averaging or alignment at the lowest tariff has important effects on the *ex post* market access opportunities of third country suppliers.

A closely related issue is whether it is necessary for the purpose of making a comparison between *ex ante* and *ex post* market access opportunities that a country by country and product by product examination of the effect of increases in tariffs be undertaken. In the examination of the Treaty of Rome, third countries argued that members of a customs union or free trade area should not have raised barriers to the trade of any individual third country.

The EEC, however, opted for a contrary viewpoint. It argued that such an interpretation would be inconsistent with the requirement that the duties and other regulations imposed at the institution of the union should not on the whole be higher or more restrictive than the general incidence prior to the formation of the union. The requirement has been interpreted by the EEC to apply to third countries as a group rather than individually and to not preclude the raising of barriers to trade in a sector or sub-sector of merchandise trade provided barriers are lowered in other sectors or sub-sectors.

Clearly, the position postulated by the EEC helps only to confuse an already difficult situation. Third countries have repeatedly raised their concerns regarding the operation of this provision in the working parties established to examine subsequent enlargement

of the EEC.³⁶¹ In practice, the provisions of *Article XXIV* have not been strictly observed, partly due to ambiguities in the language that have permitted different interpretations. The notification and examination of the European Community was an important watershed for the subsequent fate of *Article XXIV*. For purely political reasons, WTO Contracting Parties decided not to issue a formal ruling on whether the Treaty of Rome was compatible with the WTO provisions.³⁶² A precedent for inaction was thus set and has not, subsequently, been reversed.

On the 11th July 1975, 10th March 1981 and 4th March 1987, the GATT Council of Representatives established working parties to examine, in the light of the relevant provisions of the General Agreement, the first, second and third Lome Conventions respectively and to report to the Council. In these working parties, the Contracting Parties have so far never reached a consensus as to the compatibility of the successive Lome Conventions with the provisions of the GATT. On three occasions when the issue was examined in GATT, there was wide sympathy for the view that the purpose and objectives of the convention were in line with those in the General Agreements. This was basically the view that the Convention was aimed at improving the standards of living and economic development of the developing countries.³⁶³

As regards bound rate, if a Contracting Party proposes to increase a bound rate of duty on joining a customs union, the normal GATT procedures for the modification of Schedules apply as set forth in *Article XXVIII*. In providing for compensatory adjustment, *par. 6* of *Article XXIV* states that due account is to be taken of the compensation already afforded by the reductions brought about in the corresponding duties of the other members of the union. Controversy, however, exists as to when the negotiations for compensation should be carried out,³⁶⁴ the nature of the compensation and whether account must also be taken of tariff reductions by the members of the customs union on other items. The negotiations on the compensation that followed the

³⁶¹ The examination of the accession of Denmark, Ireland and the UK to the EC was halted as a result of such disagreement (GATT document C/M/107)

³⁶² *Ibid.*

³⁶³ The rationale for the Enabling Clause in particular is to encourage the more affluent developing countries to reach out to the impoverished lot of the developing countries on palatable trade terms. Such an exercise, it is hoped would help in the effective assimilation of these economies in the mainstream of the world trading system. See the discussion on this item at chapter two

³⁶⁴ For instance, is it before or after the establishment of the customs union

submission of the common external tariff of the EEC³⁶⁵ proved sufficiently complex and disappointing for third countries that some were led to threaten retaliation.³⁶⁶

The EC's debacle has been a rather vexing nay-exacerbating experience for the WTO's relentless efforts to reign in offending regional trade arrangements. As a matter of fact, since the Contracting Parties have never officially formulated agreed conclusions as to the EEC's conformity with *Art. XXIV*, the EEC's legal status within the WTO has never been settled in a definitive way. Since 21st November 1958, when the Contracting Parties decided that "... the examination of the Rome Treaty pursuant to *par. 7 of Article XXIV*... could not usefully be pursued", the EEC has always enjoyed an *ad hoc* status in the GATT.³⁶⁷ This, however, has never prevented the Community from exercising its competence in the WTO framework as foreseen by the Treaty of Rome.

In spite of the Community's high profile participation in the WTO programmes since the 1960s, some Contracting Parties still argue that the legal status of the Community remain open by the fact that it has never received an explicit WTO approval. According to members of the Community, however, the absence of the GATT recommendation requesting the amendment of specific Community provisions automatically leads to the presumption that the Community must be in conformity with *Article XXIV*.³⁶⁸

To ensure that particular industries and non-member Contracting Parties would not be disproportionately affected by the customs union, the approach favoured by the Japanese delegation and the Secretariat was one which would take into account the specific product-by-product effects of the formation or enlargement of a union on individual non-members. The Community rejected the Japanese and the Secretariat's proposal as being in total opposition to its well-established views.³⁶⁹ The Community had indeed repeated during each working group examination that the task under *Article XXIV: 5* was

³⁶⁵ The 1961 Dillon Round

³⁶⁶ See, for example, Bethlehem, Regionalism and the World Trading System, *supra* at pp.11-12, see also BISD 6S/ 70

³⁶⁷ GATT Contracting Parties 13th session, Summary Record of the 19th Meeting held on 21st November 1958, SR. D/19. P 202; also BISD 6th Supplement. p. 71. For the Community's status in the GATT, see Meinhard Hilf Francis G. Jacobs and Ernst-Ulrich Petersmann (eds.), *The European Community and GATT*, Deventer: Kluwer, 1986; and Ernst-Ulrich Petersmann, *Participation of the European Community in the GATT: Internal Law and Community Law Reports*. D. O'Keefe and Henry G. Schermers (eds), *Mixed Agreements*, Deventer: Kluwer, 1984, pp.167-198

³⁶⁸ GATT Uruguay Round documents MTN. GNG/NG7/W/13. P.11

to discuss the consequences of the Community's formation or enlargement by looking at the total trade of the member States with the other Contracting Parties taken collectively. Specific problems, which could arise for individual Contracting Parties had to be dealt with during the *Article XXIV: 6* negotiations, the Community added.

Following the Community's reaction, a compromise was worked out which seemed acceptable to all parties. The compromise, which is contained in the Brussels draft Understanding, stipulates that future evaluations of *Article XXIV: 5* would "... be based upon an overall assessment of weighted average tariff rates and of customs duties collected." This assessment must be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by GATT country origin. The GATT Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round. For this purpose, the duties and charges to be taken into consideration shall be the applied rate of duty."³⁷⁰

A close reading of the compromise clearly demonstrates that the Brussels draft still provides sufficient room for members of customs unions and non-members to express diverging opinions on the relative weight to be attached to the overall assessment versus a product-specific assessment. Moreover, even if attention goes mainly to the overall assessment of a customs union's global tariff schedule, past *Article XXIV: 5* exercises have shown something else. This is that an evaluation of weighted average tariff rates on the one hand and of customs duties collected on the other does not necessarily lead to a similar conclusion.³⁷¹

4.3.6 The improved version of *Article XXIV*

³⁶⁹ Uruguay Round – Meeting of GATT Articles Group, 21-23 May 1990, Geneva: Delegation of the Commission of the European Community, May 1990, p. 2

³⁷⁰ It is also recognised that "for the purpose of the overall assessment of the incidence of the regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required." While the procedure foreseen for the calculation of the general incidence of tariffs would be substantially clarified by the adoption of this compromise, it is unlikely that the new formula would foster agreement on the final conclusion to be drawn by GATT working groups. See Devuyt, *Infra*

³⁷¹ Y. Devuyt : " GATT Customs Union Provision and the UR: The European Community Experience", 26 *Journal of World Trade*, 1 Feb. 1992, at p. 29

The WTO Understanding clarifies several aspects of the operation of *par. 5 of Article XXIV* by providing guidelines on the methods to be followed in comparing the overall level of tariffs and charges on imports before and after the formation of the customs union. In particular, the assessment will be based on a weighted average of tariff rates and customs union duties collected using applied rates. A reasonable length of time for the formation of a customs union or free trade area is deemed to be ten years, except for exceptional circumstances, where a full explanation is required.

The negotiations on compensation provided for under *par.6 of Article XXIV*, where needed, must begin before the common external tariff is implemented. This is important to third countries because the short-term trade diversionary effects of the establishment of a customs union are easier to mitigate when the new common external tariff already includes compensatory adjustments. In these negotiations, when one or more constituent members of the customs union is required to raise its tariff on a particular product, due account must also be taken of reductions in the tariff on that product by other members, in deciding on compensatory tariff reductions on other products.³⁷² This Understanding, therefore, makes it clear that negotiating partners are required to take into account reductions of duty only on the same tariff line. While the text does not preclude acceptance of any incidental reductions in tariffs on the other products as part of the compensation, third countries cannot be obligated to accept them.³⁷³

Regarding transparency, the discipline requires that all agreements notified under *Article XXIV* be examined by a working party. If an interim agreement is notified without a plan and schedule, the working party shall in its report recommend a plan and schedule. The Understanding also confirms the biannual reporting requirement for members of regional agreements. The discipline also clarifies the relationship between the invocation of the dispute settlement provisions of the WTO, and the examination of agreements under *Article XXIV*. The discipline states that the dispute settlement provisions “may be invoked with respect to any matters arising from the application of *Article XXIV*”. This was intended to resolve the uncertainty as to whether a panel can consider issues arising

³⁷² The Understanding on the interpretation of *Article XXVIII* expands the group of trading partners with whom negotiations must be conducted to include the country with the highest share in its exports of the product affected by the withdrawal or modification. The purpose of the provision is to secure redistribution of negotiating rights in favour of small and medium-sized countries with a strong trade interest in the product.

³⁷³ As we noted earlier in this discussion, compensation was one of the major sources of conflict between the EC and third countries at the time of its formation and subsequent enlargement

from an agreement that had already been examined by a working party established under *Article XXIV*. It has, at times, been argued that only an *Article XXIV* working party can properly do this.

The purpose of the Understanding on *Article XXIV* is to clarify certain of the areas where the application of the Article had given rise to controversy in the past. In particular as regards the external policy of customs unions. The Article has, so far fallen short of addressing most of the difficult issues of interpretation that have been raised. For, example, no consensus emerged in the Uruguay Round Negotiating Group on GATT Articles concerning proposals made by several participants, notably Japan, to clarify the substantially-all-trade requirement. It is evident, therefore, that most of the problems that have plagued the working party process were not resolved in the Uruguay Round. There is a clear recognition of the Preamble to the Understanding.³⁷⁴ That is “the contribution to the expansion of world trade of customs unions and free trade areas is increased if the elimination of duties between the constituent territories and other restrictive regulations of commerce extends to all trade, and, [is] diminished if any major sector is excluded.”³⁷⁵

Thus while there have been very few unanimous conclusions or specific endorsements that all the legal requirements had not been met, the working parties have also never reached the conclusion that the legal requirements had not been met. In other words, and this needs be emphasised, making no procurement on the key matters they were charged to examine has been the rule for *Article XXIV* working parties.³⁷⁶ The absence of such recommendations has been interpreted by several Contracting Parties as implying that it must, therefore, be assumed that the agreement in question is in conformity with *Article XXIV*.

On the other hand, others have considered that in the absence of any final decision by the Contracting Parties acting jointly on the conformity of a particular agreement with

³⁷⁴ Bethlehem, *Regionalism and the World Trading System*, supra, at p. 20

³⁷⁵ The text, in addition, states that the “reasonable length of time” of interim agreements should exceed ten years only in exceptional cases. In cases where members believe that ten years would be insufficient they would provide a full explanation to GATT members of the need for a longer period. On the renegotiations of bound tariffs, *Article XXIV: 6*, the text clarify that “when a Contracting Party forming a customs union proposes to increase a bound rate of duty”, it would proceed in accordance with the provisions of *Article XXVII* which deals with Changes in Tariff Schedules.

the provisions of *Article XXIV*, the legal status of such an agreement remains open. It remains to be seen what treatment the EU-SA trade partnership would and indeed the other integration regimes that are gathering momentum in the east and southern Africa region would receive as regards conformity with *Article XXIV*.³⁷⁷ These issues would be the pre-occupation of the subsequent chapters treating integration regimes in the region.

4.3.7 The implications of *Article XXIV* on regionalism

Obviously, neither the Brussels draft nor any other politically acceptable compromise text will be able to bridge the huge gap which often separates members of customs unions on the one hand and non-members on the other regarding the concrete interpretation of *par.5* statistics or *par.6* negotiation offers. Nevertheless, in view of the endless debates which have been held in the past, especially on the methods for calculating the “general incidence” under *Article XXIV: 6* the adoption of the Brussels draft Understanding could be very useful.³⁷⁸ Some commentators are confident that the simple clarification of *Article XXIV*'s textual vagueness might lead to a decrease in the number of methodological debates.³⁷⁹

One of the Contracting Parties that decided to formally maintain reservations regarding the Brussels draft Understanding on *Article XXIV* did so because the Brussels draft did “not adequately address what was perceived to be a trend away from multilateralism and toward regionalism.”³⁸⁰ It is doubtful, however, whether *Article XXIV*, as such, could be expected to serve as a means of discouraging regionalism. In fact, *Article XXIV* merely sets out a number of purely trade-related multilateral criteria which regional arrangements must abide by. The maintenance of a certain degree of multilateral oversight by the GATT is extremely important in order to discourage the formation of inward looking

³⁷⁶ Bethlehem; *Regionalism and the World Trading System* supra at p. 17

³⁷⁷ It is noteworthy that members benefiting from a reduction of duties brought about by the formation of a customs union are not obliged to provide compensatory adjustment. On the measure taken by sub-Federal levels (*Article XXIV: 12*), the text makes clear that members are fully responsible within the GATT for breaches of the General Agreement by subordinate levels of government within their territory. The review procedures of the customs unions and free trade areas are strengthened in order to increase the chances of working parties arriving at agreed conclusions. Amongst other decisions, the text makes clear that interim agreements not containing a “plan and Schedule” can be prevented from being put into force, and it creates an obligation to report any significant changes or developments as they occur.

³⁷⁸ Bhagwati, *Regionalism and Multilateralism: an overview*, supra at pp. 33-38

³⁷⁹ In particular, consideration should be had to those aiming at the exclusion or inclusion of certain calculations and negotiations techniques purely on the basis of the expected positive or negative result of such techniques for the arguments of the opponent

³⁸⁰ MTN. TNC/W/35, p. 306

trade blocs. Quite clearly, however, the reason for and implications of regionalism obviously go far beyond international trade. It is necessary, therefore, not to lose sight of *Article XXIV*'s relatively narrow scope.

But again, the political angle to the never-ending conundrum that clouds *Article XXIV* provisions cannot be under-estimated. The EU has, not infrequently, defended its enlargements and deepening of its association agreement as stemming largely from the necessity to lend support to political democratisation and economic modernisation in unstable regions or turbulent new democracies. As a consequence of the political significance which has often been accorded to regional integration initiatives, the question has arisen as to whether the creation or strengthening of politically important regional arrangements can, in practice, be subordinated to narrowly conceived trade rules as contained in *Article XXIV*.

In this regard, it is interesting to look back at the attitude of the US on the occasion of the *Article XXIV: 7* examination of the Treaty of Rome in 1958. In view of the political importance which the Eisenhower Administration attached to the European Integration, the US delegation to the GATT constantly tried "to avoid a narrow or legalistic approach."³⁸¹ If followed literally, the formal GATT procedures were bound to lead to difficulties, wrote Isiah Frank, the then Deputy Director of the Department of State's Office of International Trade³⁸². As a result, US representatives argued in favour of "a practical and realistic approach.

This then led to the decision by the Contracting Parties to "leave aside... questions about the compatibility of the Treaty of Rome with *Article XXIV* provisions."³⁸³ In fact, the US argued in 1958 that the creation of the EEC was too important to be left to a simple assessment under GATT's trade rules. Similar views can still be heard today. Whether or not a regional arrangement will foster the growth of international trade should be one of the main questions during any *Article XXIV* exercise. However, current examinations under *Article XXIV* focus exclusively on customs duties and non-tariff barriers. Quite

³⁸¹ Isiah Frank, *The European Common Market: An analysis of Commercial Policy*, New York: Praeger, 1961, pp.161-164,

³⁸² *Ibid.*

³⁸³ GATT Contracting Parties 13th Session, Summary Record of the 19th Meeting held on 21st November 1958, SR p. 202: also in BISD 6th Supplement at p. 71

admittedly, these traditional commercial policy instruments only marginally affect real trade flows.

Indeed, economic competitiveness as well as pressures for protectionism is to a large degree determined by macroeconomic factors such as the evolution of the exchange rate, the level of inflation, and the cost of labour.³⁸⁴ Realising the significance of these factors, regional arrangements such as the EEC increasingly try to affect the macroeconomic and monetary climate. *Article XXIV*, however, is still limited to commercial policy in the strict sense. The analysis of regional regimes in east and southern Africa in subsequent chapters clearly identifies political imperatives as one of the driving force for the evolution of these regimes. The political undercurrents are in some instances far much pronounced as to play a vital role in the very existence of these regimes their legal rectitude notwithstanding.³⁸⁵ Like we have demonstrated at chapter six, the legal persona of the SACU to contract with the SADC as a single entity is highly doubtful. The underlying political imperatives would, however, excuse such a legal travesty with ease.

4.4 A critique of *Article XXIV* provisions

The clear determination of 100 percent preferences as compatible with multilateralism and non-discrimination and the equally firm view that anything less does not amount to compliance has served a concrete purpose. It meant that when *Article XXIV* was drafted, its principle objective was to close all possible loopholes by which it could degenerate into a justification for preferential arrangements of less than 100 percent preferences. *Par.4-10 of Article XXIV* was written precisely for this purpose. But as is now commonly conceded, their inherent ambiguity and the political pressures for approval of substantial regional groupings of preferences that are less than 100 percent have combined to frustrate the full import of the original desire to sanction only 100 percent preferences.³⁸⁶

This tension between intention and reality has a direct bearing on the important question of strengthening *Article XXIV* today beyond even what its original drafters intended. Bagwati³⁸⁷ laments that the original *Article XXIV* was “reasonably clear” but was

³⁸⁴ Rudiger Dornbusch and Jeffrey A Frankel: *Macroeconomic and Protection*, in Robert M. Stern (ed.), *US Trade Policies in a Changing World Economy*, Cambridge, Mass. MIT Press, 1988, pp. 77-130: See also Enzo Grilli, *Macroeconomic Determinants of Trade Protection in World Economy*, vol. II September 1988, pp. 313-326

³⁸⁵ See the detailed discussion of these issues at chapters five rights through to chapter eight

³⁸⁶ Bhagwati, *Regionalism and Multilateralism: an overview*, supra at p. 26

³⁸⁷ Ibid

occasionally violated in spirit this to the point where the great expert on GATT law John Jackson³⁸⁸ was clearly irked. He continues so far as to observe that the accommodation of the European Common Market's imperfect union in disregard of the legal requirements of *Article XXIV* was the beginning of the breakdown of the GATT's legal discipline, which "we now seek to repair".³⁸⁹ Two issues suffice to demonstrate this contention. First, in regard to the elimination of internal barriers down to 100 percent, there was enough scope within the language of *Article XXIV*, par. 8, for its intent to be successfully avoided. Ambiguity could be exploited on two fronts.³⁹⁰

The first ambiguity lay in the directive that 'duties and other restrictive regulations on commerce' were; with the specific exceptions permitted under *Articles XI, XII, XIII, XIV, and XX*; to be eliminated with respect to substantially all the trade between the constituent territories.' Skilful lawyers and representatives of governments could work wonders with the concept of 'substantially all the trade'. And then, even if a percentage cut-off point was accepted for this purpose - for example, 75 percent of all initial trade - important issues remained ambiguous. Issues such as whether across the board 75 percent cut on everything were required or whether substantial sub-sectors could be left out altogether from the scope of the cuts. The latter being evidently at variance with the intent of those who favoured 100 percent Customs unions but opposed less than 100 percent preferential arrangements. With both interpretations possible, sectorally non-uniform preferential arrangements could evidently not effectively be ruled out.

An ambiguity of equal importance arose with regard to the problem of the speed with which the '100 percent preferences' would be implemented. Evidently, if they were stretched out over long periods, one was *de facto* sanctioning 'less than 100 percent preferential arrangements. In GATT jargon, this was the problem of interim arrangements. *Par. 5* did address this issue, requiring a 'plan of action and schedule' and asking for the customs union and free trade area to be fully consummated 'within a reasonable length of time'. *Par. 7*, in turn, laid down specific procedures for such interim arrangements to be approved. Needless to say, this provision, nonetheless, left the door wide open for substantial laxity in the conception and execution of the customs union

³⁸⁸ Bhagwati; Regionalism and Multilateralism: an overview supra at p-27

³⁸⁹ A substantially improved and more effective functioning Dispute Settlement Mechanism, aimed at restoring GATT's legal discipline, is an important part of the 1992 'Dunkel draft' of what the Uruguay Round should conclude

³⁹⁰ Bhagwati Regionalism and Multilateralism: an overview, supra at p. 27

and free trade areas under *Article XXIV*.³⁹¹ A strong tendency has also been manifested for interim agreements to provide for an even longer transitional period and to contain increasingly fewer detailed commitments for eventual completion of customs unions or free trade areas.

4.5.1 The dilemma of reciprocity for regional regimes

Part IV of the GATT on “Trade and Development”- *Articles XXXVI, XXXVII and XXXVIII* establish the principle of non-reciprocity in trade negotiations between developed and developing countries. It allows developed countries to adopt special measures to promote the expansion of imports from developing countries. It also provides a safe corridor for developed countries to establish special measures to promote the expansion of imports from developing countries. *Part IV* has been invoked in certain instances by developed country parties to justify preferential treatment and non-reciprocal access for developing country parties.

For example, in the working party on the first Lome Convention, the EC stated that it had not demanded reciprocity in its trade relations with Contracting Parties from the ACP group of countries “in the light of their development needs and the principles of *Part IV* of the General Agreements”.³⁹² No reverse preferences were required of the ACP countries and all remaining preference arrangements with the ACP countries³⁹³ were eliminated. The parties to the Convention were of the view that these trade arrangements were compatible with their obligations under the GATT “in particular the provisions of *Articles 1:2, XXIV and XXXVI*, which had to be considered side by side and in conjunction with one another”.³⁹⁴

³⁹¹ On his part, Dam, *supra* at p. 290, states that the record was not that far comforting enough. He points out that perhaps only one of more than one dozen regional arrangements that have come before the GATT could be said to have complied fully with *Article XXIV* criteria. He singles out the UK-Ireland free trade Area, as one that complies with *Article XXIV*. But even in that case certain doubts were expressed before the working party. In some cases, the regional arrangements were very wide off the mark. The European Coal and Steel Community, for instance, covering only two major product lines, could not even qualify for the special regional waiver of *Article XXIV: 10*. It, instead, required a general waiver under *Article XXIV: 5*. The New Zealand-Australian free trade agreement, although not purportedly an example of ‘functional integration’, provided for the liberalisation of an even smaller percentage of inter-member trade, *supra* at p. 290

³⁹² BISD 23S/53

³⁹³ For example, under the Yaounde Convention between the original six members of the EC and their former colonies

³⁹⁴ BISD 23S/53

Other participants in the working party did not share this view, arguing that reciprocal preferences should be part of any regional integration agreement.³⁹⁵ It was also emphasised that *Part IV* of the GATT did not permit discrimination against other developing countries, since it endorsed special treatment in favour of all developing countries and not just a sub-group. These arguments were taken up again in the working parties established to examine the Second, Third and Fourth Lome Conventions. At one point, the working party examining the Fourth Lome Convention heard the views of several participants stated thus:

“... while they recognised the Lome Convention as a praiseworthy initiative, it violated the Most Favoured Nation treatment and they could not accept that it was in conformity with the provisions of the General Agreements only if the parties to the Convention were granted a waiver of their contractual obligations under the provisions of *Article XXV* as was done for the United States Caribbean Basin Initiative and Canada’s CARIBCAN programme.”³⁹⁶

On December 1994 the GATT Contracting Parties acting jointly (*Article XXV:5*) granted the members of the Fourth Lome Convention a waiver from *Article 1* until 29th February 2000 to the extent necessary to permit the EC to provide preferential treatment for products originating in the ACP States as required by the Fourth Lome Convention.³⁹⁷ The decision notes that the parties to the Convention made the request for a waiver without prejudice to their position that the Convention is entirely compatible with their obligations under *Article XXIV* in the light of *Part IV*. Effective, therefore, the Cotonou agreement, which replaced *Lome IV* is structured to conform to *Article XXIV* provisions. This new alignment is, of course, as amply demonstrated in chapter seven, structured to the detriment of the ACP countries.³⁹⁸

³⁹⁵ This has also been an issue in the working parties that examined the Australian - Papua New Guinea and Commercial Relations Agreement (BISD 24S/63), and the agreement between the European Community and Algeria, Egypt, Jordan, Morocco, Syria and Tunisia, respectively, for which under *Article XXIV* were claimed in conjunction (BISD 24S/80, 25S/133, 25S/142, 25S/88, 25S/123, 24S/97)

³⁹⁶ GATT document 7502

³⁹⁷ GATT document L/7604

³⁹⁸ See Chapter Six for a detailed discussion on this item

4.5.2 The status of the Enabling Clause

The Enabling Clause (hereinafter -'the Clause') was agreed upon in November 1979 as part of the results that emerged from the Tokyo Round.³⁹⁹ It includes a number of provisions permitting GATT Contracting Parties to grant a differential and more favourable treatment to developing countries notwithstanding the non-discrimination requirement in *Article 1* of the Geneva Agreement. It thus provides the legal cover for most notable trade concessions granted to developing countries under the Generalised System of Preferences (GSP).⁴⁰⁰ This is the subject of a decision of 25th June 1971, waving the provisions of Article 1 in its application to developing countries. Initially, for a period of ten years, *par.2(c)* of the Clause applies such treatment to regional or global arrangements entered into among developing Contracting Parties for the mutual reduction or elimination of tariffs and non-tariff measures.

The Clause is intended to facilitate the integration of developing countries more fully into the multilateral trading system by providing them with additional flexibility to meet their GATT obligations. Under this clause, arrangements that are exclusively among developing countries can be considered less restrictive, unless the arrangements contemplate the selective removal of non-tariff barriers, in which case approval by the GATT members is required

Under the Clause, GATT members may accord differential and more favourable treatment to developing countries without according such treatment to third countries in the following situations:

- preferential treatment accorded by developed countries to developing countries' products in accordance with the GSP
- differential and more favourable treatment with respect to provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT.
- regional or global arrangements among developing countries aimed at mutual reduction or elimination of tariffs on products imported from one another. However,, if the arrangements contemplate the selective removal of non-tariff barriers, approval by other GATT members would be required.

³⁹⁹ GATT focus March 1993 No. 97

⁴⁰⁰ See the discussion on this item below

The Enabling Clause also permits special trade treatment for the least developed countries (LDCs). Any differential and more favourable treatment provided:

- would be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other GATT members.
- would not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on an MFN basis; and
- would, in the case of such treatment accorded by developed to developing countries, be designed and, if necessary, modified to respond positively to the development, financial and trade needs of developing countries.

Additionally, developed countries would not expect developing countries, in the course of trade negotiations, to make contributions, which are inconsistent with their individual development, financial, and trade needs. The Clause is thus said to be less demanding than *Article XXIV* in terms of notification and consultations; substantially-all-trade requirements; *ex ante* and *ex post* protection vis-à-vis third countries; and the time frame for implementation of interregional trade liberalisation. In view of the discourse taken by the Enabling Clause and given the fact that South Africa is rated as a developed country under the WTO, the preferences it enjoys under the EU-SA trade partnership would be difficult to characterise.⁴⁰¹

The authority given under the Clause to enter into regional arrangements is governed by several conditions. A provision, similar to the key requirement of *par.4* of *Article XXIV* is found in *par. 3* of the Enabling Clause. It requires that any such arrangement be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of the other Contracting Parties. *Par. 2(c)* clearly treats tariff differently from non-tariff barriers. There is no specific “criteria set out for the mutual reduction or elimination of tariffs, while action on non-tariff barriers is to be governed by criteria or conditions which may be prescribed by Contracting Parties.”

An additional condition, which does not have a counterpart in *Article XXIV*, is that such agreements shall not impede the MFN reduction or elimination of tariff and non-tariff trade restrictions. As regards transparency, *par. 4* requires that such arrangements be notified to GATT when they are introduced, modified or withdrawn and that the

⁴⁰¹ See chapter five below for the detailed discussion of this item

participants are ready to consult with third countries upon request. The Committee on Trade and Development has the mandate to monitor the implementation of GATT provisions in favour of developing countries.⁴⁰²

Eleven agreements have so far been notified to the Committee on Trade and Development for which the parties claim the cover of the Enabling Clause.⁴⁰³ Although the experience with the Enabling Clause provisions on regional arrangements is limited, it has already given rise to controversy. The Enabling Clause does not contain any reference to *Article XXIV*, an omission which has left unclear whether the Enabling Clause applies in situations where *Article XXIV* does not or affects the terms of application of that Clause or represents, for developing countries, a complete alternative to the Article. Indeed, views differ as to whether the Enabling Clause provides an appropriate basis for all regional arrangements among developing countries.⁴⁰⁴

4.6 International Trade in Services

The GATT only sanctions the trade in goods. It does not make provision for the trade in services (the so-called “invisible” trade) which represents about 35 per cent of international trade transactions and more than 60 per cent of the BNP of most industrialised countries.⁴⁰⁵ A regulation of international trade should, however, include rules for the trade in services. During the Uruguay Round (1986-1993) negotiations took place for the conclusion of the General Agreement on Trade in Services (GATS).⁴⁰⁶

⁴⁰² This is mainly with regard to *Part IV* and the Enabling Clause

⁴⁰³ See appendix 'A' for a better illustration of this regimes

⁴⁰⁴ Some governments maintain the view that the Clause was not intended to cover arrangements of major significance that up to 1979, would have been handled under *Article XXIV*. Recently, extensive debates took place on the modalities for examining the Southern Common Market (MERCOSUR) between Argentina, Brazil, Paraguay and Uruguay. These discussions led to the establishment of a working party under the Committee on Trade and Development in May 1993, which held its first meeting on the framework agreement in April 1995. The common external tariff implemented in January 1995 has not yet been notified

⁴⁰⁵ See for example P Nicolaidis, *Liberalising service trade* (Chatham House, 1989 London)

⁴⁰⁶ This extensive Agreement is based, among other things, on the following principles: Most favoured treatment (*par.3.09*), National treatment (*par.3.43*), “transparency”, by publishing existing restrictions; progressive liberalisation through multilateral trade negotiations, as is already the case for the trade in goods (*par.3.13*); more liberalisation within the customs unions and free trade zones (see also *par.3.11*), greater participation of the developing countries in the international trade in services, *inter alia* through access to technology, distribution channels and information networks. See also M. Footer, “GATT and the Multilateral Regulation of Banking Services” (1993) 27 *International Lawyer* 343; See also F. Lazar, “Services and the GATT” (1990/1) *J.W.T* at p. 135; and P Nicolaidis, *Liberalising service trade* (Chatham House, 1989 London)

There are also some provisions on general exceptions and security exceptions in GATS, which are similar to *Article XX*, and *XXI* of the GATT (*par.3.44*). “Service”⁴⁰⁷ includes “any service in any sector, except services supplied in the exercise of governmental functions” (*Article 1 (3)(b)*). It has been said that this description is too wide and that, it therefore, makes little sense to liberalise the trade in services in the same way as the trade in goods, because services are more person related than goods.⁴⁰⁸ Moreover, one of the purposes of the GATS, i.e. the realisation of most favoured and national treatment, is very ambitious. Within the WTO, the Council for Trade in Services oversees the functioning of the GATS. Disputes between Contracting Parties about GATS obligations and commitments have to be settled through consultations or under the Integrated Dispute Settlement System (*par.3.07*).

The initiative to expand the GATT Agreement to include the domain of services came from the United States. This is due mainly to the fact that an important and increasing part of its overall trade (especially exports) consists of trade in services. From the outset, the position of the developing countries to the initiative was, if not hostile, at least sceptical and suspicious. Rom⁴⁰⁹ lists five reasons to explain this position. Firstly, the argument that the GATT had no authority to deal with this subject already treated partially by UNCTAD. Secondly, the fact that GATT had not yet solved problems of existing commitments and obligations – requiring solutions – of particular importance for the developing countries, such as agriculture and textiles;

The third reason for the demur is the dearth of knowledge on the workings of services trade that is readily available in the developing world. This is in contrast to the Organisation for Economic Co-operation Development (OECD) countries, who had dealt with the subject for years. There was also a need to study the implications that the inclusion of services in the multilateral trade framework would have for the future independent development of this sector in developing countries. This was accompanied with underlying fear in developing countries that the initiative might serve to perpetuate the state of dominance of developed countries in this sector.

⁴⁰⁷ In the sense in which the GATS is understood

⁴⁰⁸ M. Van Empel, “The visible hand of the invisible trade” (1990/2) LIEL 26-27, 38-39 (“where ‘goods’, once produced, take on an identity of their own, ‘services’ are determined by the identity of their producer”)

⁴⁰⁹ Michael Rom *supra*; at p. 23

Fourthly, there was the additional fear in the developing countries that their developed counterparts would exploit their willingness to relax restrictions, long overdue, in the field of trade in goods, to pressure developing countries to make concessions and commitments in the field of services. Finally, it should be mentioned that developing countries felt that the proposals submitted by the leading developed countries were actually strongly biased in favour of the developed countries. For instance, they emphasised subjects in which developed countries had a comparative advantage such as capital, know-how and technology-intensive services. Whereas they included only minimal proposals in favour of labour-intensive services -whether skilled or unskilled - that were of interest to developing countries.⁴¹⁰

Only within the framework of the Punta del Este Declaration did developing countries agree to accept a compromise wherein it was agreed that negotiations about liberalisation in services would be carried out in the Uruguay Round.⁴¹¹ This should, however, be under a separate framework, parallel to the negotiations in trade in goods, without any inter-relationship with the GATT Agreement. The latter served to prevent any cross linkage being used by the developed countries to the detriment of developing countries. Even from a legal point of view, the trade negotiations with respect to goods were to be conducted by the Contracting Parties of GATT, whereas the trade negotiations on services under GATS were to be conducted by governments.

At any rate development concerns, not the question of liberalisation, should be the centre of the negotiations.⁴¹² It should be mentioned that during the course of the seven years of negotiations on the Uruguay Round, a hard struggle was conducted by the developing countries to protect their interests. They managed to some extent to attain achievements and push through their positions. Yet, it is clear today that the developing

⁴¹⁰ Ibid.

⁴¹¹ Despite the fact that the Group of Negotiations on Services (GNS) reports on the Trade Negotiation Committee (TNC) constitutes an integral part of the Uruguay Round, this set up ensures that the negotiations on services are conducted as a separate and independent process outside the GATT. With the compromise, the Ministerial Declaration of Punta del Este in 1986 achieved recognition of the developing countries' demands. That is, firstly, that the GATT have no authority to deal with the subject of services. Secondly, that there be no cross-linkage between trade negotiations in goods and trade negotiations in services. And thirdly, that subjects regarding development of developing countries and the economic growth of all member countries be emphasised. That is to say, that the declared goal is the achievement of these targets by the expansion of the trade in services, and not liberalisation *per se*.

⁴¹² In this report, see the detailed discussion in Jannette Mark and Gerald Helleiner, *Trade in Services: The Negotiations Concerns of the Developing Countries*, the North-South Institute, Ottawa, Canada, December 1998 pp.19-22

countries have not managed to maintain a total separation of the two Agreements, although it is possible that this was even desirable from their point of view.⁴¹³

Rom is of the decided view that a linkage has been established here.⁴¹⁴ This may perhaps be explained by a change of heart by the developing countries he adds. The latter might have realised that they could gain far more linkage deals in the goods sector for services than from scrupulous avoidance of this kind of linkage between negotiations on services and the GATT negotiations on trade in goods. This reflects the fact of the real world where larger countries are already exerting pressure on smaller countries to introduce a more open regime for trade in services, threatening to retaliate with access limitations in the goods trade. The GATS provide a framework for liberalising trade in the services sector. The EU-SA trade partnership makes provision for trade in services. It is clear, here, as is the case with the GATT, that the EU is again the obvious beneficiary from the provision of this facility.⁴¹⁵ The same linkage in goods and services is replicated in the Cotonou Agreement.⁴¹⁶

The unconditional MFN principle requires each government to accord “services and service suppliers of any other Member treatment no less favourable than that it accords

⁴¹³ See the detailed description of the development of the negotiations during the period in Murray Gibbs and Mina Mashayekhi, the main issue in the Negotiations for a Multilateral Framework for Trade in Services in Asia and the Pacific, Selected Papers, Vol. 1, UNCTAD/UNDP, UN, New York, 1990, pp.427-441; and by the same authors, *The Development in the Uruguay Round Negotiations on Trade in Services*, *ibid.*, 1991, Vol. II, pp. 1-74. Thus, with respect to the cross-linkage the Services Agreement refers to the fact that in cases where no agreement can be reached between the Members it can rely on the understanding on Rules and Procedures Governing the Settlement of Disputes, *Section 22*, Compensation and Suspension of Concessions. For instance in *Article XXIII*, Dispute Settlement and Enforcement, in *par. 3*

⁴¹⁴ Michael Rom *Supra*; at p. 25

⁴¹⁵ Such trade is comprehensively defined as taking place through four modes of delivery as follows. (i) *Cross border* services supplied from the territory of one member to that of the other: for example, consulting services supplied by an enterprise in country A to consumers in country B. (ii) *Consumption abroad* services supplied in the territory of one Member to consumers of another: for example a resident of country B travels to country A to consume tourism services. (iii) Commercial presence services supplied through any type of business or professional establishment of one country in the territory of another: for example a bank headquarters in country A establishes a branch in country B. (iv) Temporary presence of natural persons: services supplied by nationals of one country in the territory of another: for example, a national of country A travels to country B to supply construction services. In accordance with the “*Annex on Movement of Natural Persons Supplying Services under the Agreement*”, measure affecting natural persons seeking access to the employment of a member and measures regarding citizenship, residence or employment on a permanent basis are outside the scope of GATS

⁴¹⁶ See chapter seven for example

to like services and service suppliers of any other country”.⁴¹⁷ Exemptions to the MFN principle have been appended to GATS in lists, which relate to specific measures through which differential or preferential treatment is granted to certain countries for a specific period of time.⁴¹⁸

To achieve a more certain and open policy regime for services, states in the east and southern Africa region have bound liberalisation commitment in schedules of “specific commitments.” For the service activities inscribed in a country’s schedule, market access and national treatment apply, subject to the limitation specified thereto, to services supplied by each of the four modes of delivery. The market access and national treatment provided for in the schedule must be extended to all foreign services suppliers on an MFN basis. However, better treatment than provided for in the schedule may be granted to certain foreign suppliers of services if the measure has been specified in the MFN exemption list.⁴¹⁹

4.7 The WTO Dispute Settlement Framework

As was noted above, preferential access granted by the EC has been the subject of three dispute settlement proceedings, in each case the EC claiming cover under *Article XXIV*. The adaptation of each of the three panel reports has been blocked in the Council. Under the enhanced dispute settlement proceedings this option will no longer be available. In relation to the previous GATT system, the WTO dispute settlement system provides claimants with automaticity with respect to various matters. The new procedure is that the establishment of a Panel to obtain a ruling on the legal status under the WTO of the measure applied by the trading partner; adaptation of the Panel ruling and authorisation of counter-measures in the event where an adopted Panel ruling is not implemented. This greater automaticity has been accomplished by a negative consensus approach under which a consensus will be needed in order to halt the proceedings from advancing at any stage of the formal dispute settlement proceedings.

⁴¹⁷ See *Article II* - the MFN principle does not apply to government procurement until the conclusion of negotiations on this issue, which are required to occur within the period 1995-97 are concluded (*Article XIII*)

⁴¹⁸ For example, a number of governments in Europe and Latin America have claimed MFN exemption for bilateral arrangements with neighbours or regional partners which facilitate the cross border movement of passenger and freight transport. Except for financial services, maritime service and basic telecommunications, where negotiations are ongoing, these lists are basically closed to further extensions in the future.

⁴¹⁹ For example, a country may have provided for the temporary presence of natural persons, but only nationals of certain countries may obtain the waiver of visa requirements.

In order to ensure the automacity in its adaptation Panel rulings are accompanied by greater confidence in the quality of legal findings. The appellate review is an important new feature in the WTO dispute settlement procedures. An appellate body will hear appeals from Panel rulings. If an appeal is not made, the Panel report is accordingly adapted. If on the other hand, an appeal is made, the report of the Appellate Body shall be adapted by the Dispute Settlement Board (DSB) and unconditionally accepted by the parties within thirty (30) days following its issuance to Members unless there is consensus against its adaptation. Following its adaptation, and provided that the Panel found in favour of the applicant party, the respondent party will have to notify its intention with respect to implementation of adapted recommendations.

Under the GATT, panels have generally recommended that an inconsistent measure be brought into conformity with the rules. If such a step is not taken within a reasonable period of time, compensation or the suspension of concessions or other obligations is available as temporary measures. If no satisfactory compensation is agreed, the claimant may request authorisation from the DSB – acting in accordance with the negative consensus approach to retaliate. The EU-SA trade partnership leaves it open to Parties to resort to the GATT Dispute Settlement procedures. The Agreement has, however, and like integration regimes in the region, an in-built Dispute Settlement procedure. One would expect the Parties to exhaust the in-built mechanisms before, then when dissatisfied, resort to the multilateral procedures.

4.8 Concluding Remarks

The WTO framework is premised on the rationale that an open and liberal trading system underpinned by mutually agreed and legally binding rules, is the sure recipe for the growth of the global economy. We have argued in this chapter that the advent of the GATT/WTO system has infused fresh impetus into free trade commitments in the international trade arena. The agreement is the basis for a global rule based trading system. Indeed the chapter has established that one of the WTO's overriding preoccupations is the reduction of the level of protectionism. This it purposes to achieve through the prohibition of quantitative restrictions and the decrease of existing tariff rates via reciprocal tariff reductions. The chapter has shown that tariff concessions are linked to non-discrimination through the principle of Most Favoured Nation (MFN)

treatment. We have also seen that through a series of Rounds, the WTO has significantly contributed to the liberalisation of global commerce.

The chapter has further demonstrated that legal issues became even more complicated, when more sectors like agriculture and the trade in services were brought into the fold. This legal conundrum assumed ever more volatile proportions when the exports market assumed urgent priority for many countries. The chapter has established that the effects of merely phasing out tariffs diminished since tariffs had already come down in subsequent WTO Rounds. Most importantly, though, the chapter has shown that many countries became used to lower tariffs in the framework of regional arrangements or through the General System of Preferences.

This chapter has vindicated our introductory assertion to the effect that the new institutional system points to the importance of rule based framework to guide the international economic development in the 21st century. The opposite of rules we have argued, is a destructive series of *ad hoc* protective measures. The WTO/GATT should be viewed as the basis for emerging international institutions. Quite clearly, the opposite of a rule-based system would be a system of arbitrary import restrictions, in the shape of the so-called anti-dumping policies. The chapter has conveyed the important point namely that multilateral trade rules erode when countries resort to protectionist measures.

It is interesting to note that regional arrangements have adapted this pattern of rule based multilateral super structure. The chapter has identified Article XXIV and the Enabling Clause as the jurisprudential basis for regional regimes. The chapter has noted that although regional regimes offend not only the letter but also the spirit of the WTO's basic non-discrimination postulate, these regimes are nonetheless tolerated. We have explained that regional regimes are accommodated under the WTO framework due to the fact that they are considered, among other reasons, to be a veritable vehicle to expedite tariff and non-tariff barrier phase down programme. We have also noted that *Article XXIV* was drafted with the principle objective of closing all possible loopholes by which it could degenerate into a justification for preferential arrangements of less than 100 percent preferences.

As for the Enabling Clause, the chapter has pointed out that this facility is intended to facilitate full integration of developing countries into the multilateral trading system. This objective would be achieved by providing developing countries with additional flexibility to meet their WTO obligations. Under this clause, arrangements that are exclusively among developing countries can be considered less restrictive, unless the arrangements contemplate the selective removal of non-tariff barriers, in which case approval by the GATT members is required. We have noted that the key *caveat* for the utility of the Enabling Clause is namely that any such arrangement be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for trade of the other Contracting Parties.

The chapter has demonstrated that regional regimes conglomerate together the so-called 'like-minded' parties hence their agility in the facilitation of tariff phase-out on a regional basis. This trans-national economic alignment would then eventuate into the totality of free trade world-wide. The chapter has noted that regional partners should be seen as the immediate beneficiary of this elaborate rule based international trade framework. It goes without saying, therefore, that regional arrangements in the eastern and southern Africa region are no exception in this regard.

The chapter has noted that the MFN principle in *Article 1* is the premier WTO rule upon which all other trade regulations derive their competence. Under *Article 1* any concessions made by one country to another must be immediately and unconditionally extended to like products originating from other Contracting Parties. We have seen that there are several exceptions to this basic rule. The chapter has noted, however, that the Enabling Clause and *Article XXIV* are the most fundamental exception to the MFN principle. Subject to the conditions set out thereunder these provisions constituent territories are permitted to establish more favourable duty and other arrangements amongst themselves that pertain to trade with non-member countries. We have explained that when a WTO member enters into a regional integration arrangement, it grants more favourable conditions to its trade with other parties to that arrangement than to other WTO members as a whole. This arrangement obviously goes against the grain of *Article 1* hence the necessity for the said exception.

The chapter has reviewed some of the terms and conditions under which regional regimes are allowed to operate and highlighted the latent deficiencies in these conditionalities. We have noted that the express purpose for granting the exception to regional regimes is explained under *par. 4 of Article XXIV* as being, to facilitate trade between the constituent territories and not to raise barriers to the trade of other Contracting Parties. We have discussed the controversy around the WTO's edict that regional regimes cover "substantially all trade" and have submitted that the apparent ambiguity in this provision is entirely undesirable.

We have noted that differences of opinions on the interpretation of the '*substantially-all-trade*' requirement under *Article XXIV* has been the main reason for the subsisting stalemate on the WTO compatibility by individual agreements. The chapter has also identified another major constrain specifically placed on customs unions. This is that the CET and other trade measures imposed at the time of the formation of a customs union, must be set at a level that is not "on the whole" higher or more restrictive than was imposed by the constituent territories prior to its formation. We have discussed the controversy attending this provision and have submitted that its ambiguity has created an easy loophole for countries bent on maintaining high tariff regimes against third countries. We have seen how the EU has manipulated this provision to perpetuate its offending CAP policy.

The chapter has examined the dilemma encapsulating the WTO discipline on reciprocity under *Part IV* of the GATT agreement. We have established that *Part IV* of the GATT did not permit discrimination against other developing countries, since it has endorsed special treatment in favour of all developing countries and not just a sub-group.

The chapter has noted that there are presently no satisfactory multilateral rules that are comprehensive enough to govern the determination of rules of origin. The WTO has however tried to harmonise disciplines on origin rules. These disciplines are that the rules applied by each country must be based on a positive standard namely on what confers origin not what does origin confer. We have argued that this attempt at harmonisation is feeble and therefore incomparable to the more comprehensive origin rules covered by regional integration regimes. In the main, however, this chapter has set the basis upon

which the following analytical work on the compatibility of regional regimes with the WTO disciplines would be premised.

Chapter Five: The Trade, Development and Co-operation Agreement

5.1 Introduction

In this chapter we now commence the analytical examination of regional regimes in the eastern and southern Africa region. To that extent this phase naturally forms the core of the thesis. This task would be undertaken with the view to gauge the implication of the confluence of trade regimes for the expressed desire to deepen integration in this region. We also concomitantly examine the compatibility of these regimes with the WTO disciplines.

The previous chapters have achieved the goal of rolling out a clear road map by introducing what the subject matter of this work is all about. This we did by identifying the advent, character and the dynamics of regional integration regimes. To spice up this process, we did also capture integration developments across the globe to emphasize that the pattern is the same with similar processes that are taking root in eastern and southern Africa region (hereinafter alternatively referred to as 'the region'). We wrapped up the first phase of this work by reviewing the WTO disciplines to which integration regimes must strive to comply in order to gain acceptance in the world trading system.

This phase will undertake the core task of critically analysing integration regimes in eastern and southern Africa region in the light of the deepening integration processes and compliance with the WTO disciplines. The choice of the Trade and Development Co-operation Agreement, (hereinafter 'the Agreement'), signed between the EU and South Africa to commence this important phase of our investigation is a deliberate one. The fact that this new trade instrument implies far-reaching implications for integration processes in the region cannot be overemphasised. The reason, however, for the fascination attending this development is not difficult to find.

The EU plays an immensely significant role in the integration processes currently gaining moment in the region. The EU is also the premier market for the region's export and it is by that designation a major trading partner for regional players. South Africa is, on the other hand, the undisputed economic powerhouse in the region. By virtue of this

economic muscle, many countries in the region look to South Africa as the launching pad for technological advancement. This technological advance is important if the region is to achieve international competitiveness that would ultimately lead it to sustainable prosperity. That brief exposition in a sense explains the huge significance of the EU-SA Agreement.

This chapter will review the principal features of the Agreement and highlight some of the economic underpinnings for these provisions. We shall then examine how the Agreement fares on the score of compatibility with the WTO discipline to which it owes its jurisprudential justification. The Chapter will then undertake a critical appraisal of the entire Agreement. We shall conclude the chapter by interrogating the viability of this typical north-south trade partnership.

We will then examine the implication of the EU-SA Agreement on SACU and SADC. This discourse would lay particular emphasis on the legal and economic aspects of this trade regime confluence. The focus in this respect would, in particular zero in on intra-regional trade promotion, investment promotion, revenue losses and welfare creation for the region.

The whole purpose of subjecting this trade instrument to this close scrutiny is to prepare the groundwork for the subsequent assessment of its implication for the process of deepening integration in the region. What this mean is that the EU-SA Agreement will feature prominently in subsequent chapters as we measure how it features into the integration equation in the region.

5.2.0 A broad review of the principle features ⁴²⁰

5.2.1 Tariff dismantling programme

The overall coverage of the Agreement will amount to 90% of current EU-South Africa trade. Due to the developmental nature of the Agreement the EU will, however, open its market to South Africa's products more rapidly and more extensively than South Africa. While the EU will liberalise up to 95% of its imports from South Africa within 10 years after entry into force of the Agreement, South Africa will be able to retain its tariff

⁴²⁰ See also appendix 'A'

barriers for a longer period of time. After a transition period of 12 years South Africa will open 86% of EU imports to duty free trade.

The twin principles of Asymmetry and Differentiation reflect the developmental approach of the trade provisions. In recognition of South Africa's economic restructuring efforts currently ongoing the EU will open up its market faster and more extensively for South Africa's products than it will ask South Africa to reciprocate for its products. Within these transitional periods, the bulk of liberalisation of industrial products on the EU's side will take place in the first four years. On the South African side, tariff reductions for most industrial products will concentrate on the second half of the 12-year transition period, that is, between 2006 and 2012.⁴²¹

To respect the sensitivity on both sides and taking cognisance of the economic disposition of the southern African region, a limited number of products have been exempted from free trade.⁴²² For instance, the EU in order to accommodate the preferential treatment granted to ACP States in the framework of the Lome Convention⁴²³ has on the exemption list of parties, beef and sugar. On the South African side, the main sensitivity lay in the industrial sector while the EU has made exemption mainly on agricultural products. Some products are subject to only partial liberalisation. In addition to South Africa liberalising 86.5% of EU industrial imports, 2.9% will be partially liberalised. On the EU's side an additional 13% of the agricultural imports will be liberalised partially, 61.4% being subject to full liberalisation. Contracting Parties have agreed, however, that these exemptions will be reviewed during the life of the Agreement.⁴²⁴

It is noteworthy that whereas South Africa's exports constitute only one percent of EU imports, one-third of South Africa's total imports comes from the EU. This equation unfavourably exposes the fragile South Africa economy to the obligatory fundamentals of the free trade agreement - be they good or bad. Again, the important yet nagging issue of non-tariff barriers to trade is not directly addressed in the Agreement. Presumably,

⁴²¹ Phillip Lowe, 'Main Parameters of the EU-SA Partnership, *The EU-SA Agreement: South Africa, southern Africa and the European Union* in Talitha Bertelsmann-Scot, Greg Mills and Elizabeth Sidiropoulos SAIIA, eds. 2000 (CWCIF) at p.41 See also <http://www.wits.ac.za/saiia.html>

⁴²² See Annex 1 of the TDCA for the list of agreed derogation to standstill and rollback items

⁴²³ This arrangement has expired and been replaced by a transitional arrangement under the Cotonou Agreement - for further details see chapter seven below

⁴²⁴ See *Annex IV* of the TDCA

however, these will be legitimated issues for discussion in the Council. In view of the intractable issues the non-tariff barrier regime has generated so far, it is unlikely that the Council would cover much ground in this regard.

The EU may have agreed to reduce its tariffs to zero (or near zero) for a whole range of South Africa's products in the full knowledge that many of them will either be unable to enter the EU or find it exceedingly difficult to do so. This is due to the fact that a range of impenetrable non-tariff barriers or disincentives intricately encumbers the EU's market. Some of these barriers include bureaucratic customs and administrative entry procedures, technical barriers to trade; charges relating to imports, and government aid, including agricultural subsidies, to EU members States.⁴²⁵ All these are veritable impediments to the flow of free trade. The Agreement is unfortunately silent on these obvious fetters to free trade.

5.2.2 Establishment of a free trade area

Under *Article 5*, the Community and South Africa agree to establish a free trade area in accordance with the provisions of the Agreement and in conformity with those of the WTO disciplines. The free trade area will be established over a transitional period lasting, on the South African side, a maximum of 12 years and, on the Community side, a maximum of 10 years starting from the entry into force of the Agreement. The free trade area covers the free movement of goods in all sectors. This Agreement will also cover the liberalisation of trade in services and the free movement of capital.

Under *Article 6*, on the community side, the combined nomenclature of goods shall apply to the classification of goods imported from South Africa. On the South African side, the harmonised system shall apply to the classification of goods imported from the Community. *Article 7* par. 1 provides that for each product, the basic duty to which the successive reductions set out in the Agreement are to be applied shall be that effectively applied on the day of entry into force of the Agreement. The Article at par. 2 provides that the Community and South Africa shall communicate to each other their respective

⁴²⁵ Prior to the commencement of negotiations with the EU, representatives of labour in NEDLAC argued that it was important for government to undertake research that would identify non-tariff barriers, which the EU had in place. This did not occur. It was only during the course of the negotiations that some work was done on non-tariff barriers. It is Cosatu's view that this research should have been finalised prior to the commencement of the negotiations. Cosatu's argument here is not one without force. This is more so given that its fears have been vindicated in view of the range of NTBs that South Africa is faced with in the EU market.

basic duties, in accordance with the standstill and rollback commitments agreed between the Parties, and the agreed derogation to this principles, as set out in *Annex 1*.⁴²⁶

In cases where the process of tariff dismantling does not start at the entry into force of the Agreement *Article 7* makes provision for the appropriate measures. In such a case the duty to which successive reductions set out in the Agreement are to be applied shall be either the basic duty referred to in *par. 1* of the Article or the duty applied on an *erga omnes* basis. This takes effect on the starting day of the relevant tariff-dismantling schedule whichever is the lower. Under *Article 8*, the provisions concerning the abolition of customs duties on imports shall also apply to customs duties of a fiscal nature, with the exception of non-discriminatory excise duties levied on both imported and locally-produced goods which are in accordance with the provisions of *Article 21*. And *Article 9* provides that the Community and South Africa shall abolish in their respective imports any charge having the effect equivalent to customs duties on imports on entry into force of the Agreement.

Article 11-15 sets the scheduled tariff elimination programme on various products. Customs duties applicable on imports into the Community of industrial products originating in South Africa other than those listed in *Annex II* have been abolished upon entry into force of the Agreement. On the part of South Africa, customs duties applicable on imports into South Africa of industrial products originating in the Community other than those listed in *Annex III* have been abolished upon the entry into force of the Agreement. The schedule of tariff elimination covers both industrial and agricultural products. The duty phasing out programme favours South Africa in terms of time frame.

For certain products referred to in *Annex IV* provision is made by either party for a duty free quota in accordance with the conditions thereunder mentioned. This arrangement will run from the time the Agreement commences until the end of the tariff phase down program. *Par. 6 of Article 14* refers to customs duties applicable to processed agricultural products imported into the Community and originating in South Africa that are listed at

⁴²⁶ The derogation at *Annex 1* does, in particular, take into consideration the nature of South Africa's economic transformation and the specific stage of adaptation of its tariff system within the framework of its WTO obligations. On these premises, the EU has conceded to an exceptional basis specific requests for derogation to rollback.

Annex IV, list 5 which are to apply in accordance with the conditions mentioned therein.⁴²⁷

Nonetheless, the Co-operation Council⁴²⁸ (hereinafter, the Council) is empowered to *inter alia*, decide on firstly, the extension of the list of processed agricultural products under *Annex IV*, list 5. Secondly the Council may decide on the reduction of the duties applied to processed agricultural products. This reduction of duties may take place either when, in the course of trade between the Community and South Africa, the duties applying to basic products are reduced or, in response to reductions resulting from the mutual concessions relating to processed agricultural products.

Provision is made for the reduced customs duties applicable to certain agricultural products imported into the Community and originating in South Africa. These duties are listed in *Annex IV*, list 6 of *Par. 8 of Article 14* and would only apply as from entry into force of the Agreement and in accordance with the conditions mentioned in the Annex. The customs duties applicable on imports into the European Community of products originating in the Republic of South Africa listed in *Annex IV*, list 7 shall be reviewed periodically. This exercise would take place in the course of the operation of the Agreement and on the basis of future developments in the Common Agricultural Policy (CAP). Tariff concessions on products listed in *Annex IV*, list 8 are not applicable as these products are covered by protected EU denomination. Tariff concessions that are applicable on imports into the Community of products originating in South Africa listed in *Annex V* shall be applied in accordance with the condition mentioned therein.⁴²⁹

Article 1 provides that if requested by South Africa, the Community shall consider proposals relating to an accelerated timetable for tariff elimination for imports of agricultural products into South Africa, coupled with elimination of all exports refunds for exports to South Africa of the same products originating in the Community. *Par. 2* of the Article states that if the Community replies positively to this request, the new time

⁴²⁷ See *Annex IV* of the TDCA, which lists the tariff treatment of agricultural products from the EU but lays down the conditions under which this should be effected.

⁴²⁸ The institutional framework for the Agreement makes provision for the establishment of a Co-operation Council that will ensure that the Agreement operates effectively and that the objectives of the Agreement are pursued in the best possible way. See *Article 97*, which provides for the institutional set up to cater for the administrative implementation mechanism of the Agreement.

⁴²⁹ *Annex IV* makes provision for the Fisheries products which the EU should allow free access to South Africa

table for tariff elimination and elimination of export refunds shall simultaneously apply as of a date to be agreed by the two Parties. In the case of a negative response from the Community, *par. 3* states that the provisions of the Agreement on tariff elimination shall continue to be applicable. *Article 18* provides for a review no later than five years after the entry into force of the Agreement at which time the Parties shall consider further steps in the process of liberalisation of their reciprocal trade.

5.2.3 Agreement on trade related issues

Both the EU and South Africa will benefit from the elimination of tariffs on bilateral trade, the opening up of more government contracts to competitive bidding, the liberalisation of the energy trade, and the removal of some barriers to agricultural trade. *Article 19* states that quantitative restrictions on imports or exports and measures having equivalent effect on trade between the Parties shall be abolished on entry into force of the Agreement. No new quantitative restrictions on imports or exports or measures having equivalent effect shall be introduced in the trade between the Parties. As from the date of entry into force of the Agreement, new customs duties on imports or exports or charges having equivalent effect shall not be introduced, nor shall those already applied be increased on trade between the Parties.

Under *Article 20*, the Parties may have regular consultations in the Council on the strategy and practical modalities for their respective agricultural policies. If either Party, in pursuit of their respective agricultural policies, considers it necessary to amend the arrangements laid down in the agreement, it would notify the Council, which will decide on the requested modification. Should either Party in applying *par. 2* of *Article 20* amend the arrangement made by the Agreement for agricultural products, it shall make adjustments to be agreed upon by the Council. This proviso is necessary for the maintenance of the concessions on imports originating in the other Party at an equivalent level to that provided for in the Agreement.

As regards fiscal measures, *Article 21* urges Parties to refrain from any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination between the products of one Party and products originating in the territory of the other Party. Products exported to the territory of one of the Parties may

not benefit from repayment of indirect internal taxation in excess of the amount of indirect taxation imposed on them directly or indirectly.

Parties are free, under the Agreement to enter into and maintain customs unions, free trade areas or other arrangements between either of the Parties and third countries. The only caveat under *Article 20* is that such Agreements must not alter the rights and obligations provided for in the Agreement. Consultation between the Parties shall take place within the Council concerning agreements establishing or adjusting customs unions or free trade areas and, where required, on other major issues related to their respective trade policy with third countries. In particular, in the event of a third country acceding to the European Union, such consultation shall take place so as to ensure that account can be taken of the mutual interests of the Parties. This, no doubt, is a contentious provision given the position of South Africa in relation to SADC - EU - ACP triangle⁴³⁰. One fact is clear, though, and that is that the position of South Africa in SACU and SADC and that of the EU in the Cotonou arrangement runs counter to the very tenor of this provision.

Article 23 on the other hand provides that either Party is free to take anti-dumping or countervailing measures in accordance with *Article VI* of GATT 1994. This measure is permissible notwithstanding express provision in the Agreement on the contrary. A party is also free to act under the Agreement on Implementation of *Article VI* of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures, annexed to the Marrakech Agreement establishing the WTO. It should however, be noted that before definitive anti-dumping and countervailing duties are imposed in respect of products imported from South Africa, Parties may consider the possibility of constructive remedies. These are provided for in the Agreement on Implementation of *Article VI* of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures.

⁴³⁰ See Chapter Six and Seven for a detailed discussion on this conundrum

5.2.4 Transition safeguard measures

Where imports of products originating in one Party cause or threaten to cause a serious disturbance to the markets of the other party, the Council is empowered under *Article 16* to move swiftly and remedy the situation. The Council must diffuse the situation notwithstanding other provisions of the agreement and in particular *Article 24*⁴³¹. This is more so given the particular sensitivity of the agricultural markets. Pending a decision by the Council, and where exceptional circumstances require immediate action, the affected party may take provisional measures necessary to limit or redress the disturbance. The Article provides further that in taking such provisional measures, the affected party shall take into account the interests of both parties.

Specific attention is drawn to *Articles 23* and *24* of the Agreement relating to ‘Safeguard’ and Transitional Safeguard Measures’. Generally these clauses will allow South Africa to clamp down on EU originating products should they be imported in quantities and under conditions such as to cause or threaten to cause injury to domestic producers. In certain instances infant industries and /or an entire sector may be affected in which difficulties could spurn major social upheavals. It is important that the government publicises the available safeguard mechanism fully, and takes overall responsibility for bringing them into effect. The overall review mechanism should be active, open, and accessible.⁴³²

The Agreement contains several bilateral safeguard provisions applicable during the transition period.⁴³³ During this period, a tariff “snapback” to the pre-Agreement level is allowed for up to *three years* for most products, and up to *four years* for the most sensitive products. This is in cases where imports from the EU are a substantial cause of serious injury or threatens serious injury to a local industry. In designing long transition periods and special safeguard mechanisms, the negotiators gave ample attention to the adjustment consequences of the Agreement in South Africa. Specific attention is drawn

⁴³¹ This relates to Transitional Safeguard measures for the benefit of South Africa

⁴³² This is the same case with the NAFTA. During the transition period a partner that faces “serious damage” as a result of increased imports from another NAFTA country may increase tariffs or, with the exception of Canada-US trade, impose quotas to provide temporary relief to that industry. However, for goods that meet NAFTA’s rules of origin, safeguard measures can only take the form of tariff increases. Safeguard actions may not last longer than three weeks and may not be imposed on a particular product more than once during the transition period. Once a safeguard action is lifted, the product will be subjected to the tariff that would have been in effect one year after the action was imposed. (See G.C Hufbauer and J. S Schott; *NAFTA An Assessment*: Institute for International Economics, Washington, DC 1993 at p.125)

⁴³³ See *Articles 23* and *24*

to *Article 23* and *24* of the Agreement relating to 'Safeguard' and Transitional Safeguard Measures'.

Article 24 makes provision for a safeguard in cases where a product is imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers of like or directly competitive products. The Article, however, only applies where the domestic producers are in the territory of one of the Contracting Parties, the Community or South Africa, whichever is concerned. In such a case, the Agreement empowers the offended Party to take appropriate measures under the conditions provided for in the WTO Agreement on Safeguards. It is also permissible for the wronged Party to act on the authority of the Agreement on Agriculture annexed to the Marrakech Agreement establishing the WTO and in accordance with the procedures laid down in *Article 26*.

Provision is also appropriately made where a product is being imported in such quantities and under such conditions as to cause or threatens to cause serious deterioration in the economic situation of one or more of the other Members of SACU. In such a case it behoves South Africa, to lodge a request to the country [s] concerned and after having examined alternative solutions, may exceptionally take surveillance or safeguard measures in accordance with the procedures laid down in *Article 26*⁴³⁴.

Article 25 makes provision for transitional safeguard measures. This is notwithstanding the provisions of *Article 24*. Exceptional measures of limited duration which derogate from the provisions of *Article 12* and *15* may be taken by South Africa in the form of an increase or reintroduction of customs duties. These measures may only concern infant industries or sectors facing serious difficulties caused by increased imports originating in the Community as a result of the reduction of duties envisaged under *Article 12* and *15*, particularly where these difficulties spurn major social problems.

South Africa must ensure that customs duties on imports applicable to products originating in the Community as introduced by these measures do not exceed the level of the basic duty. The Agreement at *Article 25* also forbids such duties exceeding the applied MFN rates of duty or 20% of total imports of industrial products from the Community

⁴³⁴ The Article provides for a detailed procedure to be followed where safeguards become inevitable

during the last year for which statistics are available. These measures will be applied for a period not exceeding four years. The same would cease to apply at the latest on the expiry of the maximum transitional period of 12 years. These time limits may exceptionally be extended by decision of the Council. No such measures can, however, be introduced in respect of a product if more than three years have elapsed since the elimination of all duties and quantitative restrictions or charges or measures having an equivalent effect concerning that product.

5.2.5 Agreement on trade in services

Technological advances have increased opportunities for and the importance of trade in services. Services trade negotiations demand a different focus from goods trade negotiations because service trade protectionism differs significantly from goods trade protectionism.⁴³⁵ Tariffs and quotas cannot protect domestic service providers. Customs officials at the international borders would not easily detect imports of services. Instead, services trade protectionism emphasis laws that focus not on the product, but on the producer.

Some countries outlaw foreign owned service companies of various types and even go as far as to prohibits foreigners from acquiring controlling ownership in existing domestic companies. Some bestow monopolies on particular domestically owned producers. Some regulate foreign-owned companies differently than domestically owned firms of the same type. As a final complicating factor, one country's regulation for its service firms will typically differ substantially from another country's regulations for its service firms. The ideal solution is to harmonise the regulatory framework for the service industry. In many cases, Agreement on trade in services' opening reflects less protectionism than the clauses for goods trade.

The EU-SA Agreement on trade in services does not create full harmonisation as such, but it moves in that direction and it particularly opens the South African service market. The Agreement provides for a national treatment in this area. This means that EU firms in South Africa would be entitled to regulatory procedures as if they were South African firms. Another element is that under the Agreement, national treatment is not *de jure*, but a *de facto* one. That is to say, foreign firms may still face different regulatory treatment

than domestic firms, as long as the effect of the regulations is equivalent and does not place foreign firms at a competitive disadvantage. This, of course, is easier when said than done. Quite often, the situation on the ground tends to be overwhelmingly in favour of local firms.

The EU-SA Agreement on trade in services broke new ground by establishing firm contractual obligations on services of both countries. The Agreement elaborates a framework of rights and obligations regarding treatment, establishment, licensing and certification procedures. Bilateral services transactions had been substantially unaffected by international discipline because of the lack of coverage of services in the GATT. The Agreement promotes fair trade in services by creating a level playing field and rules of the game. The Agreement does promote liberalisation in some areas, where the most notable reforms are in financial services. In addition, provision is made for professional labour services across the Contracting Party's markets.

Article 29 reconfirms the obligations under the General Agreement on Trade in Services (GATS). In recognition of the growing importance of trade in services for the development of their economies, the Parties have underlined the importance of strict observance of the GATS Agreements. In particular, the GATS' principle on the MFN treatment, including its applicable protocols with annexed commitments is observed. In accordance with the GATS, however, this treatment shall not apply to the advantages accorded by either Party under the provisions of an agreement as defined in *Article V* of the GATS or under measures adopted on the basis of such an agreement. The same principle applies to other advantages accorded pursuant to the list of MFN exemptions annexed by either Party to the GATS. The Parties, too, reaffirm their respective commitment as annexed to the fourth Protocol to the GATS concerning basic telecom and the fifth Protocol concerning financial services.

Article 30 makes provision for further liberalisation in the supply of services. The Parties are to endeavour to extend the scope of the Agreement with a view to further liberalise trade in services between them. In the event of such an extension, the liberalisation process would provide for the absence or elimination of substantially all discrimination

⁴³⁵ Is NAFTA Economic Integration? William C. Gruben and John H. Welch: *Economic Review*, Federal Reserve Bank of Dallas: 1994 at p.42.

between the Parties in the services sectors that is covered by the Agreement. The instrument should cover all modes of supply including the supply of a service:

- ◆ from the territory of one Party into the territory of the other;
- ◆ in the territory of one Party to the service consumer of the other
- ◆ by a service supplier of one Party, through presence of natural persons of that Party in the territory of the other.

The Council is mandated to make the necessary recommendations for the implementation of the objective set out as aforesaid. In the process of formulating these recommendations, the Council is obligated to take into account the experience gained by the implementation of the obligations of each Party under the GATS. In particular reference is had to *Article V* of the GATS generally and especially *par. 3(a)* thereof. This proviso covers the participation of developing countries in liberalisation agreements. The objective set out above shall be subject to a first examination by the Council at the latest five years after the commencement of the Agreement.

Article 31 provides for maritime transport. The Agreement enjoins Parties to endeavour and effectively apply the principle of unrestricted access to the international maritime market and traffic based on fair competition that is premised on commercial terms. The Parties, too, agree to extend to each other's nationals and the vessels registered in the territory of either of the Parties treatment no less favourable than that granted to the most favoured nation. This treatment is in respect of the maritime transport of goods, passengers or both, access to ports, the use of infrastructure and auxiliary maritime services of those ports and related fees and charges. Customs facilities and the assignment of berths and facilities for loading and unloading are also covered. This regime of rights is also based on fair competition and on commercial terms.

Under *Article 63*, the Parties agree to foster co-operation in the services sector in general and in the area of banking, insurance and other financial services in particular through encouraging trade in services. Another element would be the exchange where appropriate of information on rules, laws and regulations governing the services sectors in the member States. At the same time, it envisions improving accounts, auditing, supervision and regulation of finances and financial monitoring. This activity would be

for instance, through the facilitation of training schemes that would be undertaken in this regard.

5.2.6 Agreement on competition policy

Article 35 makes provision for what should be considered incompatible with the proper functioning of the Agreement in so far as it may affect trade between the Parties. In the first place, Agreements and concerted efforts between firms in horizontal relationships, decisions by associations of firms, and agreements between firms in vertical relationship, which have the effect of substantially preventing or lessening competition in the territory of the Parties is forbidden. The firms must be able to demonstrate that the pro-competitive effects far outweigh the anti-competitive ones. Secondly, abuse by one or more firms of market power in the territory of the Parties as a whole or in a substantial part thereof is expressly disallowed.

Each parties' respective competition authority is mandated under *Article 38* to make a determination of anti-competitive practices as defined in the Agreement. Whenever such a finding is made the offended Party is free to request the other Party's competition authority to take appropriate remedial action in terms of that authority's rules that govern competition. The anti-competition practices must, however, be adjudged to affect important interests of one of the Parties before the said remedial action is taken.

The Agreement provides that the registered request must not prejudice any action under the requesting authority's competition laws that may be deemed necessary. It is important, too, that such a request does not, in any way, encumber the addressed authority's decision-making powers or its independence. This measure is necessary to ensure that the Agreement stops short of encroaching on the regulatory authorities of either Party. The sovereignty of the Contracting Parties must at all times be respected.

In any event the addressed authority is enjoined to consider and give careful attention to the views expressed and documentation provided by the requesting authority. The addressed authority will nonetheless undertake this process without prejudice to its functions, rights, obligations or independence. In particular, the authority would pay heed to the nature of the anti-competitive activities in question, the firm or firms involved and the alleged harmful effect on the important interests of the aggrieved Party.

The Agreement makes provision for consultation where the Commission or the Competition Authority in South Africa decides to conduct an investigation. Consultations are also a prerequisite where either Party intends to take any action that may have important implications for the interests of the other Party.⁴³⁶ The process of consultation could commence at the behest of either Party. The emphasis here is that both Parties should strive to find a mutually acceptable solution in the light of their respective vital interests. Due regard would be given to each other's laws, sovereignty, the independence of the respective competition authorities and consideration of comity.

This provision would in effect challenge companies that enjoy a dominant market position, ostensibly to promote competition and investment. The nature of South Africa's economy would suggest that EU companies operating in South Africa would be in relatively strong position to challenge mergers and take-overs here. It is to the contrary feared that South Africa's companies will be less successful in this area whenever their interests are threatened in the EU market. There is, too, serious concern regarding the capacity of South Africa's customs and related authorities to police the Agreement. This weakness could be exploited by third parties to gain preferential access to South Africa's market.⁴³⁷

It is significant that the Community, under *Article 39*, commits to provide South Africa with technical assistance in the restructuring of its competition law and policy. This partnership would also include the exchange of expertise, organisation of seminars and training activities. In the same vein Parties undertake, under *Article 40*, to exchange information, taking into account the limitations imposed by the requirements of professional and business secrecy. Care must however be taken to ensure that such direct assistance to industry does not distort competition and thereby bestow upon South African firms undue advantage. It is in this vein that the Agreement expressly forbids public aid that favours certain firms or the production of certain goods, which distorts or threaten to distort competition. In a nutshell, public aid that does not support a specific public policy objective or objectives of either Party is incompatible with the proper functioning of the Agreement.

⁴³⁶ See *Article 38*

⁴³⁷ Neil Van Heerden: 'Implications for South African Business' SAIIA , 2000 supra at p. 96

5.3.1 Technical and development assistance

One of the important benefits South Africa hopes to tap from this Agreement is the incidence of transfer of technology from the richly endowed EU member States. South Africa is in dire need of this technological transfer to be able to revamp its industrial base for international competitiveness. In this regard, *Article 41* makes provision for public aid in so far as the same would advance trade between the Parties. The Parties, too, agree that it is in their interests to ensure that public aid is granted in a fair, equitable and transparent manner.⁴³⁸

Remedial measures are addressed under *Article 42* where Parties consider that a particular practice is incompatible with the terms of *Article 41*. These measures would in particular apply where such practice causes or threatens to cause serious prejudice to the interests of the other Party or material injury to its domestic industry. The Agreement takes cognisance of a situation where the existing rules and procedures are inadequate to remedy a given complain. In this eventuality Parties are urged to enter into consultations with a view to finding a mutually satisfactory solution. The envisaged consultations would be without prejudice to either Party's rights and obligations in terms of their respective laws and international commitments. Either Party may invite the Council to examine, in the context of such consultation, the Parties' public policy objectives justifying the grant of public aid referred to in *Article 41*.

The virtue of transparency is underscored in *Article 43*. Parties covenant to ensure there is transparency in the area of public aid. In particular, where a Party so requests, the other Party should provide information on aid schemes, in particular individual cases of public aid, or on the total amount and the distribution of aid given. The exchange of information between the Parties would take into account the limitations imposed by either Party's laws relating to the requirements of business and professional secrecy.

In the absence of any rules or procedures for the implementation of *Article 41*, the provisions of *Article VI* and *XVI* of the GATT 1994 as well as the WTO Agreements on subsidies and Countervailing Measures would apply to public aid or subsidies. The Council is empowered to periodically review the progress made in these matters. In particular the Council is enjoined to continually endeavour to develop co-operation and

understanding on the measures taken by each Party with regard to the operation of *Article 41*. This periodic review is undertaken to ensure that areas of dispute are nipped in the bud. It is also significant that the GATT/WTO disciplines are resorted to in situations of void. The GATT/WTO disciplines are by far more developed and are of universal application. These disciplines would, therefore be easily acceptable to both Parties as a point of compromise.

5.3.2 Intellectual property rights

Due to the importance of intellectual property protection in facilitating service trade and foreign investments, the Agreement's coverage of this item has received much notice. One of the most significant provisions of this section, and in the Agreement in general, is the codification of the national treatment. This codification ensures that the intellectual property of firms from any of the Contracting States will be legally treated in the third as if it had been developed in that country.⁴³⁹

Under *Article 46*, Contracting Parties are obligated to ensure adequate and effective protection of intellectual property rights in conformity with the highest international standards. Contracting Parties would apply the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) from 1st January 1996 and undertake to improve, where appropriate, the protection provided for under that Agreement. Where problems relating to trading conditions in this area occur, urgent consultations shall be undertaken, at the request of either Party with a view to arriving at a mutually satisfactory solution.⁴⁴⁰

⁴³⁸ Parties have undertaken under *Article 40*, to exchange information, taking into account the limitations imposed by the requirements of professional and business secrecy

⁴³⁹ For the purpose of the Agreement 'intellectual property' covers an array of instruments. Among these are copyrights, including the copyright on computer programmes and neighbouring rights, utility models, patents, which extend to bio-technical inventions and industrial designs. Other areas are geographical indications, including appellation of origin, trademarks and service marks. It also protects topographies of integrated circuits, as well as the legal protection of databases and the protection against unfair competition as referred to in *Article 10 bis* of the Paris Convention for the Protection of Intellectual Property and protection of undisclosed information on know-how.

⁴⁴⁰ South Africa is free to accede to various multilateral conventions to which the EU subscribes. These instruments are; the protocol to the Madrid Agreement concerning the International Registration of Marks (Madrid 1989), International Convention for the Protection of Performers, Producers of Phonograph and Broadcasting Organisations (Rome 1961). This accession is, however, without prejudice to the obligations arising from the WTO Agreement on TRIPS. The Parties further confirm the importance they attach to other related bilateral and multilateral Intellectual Property instruments.

Once again, and appropriately so, the EU undertakes to provide South Africa with the necessary assistance to facilitate the implementation of these disciplines. Such assistance would be made available on request and on mutually agreed terms and conditions. Assistance would, among other things, cover the preparation of laws and regulations for the protection and enforcement of intellectual property rights, the prevention of abuse of such rights, the establishment and reinforcement of domestic offices and other agencies involved in enforcement and protection. Human resource development is a vital element of this assistance.

Due to the importance of intellectual property protection in facilitating service trade and foreign investment, the Agreement's coverage of this item must solicit considerable attention. One of the most significant provisions of this section is the codification of national treatment. This codification ensures that the intellectual property of firms from any of the Contracting Parties will be legally treated in the third as if it had been developed in that country.

Contracting Parties are obligated to enforce intellectual property rights against infringement not only internally but also on a global scale. That is, the Agreement includes sanctions not only against the production of pirated products, but also their importation. One of the most important aspects of intellectual property protection in the Agreement is that it helps ensure the durability of South Africa's new intellectual property law. It is envisioned that the differences between Contracting Party's legal systems are a clear fertile ground for complications.⁴⁴¹

5.3.2 Standardisation and conformity assessment

One of the most controversial areas of a free trade area relates to the regime of standardisation and quality assurance.⁴⁴² Contracting Parties have covenanted to cooperate in the field of standardisation, metrology, certification and quality assurance in order to reduce differences between Parties in these areas. This partnership is geared

⁴⁴¹ Under *Article 46* of the TDCA the EU has committed, in order to facilitate the implementation of this provision, to provide, on request and on mutually agreed terms and conditions, technical assistance to South Africa. The assistance would be in, among other things, the preparation of laws and regulations for the protection and enforcement of intellectual property rights. It would also cover the prevention of the abuse of such rights, the establishment and reinforcement of domestic offices and other agencies involved in enforcement and protection, including the training of personnel.

⁴⁴² *Article 47* makes provision for the Standardisation and conformity assessment

towards the removal of technical barriers and hence the facilitation of bilateral trade.⁴⁴³ This discipline is necessary for purposes of promoting greater use of international technical regulations, standards and conformity assessment procedures, including sector specific measures. The partnership also entails developing agreements on mutual recognition of conformity assessment in sectors of mutual economic interest.

Co-operation would importantly target technical assistance for southern Africa capacity building initiative in the fields of accreditation, metrology and standardisation. Parties will also co-operate in the area of quality management and assurance in selected sectors of importance to South Africa. Lastly, co-operation is envisaged in developing practical links between South African and the European standardisation, accreditation, and certification organisation. The targeting of southern Africa region for capacity building is in line with the spirit of the Agreement to augment integration processes taking place in this region. Capacity building is without doubt one of the critical features of deepening integration in the region.

Under *Article 48* Parties have covenanted to promote and facilitate co-operation between their customs services. This element of co-operation is crucial in that it would ensure that the provisions on trade are observed so as to guarantee fair trade. Co-operation in this area would give rise, among other things, to the exchange of information and training schemes. The Contracting Parties' administrative authorities would be obligated to provide mutual assistance in accordance with the provisions of *Protocol 2* of the Agreement.⁴⁴⁴ This administrative measure would be undertaken without prejudice to other forms of co-operation envisaged in the Agreement.⁴⁴⁵

Co-operate in the all important field of statistics would be cultivated under *Article 49*. The envisioned co-operation here is geared mainly toward the harmonisation of statistical methods and practice to enable processing take place according to mutually agreed bases of data on trade in goods and services. More generally, co-operation would target any field covered by the Agreement lending itself to statistical treatment. It is not

⁴⁴³ Areas of co-operation in this sphere shall include measures in accordance with the provisions of the WTO TBT Agreement.

⁴⁴⁴ *Protocol 2* deals with various areas of mutual administrative assistance in implementing the contracted customs obligations. See the Protocol to the TDCA.

⁴⁴⁵ This applies in particular under *Article 90* where Parties are obligated to fight against drugs and money laundering

for nothing that co-operation in this technical area travels only one way - in favour of South Africa. No doubt the EU's quality assurance standards are by far much more developed than that of South Africa.

One cannot talk of harmonisation without the EU reaching out to South Africa in terms of technical assistance to help the latter upgrade its standardisation systems. Like it has been demonstrated in chapter six below, South Africa - the economically superior player in the SADC - has assumed the responsibility to help her erstwhile partners to build capacity in standardisation and quality assurance systems. The gapping deficit in technical standards between South Africa and its SADC partners is a major stumbling block to free trade in the region.⁴⁴⁶

5.4.1 Promotion of regional integration

The negotiations of a long-term co-operation agreement between the EU and South Africa are also an important new step in strengthening EU-southern Africa relations. The Agreement has been designed with a strong regional component. This is a deliberate measure that is meant to benefit not just South Africa but the southern Africa region as a whole. For South Africa's immediate neighbours in SACU, the provisions concerning the establishment of the Agreement will be especially significant since these countries already belong to a customs union.⁴⁴⁷ The EU and South Africa are convinced that in the long term, the Agreement will have a net positive effect for the so-called BLNS countries. South Africa and the EU have committed themselves to design the Agreement in such a way that it will support the process of regional economic integration currently underway in the east and southern Africa region.

Commentators are of the view that the Agreement with Europe reflects, and its adoption would reinforce, the tendency in some quarters in South Africa to prioritise trade relations with Europe and the 'global market'.⁴⁴⁸ No doubt this urge is pursued at the expense of South Africa's strategic or developmental relations with the rest of southern Africa's.⁴⁴⁹ Keet is of the view that South Africa's rapidly expanding trade with Africa and

⁴⁴⁶ See chapter six below for a detailed discussion on this item

⁴⁴⁷ *Article 96* of the TDCA pledges both financial and technical support for the regional integration effort being undertaken in the southern Africa region.

⁴⁴⁸ See, for example D. Keet: "The European Union's proposed FTA with South Africa: The implications and some counter proposals" *Development South Africa*, Silverton Development Press, Vol. 13 August 1996 at p. 650

⁴⁴⁹ See chapter six for an overview of the southern Africa economic profile

more specifically with southern Africa, though representing a small portion, at some 30 percent, and flows into much smaller markets consists mainly of manufactured goods and processed foods.⁴⁵⁰ This is the kind of commerce South Africa badly needs to address the incidence of run-away unemployment.

It is no surprise then that the umbrella trade body Cosatu concurs with Keet's sentiments. Cosatu has put up a strong case urging that government policy should embrace and move toward the regional direction. The job creation component here is indeed very clear.⁴⁵¹ South Africa, it would appear, is faced with two sets of trade relations that are qualitatively different. South Africa's major export markets in Europe are undoubtedly important, but so for different reasons – are its industrial development relations and its trade with its immediate neighbours.

Trade relations with Europe must not be managed in a way that will actively prejudice South Africa's industrial development, both directly and through its economic relations with its neighbours. A trade agreement between Europe and South Africa should not pre-empt or complicate long-standing and essential plans for the creation of an effective and stable regional economic grouping in southern Africa. Deeper integration at the regional level is of great economic value for South Africa, which is why it should move to the priority perch. The explicit intentment in the Agreement to propagate and even to optimise regional integration activities is right on target. The Agreement however fails to elaborate on exactly how parties will go about to augment integration processes in the region. We think a clear-cut action plan is preferred to a mere statement of intent.

5:4:2 Rules of Origin in the integration equation

The term 'rules of origin' refers to the rules by which South African businesses have to operate in terms of sourcing, outsourcing, exporting and importing of raw material, components and so on. The Agreement under *Protocol 1* makes provision for extensive Rules of Origin regime. The instrument provides that materials originating in the Community shall be considered as material originating in South Africa when incorporated into a product obtained in that region. It provides further that it shall not be necessary that such materials have undergone sufficient working or processing, provided such material has undergone working or processing going beyond that referred

⁴⁵⁰ Development South Africa, *supra* at p. 650

to in *Article 6* of the Protocol. The same standard applies to materials originating from South Africa.

It is noteworthy that as far as proof of origin goes, cumulation is provided for materials originating from the ACP and SACU countries. *Par.3 of Article 3* provides that subject to the provisions of *par.5* and *6*, materials originating in an ACP State shall be considered as originating in the Community or South Africa when incorporated into a product obtained there. It further provides that it shall not be necessary that such materials have undergone sufficient working or processing.

There is a rider to this provision at *par.5*. Products, which have acquired originating status by virtue of *Par. 3*, would only continue to be considered as products originating in the Community or South Africa when the value added at that stage exceeds the value of the materials used when originating in any one of the ACP States. If this is not so, then the products concerned shall be considered as originating in the ACP State which accounts for the highest value of originating materials used. In the allocation of origin, no account shall be taken of materials originating in the ACP States, which have undergone sufficient working or processing in the Community or South Africa.

In effect, Contracting Parties here are not extending any favours to the ACP countries in the strict sense of the word. This cumulation provision is for all intents and purposes a self-serving one. It is akin to giving by the right hand and taking by the left. The provision only helps to advance Contracting Parties' interests by encouraging the ACP countries to import their products. It is also common cause that ACP countries invariably act as a cheap source of raw material for both the EU and South Africa. This is why it became necessary to tailor the rules of origin to accommodate this acknowledged economic reality. The position is different for SACU, which is treated for all practical intents and purposes as part of South Africa. That is why *par. 4* provides that any working or processing carried out within SACU shall be considered as having been carried out in South Africa when further worked or processed there.

As for the ACP States, *par. 6* provides that the cumulation referred to in *par. 3* may only be applied where the ACP materials used have acquired the status of originating products

⁴⁵¹ See Cosatu's submission *infra*

by an application of the rules of origin contained in the Fourth ACP-EC Convention. But that the Community and South Africa shall provide each other, through the EC with details of agreements and their corresponding rules of origin which have been concluded with the ACP States.

It is not immediately clear as to why reference is made to the Fourth ACP-EC Convention when the instrument has since expired. The EU has contracted the Cotonou Protocol with the ACP States to replace the Fourth Lome Protocol.⁴⁵² One would expect the former to be the valid point of reference and not the latter as is the case here. The Cotonou Protocol is definitely the valid instrument binding relations between the EU on the one hand and the ACP States on the other. In a nutshell, South Africa's business will have to become more flexible to the international market place, to future development, job empowerment and methods and types of investments. These are the express dictates of the rules of origin.

5.4.3 Dispute settlement and the institutional framework

The Agreement establishes a new framework for bilateral economic relations and extensive new rights and obligations that will have to be monitored and enforced. The consultative and dispute settlement procedures should help to pre-empt some disputes and more expeditiously resolve others. South Africa will, no doubt, devote more resources to the management of the bilateral relationship since the free trade area has institutionalised procedures for notification, consultation, and dispute resolution with regard to measures affecting bilateral trade and investment. Again, due to the extensive rights and obligations that are enumerated in the Agreement, South Africa will have to closely monitor the implementation of the Agreement to ensure that its rights thereunder are scrupulously safeguarded.⁴⁵³

In this very vein, the Agreement has established the Co-operation Council to be managed by senior officials from both Parties' relevant ministries and/or their representatives to supervise the operation of the agreement and to resolve all disputes. However, the administrative provisions of the free trade area are not nearly as important as the dispute settlement procedures. The general dispute settlement procedures serve possibly two

⁴⁵² See the discussion on this instrument at chapter six below

⁴⁵³ See *Article 104* of the TDCA

important functions. Firstly, they provide a consultative forum to pre-empt potential disputes.

Secondly, when disputes do arise, the Agreement sets out procedures to resolve them more expeditiously than currently available in the legal system of either country or in the WTO disciplines. The timetable for the free trade area dispute resolution is measured in months. By contrast, judicial appeals are, for the most part, a protracted affair. The WTO process on the other hand is still prone to being blocked by disputants and by other delays, though some progress has been made in recent years to expedite dispute settlement.⁴⁵⁴

The implication of this scenario would be that consultations would be triggered whenever either party intends to take trade measures. Or when proposed changes in laws, regulations, or policies threaten to distort bilateral trade and investment flows. This would be necessary, in particular, when such measures tend to impair the benefits derived under the free trade area. In short, the procedures are designed to verify and secure the rights and obligations of the free trade area.⁴⁵⁵ No doubt, this is an important measure in view of the acrimony that attends a fledgling free trade area initiative. Trade wars and tension among industry players are not uncommon in this fragile marriage of convenience. The resultant intense trade jostling must be ventilated through well-structured dispute settlement mechanisms.

5.5 Compatibility with the WTO disciplines

The question of compatibility with the WTO disciplines is very critical to the acceptance of the Agreement into the fold of the World Trading System. Like we pointed out at chapter four, *Article XXIV* is the enabling legal framework for preferential Agreements. In which case, therefore, it is important to measure the performance of the Agreement against the WTO edict as enunciated in *Article XXIV* and the pliant Enabling Clause.

⁴⁵⁴ Jeffrey J Schott: *United States Canada Free Trade: An Evaluation of the Agreement*: Institute For International Economics Washington DC, April 1988 at p.33

⁴⁵⁵ As for the NAFTA, the first step in the dispute settlement process is consultation with the other party or parties. If the consultations fail to resolve the matter within 30-45 days, any country may call a meeting of the commission, which is to use "good offices, mediation, conciliation or other means" to resolve the dispute. In the absence of a mutually satisfactory solution, any country may institute panel proceedings. The complaining party may choose to bring the dispute under the GATT or the NAFTA (See Hufbauer and Jeffrey, *supra* at p. 142)

First the Agreement had to be fully compatible with South Africa's multilateral obligations. That is to say the rules and disciplines contracted within the WTO framework. This requirement was strongly expressed by the EU Council in trade directives of March 1996, which had foreseen the possibility of sunset (or killer) clause whereby the Agreement would become null and void if it did not receive the blessing of the WTO. The WTO compatibility was an obvious condition if the Parties were to ensure that the outcome of negotiations would not be challenged by third parties, with the risk of being forced into renegotiations or the granting of compensation to outsiders. It was not, however, at the time of the negotiation, an easy condition to interpret and to fulfil. Indeed, for the EU, the Agreement with South Africa was the first one to be negotiated after Marrakech, where the WTO had been formally established and its rules refined⁴⁵⁶.

As expected, it was on the basis of the WTO condition that the EU formulated its free trade area proposal. It would be recalled that the initial request by South Africa was an improvement of its access to the EU market through joining the Lome regime of unilateral trade preferences.⁴⁵⁷ But Lome itself only existed through successive waivers in the GATT framework yet South Africa is not categorised as a developing country under the WTO rating⁴⁵⁸. On the strength of this positioning, the EU quickly came to the conclusion that there was no Lome option for South Africa that could be WTO compatible, and that the only way to respond to the request for improved access was through a free trade agreement.⁴⁵⁹

Article XXIV of the GATT requires that the Agreement should cover 'substantially all trade'⁴⁶⁰ and avoid the exclusion of any significant sector. This then explains the ambitious target of covering at least 90 percent of trade under the Agreement and the concomitant commitment to stick as much as possible to the standard time bound transition of 10 years. In 1995, South Africa already enjoyed free access for nearly 75 percent of its exports to the EU. Had the Parties set their ambitions at a lower level, the deal would have achieved only limited success⁴⁶¹. This aspect, too, explains the inclusion

⁴⁵⁶ See the WTO/GATT compliance requirements under *Article XXIV* as discussed in chapter four

⁴⁵⁷ See chapter seven for an elaboration of this development.

⁴⁵⁸ South Africa has on its own volition elected to be rated as a developed economy under the WTO framework despite the clear developing country feature that dot the countryside..

⁴⁵⁹ Philip Lowe; 'Main Parameters of the EU-SA Partnership' SAIIA, 2000 eds. supra at p.40

⁴⁶⁰For a detailed discussion on this item, see chapter three above

⁴⁶¹ Lowe supra at p. 40

of agriculture under the objective of free trade. Given its structure and coverage, the Agreement is on this score in line with *Article XXIV* of the GATT disciplines.

The next step requires that the Agreement be notified to the WTO for confirmation although the WTO compatibility will have to remain a dynamic feature of the Agreement. The Agreement fulfils the minimum requirements of the GATT since the rules of *Article XXIV*, like we discussed earlier in chapter four, are prone to all manner of interpretation and are therefore easily manipulated.⁴⁶² It is arguable that more flexibility in the interpretation of *Article XXIV* will be called for in the future. This is more so, in particular, where a free trade area involves a developed country on the one hand and a developing one on the other⁴⁶³.

Efforts to bolster *Article XXIV* requirement in the Uruguay Round and make them more specific and operational have produced feeble results. The proliferation of preferential trade arrangements in Europe, North America, Latin America and in Africa underscores an urgent need to revisit *Article XXIV* provisions. It is also becoming increasingly important that GATT obligations under *Article XXIV* and the GATT reviews of free trade areas and customs union be further strengthened. The most important preference for developing countries is the allowance of longer period within which to fulfil their time bound obligations under free trade agreements.⁴⁶⁴

The enabling clause is a facility that was specially created to empower developed countries to spread the hand of development to developing countries⁴⁶⁵. This feature is captured prominently in the general structure of the Agreement. The Agreement had, of course, to acknowledge the difference between the two partners in terms of their

⁴⁶²Hufbauer et al say that the GATT requirements are not difficult to meet and are open to flexible interpretation. GATT *Article XXIV* authorises derogation from the most favoured-nation obligation of *Article 1* for free trade area and customs unions that meet two vague requirements. These are; the accord must cover "substantially all" the trade among the partner countries, and the accord should not raise barriers to the trade of third countries. According to Hufbauer et al no agreement has ever failed these tests (See Hufbauer and Jeffrey supra at pp.111-112)

⁴⁶³ For a detailed discussion on the dynamics of the enabling clause see chapter four above.

⁴⁶⁴ In explaining the ambiguity attending the GATT provisions, Hufbauer et al aver that in essence, the conclusions of GATT working parties that review *Article XXIV* notification reflect a recognition that the GATT standards ignore practices that can have adverse effect on third country trade. For instance, *Article XXIV* skirts around problems caused by grey area measures such as voluntary export restraints, contingent protection measures (anti-dumping and countervailing duties), and rules of origin. These measures may significantly distort trade and investment flows between the region and third countries, and thus third countries are reluctant to give pacts that include such measures unqualified approval. See also Lowe, supra, at p.41

⁴⁶⁵ See chapter four on the dynamics of the Enabling Clause

respective levels of development. It was expedient, too, for South Africa to undergo a series of structural reforms to lift up her fledgling economy to a more internationally competitive level.

It would appear, from the outset that the EU was keen to insert a strong developmental dimension into the Agreement. This very same concern was the guiding principle for South Africa's negotiating team. It is reported that at one stage, the concept of a Trade and Development Agreement (TDA) was presented as an alternative framework to that of a free trade area.⁴⁶⁶ This was, however, felt to be overly restrictive and constraining. The character of the final document does, indeed, incorporate a strong and unequivocal developmental agenda.

This developmental concern logically found its way into the trade part of the Agreement through the twin concepts of differentiation and Asymmetry. Differentiation reflects the difference in the coverage of free trade between the two sides at the end of the transition period, and it is quite significant. South Africa will grant duty free status to 86 percent of its imports from the EU, whereas the EU will accept 95 percent of South Africa's exports duty free. Asymmetry on the other hand has to do with the timing of the Party's respective tariff dismantlement schedules and hence tariff cuts will take place much earlier and faster on the EU side than on the South Africa's side.⁴⁶⁷

That means that by year 2006 the bulk of the EU's liberalisation effort will be complete. Whereas South Africa's tariff cuts will concentrate on the second half of a 12-year transition period that is between 2006 and 2012. To that extent, the Agreement seats well within the rubric of the developmental intent espoused in the Enabling Clause.⁴⁶⁸ The Agreement's approach has been heralded as a means to achieve substantial trade liberalisation on a bilateral basis and to bolster efforts currently under way in the

⁴⁶⁶ Lowe, *supra* at p. 41

⁴⁶⁷ *Ibid.*

⁴⁶⁸ Development is also the subject of a whole chapter of the Agreement. It sets the basis for a continuation of the EU's financial and technical co-operation with South Africa. The EU is currently running one of the largest programmes it has ever had with an outside partner for South Africa: with Euros 130 million per year of project grants known as the European Programme for Reconstruction and Development (EPRD). A further Euro 150 million of the European Investment Bank (EIB) loans is guaranteed by the EC budget, and comprise more than US\$300 million or R1.8 billion every year that can be committed to new projects and programmes. The Agreement does not contain any figure but it does commit the EU to maintaining its efforts at a similar level in the coming years.

multilateral talks to strengthen the world trading system. This again is the spirit upon which *Article XXIV* exception to the basic non-discrimination rule is premised.

It is important to note, however, that there are many trade barriers that are not amenable to bilateral solutions like the Agreement under review. Unilateral or bilateral disarmament will not work if the policies and practices of third countries continue to influence world trade and thus distort domestic markets. It is arguable that key trade problems that revolve around agriculture and subsidies require global solutions. Furthermore, if liberalisation is limited to specific products or sectors and is applied in a discriminatory manner, the agreement could undercut multilateral efforts and could even have perverse effects for world trade. From this point of view, one is justified to state that the Agreement runs counter to the WTO's principle of promoting a tariff free world trading system.⁴⁶⁹

The Agreement contributes to the improved management of bilateral trade relations by creating new rights and obligations that perforce require new consultative and dispute settlement mechanisms. These mechanisms are a prerequisite in order to supervise the operation of the agreement and to monitor and enforce rights and obligations created thereunder. These mechanisms could also provide a means to pre-empt potential disputes. The establishment of the Council and the provision of binding arbitration to resolve certain types of disputes under the Agreement are useful models for other upcoming free trade agreements.

Although such consultative mechanisms need not conflict with the GATT objectives and disciplines, the existence of various bilateral dispute settlement mechanisms could raise problems with regard to the consistency of rulings. For, instance, different bilateral panels could put forward conflicting interpretations on Contracting Parties' obligations.⁴⁷⁰ That said, however, the provision for an elaborate dispute settlement

⁴⁶⁹It is noteworthy that most of the past efforts by the US to open foreign markets selectively have resulted only in a redistribution of import share and not overall liberalisation, as the US supplier received special preferences to the detriment of other exporters. Other countries seeking their own special deals, however, usually imitate such efforts. In the end, such actions often result in market sharing arrangements instead of market liberalisation, an out-come clearly inferior to the maintenance of the GATT global liberalisation spirit. See chapter two for a discussion on the fundamentals of Regionalism and Multilateralism

⁴⁷⁰The NAFTA provides new rights for private investors to obtain relief directly against governments for NAFTA violations. Instead of seeking relief in courts or administrative tribunals of the host country, or trying to get his home government to pursue a claim against the host government, an

mechanism is in clear conformity with the GATT disciplines. Again, the Agreement does not preclude Parties from accessing, if need be, the much advanced WTO dispute settlement mechanisms should they choose to do so. This leeway is a clear acknowledgement of the superiority of the WTO framework over that of the preferential Agreement.

The discussion in chapter one did point out that free trade areas are unlikely to redress bilateral trade imbalances. The avowed objective of trade diversion implicit in such arrangements has little more than temporary political appeal. Efforts by candidate countries to reduce the bilateral imbalance in the short term yield little in terms of trade improvement or political goodwill. Contracting Parties find out sooner than later that they need a more sustained performance that can only be achieved through complimentary changes in macroeconomic and exchange rates policies. It was also argued that free trade areas slow the momentum for the multilateral tariff cuts by creating vested interests in the partner countries for the preservation of the free trade area tariff preferences.⁴⁷¹ To this extend, the Agreement must be held to be inconsistent with the WTO's stated commitment to a multilateral trade regime.

The Agreement scores well on the GATT most favoured nation and national treatment fronts. The Agreement commits the Parties to provide national treatment to investors from the partner countries. In other words South Africa's and the EU and its member States' investors must be treated at least as well as domestic-based investors. This obligation must hold true for practices applied by States or Provinces. In addition, the Agreement contains a most favoured nation obligation that ensures that the Contracting Party's investors are treated in like manner with other investors in the country.

Compared to GATT rules, however, the energy security safeguards are sharply circumscribed. For instance, the national security exemption is limited to fulfilment of

investor may seek binding arbitral rulings directly against the host governments in an international forum. This would be governed by the rules established by the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) or the UN Commission on International Trade Law (UNCITRAL). Remedies for violations of NAFTA obligations include monetary damages and return of property. The arbitration panels themselves cannot, however, enforce money damages or compel the return of property. Instead, the investor can take the arbitral awards to a court in any of the three NAFTA countries and seek enforcement under treaties to which all the three countries are parties (See Hufbauer et al supra at p. 81)

⁴⁷¹ See chapter one for the detailed discussion on the subject of 'Multilateral vs.- Regional Integration initiatives.

military related requirements, and short supply restrictions must provide for proportional sharing of supplies with the other country. In essence, the Agreement ensures that in most cases energy trade will be based on commercial considerations, with prices set by the market forces.

It would appear the Agreement fails to address the question of accession based on the GATT procedures. The GATT's procedure underpins the importance of a free trade agreement being open to third countries.⁴⁷² This omission renders the Agreement incompatible with the WTO's strategy to coalesce the world commerce into a global village through building blocks in regional integration schemes. The creation of an EU-SA exclusionist trade club obviously does not augur well for the WTO refrain of a tariff free global commerce.

The other basic features on tariffs and non-tariff barriers including dumping and countervailing measures to a large extent replicate the WTO disciplines. Provision is also made for safe guard measures that are specifically underscored by the WTO framework where an Agreement involves a developing country. Although South Africa is rated as a developed country under the WTO framework, the safe guard facility is clearly in its interest. The Agreement commits reasonable treatment to trade in services in a manner that conforms to the GATS disciplines.

The next section would take a critical re-appraisal of the impact this agreement portends for South Africa. It should, however, be clarified from the outset that the views on the implication of the Agreement are based on a reasoned estimation. The actual impact of the Agreement would be gauged during the implementation phase more particularly after the contracted disciplines have been effectively domesticated.

⁴⁷²It is noteworthy that NAFTA has an accession clause. The clause states that "any country or group of countries may accede to this Agreement subject to such terms and conditions as may be agreed between such country or countries and the Commission and following approval in accordance with the applicable approval procedures in each country". In addition, like in the GATT *Article XXXV*, the NAFTA contains a "non-application" provision that allows existing members to deny new members at the time of their accession the benefits of the NAFTA in their markets without blackballing the candidate country or countries entirely from the club (See Hufbauer et al, *supra* at p. 114)

5.6.1 Implication of the Agreement for SACU

SACU has been an arrangement whereby South Africa acquired "captive markets" in return for disproportionate share in the revenue pool. It guaranteed South Africa duty-free access to the BLNS markets, and drew the latter behind South Africa's protective tariff wall. The problems that the BLNS have had with South Africa, and their relationship in the SACU, have received generous literary treatment by eminent scholars. It will, therefore serve no material purpose to reproduce these issues here.⁴⁷³ Suffice to say that the SACU is a customs union that goes back to 1910 and the colonial era. It was renegotiated in 1969, and Namibia became a sovereign state member in 1990. To date, there have been seven rounds of negotiations, with the last taking place in Swaziland, in March 1996.⁴⁷⁴

For the SACU members, the EU-SA Agreement would effectively transform the BLNS's non-reciprocal status to reciprocal duty-free access. At least one-third of the revenues from SACU common revenue pool go to the BLNS countries, whose governments are to varying degrees dependent on those revenues for government expenditure.⁴⁷⁵ With the EU accounting for a little less than a half of the SACU's imports, the revenue implications are enormous and not sustainable. Economists fear that an EU-SA free trade partnership would be disastrous for a country like Lesotho, which receives approximately 60 percent of its budget from customs revenues.⁴⁷⁶

The SACU arrangement is currently undergoing radical transformation, not least because it leaves the BLNS countries heavily dependent on customs revenue. It has been calculated that, customs revenue provides 14.5% of the total government revenue for Botswana, 57.7% in the case of Lesotho, 43.8% in the case of Namibia and 32% in the case of Swaziland.⁴⁷⁷ This is why the EU argues that a free trade agreement with South Africa or not, any trade liberalization would undoubtedly lead to a decrease in customs revenue and that this system of financing is inefficient and therefore unsustainable.

⁴⁷³ See for example, M. Sisulu, et al, (ed.) *Reconstituting and Democratizing the SACU*, Report of the Workshop held in Gabarone, Botswana, March 1994

⁴⁷⁴ The details of these negotiations are not germane to this discussion. Our discourse here is to set out and lay bare the level of economic dependency within SACU in order to amplify the implication of the EU-SA trade partnership for these States.

⁴⁷⁵ SACU revenue accounted for 14.5% of Botswana's total government revenue in 1990/91, 32% of Swaziland's in 1989/90. 43.8% of Namibia's in 1991/2 and 57.7% of Lesotho's revenue in 1990/91. See R. Thomas, *Regional Arrangements* supra at p. 26

⁴⁷⁶ See Charles Harvey, supra at p.83

⁴⁷⁷ Ibid.

Assuming this is true, the region will have to face massive adjustment costs, which will have to be paid for somehow.

The EU has stated that, in principle, it is prepared to consider ways of compensating the BLNS, but has so far failed to put forward any specific proposals in this respect. It is obviously critical that comprehensive proposals be urgently tabled so that the understandable concerns of the BLNS can be urgently addressed. Even before the EU-SA free trade partnership was agreed upon, its partners in southern Africa were already feeling the pinch as South Africa moved out of its long isolation towards integration into the global economy. Like we pointed out earlier, countries in the region have had to liberalize their economies as a condition of IMF/World Bank structural adjustment programmes (SAPS). As a result of these developments news abound of factories closing, job losses, and relocation of industries to South Africa. In an interview in November 1997, Jean Claude Boidin, Head of the Commission's Task Force for Negotiations with South Africa had this to say:

"Let us be frank, the investment impact of the free trade agreement may not always be 100% positive. During the apartheid years, when South Africa was facing serious investment and trade barriers, certain operators did invest significant capital in the BLNS countries in particular, to remain close to the South African economy, yet avoiding South African labels; in this way, they could enjoy easy access to the whole of SADC market, and also excellent access to the EU market, through the Lome Convention. Asparagus canning in Lesotho, flourmills in Botswana, textile units in Swaziland are sometimes quoted to illustrate the argument."⁴⁷⁸

Indeed South Africa has now gained a much better access to EU market in part thanks to '*erga omnes*' tariff reduction in the Uruguay Round and even more so, thanks to the Generalized System of Preferences (GSP). The reality of Jean Claude's assessment is that tomorrow, if it becomes as easy to export canned asparagus from Bloemfontien – South Africa - as it currently is from Maseru, what will happen? We might see an investor decide that asparagus canneries would be more efficiently located in South Africa -closer to the fields where asparagus is grown, or the Port where it must be shipped. This would definitely make much economic sense.

⁴⁷⁸ Sudworth, E, and K. Van Hove. 1998, EU-SA Trade Negotiations: Insight into an ACP-EU Negotiating process (ECDPM Working Paper No. 57) Maastricht: ECDPM cited at <http://www.eusa.org.za> at p.8

There is, therefore, legitimate anxiety among the BLNS that certain existing investments could be dislocated or rendered idle as a result of the fact that South Africa would become a preferential trading partner of the EU. This risk is known by economists as "growth polarization", where investment in a given economic area tends to be concentrated on a few local zones where profitability is higher.⁴⁷⁹ On this score, however, Claude communicates the EU's assurance in these terms:

"We in the Commission would like to nature the positive impact of the future agreement on the region and avoid as far as possible the occurrence of negative consequences, growth losses, disruption of traditional activities or redundancies that could be caused by the closing down of one or more factories. We must work with our BLNS partners that this does not happen."⁴⁸⁰

Exactly how the EU proposes to achieve this level of stability is not quite clear. But there is a familiar ring of the old 'constellation of states' with South Africa at the hub, thought up by the apartheid regime in the 1970s.⁴⁸¹ Meanwhile the EU officials insist that the decline in consumer prices in the BLNS countries that will be prompted by decreasing SACU tariffs will encourage foreign investors to set up shop here and give the region's consumers and businesses access to a larger variety of cheap European goods. The view among the BLNS States is, however, different, says Paul Goodison.⁴⁸²

Goodison warns that the promised benefits for SACU may turn out a far cry. He points to the different structures and levels of development that the latter have compared to South Africa's fairly diversified manufacturing and industrial base. Independent analysts such as Goodison worry that while South Africa is strong enough to cope with increased competition from European imports⁴⁸³ the fragile BLNS economies may not be able to handle the sudden arrival of cheap EU imports. It is quite correct to point out that in view of their limited industrial production base, the BLNS exports to the EU -already duty-free under the Lome Convention are unlikely to rise. It also remains valid to argue that the BLNS goods produced for the SACU market will come into competition with

⁴⁷⁹ <http://www.eusa.org.za> 1998

⁴⁸⁰ <http://www.eusa.org.za> supra

⁴⁸¹ Countering this was the major driving force behind the creation of SADC, which the EU has supported from its inception.

⁴⁸² A researcher for European non-governmental agency, which has been working with Lesotho's ministry of Trade, Industry & Marketing to evaluate the regional impact of the SA-EU deal. 'African and Asian voice unease as South Africa picks up the Pen: Reported in the 48 Financial Times, Oct. 8, 1999

⁴⁸³ Indeed South African exporters will be able to benefit from reduced tariffs on EU markets as well

EU exports. There is, again, no gainsaying the fact that the Customs revenues paid to BLNS governments from SACU's common revenue pool will definitely take a deep dive.

It is in this respect that the BNS are demanding action to protect vital economic sectors threatened by the EU imports, especially against subsidized farm products.⁴⁸⁴ The four countries may also press for direct representation on the EU-SA Co-operation Council⁴⁸⁵ that will manage the EU-SA Agreement. Economic analysts argue that though the SA-EU free trade partnership has 'fundamentally transformed' the basis of BLNS relations with Europe thereby creating a *de facto* EU-SACU free trade area, the four countries were never adequately consulted.⁴⁸⁶ This, they say, violates the EU-ACP treaty, which provides for prompt consultations in cases where the interests of any ACP member States are adversely affected by EU measures.⁴⁸⁷

SACU States are genuinely concerned about the prospect of investment diversion occurring within the SADC region. This concern stems from the fact that SADC states would apply widely differing external tariffs to the rest of the world while offering free trade within the region. The issue of regulating investment incentives (and external tariff harmonization) needs to be discussed at the regional level, although one must be doubtful whether there will be agreement on a precise workable definition of

⁴⁸⁴ The EU argues that since the BLNS agreed to an FTA, any problems now arising are purely an internal matter for the SACU partners. This makes a mockery of the EU member states' stated policy of support for the economic development of the Southern African states, as contained in the Berlin Declaration of September 1994 (SADC/SO/1/942 of September, 1994), now known as the *Berlin Initiative*. The Ministers of Foreign Affairs of the EU and SADC, adopted a Declaration which *inter alia* recalled, "... the long standing co-operation between the two regions [the EU and SADC] as expressed in bilateral and multilateral frameworks, in particular the Lome Convention; ..[Recognized] that the Southern African region has a substantial development potential through closer co-operation; [and] decided to enter into a comprehensive dialogue to further the development of relations between the two regions, taking into account other bilateral and multilateral arrangements and without prejudice to the Lome Convention.." To this end, the Declaration sets out the overall objectives of this co-operation between the two regions as, *inter alia*: Supporting an open and increasingly productive and equitable international economy and, in this context, *promoting co-operation in trade with and in the Southern African region, in order to enhance its economic development*

⁴⁸⁵ See chapter five for a detailed discussion on the character of the Co-operation Council

⁴⁸⁶ South Africa constantly consulted and briefed the BLNS States of progress on the EU - SA free trade partnership but the former think that this was not good enough

⁴⁸⁷ Because of their intimate trade relationship with South Africa through the customs union and the difficulty of enforcing separate rules of origin, the SACU member States have always been considered *de facto* parties to this agreement. For this reason, South Africa has both consistently and conscientiously consulted and briefed SACU states for the period of the negotiations. See discussion on the EU-SA Negotiations at chapter five above. See also chapter seven for an in-depth analysis of the EU-ACP post Lome relation. See also 48, Financial Times *supra*

“harmonization”. Nevertheless, the threat of an incentive race could lead the region to favourably consider moves to debate investment measures within the region.

5.6.2 Implication for the SADC Trade Protocol

In respect of SADC, while its position is not as critical as that of the SACU States, it nevertheless faces a similar dilemma. This is so in that it has negotiated among its fourteen states to establish a free trade area within eight years of the entry into force of the SADC Trade Protocol -i.e. by late 2008.⁴⁸⁸ This Protocol has now entered into force following ratification by the requisite number of states.⁴⁸⁹ South Africa is a party to the SADC trade Protocol, signed in Maseru in August 1996. A key element in this trade Protocol is the principle of asymmetry whereby South Africa will offer market access to its poorer neighbours in exchange for concessions, by other SADC countries at a later date.

The Protocol also includes a clause to the effect that no SADC State can offer trade benefits to a third country without extending them simultaneously to other SADC member States.⁴⁹⁰ Thus, the bilateral agreement between the EU and South Africa has to be extended to other SADC member States. This explains South Africa's insistence on the 'SADC first' principle or what has become known as 'sequencing' and the importance it places on the question of asymmetry.⁴⁹¹

Commissioner Pinheiro,⁴⁹² takes a different view on this matter. He says the main area of concern for exporters in Southern Africa is therefore not their access to the EU market, which will in any case remain favourable, but their access to the South African or rather SACU market. The South African market, he laments, is still the fortress it has been for so many years. In his view South African tariff and non-tariff barriers are still among the highest in the world.

⁴⁸⁸ See the discussion on the establishment of the FTA above

⁴⁸⁹ As a consequence, any arrangement contracted by non-SACU members of SADC in terms of the Cotonou may be undermined once the proposed EU-EPA free trade agreement become fully reciprocal in 2012. A further complication arises should, for example, Mauritius elect to conclude a separate deal with the EU along the lines of the EU-SA free trade partnership, to guarantee protection of its unique interests in the EU market.

⁴⁹⁰ See *Part Eight* of the Trade Protocol

⁴⁹¹ Jean Claude admits that the EU has reached an agreement with South Africa that it would be legitimate for the latter to open up its market first to its SADC neighbours with whom it has entered another free trade agreement. The EU can then come in later. This is what they call 'SADC first' or in other words, a sort of 'SADC preference' See the ECDPM paper supra

⁴⁹² In his Maastricht address (ECDPM Paper) Supra at p. 8

He notes that the EU wants to be instrumental in the necessary liberalization process of the South African economy towards the region. Pinheiro adds that in its negotiations with South Africa, the EU therefore took the position that South Africa, at the minimum, should give the same trade concessions to its neighbours as it will give to the EU. This very principle has also been laid down in the SADC Trade Protocol.⁴⁹³ Through this double locked mechanism the EU-SA Agreement serves as the crowbar for opening up South Africa to the region. This argument is not without some force. Commentators have argued that should South Africa extent concessions it has allowed the EU to her SADC partners the latter would have achieved greater in-roads into the hitherto fortress that has been the South African market.⁴⁹⁴

It should be noted, however, that the desperate social and economic problems inherited by the democratic government of South Africa when added to the transformation process that is taking shape and then the attendant adjustment costs of this 'crowbar' are awesome in dimension.⁴⁹⁵ For a clearer picture on the implications of the EU-SA Agreement for the SADC region, we dissect the various sectors that are in the firing line and consider the ramification of the Agreement on each one of them.

(a) *Trade and Development*

Trade preferences granted by South Africa to the EU would also open up the SADC market to EU exports. This could thwart SADC's objective of using trade integration to achieve industrial development and diversification because regional producers are unlikely to be able to compete with EU producers, particularly in manufactured goods. Given, however, that the EU is a major trading partner for SADC, analysts' fear that the EC may impose new rules and conditions, strict specifications and standards on products, which could amount to a new form of protectionism thereby restrict SADC's access to the EC market.⁴⁹⁶ For the SADC economies to prosper, they must have a reliable market to earn them the much-revered yet elusive foreign currency, which they need to purchase all kinds of imports. It is therefore necessary for the SADC countries to compete as a region in the rest of the world.⁴⁹⁷

⁴⁹³ *Part Eight* of the Trade Protocol

⁴⁹⁴ See for example remarks by Pinheiro *Supra*

⁴⁹⁵ The ECDPM paper *supra* at p.8

⁴⁹⁶ *Ibid*

⁴⁹⁷ See Tiroyamodimo *supra* at p. 5

The EU-SA Agreement would also have implications for the implementation of the Trade Protocol and the region's broader agenda of trade and development integration. Although a comprehensive study of the impact of the EU-SA Agreement on SADC has not been undertaken, preliminary evidence suggest that it will restrict the region's access to the South African market as well as the capacity to supply in their areas of strength.⁴⁹⁸ Economist point out that industries that are likely to be negatively affected by unfair competition are mainly in foodstuffs such as biscuits, sugar, wheat, jams and beef. This is due mainly to the high agricultural subsidies, which the EU products enjoy under the Common Agricultural Policy (CAP).⁴⁹⁹

(b) *The proposed EU-SADC Free Trade Area (EPA)*

Depending on when the proposed European Partnership Agreement (EPA)⁵⁰⁰ is concluded between the EU and SADC States, and when any trade benefits in respect of SADC begin to flow, there may be adverse effects for both sides. From SADC States' point of view, any benefits that they may negotiate vis-a-vis asymmetry in their tariff regimes with the EU under the EPA may be negated should goods slip through to their market via the free trade agreement with South Africa because of poor border controls. It follows, therefore, that even though the EPAs might insulate their economies from highly sensitive EU products, these would nonetheless enter their territories via their southernmost SADC partner, or through Mauritius.

Again from the South African perspective, concerns already exist that the EU-SA free trade partnership excludes certain very sensitive products, particularly agricultural products benefiting from high subsidies. However, given that any EPA concluded with the EU will allow for cumulation, the EU could use this arrangement with the SADC States to circumvent those exclusions through very liberal cumulation terms. This

⁴⁹⁸ SADC Commissioned David Evans Study, for instance, admit that many problems limits its ability to forecast impact: The SADC Trade Protocol, May 1999, see also citation on th Report supra

⁴⁹⁹ See comments by R. Thomas, Trade Liberalization Issues, (supra) at p.49, See also chapter three for a detailed discussion on the EU's CAP policy

⁵⁰⁰ There are ongoing discussions to establish a free trade agreement between the SADC and the EU within the rubric of the ACP framework. The study report recommends that: "first, extend the EU-SA free trade agreement to other SACU members then conclude some form of REPA with the three remaining developing countries (i.e. Mauritius, Seychelles, Zimbabwe), temporarily leaving out six least developed countries that are better off outside a regional partnership agreement. A SADC-wide REPA with the EU might be envisaged beyond 2010." The argument behind this recommendation is that least developed countries in SADC (i.e. Angola, Lesotho, Malawi, Mozambique, Tanzania and Zambia) would continue to enjoy preferential access into the EU market even when the Cotonou expires without having to reciprocate. See the Evans Study supra

development, however, remains to be seen. The modalities of such an arrangement are yet to be worked out.⁵⁰¹

(c) Implication for Revenue Streams

According to a study conducted by the Centre for Research into Economics and Finance in Southern Africa and Imani, Associates ('the Report')⁵⁰², both Zimbabwe and Malawi will have to raise their taxes by as much as 5% to free trade agreements. Lesotho, Botswana, Namibia, South Africa, Swaziland and Tanzania would have to increase their taxes by 8% to 12%. These measures portend serious economic and social implications for the already poverty stricken populations in the southern Africa region. The report recommends that countries should opt for broadening their tax bases rather than an increase.

The report says that a more serious problem is with customs revenue where, under the worst-case scenario Malawi and Mozambique would lose 90% of their customs revenue. This is due mainly to the fact that most of their trade is with the SADC countries and these would not be subject to any duty. It says Zambia and Zimbabwe would lose 25% and 41% revenue respectively. The report points out that the impact on other countries is minor. These results happen due to the fact that imports from the rest of the world lead to the replacement of tariffs with non-tariff imports from the European Union.

Compounding these concerns are fears in some quarters that the EU-SA trade pact will enable EU companies to use South Africa as an export base from which to make inroads into other Southern African markets thereby damaging local industries.⁵⁰³ SADC states also fear that EU exporters will gain access to the South African market on better terms than those available to the neighbouring SADC firms.⁵⁰⁴

Ramsamy has, however, discounted fears that EU companies would be able to encroach on the SADC markets by transiting goods through South Africa.⁵⁰⁵ He points out that SADC rules of origin specify that if more than 35 per cent of a product's inputs originate in SADC countries, the product gets preferential access to the SADC market. He

⁵⁰¹ See the discussion on EPAS at chapter seven below

⁵⁰² Reported at <http://www.africarecovery.org> see infra

⁵⁰³ African Recovery, vol. 13 # 1 June 1999 at p. 23 cited at <http://www.africarecovery.org> at p.1

⁵⁰⁴ Ibid

⁵⁰⁵ See <http://www.africarecovery.org> 1st June, 1999 at p.23

explains that bilateral agreements between South Africa and other SADC countries specify a threshold lower than 35 per cent. Ramsamy, however, admits that some companies with a very high component of foreign imports won't meet the 35 per cent value-added threshold and might have problems penetrating the market.⁵⁰⁶

Ramsamy adds another angle to this debate. He argues that should South Africa responds to pressure induced by trade liberalisation by acquiring technology to improve competitiveness, then this technology acquisition will penetrate the rest of the SADC market. He notes that it's important in the context of globalisation that SADC utilises the region as a stepping stone to the global market, and this is where the EU-SA Agreement comes in handy.⁵⁰⁷ Ramsamy's reasoning finds concurrence in the seminal views expressed by Nelson Mandela, the former South African President. Underlying the importance of technology to the economic growth of the SADC region, Mandela forcefully argues that:

"We live in a world driven by science and technology. To enhance our development capacity, we need increased investment in research and development within the SADC region. This will assist to achieve high productivity levels and make us competitive in the international market place. It is regrettable to note that the developing world, including the SADC region spends less than 2 percent of their budgets on research and development compared with more than 10 percent for the developed world. More resources need to be mobilized from government and the private sector to fund research and development"⁵⁰⁸.

The main handicap afflicting the SADC States is the endemic weakness in the supply side structures. In view of this enduring handicap, it is inconceivable that these States would be in a position to compete with the EU's products in the South African market. In any case, SADC States have perennially failed to utilise all the quotas allotted to them to export to the EU market duty free under the EU-ACP trade arrangement. The reason why this is so is the deficiency of the supply side infrastructure. Describing SADC countries' concerns over the EU-SA trade deal as "legitimate," an April 1999 study by the South Africa Foundation⁵⁰⁹ nevertheless sounds an optimistic note. The study predicts that the signing of the SADC trade protocol "will go a long way to provide equal access for products from SADC countries to the South African market." Moreover, the study

⁵⁰⁶ Ibid.

⁵⁰⁷ See <http://www.africarecovery.org> 1st June, 1999 at p.23

⁵⁰⁸ Statement by the then Chairman of SADC on the occasion of the official closing of the summit of heads of States and Government of SADC at Chichiri Conference Centre, 8th Sept. 1997)

⁵⁰⁹ Reported at <http://www.africarecovery.org> 1st June, 1999 at p.23

adds that the EU-SA Agreement has given an impetus to the signing of the SADC trade protocol⁵¹⁰.

One hopes that the EU-SA partnership would facilitate the much needed technology transfer to the SADC region. This measure would come in handy to strengthen SADC state's supply side deficiencies. It is in this light that one can validate Mandela's concerns. If SADC states do not get aboard the technological bandwagon and sooner rather than later, there is no hope for them to be fully integrated into the world trading system.

To actualize the aforesaid feat SADC must reconfigure itself on the basis of assertive, mutually sustained and beneficial relationships so that it can locate itself, its neighborhood, and the rest of the continent in this period of major changes in the global system. The state of affair in southern Africa region is such that it behooves South Africa, as the regional economic powerhouse to take the lead in emancipating its SADC Partners from wallowing in the mire of economic stagnation and decay. South Africa can hardly afford to remain an island of wealth surrounded by a sea of poverty, and that the region as a whole needs to benefit from any integration initiative taking root in the region.

The immediate significance of this agreement, however, and one of the reasons for expediting the intra-SADC negotiations, was precisely in response to the EU -SA Agreement. An additional motivation, from South Africa's point of view, was to prevent countries further afield being able to claim - under the WTO disciplines - the same preferential access to the South African market as was being accorded to its SADC partners. By registering SADC as a new trade bloc under the WTO, the SADC would have secured some legal 'space' within which to polish and consolidate gains made in their region. SADC is also in a far stronger position to counter the EU's free trade demands as a solid front. In general terms being able to present SADC as a 'going concern' can be persuasive in bringing pressure to bear on the EU to concretise its support for SADC regional integration initiative.

⁵¹⁰ Mr. Hidipo Hamutenya, Namibia's Minister of Trade, shares this view: "There was really no sense of urgency [to trade liberalization in South Africa]. But now that South Africa is focused on the free trade agreement with the EU, they will have the opportunity to speed up the SADC Protocol Reported at <http://www.africarecovery.org> 1st June, 1999 at p.23

5.6.3 Any welfare gains for the region

The overriding concern that has been expressed by the SADC States, both developing and the least developed, in respect of their special and differential status in the WTO should be applied equally. The special rights accruing to these States would be compromised at a critical time when such rights should be seen as part of the SADC armour for policy instrument. The SADC states need this differential facility in order to achieve their national development objectives. In particular, with the benefit of supply side-measure, special and differential measures could assist these countries in developing their comparative advantage. With the advent of the EU-SA Agreement, these benefits now precariously hang in the balance.

To underscore what it considers to be its noble intentions in contracting a free trade Partnership with South Africa, the EU's representative in South Africa mints no words in this regard. He communicates his Union's commitment as follows:

“ I would like to reinforce one idea that has been a strong element in the European Union's overall approach to the SADC region and in particular to the South African negotiations. That is that the European Union is ultra anxious to ensure that this bilateral treaty with south Africa should help to develop intra-SADC trading and other relationships rather than to cause problems in the development of trade. Think about it. It is not in the European Union's interest to invest considerable amounts in development assistance in the African, Caribbean, and Pacific countries in the region, notably to stimulate the development of their trade with each other. If on the other hand, the EU were to enter into an agreement with South Africa, which in some way, creates obstacles to that process.”⁵¹¹

It is probably fair to say that it is still too early to form a conclusive judgement one way or other as to the cost and benefits of the EU-SA Agreement for either South Africa SACU or SADC. Having said that, it must be pointed out that for the SACU and SADC partners, the early prognosis does not, nevertheless appear to be positive.⁵¹² Within SADC, however, the costs of adjusting to the new trade regime are exacerbated by the fact that most of its member States have a weaker capacity than most other developing countries to successfully enter into tradable activities and develop exports, and absorb the shocks related to import liberalization.

⁵¹¹ H.E Ambassador Micheal Laidler's presentations at the AWEPA Seminar supra at p.15

⁵¹² R.H. Thomas: 'The EU-SA Trade, Development & Co-operation Agreement: precedent or Complicating factor? Paper presented at the 'Regional Workshop on the Cotonou - ACP Agreement: What are the options and Challenges for SADC' Harare, Zimbabwe 21-22 September 2000

The refrain by economists has been that without first addressing their supply side structures, no amount of trade pegs would revamp SADC's competitiveness in the world markets.⁵¹³ This is where Mandela's edict on the need to invest in technology is right on target. Economists admit that it is pertinently difficult to quantify welfare effects in the current erratic world markets.⁵¹⁴ It has been suggested that the correct way to judge the overall economic effect of a regional arrangement is to compare real income under the arrangement with that occurring if there was no such arrangement. It is abundantly clear that increases in real income that arises from the expected positive economic welfare would benefit the region. Such as through specialization in production and trade creation, which can lead to increased imports from non-member States.⁵¹⁵ This is, nevertheless, the ideal scenario. This is pertinently a difficult approach to take due to the sheer complexity and magnitude of the task involved.⁵¹⁶

For the sake of simplicity, McMillan has suggested that one criterion for assessing regional trade agreements should, thus, be the economic welfare of non-regional trade agreement members.⁵¹⁷ Accordingly, he prefers to base the process of regional integration assessment - on economic welfare of non-member States. The design here is to examine whether the welfare of non-member States would be protected if their exports to the newly created regional bloc remain unchanged. This scenario would, however, need to maintain the existing terms of trade to ensure that the welfare of none member States is maintained. Consideration is, therefore, needed as to the value of the

⁵¹³ See for example P.S Mistry "The New Regionalism: impediment or Spur to future Multilateralism?" in *Tewissen, J. (ed.), Regionalism & the Global Economy: The case of Latin America & the Caribbean, 1995*.

⁵¹⁴ Ibid.

⁵¹⁵ From the political standpoint, a member State's subjective assessment of the costs and benefits derived from integration cannot be determined with any degree of certainty. See for example Mistry "The New Regionalism: impediment or Spur to future Multilateralism *supra*". He contends that " there is an imbalance between the sophisticated quantitative analysis which can be undertaken to assess the trade implications of RIAs (regional integration arrangement) and the less rigorous, almost elusive qualitative basis on which the case of assessing the none-trade effects of RIAs must rely. ... Developing a holistic methodology for assessing all the advantages of regionalism in general, or even of specific RIAs in particular is, of course, easier mooted than achieved. There is no obvious precedent which suggests the viability of a single all-embracing approach to evaluating the costs and benefits of a phenomenon with multiple effects of a quite different nature (economic, political, military, social)."

⁵¹⁶ P. Wonnacott and M. Lutz (1989), 'Is There a Case for Free Trade Areas?', in J. Schott (ed.), *Free Trade Areas and US Trade Policy*, Washington, Institute for International Economics, pp.59-84

⁵¹⁷ J. McMillan (1995), '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*, New York, St. Martin's Press, pp.292-310

net trade balance before and after any regional trade agreement is formed or the addition of new members to the group.⁵¹⁸

Again, like we have pointed out before, quantification of welfare gains is problematic in the ex-ante case when several other influential factors are at work in the global arena.⁵¹⁹ One only needs look at the way world markets tumbled in the wake of September the 11th terrorist infamy. The treble effects ignited by that ghastly act ricocheted in every corner of the global market resulting in a deep recession that still plague some economies to date.

Another shade of opinion predicts the welfare effects on trade volumes and product prices.⁵²⁰ This school of thought argues that the impact of the regional trade agreement can still be constructed as one that determines whether trade volumes and product prices are likely to alter considerably as a consequence of the formation of the regional economic bloc. This, approach is premised on the assumption that global forces elsewhere would, of course, not affect world product prices, as well as world trade levels of products under consideration.⁵²¹ In our considered view, this approach is an entirely impossible feat to predict with any measure of certainty.

Trevor Manuel holds the view that foreign direct investment in a region maintaining tariff barriers against the rest of the world is attracting investment unnaturally by way of market and price intervention.⁵²² The Minister contends that this would lead to a less than effective allocation of resources and, thus a fall in global economic welfare. Interestingly, one may expect that a regional trade agreement would see a shift in industries. The EEC experience we examined earlier speaks the contrary view. Its creation did not lead to large-scale contraction of entire industries in any one country and their subsequent replacement by imports from another Member State.

⁵¹⁸ As suggested by A. Panagariya (2000), 'Preferential Trade Liberalization: The Traditional Theory and New Developments', *Journal of Economic Literature*, 38, pp.287-331 (at p.327),

⁵¹⁹ See Marceau et al supra at p.308

⁵²⁰ See for example, A Winter and W. Chang (2000), 'Regional Integration and Import Prices: An Empirical Investigation', *Journal of International Economics*, 51, at pp. 363-377

⁵²¹ Other unforeseen events too impact negatively on trade outflows. For instance events of the 11th September 2001 suddenly threw the world economy into a biting recession.

⁵²² Minister Manuel's views at the AWEPA Seminar, supra at p.42-45

Marceau opine that this might have been due to the fact that affected industries reinvented themselves to adapt to the new regime of increased competition.⁵²³ The argument goes that such industries eventually found their market niche, thereby specialising in production, trading according to comparative advantage, exploiting potential economies of scale and remaining in business.⁵²⁴ Either way, it is unlikely that the EU-SA Agreement would ignite an exodus of EU firms relocating to the SADC region. In the unlikely event that this were to happen, one hopes that the fundamentals of economies of scale which economists are wont to peddle would be replayed in this poverty plagued region.

When, however, past experience were anything to go by, any influx of industrial establishments in the SADC region would be the final nail in the coffin of the already bed-ridden SADC companies. The struggling firms in the SADC region are hardly in a position to stand against a technologically backed EU establishment that decides to set up operations in the region. So it appears to be a vicious circle of a double-edged sword cutting with ire of economic gloom either way. It is unlikely that the eventuality of industrial relocation would material for the SADC region in the foreseeable future. Certainly not if the performance of the concluded trade instruments is anything to go by.

The changes in the global economy, notwithstanding, the EU-SA Agreement presents enormous opportunity to SADC States if properly managed and marketed. The reappraisal of investment opportunities in the wake of the Asian collapse is a clear wake-up call for SADC to carefully strengthen and give an impetus to the ongoing economic transformation in the region.

The SADC Trade Protocol is clearly of enormous significance to the consolidation of an integrated economy in southern Africa. To the frustration of the non-SACU members and South Africa, the smaller states in SACU shun any discussion of the SACU negotiations on institutional and trade matters within the SADC for a free trade agreement. Within the SACU negotiating rounds, they push to the farthest recesses of the agenda, any discussion of relations within SADC and COMESA. This does not bode well for the development of sound policies and inter-linkages between the diverse

⁵²³ Marceau et al, *Legal Issues of Economic Integration* (supra) at p.307

⁵²⁴ Marceau et al supra at p.38, see also chapter two for the fundamentals of the economies of scale

institutions, and makes a mockery of the Abuja Treaty's call for building blocks to fuse together the Pan-Africanist vision for a continent-wide common market.

It is also significant that the SADC Protocol has to a large extent complied with the WTO disciplines. The question of dispute settlement presents a peculiar problem in a proliferation of free trade area setting. The fronting of SACU as unit on tariff disciplines is without legal basis either in the SADC Protocol or under the WTO framework. This grey area needs to be resolved before the on-set of dispute settlement processes as established under the Protocol.

5.7 The viability of the Agreement

We have noted in chapter one that there are two primary supply conditions, which are a prerequisite for a successful integration effort. The first is what Mattli⁵²⁵ called “commitment institutions” such as a centralised monitoring institution and third party enforcement mechanism. These factors enhance the chances of sustained co-operation by acting as constraints on contracting Parties in circumstances where self-help measures alone are insufficient to prevent renegeing on contractual obligations. According to Mattli, the second supply condition is the presence of a hegemon among the group of countries seeking closer ties to act as the focal point in the co-ordination of rules, regulations, and policies. Such a hegemon does, also help to ease distributional tension by assuming the role of regional paymaster.

To a considerable extent, the Agreement does satisfy these important criterion. The Council should undertake the responsibility for monitoring and enforcing the Contracting Parties' obligations. One would be justified to say that the Council plays the role of a commitment institution and the presence of the affluent European Union, through its member States, supplies the necessary hegemon stature. One would expect the EU to take on and carry forward the critical institutional leadership that is necessary in the process of deepening the integration disciplines. Indications, at least as far as the Agreement goes, show that the EU is ready and willing to ease distributional tensions through generous side payments. The developmental nature of the Agreement would vindicate such benevolent intentions on the part of the European Union.

⁵²⁵ See chapter one for a discussion on the “supply of regional integration”

The crucial brief for the Council, according to the spirit of the Agreement is to see that individuals, companies, and member States do not violate the express provisions of the Agreement. The mandate of the Council is broad and it covers treaty regimes including competition policy, intellectual and commercial property, public procurement, state aid, telecommunications, banking, financial services, company accounts and taxes, indirect taxation, technical rules and standards, consumer protection, health and safety, transport, and even political participation.⁵²⁶

It is yet to be seen how actively private firms and individuals would participate in enforcing the Agreement to call the respective governments to account. Such activity goes a long way to entrench the Council's role as a central monitoring agent.⁵²⁷ As for institutional leadership, it behoves the EU to play a key role in especially bankrolling the functional operations of the contracted regimes. Needless to state the EU remains South Africa's principal trading partner by which designation it plays a central role in the growth of the latter's nascent economy. The EU's prosperity is common cause and its development assistance obligation to South Africa is well documented in the Agreement. It would not be too extravagant to say that the EU would take the lead as the key policy initiator and institutional pacesetter on a wider range of issue areas.

In view of the stated fundamentals it is not far-fetched to point out that the Agreement does stand a good chance of cementing the Parties economic and political relations. It is also safe to predict that the Agreement has the potential to take the EU-SA economic relations to a significant level of tariff-free trade. It goes without saying that this

⁵²⁶ For example, if firms enter into an agreement that restricts competition, the Commission may seek a voluntary termination of such an agreement or issue a formal decision prohibiting it and inflicting fines on the parties to the agreement. It can also take member States to task by demanding termination of an infringement, or by taking the matter to the Court of Justice for a final determination. See Ulrich Everling, 'The member States of the European Community before their Court of Justice,' *European Law Review* 9 (1984), 215-241.

⁵²⁷ This direct participation of private parties in the enforcement of the Treaty of Rome, a treaty of international law, is without precedent. It has greatly improved the court's role as a central monitoring agent. For the same reason, it has increased the Court's caseload. In response, the EU, in 1988, added a new institution, the court of First Instance, to its enforcement system. This new court was established to hear and give judgement on a number of specific types of legal action, particularly on complaints or disputes arising from the EU's competition policy. Clive Archer and Fiona Butler, *The European Community Structure and Process* (New York: St. Martin's Press 1992), p. 37. See also Chapter One for the discussion of 'integration in Europe'

eventuality is good riddance for the world trading system and the fledgling integration initiatives in the east and southern Africa region.

5:8 Concluding Remarks

In this chapter, we have taken a sweep through the principles features of the TDCA. We have noted that the Agreement is fairly comprehensive and one that covers not only trade and trade related issues, but also co-operation in economic, social and political matters. We have pointed out that the twin principles of Asymmetry and Differentiation that characterise the Agreement reflect the developmental approach to the trade provisions. We have argued, however, that the asymmetrical and differential nature of the Agreement will be eroded by the EU's superior capacity to immediately take up increased production as well as defend their own markets.

We have opined that the Agreement scores well on the GATT most favoured nation and national treatment fronts. We have noted that the Agreement commits the Parties to providing national treatment to investors from the partner countries. It is our thesis, however, that compared to GATT rules the energy security safeguards are sharply circumscribed. We have pointed out that other basic features on tariffs and non-tariff barriers, including dumping and countervailing measures, to a large extent replicate the WTO disciplines.

We have noted that the provision for an elaborate dispute settlement mechanism is in clear conformity with the GATT disciplines. We have postulated that the Agreement does not preclude Parties from accessing the much-advanced WTO dispute settlement mechanisms should they choose to do so. It is our submission that this leeway is a clear acknowledgement of the superiority of the WTO framework over that of the preferential Agreement.

We have argued that the Agreement fails to address the question of accession based on the GATT disciplines. We have pointed out that the GATT disciplines underpin the importance of a free trade agreement being open to third countries. In our considered view this omission renders the Agreement incompatible with the WTO's strategy to coalesce the world commerce into a global village through building blocks in regional integration schemes. We have argued that the creation of an EU-SA exclusionist trade club obviously does not augur well for the WTO quest for a tariff free global commerce.

The chapter has established that the Agreement makes provisions, which would stimulate intra-regional trade and integration of the southern Africa region. We have argued that the challenge the South African government in general and the business community in particular are faced with is to relentlessly pursue the obvious potential benefits offered by the Agreement for South Africa's market. On the other hand, we have demonstrated that the Agreement will impose considerable adjustment costs both on the vulnerable sectors in South Africa and the rest of the eastern and southern Africa region. We have noted, however, that the Agreement makes provision for safeguard measures that would cushion against import surges, which threaten domestic producers.

We have argued, in the main, that the Agreement sends out a positive statement about South Africa to the international community. In our considered view, this message effectively communicates South Africa's wish to be seen as an economic entity that is more developed than developing, and one that is able to hold out its own in trade and investment terms.

We have reviewed the sustainability of the Agreement and have noted that by and large it satisfies the two main tests of commitment institutions and supply condition. As for the first test, we note that the Agreement makes provision for a centralised monitoring institution and third party enforcement mechanism. These factors enhance the chances of sustained co-operation by acting as constraints on contracting Parties in circumstances where self-help measures alone are insufficient to prevent renegeing on contractual obligations. As regards the second test, we have noted that the EU clearly plays the key role of policy pacesetter and thence acts as the focal point in the co-ordination of rules, regulations, and policies. Above all else, we have noted that the EU would also help to ease distributional tension by assuming the role of paymaster, to which it has given a good account in the recent past.

In view of the stated fundamentals it is not far-fetched to point out that the Agreement does stand a good chance of cementing the Parties economic and political relations. It is also safe to predict that the Agreement has the potential to take the EU-SA economic relations to a significant level of tariff-free trade. It goes without saying that this eventuality is good riddance for the world trading system and the fledgling integration initiatives in the eastern and southern Africa region.

The chapter has noted that SACU is the first casualty of the EU-SA Agreement. We have argued that the EU-SA Agreement would effectively transform the BLNS's non-reciprocal status to reciprocal duty-free access with serious legal and economic ramifications. In respect of SADC, while its position is not as critical as that of the SACU States, it nevertheless faces a similar dilemma.

The chapter has alluded to the provision under the EU-SA Agreement that purports to extend trade benefits to SADC member States. The chapter has detailed the various SADC State's sectors that are in the firing line of the EU-SA Agreement. We have, in the main, argued that the principal handicap afflicting the SADC States is the endemic weakness in their supply side structures. We have argued that in view of this enduring handicap, it is inconceivable that these States would be in a position to compete with the EU's products in the South African market.

We have pressed that the reality of supply side handicap remains true in spite of 'the SADC first' principle which the EU-SA Agreement has internalised. We have argued, however, that SADC stands to benefit immensely from the technology transfer opportunity, which the EU-SA partnership offers. We have cautioned, however, that to actualise this feat SADC must reconfigure itself on the basis of assertive, mutually sustained and beneficial relationships so that it can locate itself, its neighbourhood, and the rest of the continent into the competitive global economy.

Chapter Six: The SADC Trade Protocol in the Integration Equation

6.1 Introduction

Several important events are occurring within the east and southern Africa region simultaneously with efforts to nature the integration process. These developments have a bearing on the deepening of integration in the east and southern Africa region. Some of the significant developments in the region include the negotiations between several SADC member States, at a bilateral level, for the conclusion of preferential trade agreements between themselves. The most outstanding of these developments is the recently concluded EU-SA free trade Partnership.

The SADC Trade Protocol clearly represents an enormous amount of work, which by itself is an almost insurmountable challenge. The SADC Trade Protocol is taking shape

in the backdrop of the recently concluded bilateral agreement between the European Union and South Africa, the motor of which is, of course, the establishment of a free trade area. This development when measured against the even more complicated background of the intended differentiated trade arrangements negotiated for the Lome countries after the expiry of Lome IV you begin to see that the timing and the inter-relationship of all these processes would demand skilful and flexible handling to succeed.

On the other hand many of the SADC members are party to the COMESA and have, within the latter agreement, adopted a programme to deepen trade relations amongst themselves. The extent, to which this confuses even further, the SADC agenda, also requires discussion. Questions that would need to be addressed include how to deal with existing bilateral preferential agreements? How SADC should, as a regional grouping, deal with third party relations and appropriately align SADC to the WTO multilateral trade disciplines. All these preponderance of developments tend to complicate the entire regional integration agenda.

The manner in which this 'open-regionalism' is taking place within SADC is cause for concern, as it tends to undermine the east and southern Africa's strategies for integration and has the propensity to create conflict. This convoluted process could negatively impact on the region's economic development and its ultimate integration into the global economy.

This chapter would commence the rather complicated analysis of the convoluted configuration of regional trade regimes in the east and southern Africa region. The thrust of the discussion is to underpin the conundrum created by the addition of the EU-SA free trade partnership to an already polarized regional integration profile. It is important, too, to investigate the compatibility of the SADC Trade Protocol with the WTO disciplines.

The objective of the chapter is to investigate the implication of the configuration of preferential trade regimes on SADC's expressed desire to deepen integration in the region. We would, along the way, highlight the synergies that emanate from this configuration in order to sue for harmonization of integration processes. To achieve this goal it would be necessary to look into the SADC region's economic profile in order to

demonstrate its strengths and weaknesses. The chapter will then take a critical look into the SADC Trade Protocol and underscore features, which we think conflict and or comply with the WTO disciplines on regionalism. We would at the end of the chapter wrap up with a few concluding remarks.

6.2 A brief historical overview

The chequered history of SADC's development is amply documented and the same has received a generous literary treatment. Its evolution from the politically oriented SADCC to the more economically focused SADC has been a beneficiary of fascinating academic exposition. It, would, therefore, serve no material utility to reproduce what is a matter of common knowledge. Suffice to say that a brief historical overview will lay the foundation and open the door for our chosen field of endeavour. A glimpse into the known would, we think, more safely navigate us into the unknown territory that lay ahead.

Following an uninspiring attempt at regional co-operation in the 1980s, southern African states began pursuing economic integration with renewed vigor in the Nineties primarily as a consequence of developments in Europe and North America.⁵²⁸ Certainly the political rapprochement in the region had a strong influence⁵²⁹. But more particularly, the emergence of a new and democratic South Africa in April 1994 lent urgency to the search for a new partnership dispensation⁵³⁰

528 When it was created in 1980, the Southern African Development Coordinating Conference (SADCC) which was the precursor institution to SADC, deliberately eschewed trade in favour of a functional-sector oriented integration arrangement. Indeed Mistry amply conveys the position thus "To assume that expanding trade is the purpose of economic co-operation is one of the two basic errors of the standard free trade approach to economic integration. States are less concerned with trade as such than with material production, employment and economic security. The second error is to argue for an unregulated, free-market approach to regional trade when, in fact, all the participating governments practice interventionism (even if to varying degrees) nationally. Further, regionally, as well as nationally, free markets (as opposed to managed markets) are inconsistent with ensuring an acceptable division of gains and costs among members". See P.S Mistry "The New Regionalism: Impediment or Spur to future Multilateralism?" in Teunissen, J. (ed.), *Regionalism & the Global Economy: The case of Latin America & the Caribbean*, 1995).

529 The trade agenda was seen as falling within the mandate of the Preferential Trade Area for Eastern and Southern Africa (PTA), which had been established precisely for that, purpose. On this basis, Southern African states could perpetuate a fiction and justify their involvement in two potentially competing institutions: SADCC and the PTA (now COMESA).

530 Thus the Heads of States and Government of the former SADCC, meeting in Arusha at the end of August 1991, and in anticipation of South African membership resolved decisively to shift the focus of the organizations activities away from the co-ordination of externally funded projects, towards promoting economic integration amongst the ten members, eventually including South Africa as the eleventh member. See "Africa: SADCC Dreaming too Sweetly of South Africa", by Rachel Waterhouse, *Inter Press Service*, Maputo, January 31, 1992, and "Chissano opens SADCC Consultative Conference". by Paul Fauvet, *Agency France Presse*, January 30, 1992. ANC Deputy President Walter Sisulu had pledged that a non-racial South Africa would not seek hegemony

In anticipation of the latter event, the region had already begun, in 1991, to seriously reconsider its strategies for closer economic co-operation, acknowledging the importance of consolidating efforts to integrate their economies. As a consequence, the Southern African Development Community (SADC) was established by Treaty in August 1992, succeeding the former Southern African Development Co-ordination Conference (SADCC). Not surprisingly, in August 1994, South Africa⁵³¹ became the eleventh member and one-year later, in August 1995, Mauritius joined the SADC as the twelfth member.⁵³²

The SADC Summit meeting in Maseru, which was held between 17-25 August 1996, concluded and adopted a Protocol on Trade and Development for the region. This initiative anticipates the establishment of a free trade area in 8 years⁵³³. This attempt at regionalism must be viewed against developments in the global economy. Like we argued earlier in chapter four multilateralism has seen the adoption, in 1994, of a rules-based trading system and witnessed the creation of the World Trade Organization (WTO) to police trade diplomacy.⁵³⁴

6.3.1 The Jurisprudence of the SADC Trade Protocol

The SADC Trade Protocol ('the Protocol') is in essence, an interim agreement leading to the establishment of a free trade area.⁵³⁵ It comprises in total, thirty-seven articles and five annexes and is clearly reflective of the times in which it is written. The Preamble recognizes, *inter alia*, the pivotal role of the private sector and is mindful of the overarching effects of the Uruguay Round Agreement on global trade liberalization. The

over the region, and endorsed the SADCC principles of "equity, interdependence and mutual benefits".

⁵³¹ In November 1999, Parliament ratified the Protocol and South Africa deposited her instrument of ratification with the Executive Secretary of the SADC in December 1999. After ratification by two-thirds of the eleven member States that are signatory, the Protocol entered into force on the 25th January 2000. There are good reasons why South Africa should have entered into an agreement with SADC states. First and foremost, South Africa has a moral responsibility to assist in the economic development of the region. Many SADC states carried a large burden as a result of South Africa's liberation struggle. See Mark Bennett; Policy Bulletin (*infra*) at p.1

⁵³² Today, SADC regroups 14 member states, namely Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe

⁵³³ The SADC Treaty as adopted, is a broad enabling document, which does not create specific obligations of an economic nature for member States. These are to be spelt out in a series of protocols.

⁵³⁴ For a Trade Protocol to be acceptable under the rules of the WTO, it must cover substantially all trade. Thus, concessions by South Africa must cover substantially all goods, usually interpreted as over 80%. There must also be a corresponding concession from the other SADC countries. The only real concession that South Africa can give, as the EU gave in the EU-SA Agreement is on timing. See also Chapter Two and Three for the treatment of the WTO and GATT agreements

Pan Africanist ambition for an African Economic Community has not been forgotten either, as the Preamble recalls the provisions for the Abuja Treaty of 1991. It recognizes the circumstances within which it has been concluded by alluding to both existing bilateral agreements and trade arrangements.

The Preamble calls for a framework of co-operation based on the SADC principles of "equity and mutual benefit", although it is interesting to note that "fair competition" has also been added. Within this context, an important issue for the member States to consider, is what would be the most appropriate WTO instrument under which to register the Protocol? What must be born in mind is the economic diversity in the region, and the flexibility in approach that will be necessary, should the member States proceed with the more restrictive *Article XXIV*, or should they rely on the pliable Enabling Clause.⁵³⁶

6.3.2 The tariff phase - out timetable

The main thrust of the Protocol is to facilitate regional economic growth and development through, among others, the creation of a Free Trade Area in the SADC region. With regard to trade in Goods *Article 3* states that the process and modalities for the phased elimination of tariffs and non-tariff barriers shall be determined by the Committee of Ministers responsible for trade matters (CMT) having regard to specific matters.⁵³⁷ The CMT would also take into consideration concerns of member States who feel that they may be or have been adversely affected by the removal of tariffs and non-tariff barriers (NTBs) to trade. The affected States must, however, first apply to the CMT to be granted a grace period to afford them additional time for the elimination of tariffs

⁵³⁵ See chapter four for a note on the nature of "interim Arrangements"

⁵³⁶ Because of its lack of flexibility on a number of criteria, *Article XXIV* is viewed as a difficult instrument with which to proceed, especially when exploring alternative strategies to maximize the development impact of trade arrangements. SADC member States should explore the use of the more flexible "Enabling Clause" as the region begins to consider how best to develop the "framework agreement" it adopted at Maseru. The existing schedule of tariffs applies in theory but not in practice. The difference between tariffs that are supposed to be levied and those actually collected is enormous-- largely because of the lack of effective administration of customs at boarder posts. This is, *inter alia*, due to endemic misrepresentation and miss-classification of goods in bills of lading for imports

⁵³⁷ From South Africa's perspective, the Protocol in any case places far too much emphasis on the elimination of tariffs and the role of tariff policy in archiving regional integration through a free trade agreement, when tariffs *per se* are not the issue for two important reasons. When a limited range of tariffs will be in use at any one time by the majority of countries in SADC. South Africa is likely to be the only country requiring an elaborate range of tariff lines. Secondly, tariffs are hardly the reason why intra-SADC trade remains at such low levels. See, for example the discussion on investment matters below

and non-tariff barriers. This provision is in line with the different developmental levels which member States have achieved. It is necessary that the principle of asymmetry and differentiation come into play here.⁵³⁸

Article 3 also provide that different tariff lines may be applied within the agreed time frame for different products in the process of eliminating tariffs and non-tariff barriers. Again the process and method of eliminating barriers to intra-SADC trade, and the criteria of listing products for special consideration, would be negotiated in the context of the Trade Negotiating Forum (TNF). *Article 4* provides for a phased reduction and eventual elimination of import duties in accordance with *Article 3* of the Protocol on goods originating in member States.

It is important to note the rider to the liberalisation process in that it is linked to an industrialisation strategy. This is tailor made to improve the global competitiveness of member States. Parties⁵³⁹ are wide-awake to the possible adjustment costs that will be engendered by this process and provision is made for the CMT to adopt relevant measures as may be appropriate to mitigate the effects of such an eventuality. To ensure compliance with the WTO *Article XXIV* provision member States are to refrain from raising import duties beyond those in existence at the time of entry into force of the Protocol.⁵⁴⁰

What is not certain, however, is whether the framers of the Article anticipate that this caveat on import duties should be as against each other, as against third parties, or lastly as against both SADC members and third parties. The beneficiaries of this clause are not immediately obvious, and clarification is sought. Thomas⁵⁴¹ is of the view that the latter interpretation was probably the one intended. It is pertinently important for the Protocol to be clear, as ambiguity in the language could give rise to interpretations that were not anticipated by the negotiators, resulting in unnecessary trade disputes. The WTO dispensation would tend to support the latter interpretation.

⁵³⁸ See discussion on 'asymmetry and differential treatment

⁵³⁹ In an attempt to mitigate on the obvious monotony resulting from repeated use of this phrase, 'member States' and 'Parties' are used interchangeably

⁵⁴⁰ See for example the discussion on the WTO compatibility below

⁵⁴¹ R. Thomas, Regional Arrangements supra at p.38

At *Article 5* Parties commit themselves not to apply any export duties on goods destined for export within the SADC area. Member States may however, apply export duties that are necessary to prevent the erosion of any prohibition or restriction which apply to exports outside the Community provided that the WTO most favoured Nation treatment is extended to third countries as well. What this provision means is that municipal laws in this respect shall take precedent over the Protocol. This is an issue that has serious ramification. It is also a contradiction in terms given that it takes away what clause 1 of the Article purports to give. Namely that members should promote a tariff free trading environment in the region.

In terms of the Protocol, South Africa's⁵⁴² offer to non-SACU SADC countries is delineated into three categories.

- ◆ Immediate liberalisation is forecast on products that attract less than 17% import duty. They include copper, iron products and steel, wood and articles made of wood, machinery and appliances, paper and paperboard and printed materials, hides, skins and leather.
- ◆ For gradual liberalisation are products that attract between 18% and 25% of import duties, and would be removed in the first three years of implementation. They include furniture and bedding, selected chemicals, paper products, machinery and appliances. Under this category, products that attract duties above 25% would be duty free within the first five years of the free trade agreement's implementation. Products in this category include articles of leather, rubber, selected textiles, vehicles, parts and commodities, selected footwear, cutlery, ceramic kitchen and tableware.⁵⁴³
- ◆ On the sensitive list are largely textiles, clothing and footwear products that are the subject of disagreement and outstanding negotiations among the SADC member States. These products constitute 0.78% of tariff lines and represent 3,04% of the SADC imports.

⁵⁴² The Department of Trade and Industry informed the Portfolio Committee on Trade and Industry that Cabinet committed South Africa, to act in unison with partners in the SACU to create a momentum for forward movement in tariff reductions and the credibility of the SADC free trade agreement. This would be achieved by implementing the agreement to eliminate tariffs and other non-tariff barriers by 1st January 2000 even if it means that SACU implement unilaterally ahead of other SADC countries.

⁵⁴³ Most of these goods are categorized as sensitive because they are labour intensive and they have been among the most difficult to sell in any international trade. Motor vehicles are a concern because of their symbolism, but also because of global excess capacity necessitating downsizing. To date, there is no overall agreement on tariff reduction, sensitive goods or the terms of a SADC agreement. Some countries have declared so many goods as "sensitive" as to reduce the meaning of any agreement that far.

6.3.3 The non-tariff barrier regime

Article 6 attempts to address the rather vexed question of non-tariff barriers to trade (NTB)⁵⁴⁴. Under this provision Parties are urged to adopt policies and implement measures that would ensure the elimination of all existing forms of NTBs and at the same time refrain from imposing such measures anew.⁵⁴⁵ This is a general provision, which then ushers in *Articles 7* and *8* where specific non-tariff barriers are addressed. Quantitative import restrictions⁵⁴⁶ are a common non-tariff barrier, which Parties are not only urged to phase out but also to refrain from introducing new ones. Another common non-tariff barrier to trade comes in the form of Quantitative Export Restriction⁵⁴⁷.

Article 8 prohibits Parties from applying quantitative restrictions on exports against other member States but again this provision is diluted by a rider which allows Parties to circumvent the provision where measures are necessary to prevent the erosion of any prohibition or restriction which apply to exports outside the Community. This rider clearly creates room for States that are keen on maintaining protectionist structures to hide behind this convenient cover. It is particularly difficult for SADC to monitor the veracity of excuses Parties give when resorting to this particular measure. This provision should, however, be viewed in the light of the colonial structures that favour exports to the EU market. These skewed structures have not yet been redesigned to provide the much-needed diversification of exports to the regional markets.

General Exceptions to *Articles 6* and *7* are contained in *Article 9* and comprise a medley of exemptions including *inter alia* public morals, precious, semi-precious and strategic minerals, provisions of the WTO Agreement and treasures of an historic or other value. A major concern here is that some of the exceptions are so broadly defined. For instance, *Art.9 (a)* provides "... necessary to protect public morals". This is obviously a recipe for loopholes for ease of circumlocution and therefore the gateway to evading this obligation, in particular, to eliminate non-tariff barriers.

⁵⁴⁴ For a detailed discussion on this regime see Chapter three.

⁵⁴⁵ For all the reasons stated in the African Development Bank Study on *Economic Integration in Southern Africa* (1993) indicated that the major problem in intra-SADC trade, were non-tariff barriers - not tariffs for these and other reasons, the focus of the Protocol on tariffs is considerably misplaced.

⁵⁴⁶ For a detailed discussion on this item see chapter three above

⁵⁴⁷ Ibid.

Article 9 and *10*, however, make a weak attempt to forestall the possibility of abusing this rider. These two provisions state as follows. That "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination between Parties, or disguised restriction on intra-SADC trade." This provision would have offered a measure of balance but it did not go that far. The provision is, again, diluted when it is made subject to the dictates of the Member State's Municipal Law. The relevant part states that "nothing in the said Articles shall be construed as to prevent the adoption or enforcement of any measures by a member States to enforce provisions of the municipal law".

This rider clearly derogates from the only available remedy against abuse. Although areas of such intervention are clearly spelled out, this is no bar to the abuse of the provision by Parties who are not committed to the tariff phase-out discipline. It is more so given that the decision as to whether to effect the non-tariff barrier lies entirely with each Member State.⁵⁴⁸ This, again, is a clear fertile ground for the incident of trade wars to germinate. In situations where some States feel that a certain measure taken by the other State is arbitrary and without foundation, retaliatory counter-measures would ensue and thereby a cause for disharmony. The aggrieved State would most likely retaliate with a similar if not more devastating missile hence the intermittent eruption of destabilising trade wars between member states.

The veritable principle of National Treatment is underscored under *Article 11*. Parties are enjoined to accord, "immediately and unconditionally National Treatment to goods traded within the community as to goods reproduced nationally". By urging Parties to give National Treatment to member States this provision implicitly excludes third Parties from being accorded similar treatment. This measure runs counter to the WTO provision on the National Treatment facility that should be extended to all WTO members and to this extend non-SADC members are covered well.⁵⁴⁹

Again, *Article 11* is unrealistic and probably unenforceable in the short-to-medium term, as it accords immediate and unconditional national treatment on goods traded within the region, in respect of laws, regulations and standards applying to the sale, purchase,

⁵⁴⁸ Specific commitments are not asked for, nor are any timetables for the tariffication of non-tariff barriers, mentioned.

⁵⁴⁹ See for example the discussion on this item at chapter four

transportation, distribution or use of such goods. This will obviously give rise to problems given the differing standards and technologies existing currently in the region. Without a qualification with respect to the latter, and a time frame for compliance, it becomes a bad rule since it is almost certain to be transgressed immediately the Protocol comes into force. Developing countries not only require time, as indeed it is unequivocally recognized in the WTO legal framework to get their standards right, but they also require time to ensure that their legal and operational framework is in order. Technology is always, of course, a critical factor in measures pertaining to trade liberalization⁵⁵⁰. Yet this is a commodity that is in severe short supply in the SADC region.

6.3.4 Differentiation and asymmetry

The GATT legal system as a whole and the various agreements of the Uruguay Round in particular, enshrine the right of least developed countries (LLDCs) to differential and more favourable treatment. It makes similar provisions for the developing countries albeit it is time bound and limited for the latter. Thomas argues that the Protocol is, to a large extent devoid of such differential treatment for the weaker members in its ranks. Not even for member States, which have the status of LLDCs, she laments.⁵⁵¹ She notes that the Protocol, in *Article 19* as read with *Article III*, obligates parties to a reduction of subsidies within 8 years for all States in the region. This article empowers the Committee of Ministers to grant a "grace period" and elaborate "appropriate criteria for the consideration of such applications". Thomas concludes that the Protocol takes away rights that have been granted least developed and developing countries within the global trade framework in recognition of their special positions.⁵⁵²

Thomas is of the considered view that the strategy adapted by the Protocol is better suited for countries at the same level of development.⁵⁵³ It is true that the principle of

⁵⁵⁰ See for example, R. Thomas, *Regional Arrangements supra*, at p.22

⁵⁵¹ There are a number of areas where the gains made by LLDCs during the Uruguay Round of the GATT have been eroded in the regional context. These include tariffs on agricultural goods, export subsidies, standards with respect to technical regulations, textiles and clothing and the elimination of tariffs. Taking away rights granted to LLDCs under the GATT agreement would obviously be inimical to their economic development. See R. Thomas *Trade Liberalization Issues (supra)* at p.51

⁵⁵² For instance the GATT 1994 does not require least developed countries to phase out export subsidies at all - that is, implicitly, until they graduate from their unfortunate state of underdevelopment. Developing countries, on the other hand, are given ten years to do so and need only cut subsidies by two-thirds of those cuts applying to developed countries.

⁵⁵³ *Trade Liberalization Issues supra* at p.51

differentiation and asymmetry is acknowledged even in the most successful showcases of regional integration.⁵⁵⁴ Like we pointed out earlier, the South African region has a diverse economic landscape. Four of the BLNS States comprise only 3 percent of South Africa's GNP. The South African GNP is four times larger than that of the other thirteen SADC States combined. Given these glaring differentials a proposal like the one projected by the Protocol in respect of industrial development is inexplicable. Thomas⁵⁵⁵ suggests that what the Protocol should have attempted to do, is to build upon the natural advantages these countries have under the GATT regime and to maximise their opportunities within the SADC trade framework so as to achieve economic growth and development.

The argument advanced by Thomas is right on target with regard to the question of the SADC States building upon their natural advantages for sustainable growth and development. On the score of asymmetry and differentiation we beg, with due respect to disagree with the learned author. The tariff timetables we examined earlier are designed along the lines of the EU-SA Agreement.⁵⁵⁶ The tariff lines are governed by principles of asymmetry and differentiation. Under this design, the weaker economic partners would have more time within which to implement onerous obligations of the agreement than the stronger ones.

Abraham Pallangyo⁵⁵⁷ - the SADC industry and trade adviser - explains this arrangement. He says that the SADC free trade agreement would be structured in such a way that the South Africa-SACU States⁵⁵⁸ will front-load and, Mauritius and Zimbabwe will mid-load. He adds that the rest of the member States will back-load in terms of the timeframe, pace of the tariff reduction and the coverage of the SADC free trade. To this extend the Protocol must be taken to have paid sufficient homage to the twin WTO ethos of asymmetry and differentiation for developing States within the SADC. Whether the ratio

⁵⁵⁴ In the EU, for instance, Portugal has been supported financially to prop it up to achieve developmental levels of other member States. Mexico in the NAFTA was allowed more space within which to implement certain obligation than the time frame accorded to Canada and the USA. See also chapter three for a more in-depth discussion of this subject

⁵⁵⁵ R. Thomas: Regional Arrangements supra at p.53

⁵⁵⁶ Under the EU-SA FTA the EU would front-load its tariff phase-out schedule while South Africa will back-load its tariff obligations

⁵⁵⁷ Cited at <http://www.mg.co.za> on 21st June 2000

⁵⁵⁸ South Africa has undertaken to phase-out its tariffs to 0% within eight years of accession. Most tariffs will be at 0% in four years. Sugar and Automobiles are excluded. SADC states will have 12 years within which to reduce their tariffs to 0%. It is estimated that by the end of the period, 90% of SADC products will be at 0% duty. See the DTI presentation to the Parliamentary Portfolio Committee supra

of asymmetry and differentiation pledged under the Protocol is welfare creating for the beneficiary States is a different matter altogether.⁵⁵⁹

The complication here though is that South Africa already has bilateral trade agreements with a number of non-SACU countries.⁵⁶⁰ The SA/Malawi bilateral agreement allows the latter to export everything to South Africa duty free on condition that 25% of goods originate from Malawi.⁵⁶¹ The SA/Zimbabwe bilateral trade agreement allows the latter to export certain products to South Africa at half the most favoured nation (MFN) rates whilst Mozambique is required to have a 35% originality value for her goods to access the South Africa Market duty free.⁵⁶² This pattern of bilateral preferential trade arrangements is another fertile ground for intractable trade conflict.

It is not clear, for example, between the bilateral trade arrangements and the Protocol as to which one would take precedent in case of inconsistency. For purposes of harmonisation it would have been better for the Protocol to override all the existing bilateral trade arrangements. In any case, it would be a culpable case of discrimination if South Africa were to offer better terms of trade under a bilateral arrangement than what is on offer for other SADC member States.

Thomas is of the view that no special dispensation was asked for by the least developed States, despite their GATT entitlements in this regard.⁵⁶³ She adds that, none were asked of South Africa as the developed economy in the equation, even though they would have conformed with *Part IV* of GATT (*Art XXXVI: 8*) and the Enabling Clause. The answer to this state of affairs recites in the tariff regimes of these countries. Most of the SADC countries with the exception of South Africa had already undertaken extensive tariff reduction under the IMF/ World Bank administered Structural Adjustment Programmes (SAPS).

⁵⁵⁹ But like we have pointed out below, this is a vexing issue that has engaged economists for a considerable length of time. No clear resolution of the issue seems to emerge from these obviously animated discussions.

⁵⁶⁰ These are between Namibia and Zambia, and between South Africa and Zambia and Zimbabwe, respectively, although strictly speaking, the negotiations between South Africa and Zimbabwe are for the re-instatement of an old agreement, but on revised terms. Agreement in principle was arrived at between South Africa and Zimbabwe on 6 August 1996 in respect of textiles and clothing (Zimbabwe, S. Africa in textile deal". *Financial Times*, Wednesday 7 August 1996, at p.4,

⁵⁶¹ According to Abraham Pallagyo, SADC industry and trade advisor: Reported in the *Mail & Guardian*; June 21, 2000, See also <http://www.mg.co.za>

⁵⁶² Reported in the *Mail & Guardian*, June 21, 2000

⁵⁶³ *infra*

Again, it is not entirely the case that none of the SADC States has moved to seek preferential favours from South Africa. Zambia for one has complained that it is the only Southern African country not enjoying a preferential trade arrangement with South Africa. This despite the fact that due to its open economy, South African manufacturers have successfully penetrated its markets, giving rise to substantial problems of dislocation and de-industrialization and a huge trade deficit. For this reason, Zambia now rightfully seeks reciprocity from South Africa.

Thomas, however, says that the South African government takes a different view of this matter.⁵⁶⁴ She explains that the granting of a preferential agreement to Zambia at this stage, and prior to the conclusion of a GATT *Article XXIV* arrangement within SADC, would expose South Africa to MFN claims from other developing countries which are not members of the regional arrangement. To this assertion, we counter that the MFN status is a WTO obligation for all states to comply with provisions to the contrary in regional regimes notwithstanding. The exception to this express provision only comes into play when no duties are raised against third parties. It has also been argued that a free trade agreement with South Africa is precisely what Zambia does not need at this stage, as this would merely exacerbate its already precarious economic situation.⁵⁶⁵ It is not clear as to how the Zambian situation could worsen when in actual fact, South Africa's products are having a field day in its market.

6.3.5 Measures on trade laws

Part IV of the Protocol deals with Trade Laws and comprises *Articles 16 to 21*. The Articles make provision for sanitary and phytosanitary measures; standards and technical regulations; anti-dumping measures; subsidies and countervailing measures; safeguard measures and, infant industry protection. This part of the Protocol attempts to achieve harmonization across the board. The Protocol also by reference incorporates a substantial part of the WTO Agreement on these various issues.⁵⁶⁶

(a) Sanitary and Phytosanitary Measures

These Articles obligate member States to base their sanitary and Phytosanitary measures on international standards, guidelines and recommendations. The aim here is to achieve

⁵⁶⁴ R. Thomas, *Regional Arrangements*, supra at p. 15

⁵⁶⁵ Ibid.

⁵⁶⁶ See chapter four for a discussion of the GATT/WTO agreement.

harmony in sanitary and phytosanitary measures for agricultural and livestock production. It is, however, unrealistic to expect most of the SADC States, especially the least developed one to measure to international standards on sanitary and phytosanitary measures. One of the biggest obstacles standing in the way of the SADC trade with South Africa is that the latter has far much higher sanitary and phytosanitary standards than the rest of the SADC member States. The LLDCs among the SADC in particular do not have the technological infrastructure to achieve international standards as required by this provision.⁵⁶⁷

Perhaps it was in recognition of this latent deficiency among members that there is a rider to this provision which allows Parties to enter into consultations with the aim of achieving agreements on recognition of the equivalent of specific sanitary and phytosanitary measures. Such an understanding must, however, be in compliance to the WTO Agreement on the Application of Sanitary and phytosanitary measures.

(b) Standards and Technical Regulations

On Standards and Technical Regulations on Trade under *Article 17*, Parties are absolved from this obligation where the provisions of the Protocol would render ineffective or inappropriate the means for such Party to fulfil its legitimate objectives. This is clearly a subjective test, which is susceptible to abuse by Parties hell-bent on maintaining arbitrary non-tariff barrier regime. At par. 4 of *Article 17*, Parties are enjoined to accept as equivalent technical regulations of other member States, even if these regulations differ from their own, provided that they adequately fulfil the objectives of their regulations. This particular provision goes against the quest for harmonisation of standards, which SADC craves to achieve. It is unlikely that the dream of achieving a harmonised system would crystallise where each Party fronts what it deems to be equivalent standard measure. At any rate, the diverse disposition of the member States in itself renders this rider a veritable recipe for abuse.

(c) Trade Related Investment Matters

Parties are obligated under the Trade Related Investment Matters at *Article 22* to adopt policies and implement measures within the Community to promote an open Cross-

⁵⁶⁷ In its presentation to the Parliamentary Committee on Trade and Industry, the DTI said that South Africa has the highest technical standards in the region such that other SADC countries cannot

Border Investment (CBI) regime. This measure would stimulate economic development, diversification and industrialisation. This is an important enabling legal framework given that the levels of intra-SADC trade are unacceptably low. Like we have argued below, the SADC region can only realise sustainable economic growth if cross border investment is intensify. This activity would, no doubt open up opportunities for the much sought after Foreign Direct Investment (FDI).

(d) Anti-dumping, Subsidies, Safeguard and Countervailing Measures

Article 18 justifies anti-dumping measures taken by any Party the only caveat being that such measures are in conformity with the WTO disciplines in this respect. The touchy question of Subsidies and Countervailing measures is given treatment under *Article 19*. Parties are forbidden from granting subsidies, which distort or threaten to distort competition in the region. Under the framework of the tariff phase-out timetable provided for under *Article 3*, Parties may legally maintain subsidies in line with their developmental rating. Countervailing duties are only permissible under the WTO rubric, which also goes for the introduction of new subsidies.

The Protocol also provides for Safeguard measures against unfair practices. In such instances the affected Party would have recourse to take anti-dumping action and apply Countervailing Measures to import trade that distorts fair competition. It also prohibits the granting of production and export subsidies that may distort or threaten fair competition. It is proposed that products benefiting from direct and actionable subsidies that may distort fair competition, including export subsidies such as export processing zones should be granted preferential treatment under the Trade Protocol. This proposition has a clear foundation in the nature of the nascent industrial base in the region.

Many of the SADC countries maintain an export-processing zone, which is heavily subsidised by the respective state to stimulate industrial growth. It would be disastrous if products from such an industrial zone are subjected to countervailing measures. Since the Protocol makes provision for infant industry subsidy, it is sensible to accord such industrial establishments preferential treatment under the Protocol. This is where the South African leadership authority comes in handy. South Africa must be seen to come

out strongly to support industrial revolution in the region. After all, this measure is critically important for her economic prosperity. One way of doing this is to admit substantial tariff leeway for products of member States originating from such export processing zones in order to promote industrial growth in the region.

Article 20 allows Parties to apply such measures to a product upon determination that such a product is being imported to its territory in such increased quantities, absolute or relative to domestic production. And the same is imported under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. The WTO provision⁵⁶⁸ on what constitutes serious injury to industry is the applicable yardstick here.

One immediately visualises a scenario where, say South Africa imports goods from the EU, which causes serious injury to an industry in a SACU country, like Lesotho. This is highly likely given the level of market dependency these Countries have on South Africa. It is not immediately clear whether Lesotho can then institute safeguard measures under the SADC Protocol or the SACU Treaty or both. This again is an area of conflict of laws, to which no attention has been paid at all by the Parties to the Protocol.

(e) Infant Industry

Protection of infant industry is provided for under *Article 21*. The affected Party must apply to the CMT for relief. The CMT may in turn and as a temporary measure in order to promote an infant industry and subject to the WTO disciplines authorise the affected Party to suspend certain obligations under the Protocol in respect of like goods imported from the other member States. The catch here kicks in where say South Africa is, under the EU-SA Agreement, accorded this facility for the protection of its infant industry.

How then would measures taken in pursued of this relief affect South Africa's obligation under the Trade Protocol. If the activity on the ground were that South Africa is taking measures to protect its infant industry from the surging EU imports, what would be the implication of such a measure for South Africa's obligations under the Trade Protocol? Conversely, where one of the SADC states acts under the COMESA Treaty, to which it

modalities for co-operation, which was signed in January 2000 by the SADC Council of Ministers.
⁵⁶⁸ See chapter four for an explanation of what constitute serious injury to industry and when such measures are applicable and for what period of time

owes membership, to protect its infant industry, would such a measure be permissible under the Trade Protocol? This again, we submit, is another area rife with conflict. Any measure that is taken by a member State under the authority of its membership to a different trade arrangement would severely encroach on its mandate under the Protocol. This plays out where derogation is permissible under one trading regime but the same is expressly forbidden in the other.

Similarly, Parties are obligated to make a notification of the non-tariff measures that they apply in their trade policies. They are also urged to make firm undertakings on the removal of measures that distort or inhibit the free flow of trade in the region. In this regard, the removal of trade-distorting measures in agricultural trade such as quantitative import and export control, single channel marketing and price control is an urgent matter that still needs to be addressed more effectively.⁵⁶⁹

6.5.6 General Agreements on Trade in Services

The equivalent of the General Agreements on Trade in Services (GATS) in the WTO framework is captured under *Article 23* of the Protocol. What is significant here is the fact that members acknowledge and give due recognition to the trade in services for the development of the economies of the SADC States. The significance of this development draws from the fact that developing countries were most vocal in rejecting the introduction of the trade in services regime under the purview of the WTO disciplines⁵⁷⁰. Parties are obligated to adopt policies and implement measures that would conform to the WTO disciplines on the GATS and thereby liberalise the services sector within the SADC region. The conformity of the GATS to the WTO disciplines is a good riddance to the multilateral stakeholders who have been agitating for the opening up of developing countries' trade in services.

The liberalisation of the services sector is a tricky catch for developing countries and more so in a region where discussions on free movement of labour is avoided like a plague. It is submitted that without the concomitant framework for the free movement

⁵⁶⁹ The main areas of disagreement are the product-specific rules of origin for clothing, textiles and footwear. There were also disagreements on differentiated tariff offers from the non-SACU SADC states who wanted one offer from South Africa and another offer from Botswana, Lesotho, Namibia Swaziland and Mozambique. Another area of disagreement was product coverage and the timing of the tariff reduction schedule.

⁵⁷⁰ See chapter four where this development is discussed under the GATS provisions

of labour within the region, the GATS law for SADC would remain a dead letter law. It is notable, however, that South Africa which is known to be vehemently opposed to the provision for free movement of labour in the region is the biggest beneficiary of the GATS providence. The Service industry is already blossoming in the region only that it is a one way highway shooting from South Africa to the rest of the region.⁵⁷¹ Arguably, trade in services is hardly the kind of investment any country would want to attract to its market since it has the potential and does dig many graves for small and upcoming local entrepreneurs.⁵⁷² The good aspect to this provision is that it has been made WTO compliance to avoid situations of conflict with the multilateral disciplines.

The theme document produced in Maputo, Mozambique (1992) observed that "promoting the free movement of labour and people generally across borders will be an essential component of a strategy of regional integration." The movement of citizens within the SADC region is regrettably still curtailed by legislation such as the requirement of Visas, work permits and the use of passports. Although this issue was tabled for discussion under the "freedom of movement" Protocol, it has never been signed as many States have encountered stiff opposition from their citizenry. Those that are for the Protocol argue that labour will be readily available for professional jobs hence bring about an economic boost to the region. Those against it argue that foreigners will come and take up their jobs under the pretext that they are more qualified⁵⁷³.

Provision is made for Intellectual Property rights under *Article 24*. This provision, too, has been made WTO compliant wherefore Parties are obligated to adopt policies and implement measures within the SADC region for the protection of Intellectual Property Rights. The same goes for trade related investment measures. On Competition Policy, Parties are enjoined to implement measures in the Community that prohibit unfair

⁵⁷¹ In a recent seminar for Trade, Investment and Infrastructure Co-operation within the SADC region organized by the African European institute, a delegate from Malawi posed some rather vexing questions. He posited "What do we do when the influx of cheap foreign goods results in the closing down of local industries and therefore unemployment for our people? How do I, as a politician explain to these people who have just lost jobs as a result of foreign competition that globalization and trade liberalization are good for them? How can we, as politicians preach the virtues of great productivity when some of our policies appear to discourage local initiatives?" The presentation by Hon. Ken Lipenga, deputy Foreign Minister, Malawi at joint initiative by the South African Chief Whips Forum and AWEPA, Cape Town South Africa, 20-21 March, 1998.

⁵⁷² See remarks by Hon. Ken Lipenga, deputy Foreign Minister, Malawi, in his address to the AWEPA Seminar, *infra*

⁵⁷³ For instance, the South African immigration department is currently locked in a feud with farmers in the Limpopo province whom it accuses of harbouring illegal immigrants as cheap labour at the expense of the locals

practices and instead strive to promote competition. It is important to note that until recently and with the urging of the IMF and World Bank sponsored programmes, most firms in the region consisted mainly of entrenched monopolies some under a hefty State subsidy.

With the liberalisation of the services and manufacturing sector, most firms in the region have been exposed to outside competition. Unfortunately this wind of change has come suddenly and thereby sweeping the firms off balance before they could put in place necessary structures to position themselves in order to be internationally competitive. Indeed many firms in the region can be classified as infant industries even after long years of existence. This is clearly a misnomer given the fact that quite a few firms have roots in the colonial era. This unending stupour of infancy has everything to do with complacency created by monopoly status that gave no motivation for these firms to invest in the cutting edge technology. Such struggling firms would be more worried about their survival in the liberalised market dispensation than worry about infringing the provisions of the competition policy.

6.6.1 Institutional Framework

We have underpinned the vital role played by institutional arrangement structures in the success of a free trade agreement. The EU-SA Agreement has vested the administration of the trade partnership to a Co-operation Council⁵⁷⁴. The Council among other things oversees the implementation of the contracted obligations. Initially SADC's organisational structure was such that different Member States co-ordinated various sectors⁵⁷⁵. At an extraordinary meeting of the SADC Council of Ministers in November 2000, recommendations were put forward for the phasing out of some twenty sector co-ordinating units and commissions that are currently located in individual member

⁵⁷⁴ See chapter five above

⁵⁷⁵ Angola is responsible for coordinating the energy sector: Botswana the agricultural sector: Lesotho the water sector: Malawi the inland fisheries, forestry and wildlife. Mauritius holds the tourism sector and Mozambique is responsible for transport. Namibia for marine fisheries and resources while Swaziland is responsible for human resources development. Tanzania caters for Trade and industry and Zambia takes charge of employment, labour and mining. Zimbabwe takes the portfolio of food, agriculture and natural resources and South Africa retains the finance and investment docket. This later sector was established in February 1995. It is one of the youngest sectors within the SADC having been established soon after South Africa became a full member of the SADC in August 1994. This revelation was made by M. Lindie, Chief Director, Department of Finance, South Africa, at the AWEPA Seminar (supra) at p.49

States⁵⁷⁶. During the SADC Summit held in Namibia in March 2001, the SADC Heads of States approved the formation of four Directorates to be based in Gaborone Botswana. The phasing out of the existing sectors and commissions is to be undertaken within two years.

Commentators have expressed optimism that the new managerial structure adopted at the SADC's extraordinary summit in Windhoek would go a long way towards promoting regional co-ordination and co-operation.⁵⁷⁷ Horst Brammer, a deputy director in South Africa's Foreign Affairs Department, supported the move and expressed hope that new structure would bring greater focus to the SADC and the manner in which it approached project implementation. He, in particular, remarked that;

"Until now there has been a sectoral approach, a great deal of decentralization among countries with differing degrees of capacity. Depending on the capacity of a country driving a particular sector, some were operating and others were not operating at all. Now, instead of a country running one sector, experts from across the region will be used,"⁵⁷⁸

According to Brammer the changes could transform the SADC into a leaner and meaner body.⁵⁷⁹ No doubt the new system will be less cumbersome. It will be cheaper, and at the same time there will be a higher level of efficiency because this is a case of pooling expertise⁵⁸⁰. The Protocol has under *Article 31* rolled out institutional mechanisms for the implementation of its objectives. These institutions according to their hierarchical order are the Council of Ministers of Trade, a Committee of Senior Officials responsible for trade matters, the Trade Negotiating Forum and the Sector Co-ordinating Unit. Thomas⁵⁸¹ is critical of the idea of creating a second bureaucratic layer of "Senior

⁵⁷⁶ It was recommended their respective work programs be consolidated in four directorates to be located in Gaborone, Botswana. All the existing sectors were to be clustered under these four directorates according to their sectoral linkages.

⁵⁷⁷ South Africa: SADC Update: Africa Policy Electronic Distribution list <http://www.africapolicy.org> 010418 Johannesburg, 13 March (IRIN)

⁵⁷⁸ Ibid.

⁵⁷⁹ See <http://www.africapolicy.org> 010418 Johannesburg, 13 March (IRIN)

⁵⁸⁰ Jakkie Cilliers, director of the Institute for Security Studies, based in South Africa, agrees. He explains that Protocol was negotiated and it was agreed at ministerial meetings in Swaziland that the organ's leadership would rotate. But Cilliers points out that the fact that it took five years to find agreement on the issue indicated that the region remained divided, with members of the SADC being suspicious of each other, and with differing approaches to issues like conflict resolution and regional collaboration.

⁵⁸¹ R. Thomas, Regional Arrangements supra at pp.23-24

Officials" over the Trade Negotiating Forum, which she says in any case comprises senior officials of SADC member States.⁵⁸²

To the extent that this arrangement has financial consequences⁵⁸³ we concur fully with the position taken by Thomas. It will also slow down procedures. The justification for such is therefore questionable. One may however justify this elaborate structure given the sheer expanse of the SADC region. There is also a need for close monitoring at this crucial fledgling phase of the Protocol. Unlike the EU, which has the technological know-how that enables it to maintain a leaner institutional structure, SADC lacks equivalent state of the art technology. Indeed most SADC States have poor to none existent infrastructure that would facilitate the co-ordination and implementation of the Protocol.⁵⁸⁴

It must be admitted however that the Trade Negotiation Forum is a superfluous structure. In the first place it is now a *functus officio* organ it having completed its task upon the signing of the Protocol. Secondly, the forum would consist of the very same people to be found in the Committee of Senior Officials and the Sector Co-ordinating Unit. The TNF, in our view serves no meaningful purpose in augmenting the objects of the Protocol.

The CMT is the highest-ranking body on regional trade matters. It is entrusted with the supervision of the implementation of the Protocol. It also foresees the supervision of the work of any committee or sub-committee established under the Protocol. On the other hand the Committee of Senior Officials reports to the CMT on matters relating to the implementation of the provisions contained in the Protocol. It is entrusted with the responsibility of supervising the work of the Sector Co-ordinating Unit as well. This measure is undesirable in view of the fact that the CMT also supervises the Unit. Too much supervision from different hierarchical quarters is a breeding ground for conflict of interest. It would have been better for the Committee of Senior Officials to supervise the Co-ordinating Unit and report back to the CMT instead of the later directly supervising the Unit. This is more so given that the Committee of Senior Officials plays the vital role of a liaison between the CMT and the Unit.

⁵⁸²Ibid.

⁵⁸³This set up would indeed increase the number of meetings that will be necessary before policies are adopted

The TNF's main responsibility lies in the conduct of trade negotiation and reports to the Committee of Senior Officials. One of the most important briefs for the TNF is to establish a linkage between trade liberalisation and industrial policy. The importance of this intervention lies in what economists have repeatedly warned that a programme of liberalisation devoid of industrial policy would be meaningless. Like we pointed out earlier it is of critical importance to develop a sound industrial policy, which will help stimulate intra-SADC trade and therefore ensure sustainable economic growth. This is where the private sector factors in the equation of measures. The private sector is, after all, the veritable engine of development hence the excellent gateway to economic growth and development.

The Sector Co-ordinating Unit (the Unit) has the onerous mandate of overseeing the day to day operations in the implementation of the Protocol. This group is essentially a technical team comprising experts drawn from different disciplines. They are specially tooled to provide technical and administrative assistance to the CMT, the Committee of Senior Officials and the TNF. Granted its load of expertise and the fact that it is on the ground to oversee the implementation of the Protocol, the unit is in a far better position to periodically constitute a Trade Negotiating Forum to share experiences and identify areas of urgent intervention.

The TNF is, therefore, in our considered view, an unnecessary bureaucratic layer that merely duplicates the work of the Unit. It is noteworthy that the Unit has been mandated to work closely with the private sector. This is an important feature that is not catered for in the EU-SA Agreement. The private sector like we have pointed out, is the engine of development and there is an urgent need to give it guidance in identifying trade and investment opportunities that would be spurned by the implementation of the Protocol. The Unit does well to sensitise the private sector on investment indicators so that full advantage is taken of the trade opportunities within the region.

The office of institutional mechanisms is a standard measure adapted by regional blocs and preferential trade agreements to foresee the implementation of the covenanted obligations. The measure is admissible under the WTO disciplines and hence its legitimacy cannot be disputed. Co-ordination of Trade Policy is one crucial measure for

⁵⁸⁴ This is, in fact, one of the reasons the earlier design of sectoral coordination was a rueful failure.

the success of a free trade agreement. The EU's common market⁵⁸⁵ has been sited as a model success story due largely to its integrated policy harmonisation. This is why *Article 29* enjoins member States to attempt their best endeavour in the area of co-ordination of their trade policies.

Admittedly the implementation of the Protocol would require effective co-ordination and an improved efficiency of all the relevant institutions. It also calls for an increasing leading role by the Parties in driving the process forward, in monitoring and in maintaining close liaison with one another. This raises, in a broader context, the urgency of institutional reform and rationalisation of the SADC with Parties providing political leadership and the requisite technical support.

6.6.2 Dispute Settlement Procedures

Free Trade Agreements are known to spurn some of the most vexing trade wars between Nations. This scenario not infrequently leads to intermittent but bitter diplomatic rows among States. The free trade instrument *per se* would never guarantee a smooth riding trade partnership. Sooner rather than later there will be accusations and counter accusation mostly in the undefined area of non-tariff barriers. Free trade agreements, for the most part, tend to set up a programme for phasing out tariffs but merely make general provisions with regard to non-tariff barriers. This is why the non-tariff barrier regime is almost always the bane of trade wars.

It is in anticipation of such disagreements that free trade agreements, perhaps with the benefit of hindsight, provide mechanisms for the smooth settlement of trade related disputes. The Protocol is no exception in this regard. *Article 32* enjoins members to endeavour to agree on the interpretation and application of the provisions set out in the Protocol. The Protocol underscores the importance of co-operation and consultation in seeking to arrive at a mutually satisfactory agreement. Co-operation and consultation does, to a great measure promotes consensus which builds trust.

On the other hand the adversarial panel adjudication process tends to exacerbate divisions and breeds mistrust among the Parties. Panel adjudication is in most cases summoned as an avenue of last resort. This is after efforts at conciliation have

⁵⁸⁵ See chapter three on 'Integration in Europe for an in-depth treatment of the EU's common market.

completely failed to yield agreement. The available remedies to the wronged party are a withdrawal of equivalent concessions. The offending Party is in the first instance called upon to remove measures not conforming with the provisions of the Protocol or those causing nullification or impairment of such provisions. This is a WTO compliant procedure for dispute settlement.

The main object of the revised dispute settlement provisions is to ensure certainty and predictability in the settlement of disputes arising under the Protocol.⁵⁸⁶ This feat has been achieved by clearly outlining the different phases in the settlement of disputes and linking them to clear cut time frames. The new provisions are based on the same principles underpinning the Dispute Settlement Understanding of the WTO. It is, however, not made clear whether Parties are free to take recourse to the WTO Dispute Settlement mechanisms in place of those provided for under the Protocol. The EU-SA Agreement makes this option open to an aggrieved Party.⁵⁸⁷ This ambiguity needs to be resolved to widen the field of remedy for an aggrieved member State.

It is noteworthy that the appointment, composition, powers and functions of the panels is to be determined by the CMT. This procedure is, in our view, an undesirable one. The CMT is hardly the appropriate authority to carry out this manifestly important responsibility. The Protocol does not say whether the Panel would be set up on need basis or whether there would be a permanent list of panellist to be drawn from whenever a dispute arises. If the later is the case, then the CMT would severely curtail the work of the panel since the latter's meetings are going to be periodical in nature⁵⁸⁸ and yet a dispute could erupt at any time. To the extent that this arrangement clearly interferes with a Party's right to choose whom they want to adjudicate on their dispute and urgently whenever necessary. It is an inefficient regulatory measure. The same must be reviewed urgently before trade disputes start flooding in as is expected.

Baring the fact that SADC has not been notified to the WTO and therefore it is not a member, the WTO's dispute settlement structures are still open to parties by virtue of

⁵⁸⁶ See the revised Protocol on 'dispute settlement measures *Article 32*

⁵⁸⁷ The details of this provision is discussed in Chapter Four under 'dispute Settlement Mechanisms'

⁵⁸⁸ Trade Ministers are first and foremost politicians in -charge of very busy ministerial portfolios. They owe their position first and foremost to their respective electorates where the calling is very demanding. It is unlikely that SADC meetings would take priority over important governmental business. Convening this lot on a short notice is hardly achievable.

their individual membership. The WTO's Dispute Settlement Board is well supplied with the necessary expertise and that it boasts vast experience in settlement of both multilateral and regional trade disputes. The Protocol should have, therefore, opened the door for members to access this multilateral facility if they so desire even though practice has shown that developing countries' participation in the WTO dispute settlement process is almost none existent⁵⁸⁹.

The reason for this cavalier attitude on the part of developing countries toward this important dispute settlement facility is beyond the limited means of this work. In any case since the EU-SA Agreement operates within the SADC region, SADC States have a direct recourse to the WTO procedures should they be aggrieved by the EU's activities. At any rate, since the Protocol does not expressly forbid members from accessing the WTO dispute settlement process, the Parties are free to submit their dispute to this process if they so desire.

6.6.3 The dilemma in the right of audience

South Africa and its SACU Diaspora have under the Protocol offered a cumulated tariff reduction schedule. The non-SACU SADC countries were vehemently opposed to this move. They wanted each SACU member State to individually reduce tariffs and not as a bloc. There are serious legal implications to this arrangement. One of the conundrums has to do with the implication for the dispute settlement process. The crisp question one is bound to posit here is "what happens in the event that say, South Africa fails to meet its tariff phase-out schedule and a fellow SADC country is aggrieved in the result? The collateral question is, would that country institute dispute settlement procedures against South Africa as a country or should it be SACU that is to be arraigned before the dispute settlement panel?

Fortunately there is persuasive authority for this type of eventuality. The recent case of Turkey Textiles⁵⁹⁰ is on all fours in point on this issue. In this dispute, Turkey's trade in textiles with third countries represented less than 4.5% of Turkey's external trade. It was thus considered that, for the Turkey-EC customs union to be GATT compatible, Turkey's duties and regulations concerning textiles with third countries did not need to

⁵⁸⁹ The record of developing countries and especially African countries seeking audience at the WTO dispute settlement panel is pathetic. This is an understandable situation given that the WTO procedures are complex and far too expensive for developing countries to afford

be harmonized with those of the European Commission. The question for the Panel, really, was whether the Turkey-EC customs union had a *locus standi* before the WTO dispute settlement panels.

In this dispute, the panel noted that the WTO dispute settlement system is based on Member's rights. It is only accessible to Members and is only enforced and monitored by Members.⁵⁹¹ The Panel pointed out that the Turkey - EC customs union was not a WTO member and, in that respect, did not have any autonomous legal standing for the purpose of WTO law and, therefore, its dispute settlement procedures. Accordingly it was impossible for the Turkey - EC customs union to have any standing in this procedure.

The same analogy captures the SACU-SADC scenario. Since SACU is not a member of the SADC it has no *locus standi* before the latter's dispute settlement procedures. It is only the individual SACU member States that must answer to queries pitting the SACU union against a SADC non-SACU Member State. In any case, as was argued in the Turkey Textile case, once it is factually determined that the particular SACU Member State had taken the measures in issue individually within its borders then such a member is answerable to the aggrieved SADC State individually.

What is important is to establish that the offending measures were enforced on such Member State's territory and that the State in question was ensuring the surveillance of such quotas at its borders. Once this fact is established then that State must answer to charges individually irrespective of its SACU membership. In this scenario, it is unlikely that SACU would be clothed with the requisite competence to defend the dispute purely on the ground of its harmonized tariff regime. Thomas⁵⁹² points out that as a WTO consistent arrangement, SACU should address trade matters with other SADC States as a single entity, and not the individual member States. She offers that SACU should be negotiating the scheduled tariff reductions with the rest of SADC in the Trade Negotiating Forum (TNF).

The position espoused by Thomas is in effect untenable on the hard issue of audience at the dispute settlement panel. Of course negotiating tariffs, as a bloc is another matter all

⁵⁹⁰ Turkey Dispute *Article 4* and Customs Unions cited in Marceau et al supra at p.306.

⁵⁹¹ The Panel cited *par. 101* of the Appellate Body Report on United States - Import Prohibition of Certain Shrimp and Shrimp Products, adopted on 6th November 1998, *WT/DS58/AB/R* (US -Shrimp)

together. The point remains that SACU is not a member of the SADC as such. It is therefore a misnomer to give it an audience before the dispute settlement panel. The right of audience as established under the Protocol before the panel is reserved for members only. The SACU union, therefore, lacks the requisite *locus standi* to address the panel. For the very same reasons, it is a serious misnomer to allow SACU to offer a bloc tariff schedule. This framework is not provided for in the Protocol either.

The implied ultimate and ideal situation is that once the constituent members of a customs union adopt a complete single common foreign trade regime, a series of different arrangements are possible. But in all cases, the formation of a customs union will necessitate important harmonization of duties and other regulations of commerce. In the light of *par. 4*, the requirements of *par. 5* must be taken into account by regional trade arrangements in the determination of how harmonization should proceed, particularly since such harmonization should not lead to increased barriers to trade with third countries.

The argument advanced by SACU is that since it has a Common Market, it is only prudent that tariffication be considered as a bloc to avoid policy inconsistency which might erode the efficacy of the Common Market. Thomas⁵⁹³ suggests that SACU member countries may opt to deal with the WTO as a single entity as well as independently, as individual WTO members. Indeed with regard to the EU-SA Agreement SACU is treated by the EU as part of South Africa. In which case SACU is a *de facto* member of the EU-SA Agreement. This argument, no doubt, carries considerable force. While it may appear convenient to hitch SACU States unto South Africa's back when dealing with a seasoned predator like the EU, we doubt that a similar design is appropriate with regard to the SADC. The view we take of this matter is that the arrangement with respect to SADC creates an awkward scenario where SACU as a bloc is a *de facto* member of the SADC while on the other hand the SACU countries claim individual membership to the same bloc.

This is a classic case of having one's cake and eating it. It is simply untenable legally. Either SACU contracts in the SADC as SACU or as individual States that belong to

⁵⁹² R. Thomas, Trade Liberalization Issues *supra* at p. 43

⁵⁹³ She however cautions that SACU will need to determine how to deal with their partners in SADC and with other parties such as the EU, COMESA and third countries, *Ibid*.

SACU. Furthermore, we have argued that SACU's status is not provided for anywhere in the SADC Protocol. Save that the SACU common market makes provision for a common external tariff (CET) the SACU out-fit is not recognized in the Protocol as a legal entity with a persona of membership. Such recognition, if one were to be supplied in the Protocol, would have created insurmountable legal quagmires.

Cumulation has the potential to encourage economic linkages within the region. However, it also has the potential to encourage economic polarization by encouraging the more developed areas to source raw materials from less developed areas. With the lowering and removal of tariffs SACU must explore ways and means in which to retain and enhance its attractiveness as a location for investment. The opening up of the SACU market to the EU and SADC will reduce the relative preference that Swaziland has through its membership of the SACU.⁵⁹⁴

The non-SACU members of the SADC seek clear direction from SACU members as to where the latter is going in this regard, since it impacts fundamentally on the Protocol. If SACU is to be a custom union in the true sense of the definition, it should be "SACU", the institution that would enter into the free trade area agreement with the other SADC Member States, and not its constituent members. Thomas⁵⁹⁵ says that both SACU and SADC perpetuate the myth that it is irrational for five countries, which operate behind one external tariff, to go into negotiations as individual parties capable of making separate concessions on tariff lines. She points out that in reality the same principle that applies to the BLNS vis-a-vis the EU-SA Trade agreement applies proportionate to SACU's relations with SADC. It is unfortunate that SACU member States are unable to provide an answer to the SADC non-SACU members on this tricky issue.

⁵⁹⁴ We have carried out a review of our fiscal policy (e.g. New Income Tax Bill, considering the introduction of VAT, and are proceeding with the strengthening of the revenue departments) with the aim of ensuring that we remain competitive. See also R. Thomas, *Trade Liberalization Issues* supra at p. 47

⁵⁹⁵ Thomas urges that there should be a progression by SADC member States individually or as a group, to a deeper level of integration with SACU. This could happen through graduation of the non-SACU members from SADC -free trade area to the SACU. It is highly conceivable that as the most advanced regional arrangement, SACU could accommodate individual SADC member States within the inner-core as and when they achieve greater macro-economic policy coherence and harmonization with SACU. See R. Thomas, *Trade Liberalization Issues* supra at p.44. As politically unacceptable this suggestion may appear to the majority of the SADC States, it is nonetheless the most logical way forward in the circumstances.

6.7.1 The Rules of Origin regime

To ensure that SADC States do not become conduits for goods made elsewhere in the world to enter especially the South Africa market, specific 'rules of origin' have been developed⁵⁹⁶. Rules of Origin are used to determine whether goods originate in the region and whether such goods qualify for preferential tariff treatment under the Protocol. In this sense, it is right to state that origin rules are the very bastion upon which the entire free trade area edifice recoils. This is why the origin rules are given an extensive treatment in instruments of this character. The revised⁵⁹⁷ origin rules are aimed at ensuring that sufficient value adding takes place in the region in the manufacturing or processing of goods. The new rules can be broadly divided into two categories namely that goods must be wholly produced in the region or they can consist of some materials not wholly produced in the region but have undergone sufficient work processing. In respect of the later, conditions or "lists-rules" have been developed which describe the minimum working or processing that must take place⁵⁹⁸.

The SADC Ministers on Trade agreed in Gaborone, Botswana on 15th July 1999 on well-defined rules of origin that would help stimulate economic activity in the SADC region. The Rules would also enhance value-added processing and circumvent trade of illicit or counterfeit goods and the fraudulent supply of third party goods. Basically, the origin rules provide that agricultural products must be wholly produced while clothing and textiles products undergo a two-stage transformation. Footwear and leather must undergo substantial transformation while processed agricultural goods should undergo substantial transformation as well. The traditionally sensitive auto industry must equally undergo substantial transformation.⁵⁹⁹

⁵⁹⁶ For example, only the meat of an animal, which is born, raised and slaughtered in a SADC state, would qualify for duty privileges into the South African market. Manufactured goods would generally have to undergo two stages of transformation before they could be granted access to the South African market.

⁵⁹⁷ The preamble to *Annex 1* on the amended Rules of Origin takes cognizance of the fact that it is desirable to provide for transparency in the regulations and practices regarding rules of origin. Parties are desirous to ensure that rules of origin themselves do not create unnecessary obstacles to trade and to facilitate the implementation thereof by Customs administration by providing an exhaustive and complete text.

⁵⁹⁸ South Africa insists on Lome 4 rules that are 60% material content and 30% value added (including labour) coming from SADC countries but allowing "cumulation of value added in SADC could make meeting these requirements easier. However, unless there is effective enforcement of the Origin Rules, the problem of transshipment could significantly harm the importing economies.

⁵⁹⁹ See *Annex 1* of the Protocol

It is now agreed that all primary products, including agricultural products should be wholly obtained from each Member State. It has further been agreed that processed industrial products can acquire originating status provided that the imported materials have undergone sufficient transformation such that the value of the CIF of the materials does not exceed 60% of the total cost of the materials used in the production of the goods. It also provides that value-added resulting from the process of the production accounts for at least 35% of the ex-factory costs of the goods.⁶⁰⁰

The Rules of Origin regime is covered under *Article 12* and elaborated at *Annex 1* of the Protocol. The Annex details a complex maze of origin rules, which would principally regulate the intra-SADC trade. The two way criterion for the rules of origin are firstly that *Rule 2* of *Annex 1* provide that goods shall be accepted as originating in a member State if they are consigned directly from the member State to a consignee in another member State. Such goods should be wholly produced in any member State as provided for in *Rule 4* of the Annex⁶⁰¹. The purport of the phrase 'any member State'⁶⁰² instead of the particular Member State takes note of the provision for cumulative treatment. This means that raw materials or semi-finished goods originating in any member State shall, for the purpose of determining the origin of a finished product be deemed to have originated in the Party where the final processing or manufacturing takes place.

This measure allows for the blossoming of industrial network within the region. Unfortunately, save for South Africa, most SADC countries do not have cross-border industrial networks. Once again South Africa is, no doubt, the main beneficiary of this provision given that it is the principal recipient of raw material from the region. South Africa manufactures and sells a substantial part of finished products to the SADC regional market. The rest of the SADC countries do not have a strong manufacturing sector to process raw products imported from within the region. Most of the countries have light industries, which process or prepare for processing what is produced locally. The second level of origin rules is that products that are not wholly produced in any

⁶⁰⁰ Considerable emphasis has in particular been placed on processed agricultural products, textiles, clothing, leather, footwear and auto industry. These items have specific list of rules detailing sufficient processing and substantial transformation to confer an originating status.

⁶⁰¹ *Rule 4* makes provision for cumulation in that for the purpose of the Protocol member States shall be considered as one territory.

⁶⁰² Any member state here must be taken in context to mean a member State in the SADC group.

member State are sufficiently worked or processed when the conditions set out in the Annex are fulfilled.⁶⁰³

Under *Rule 11* of the Annex, the CMT is empowered to grant derogation where the development of existing industries or the creation of new industries is justified. Parties are, however, called upon to make the request for derogation for existing or new industries to the CMT, which then shall respond to each Member State accordingly. The CMT can only exercise the prerogative to grant derogation where such derogation does not threaten to cause serious injury to any substantial industry within the region. The CMT, in our view, is hardly the appropriate institution to manage this important facility. It would have been better if this function were entrusted to the Senior Trade Officials or the Co-ordination Unit. The latter, especially the Unit is by far the better-placed institution to expedite the processing of such applications. It is possible for the CMT to delegate this responsibility. This has, however, not been expressly stated in the Protocol. Clarity on this important matter would be the preferred methodology.

Senior Trade Officials and the Unit are the people on the ground and being full-timers would be able to process the appropriate remedy without delay. Delay in processing derogation requests is in itself a non-tariff barrier to trade. It is common cause that most SADC countries would flood the CMT with requests for derogation to protect their "enduring infant industries". Derogations are allowed under the WTO framework to protect infant industry. The Enabling Clause does also leave room for derogation in favour of the Least Developed Countries (LLDCs) and developing countries to a certain measure as well. With the exception of South Africa, the SADC is, after all, nothing other than a conglomeration of least and developing countries.⁶⁰⁴

67.2 Co-operation in customs administration

To facilitate the smooth implementation of these rules *Article 13* makes provision for co-operation in customs matters as laid out in *Annex II* of the Protocol. The Article entreats Parties to take appropriate measures, including arrangements regarding Customs Administration Co-operation that would ensure that the provisions of the Protocol are effectively and harmoniously applied. This edit is tied to *Article 14* where Parties are enjoined to take such measures as are necessary to facilitate the simplification and

⁶⁰³ These conditions are set out in the list in *Appendix 1* of the Annex to the Trade Protocol

harmonisation of trade documentation and procedures. The modalities of such facilitation are laid out in *Annex III*. On the other hand *Article 15* enjoins Parties to ensure the free movement of goods within the region at nominal rates for services rendered.⁶⁰⁵

Under the provisions of *Article 12* of this Annex the CMT is empowered to adopt regulations to facilitate the implementation of the Annex. Provision is also for a Regulation on Mutual Assistance and Co-operation in Customs Matters.⁶⁰⁶ The Regulation aims at putting an institutional framework in place between SADC customs authorities to co-ordinate mutual assistance and co-operation and provides for the undertaking of joint customs inspections and visits to verify the origin of goods receiving preferential tariff treatment.

Article 8 of the amended *Annex II*⁶⁰⁷ enjoins the respective Parties' customs authorities to proceed 'within the limits of their competence and valuable resources to supply information already possessed by carrying out appropriate enquires or by arranging for them to be carried out. This edit again will suffer at the altar of the already weak information and enforcement structures bedevilling the SADC member States. For those who have been unfortunate to deal with some of the SADC States' customs authorities, it has been, for the most part, a nauseating experience. Most SADC States are still lagging far behind in information technology hence the ran-down information systems makes it almost nightmarish to secure quick reference to relevant information. This is one area that SADC would have to contend with. It should in any case be addressed as a matter of utmost priority if the noble objectives of the Protocol are to be seen to function for the benefit of all.

Rule 10 of the Annex makes provisions for penalties for the infringement of the origin rules. The rule enjoins member States to introduce legislation, where non-exists, to make such provision as may be necessary for penalties. These are sanctions against persons who, in their territories furnish or cause to be furnished documents, which are untrue in any material sense, particularly in support of a claim in another Member State. The efficacy of this provision would be severely undermined by the pertinently weak

⁶⁰⁴ Under the WTO South Africa is rated as a developed Nation (Also See Chapter Four)

⁶⁰⁵ See the discussion below on "Customs Co-operation"

⁶⁰⁶ See *Appendix to Annex II* of the Protocol

enforcement structures in member States' customs border posts. It is generally believed that due to poor monitoring infrastructure and the untamed menace of endemic corruption well-intentioned customs regulations are a dead letter law in most of the member States' jurisdiction. SADC member States would do well to move fast in addressing the capacity and structural deficiencies if the well-intentioned mechanisms outlined in the Protocol are expected to yield any tangible results.⁶⁰⁸

6.8 Implication of regime configuration

In recognition of the proliferation of free trade agreements and other bilateral trade instruments in the region *Article 27* grandfathers the existing trade regimes⁶⁰⁹. Parties are free to contract new and/or maintain the existing preferential trade and other trade related arrangements. The rider to this is that the new arrangements must not be inconsistent with and/or inimical to the objectives set out in the Protocol. If parties adhere to the WTO disciplines it is possible to avoid conflict in the free trade agreements contracted outside the SADC⁶¹⁰. In view, however, of the many conflict areas we have highlighted before, it is unlikely that this measure can be realised.

Paragraph 3 of *Article 27* takes cognisance of the fact that a substantial number of the SADC States belong to and have membership in the COMESA. The EU-SA Agreement, where South Africa is the only regional member, albeit *de jure*⁶¹¹ is conveniently skipped and yet, this is the most complicating of all the instruments in the region. *Paragraph 3* provides that Parties with membership in existing preferential trade arrangements and

⁶⁰⁷ See *Appendix 1* of the Protocol

⁶⁰⁸ Thomas is in full agreement here. She says that there is widespread fear that the regional customs' administrations will be unable to ensure that goods smuggling do not take place as a way of getting around the 'rules of origin'. In the past, South Africa has been flooded with illegal goods, which have entered via other southern Africa states. This has had a significantly negative impact on domestic employment and has resulted in the state losing significant customs duties and VAT payments.

⁶⁰⁹ The problem with such a condition is that enforcement and administration of the divergent tariff regimes by member States will be extremely difficult. This is more so given the structural weakness of customs border controls within the region. This applies to South Africa as well. In this regard, Thomas suggests that it would have been better were member States to attempted either to simplify their arrangements, in line with the AFDBs "variable speed, multiple geometry" approach to integration. *Regional Arrangements supra* at p.23

⁶¹⁰ According to Thomas member States are not willing to make the hard decisions that are necessary given the global environment, in regard to SACU, COMESA and other bilateral agreements. While such uncertainty and ambiguity surrounds regional relations the world over, it is unlikely that the single most important objective of the Protocol -- namely to contribute towards the improvement of the climate for foreign investment -- will materialize in any substantial way. *Regional Arrangements supra* at p.23

⁶¹¹ It is understood that SACU is, by virtue of South African membership, a *de facto* member of the EU-SA Free Trade Partnership

other trade related arrangements⁶¹² must undertake to review the further application of such agreements with a view to attaining the objectives of the Protocol.

What is implicit in this provision is the fact that it comes out more like a directive than a suggestion is an appeal to SADC States with membership in the COMESA to withdraw their membership from the later. In our considered view, rooting for harmonisation rather than seeking withdrawal from this trade pact is the better way to go.⁶¹³ It is not clear why South Africa's dual membership in both the EU-SA Agreement and the SACU union is excluded yet the two, especially the former are inimical to SADC's achievement of its stated objectives. The influx of cheap subsidised EU agricultural products and the intensified competition in the South African market is hardly a healthy economic growth environment for the stated objects of the SADC Protocol⁶¹⁴.

Like we pointed out before⁶¹⁵ the Most Favoured Nation principle is the cornerstone of the multilateral trade agreements. *Article 28* of the Protocol is merely restating the principal precept of the WTO disciplines. It is however not clear whether, when the provision obligates Parties to accord the Most Favoured Nation Treatment to 'one another' it implicitly excludes such treatment from being extended to third parties. If this were the case, then the Protocol would be in clear breach of the fundamental law of the world trading system. The establishment of regional arrangements is, nevertheless, permissible under the WTO framework as an exception to the MFN principle. The main caveat being that the existing tariff regime between member States is not raised, in particular as against third countries.⁶¹⁶

It was in view of the EU-SA Agreement that *par. 2* of *Article 28* allows Parties to grant and maintain preferential trade arrangements with third countries. It is permissible under the protocol for Parties to so contract as long as such covenants do not impede or frustrate the objectives of the Protocol. This, no doubt, is a classic case of applying

⁶¹² It should be noted that most of the SADC countries have many bilateral trade instruments between them. Indeed only Zambia has no bilateral trade pact with South Africa in the region

⁶¹³ See chapter eight for a discussion of this proposition

⁶¹⁴ This position is elaborated in the argument that follows below

⁶¹⁵ See Chapter four for an in-depth disposition on the principle of Most Favoured Treatment.

⁶¹⁶ According to top trade officials, South Africa's strategic approach also requires that the WTO rules governing regional economic co-operation and integration programs must be "interpreted flexibly" in recognition of the different levels of development in the world – see the DTI presentation to Parliament *supra*. The South African government spokesperson also refers to an

double standards. Whereas the EU-SA Agreement is tolerated, Parties with membership in the COMESA have been prevailed upon to review such membership. It is not altogether difficult to see why this is so. South Africa is clearly putting its economic predominance in the region to good use to protect its vested interests.

Quite clearly, in a situation where a member of the SADC elects to remain in the COMESA, this would be uncouth for the South African economy. It should be born in mind that Kenya and Egypt, two countries that could utilise their COMESA convenience to sieve their goods through unto the South African market, dominate COMESA duty free. It is also possible for developing countries from the Far East and developing countries to percolate their goods through these countries into the South African market. This is one development South Africa is not ready to let materialise. On the other hand, the EU-SA Agreement has unnerved many SADC States yet since the big brother is the culprit here, he must have his way. That then explains why the EU-SA Agreement is "tolerated" whilst the COMESA Diaspora is resisted in certain SADC quotas with deeply vested interests.

We have already alluded to the damage the EU-SA Free Trade Partnership would unleash on the nascent SADC Free Trade Area initiative⁶¹⁷. This aspect is in fact common cause. It would appear, however, that the Protocol does not provide a remedy where a preferential Agreement covenanted by a member State impede and therefore frustrates the objectives of the Protocol. This, in our considered view is a serious omission. It means that the aggrieved party has no recourse to a tangible remedy and therefore they must suffer in silence. It would be interesting to see how South Africa would manage to calm down the already garrulous SADC States who fear that the EU-SA Agreement is a sure death nail in their efforts towards deepening integration in the region.

The very same *par.* 2 provides that any advantage, concession, privilege or power granted to a third country under a preferential Agreement must be extended to other member States. One needs not go any far to see the fallacy of this edict. Already SACU is an exclusive club of States under the South Africa tutelage. SACU States have duty free

⁶¹⁷ "overreaching review of the WTO rules so as to address the needs of development in a more focused way.

access to the South African market. This particular facility is not extended to other SADC States in line with this provision. The beckoning dilemma here is however conveniently redressed by the rider at *par. 3* which provides that a Party shall not be obliged to extend preferences of another trading bloc of which that Party was a member at the time of entry into force of the Protocol. This means that the SADC States who have granted concession to non SADC /COMESA States are not obliged to extend them to other SADC States since COMESA was in existence before the Trade Protocol came into effect.⁶¹⁸

The same argument must go for SACU and other bilateral instruments that have been in existence before the Trade Protocol. This scenario then leaves out the EU-SA Agreement as the only other major preferential trade arrangement in the region that would not be hit by this provision⁶¹⁹. Where the EU-SA Agreement is concerned South Africa has always insisted on the 'SADC first Principle'. The EU says it has no problem with this approach.⁶²⁰ In fact the EU says it wants to create space for the principle to take root within the SADC region. This development, however, remains to be seen in the light of the considerable duty leeway South Africa has extended to the EU. It is all the more urgent with regard to the so-called sensitive product regime.

Under *Article 39*, the Protocol is open for accession by third parties. This provision complies with the WTO mandate on the accession clause for third parties. It is notable that the EU-SA agreement lacks the equivalent provision. *Article 29* enjoins the Parties to take up negotiating position in respect of relations with third countries or groups of third countries and international organisations. Economists have been critical of SADC's expansiveness which they claim would seriously constrain its limited resources and hence

⁶¹⁷ The impact of the EU-SA FTA on SADC is treated in detail below. See also chapter five above for additional insights on this item

⁶¹⁸ To the frustration of the non-SACU members and South Africa, the smaller states in SACU shun any discussion of the SACU negotiations on institutional and trade matters within the SADC for a free trade agreement. Within the SACU negotiating rounds, they push to the farthest recesses of the agenda, any discussion of relations within SADC and COMESA. This does not bode well for the development of sound policies and inter-linkages between the diverse institutions, and makes a mockery of the Abuja Treaty's call for building blocks to fuse together the Pan-Africanist vision for a continent-wide common market.

⁶¹⁹ The Protocol came into effect before the EU-SA Agreement.

⁶²⁰ Ambassador Michael Laidler, the EU representative in South Africa indeed conveys this point more emphatically and in no uncertain terms when he says, "the EU is ultra anxious to ensure that the SADC Protocol is a success story". H E. the Ambassador's address to the AWEPA Seminar supra at p.15

affects delivery of services to members.⁶²¹ Some commentators have called for a leaner and more focused free trade area that would realise its objectives more efficiently.

Other commentators fear that the expansive size of the SADC may prove to be its Achilles heel. They point to what is now paraded as the success story that is the Mercosul.⁶²² It is argued that if four countries can be so successful in a regional grouping, it shows that the SADC may not be successful due to a large membership, with countries of diverse and varying interests. The bureaucracy of debating macro-economic stabilisation or liberalisation is, with less membership, not that protracted. This reasoning is, of course misplaced. The membership number may have been a contributing factor but it is certainly not the dominant reason for this bloc's success story. The success of this grouping is due mainly to the fact that some of the individual States' GDP is higher or equal to that of the entire sub-Saharan Africa. Brazil has a GDP of two and a half times the size of sub-Saharan Africa and Argentina's GDP is almost equal to it.⁶²³

No doubt the Mercosul countries have a measure of commonality in the basic economic interests and perspective. The SADC group is not so endowed, at least at its current stage of development. This reasoning appeals as far as there is, indeed, nothing common in the current level of economic fundamentals in the SADC regional economic bloc. Commentators even go as far to argue that some countries in the organisation are currently contributing nothing to the region's development. This is a position fronted by Tiroyamodimo.⁶²⁴ He singles out the admission of the DRC into the SADC fold, which he says is more of a liability than an asset to the SADC hegemony. He adds further that three member States namely: Angola, Namibia and Zimbabwe are now embroiled in the DRC civil war that is draining their fledgling economies. This is a war that they did not have to fight if it was not for their national interests he laments.

These arguments, though factually valid, nonetheless fail to take cognisance of the bigger picture in the regional integration initiative. The SADC States have basically agreed to pool resources in order to create larger markets and be able to maximise the exploitation

⁶²¹ O.B Tiroyamodimo: "The SADC: Toothless lion or salvation in Action?" http://www.file:///A:\the_sadc.htm 2002/03/16 at p.5

⁶²² The South American Regional Grouping (MERCOSUL) is made up of four members States. These are Argentina, Brazil, Paraguay and Uruguay.

⁶²³ See Tiroyamodimo (supra) at p.5

⁶²⁴ Supra at pp. 5-6

of their full potential for sustainable growth. The DRC, in spite of its current sorry state of belligerency remains one States that is amply endowed with vast reserves of natural resources in the region. It could have been a big folly on the part of the SADC to deny the DRC membership simply because there is a war going on there. After all Mozambique and Angola have long been ravaged by intractable wars whilst still maintaining their SADC membership.

There are, of course, the brighter prospects on the other side of the Civil War Bridge. These prospects must be sought by SADC. The one time war ravaged Mozambique has managed to record a phenomenal GDP rate in the entire sub-continent.⁶²⁵ In any case, by SADC embracing the DRC as a member in its ranks, it has strategically positioned itself well to be able to influence the course of this war for the better.⁶²⁶ Tiroyamodimo argues that SADC could have avoided being embroiled in the DRC conflict had it opted for a smaller membership of countries free from internal problems, committed to the rule of law and full economic development.⁶²⁷ This line of thinking once again detracts from the long-term spin-offs that SADC stands to gain when doing business with a peaceful DRC. It is no wishful thinking that upon the restoration of peace in the DRC (and hopefully Angola) SADC will have under its wings two strategically placed mineral rich member States. This is definitely something to look forward to the present security complications notwithstanding.

The flip side of the coin, of course, is that the larger the group, the greater is the chance of embracing lowest cost products, thereby minimising trade diversions.⁶²⁸ Also similar production patterns in integrating countries will lead to greater scope for trade creation if there are differences in production costs. Marceau and Reiman⁶²⁹, however, argue that such factors might prove to be elusive when seeking robust measurements. They note that some factors have a priori bearing on the relative size of the trade creation and trade diversion effects. The learned authors point out that the fall of high initial tariffs

⁶²⁵ Estimated to grow at the rate of 8% which is the highest figure record for developing countries in the region. See AWEPA Seminar supra – see Mfundo Nkuhlu - the DTI presentations at the AWEPA Seminar supra at p. 33

⁶²⁶ Following regional peace overtures, significant developments towards a peaceful resolution of the civil strife are taking shape. Uganda and Rwanda, the main belligerents in the war have pulled most of their troops from the DRC.

⁶²⁷ G. Marceau at el infra at p.306

⁶²⁸ Ibid

⁶²⁹ Marceau and Cornelis Reiman "Legal issues of Economic Integration 28(3): 297-336, 2001. Kluwer Law International; Netherlands

encourages trade creation and the growth of economic welfare.⁶³⁰ Indeed like we noted in chapter two, low trade barriers lead to less incidence of trade diversion.

The experience of the EU integration, which we examined earlier, clearly shows that political considerations do also affect the success of regional trade arrangements⁶³¹. Quite admittedly, one of the powerful political tools that the SADC has realised through the Protocol is that of engaging the international community with one voice. This is a powerful voice that is unachievable were each State to crusade for its own cause.

Article 30 allows member States to develop co-operation and conclude agreements with third countries or groups of third countries and international organisation as provided for under *Part VIII*.⁶³² This is a rather curious provision. There are very good tidings when a country co-operates globally. We do not, however, see the wisdom in urging States to conclude Agreements with third countries whilst *Article 27 par. 3* enjoins member States to review preferential agreements they have with third parties. In any case there are already numerous preferential trade agreements in the region that calling for more is a sure recipe for turmoil.

It is possible that the Protocol here refers to co-operation agreements, such as for development and technical support with the donor community. In this category are co-operation arrangements that are devoid of preferential treatment on trade. Experience has, nonetheless, shown that most instruments concluded along these lines are crowded with conditionalities that have serious implications for a country's trade obligations with the outside world⁶³³.

⁶³⁰ Ibid

⁶³¹ In Chapter three, on the subject of the 'integration in Europe', we saw how the desire for the European States to come together to form a bulwark against the ever rising might of the USA was a deep motivation for seeking regional integration.

⁶³² *Part VIII* of the Protocol makes provision for trade arrangements among member States with third countries

⁶³³ A co-operation akin to the America's brainchild of African Growth and Opportunity Agreement may sound a unilateral attempt to create markets for African produce but underlying it is a requirement that certain basic materials be sourced from the USA. This requirement would obviously carry negative effects for a regional arrangement.

Member States have elected to notify the arrangement under *Article XXIV* of the GATT Agreement.⁶³⁴ This means that the free trade agreement will have to conform to the rules prescribed for the establishment of free trade areas and customs unions under that Article. Par. 8(b) of *Article XXIV* provides that a free trade agreement must eliminate duties on 'substantially all trade' between its members and maintain external tariffs at the same level as before the creation of the free trade area.⁶³⁵ In addition, *Article XXIV 5(b)* provides that members' tariffs and rules for the regulations of commerce are not "higher or more restrictive than those in existence prior to the formation of the free trade area"

6.9 Concluding Remarks

One striking feature that has come out clearly in this chapter is the fact that the process of integration in the SADC region involves unequal developing and least developed countries. This chapter has pointed out that such an economic landscape offers unique yet insurmountable challenges for economic integration processes

We have seen that the main thrust of the Trade Protocol is to facilitate regional economic growth and development through, among others, the creation of a free trade area in the SADC region. We have discussed the significance of the rider to the liberalization process in that it is linked to an industrialization strategy. This strategy, we have argued, is tailor made to improve the SADC State's global competitiveness.

The chapter has noted that before ratification of the Trade Protocol most SADC States had liberalized on a large scale. We have argued that when one looks at the issue from this perspective, it then becomes abundantly clear that an expedited move to a free trade area would be more demanding in terms of adjustment on South Africa than would be for her SADC counterparts.

We have demonstrated that the Trade Protocol is to a large extent compatible to the WTO disciplines save for some areas of ambiguity, which we have highlighted. It is not clear, for example, between the bilateral trade arrangements and the Protocol as to which one would take precedent in case of inconsistency. We have argued that it would have

⁶³⁴Despite views to the contrary expressed by South Africa. See R. Thomas, 'A South African Perspective on the SADC Trade and Development Protocol', in Schwersensky, S (ed.) *The Maseru Protocol on Trade*, Friederich Ebert Stiftung, 1997).

⁶³⁵ See Chapter Three for a detailed discussion of this provision

been better, for the sake of harmonisation that the Protocol override all the existing bilateral trade arrangements

The chapter has alluded to the fact that provisions on trade in services have been made WTO compliant to avoid situations of conflict with the multilateral disciplines. We have pointed out that the service industry is already blossoming in the region only that it is a one way highway shooting from South Africa to the rest of the region. On the obverse side of the coin, however, the chapter has cautioned that with the liberalisation of the services and manufacturing sectors, most firms in the region have been exposed to outside competition. We have argued that this wind of change has, unfortunately, come suddenly and thereby sweeping the regional firms off balance before they could put in place necessary structures to position themselves in order to be internationally competitive

We have faulted the Protocol for failing to provide a remedy where a preferential Agreement covenanted by a member State impede and therefore frustrates the objectives of the Protocol. We have also alluded to the inconsistencies created in *Article 27 par. 3* on the creation of new preferential instruments. We take the view that in any case there are already numerous preferential trade agreements in the region that calling for more is a sure recipe for turmoil. We have, however, noted that, indeed, these regional regimes duplicate each other in the coverage of trade and development issues.

We have lauded the fact that the revised dispute settlement provisions strive to ensure certainty and predictability in the settlement of disputes arising under the Trade Protocol. We have noted that this remarkable feat has been achieved by clearly outlining the different phases in the settlement of disputes and linking them to clear cut time frames. We have also noted that the new provisions are based on the same principles underpinning the Dispute Settlement Understanding of the WTO. The chapter has highlighted the difficulty created with respect to SACU's *locus standi* before the dispute settlement panel by its insistence on presenting a harmonised tariff regime within the SADC framework. We have argued that in this convoluted scenario, it is unlikely that SACU would be clothed with the requisite competence to gain audience before the panel.

Chapter Seven: Exit Lome enter the Cotonou: Implication of the New Trade Dispensation for Integrative Processes in Eastern and Southern Africa

7.1 Introduction

The EU-ACP partnership is, beside the EU-SA Agreement, the archetype north-south relationship that binds the affluent north to the impoverished States in sub-Saharan Africa. States within the east and southern Africa region constitute a significant constituency of the ACP membership. This means that the EU-ACP trade regimes would have important implications for integration processes within the east and southern Africa region.

Indeed, we have noted in chapter five that one of the commitments, which the EU-SA Agreement makes, is to promote the closest links between the ACP States and South Africa. This commitment is not surprising in view of the bare fact that the EU is the main player in both Agreements. Since the Cotonou Agreement commits the east and southern Africa states to a direct trade partnership with the EU in spite of the integration disciplines taking root in the region, it is important to review the implication of this relationship.

The Cotonou is a transitional mechanism that would run for a 12-year period before a Lome replacement is negotiated and formulated. That is an awfully long period of time whose repercussions for the region would be considerable. This chapter examines some of the pertinent features of the Cotonou and how this reflects on integration regimes within the east and southern Africa region. We also contend that the Cotonou has taken aboard some significant innovations, which are healthy for the east and southern African regional integration initiatives.

The chapter examines the position of the Cotonou vis-à-vis the EU-SA Agreement and the SADC Trade Protocol. We then highlight some of the synergies and divergences that emerge in view of the WTO disciplines on regionalism. The chapter closely examines arguments around the question of the EU-SA Agreement being the model for the post-Lome replacement and affords some reasoned grounds on why this proposition is flawed. We also analyse the differing views regarding the proposed post-Lome dispensation. These views are then measured on the past and present realities in the Lome life span. Our thesis is that no matter what shape the post-Lome regime takes the

EU-ACP arrangement would largely retain its principal theme, which is aid and development for the ACP States.

7.2.1 A brief review of the principle features

The Cotonou aims to strengthen the political dimension of the partnership, to provide new flexibility and to entrust the ACP countries with additional responsibilities. The Agreement has three main dimensions, namely politics, trade and development, and represents an approach that is both integrated and sectoral. Programme support focuses on specific sectors such as health, transport and combines many different aspects of co-operation such as economic, environmental and social development. This strategy is to ensure that aid is better targeted. The Agreement has been concluded for 20 years, with a revision clause every five years.

The preamble to the Agreement *asserts* the Parties⁶³⁶ resolve to make, through their co-operation, a significant contribution to the economic, social and cultural development of the ACP States and to the greater well being of their population. It pledges to help the ACP States face the challenges of globalisation and to strengthen the ACP-EU Partnership in an effort to give the process of globalisation a stronger social dimension. The Agreement also reaffirms Parties' willingness to revitalise their special relationship and to implement a comprehensive and integrated approach for a strengthened partnership based on political dialogue, development co-operation and economic and trade relations.

The ACP States have been empowered under *Article 4* to determine the development principles, strategies and models of their economies and societies in all sovereignty. This means that the ACP States would establish, in conjunction with the Community, co-operation programmes provided for under the Agreement. It is, however, significant that Parties recognise the complementary role of and potential for contributions by non-State actors to the development process. To this end, under the conditions laid down in the Agreement, non-State actors would, where appropriate be informed and involved in consultation on co-operation policies and strategies, on priorities for co-operation especially in areas that concern or directly affect such non-state development partners.⁶³⁷

⁶³⁶ The term 'Party' whenever it appears in this chapter refers to the contracting Parties under the Cotonou Agreement – that is to say the ACP on the one hand and the EU on the other hand

⁶³⁷ The Article adds that on the political dialogue such States would be provided with financial resources, under the conditions laid down in the Agreement in order to support local development

In order to ensure the full participation of non-state actors, *Article 5* of the Agreement deals with Co-operation in information to create greater awareness of the basic features of ACP-EU Partnership. Co-operation will also encourage partnership and build links between ACP and EU actors; strengthen networking and exchange of expertise and experience among the actors. The importance of strengthening community organisations and non-profit non-governmental organisations in all spheres of co-operation is given credence under *Article 7*. This would enhance the contribution of civil society to development. There is need for the establishment of arrangements for involving such organisations in the design, implementation and evaluation of development strategies and programmes.

7.2.2 Promotion of regional integration

The EU has become increasingly concerned about the proliferation of regional preferential trade agreements and the possibility of significant trade diversion against EU exports. The EU is particularly much more concerned than in the past that these arrangements should be fully compatible with the WTO disciplines.⁶³⁸ This is where the crucial question of regional co-operation and integration that is treated under *Article 28* of the Agreement kicks in. Co-operation in this area would provide effective assistance to achieve the objectives and priorities, which the ACP States have set themselves in the context of regional and sub-regional co-operation and integration. This feature would include inter-regional and intra-ACP co-operation.⁶³⁹ In this context, co-operation support would aim to foster the gradual integration of the ACP States into the world economy. It will also accelerate economic co-operation and development both within and between the regions of the ACP States.

As regards programming of regions, or in other words the regions covered by the Regional Indicative Programmes, the Cotonou implies important changes in relation to the practice so far. These changes are the result of paying explicit attention to regional economic integration. For the first time the Agreement states that it is the ACP States

processes. They would also be involved in the implementation of co-operation project and programmes in areas that concern them or where these actors have a comparative advantage; be provided with capacity-building support in critical areas in order to reinforce the capabilities of these actors. This is particularly as regards organisation and representation, and the establishment of consultation mechanisms including channels of communication and dialogue, and to promote strategic alliances.

⁶³⁸ Steven, et al IDS Commonwealth Secretariat at p.74

that must decide on the geographic composition of programming regions.⁶⁴⁰ This provision takes cognisance of the prevailing situation on the ground. There is a worrisome proliferation of regional trade agreements within the ACP ranks in general and in the sub-Saharan Africa in particular.

The Agreement also specifies that the definition should be based on the membership of regional organisations with a mandate for economic integration. In the event of an overlap in the membership of different organisations, the programming region should, to the maximum extent possible, be constituted by the combined membership of the overlapping organisations. This particular provision is rather troublesome. If taken on face value, it would mean that SADC and COMESA must constitute one region. Such an arrangement would create an expansive regional hegemony that would be too unwieldy for effective administration. Already the dominant thinking in SADC is that those within its ranks that have membership in the COMESA must review such membership to ease the administrative pressure integration initiative.⁶⁴¹ The logic behind the principle of programming regions is that regional co-operation should build on and strengthen regional integration in a coherent and efficient way.⁶⁴² A situation of disharmony is the very anti-thesis of regional integration processes.

Free movement of persons, goods, services, capital, labour and technology among ACP countries will also be promoted under this co-operation endeavour. This provision would definitely encounter problems in implementation within the region. This hiccup is attributable to the fact that the SADC Protocol makes no pledge on free movement of labour. Indeed, the SADC membership is deeply divided over whether to let free

⁶³⁹ Regional Co-operation can also involve Overseas Countries and Territories (OCTs) and outermost regions.

⁶⁴⁰ Commissioner Nielson singles out three Regional Indicative Programmes: East Africa, SADC and Indian Ocean Commission. The geographic coverage of these programmes corresponds to the combined membership of COMESA and SADC. Both organisations have a declared purpose of economic integration, but there are 9 ACP States belonging at the same time to both organisations. Commissioner Nielson suggests that Eastern and Southern Africa and the Indian Ocean constitute a single programming region. Admittedly, there is certainly scope for sub-regional organisations to assume the role of Regional Authorising Officer. Commissioner Nielson is of the view that the approach is fully consistent with the Cotonou Agreement and, that it will provide an incentive towards coherence of the integration programmes. It is the lack of coherence that is among the main causes of the limited results of integration so far. It slows down the whole process. It is also the approach that will lead to the most effective use of resources. Commissioner Nielson opening statement see *infra* at p.3

⁶⁴¹ See H. Thomas: ECDPM Working Paper, *supra* at p.2

⁶⁴² Opening Session - Meeting of Heads of ACP Regional Organisations Statement by Commissioner Nielson; Commissioner for Development and Humanitarian Aid Brussels 7.12.2000.

circulation of labour within the region or put caps on this activity.⁶⁴³ No specific commitment has been made to this end which means the matter has been left to fall into a limbo for the present. It is unlikely that the provision for free movement of people within the region as made under the Cotonou would change the situation as it stands on the ground.

Parties will also co-operate to accelerate the diversification in the economies of the ACP States to make them internationally competitive. It is crucial for the sustainability of the ACP economies that there be harmonisation of regional and sub-regional co-operation policies. This initiative would also be driven to achieve just that in addition to the promotion and expansion of inter and intra-ACP trade with third countries. This measure is welcome in view of the fact that there is dismal trading activity among the States in the region. The problem, however, resides with the absence of economies of scale given that the regional States, with the exception of South Africa, deal in primary exports only. Like we argued earlier, such an undiversified economic base severely constrains intra-regional trade.

On the germane issue of regional economic integration *Article 29* provides that co-operation would support the development and strengthening of the capacities of regional integration institutions and organisations set up by the ACP States to promote this initiative. Efforts by National governments and parliaments in matters of regional integration would also be augmented.⁶⁴⁴ Within the SADC, the institutions targeted here are the Council of Ministers of Trade, the Committee of Senior Officials responsible for trade matters, the Trade Negotiating Forum and the Sector Co-ordinating Unit as established under the trade Protocol. To its immense advantage, COMESA has a clearinghouse, a regional court and a regional Re-insurance facility. All these institutions are set to benefit from the Cotonou co-operation assistance with a view to deepen integration in the region.

The promotion of Cross-Border Investments (CBI) both foreign and domestic, and other regional or sub-regional economic integration initiatives would, too, benefit from

⁶⁴³ See, for example, chapter six above

⁶⁴⁴ The Article recognises the importance of fostering the participation of LLDCs in the establishment of regional markets and sharing the benefits therefrom. The LLDCs would therefore be assisted in the implementation of sectoral reform policies at regional level and the liberalisation of trade and payments.

the Cotonou program assistance. These measures would, however, be implemented while taking account of the effects of net transitional costs of regional integration on budget revenue and balance of payments. There is already an active C.B.I facility driven by the IMF and the World Bank in the east and southern Africa region. This cross border investment facility has not, however, made an impact in raising the level of inter and intra-regional trade to any significant point. One hopes that this new initiative would help to inject the much-needed impetus in the CBI's activities to raise the temple of cross border trade in the region.

Article 30 recognises the central role played by regional co-operation in fostering development among the ACP States. In that vein co-operation will be geared to support a wide variety of functional and thematic fields which specifically address common problems and take advantage of scale of economies. Among the measures covered here include infrastructure development in particular transport and communications and its safety thereof. The services sector, which rolls the road map to the economic growth infrastructure, is another area in dire need of development. This is one prime area for which the SADC Trade Protocol is seriously grappling with. The EU-ACP co-operation in this respect would go along way in helping to argument the regional efforts in this regard.⁶⁴⁵

The Cotonou recognises, and rightly so, that there are enormous regional opportunities in the area of information and Communication Technologies (ICT), the environment, water resource management and energy. Other vital areas identified by the Agreement and which are suited for regional co-operation are; health, education and training to mention just a few.⁶⁴⁶ This is certainly a new but awfully important feature that the SADC Protocol has trained its sights upon. Under its sectoral programmes the Protocol

⁶⁴⁵ Indeed SADC is 'work-in-progress' and intra-regional trade integration and development is explicitly linked, and in many ways premised upon the implementation of a whole range of related provisions. As the 1996 Maseru Trade Protocol indicates, regional trade integration and promotion in southern Africa requires extensive improvement of transport, communication and other infrastructure, and the co-ordination and harmonisation of trade financing, insurance and banking systems, customs procedures, etc. See Dot Keet: IDG Occasional Paper No.21 TIPS Workshop Proceedings supra at p.31

⁶⁴⁶ *Article 32* makes provision for environmental protection and sustainable utilisation and management of natural resources. This shall aim at among others mainstreaming environmental sustainability into all aspects of development co-operation and support programmes and projects implemented by the various actors. Other areas covered here are water resource management and energy; health, education and training, research and technological development; regional initiatives for disaster preparedness and mitigation; and other areas, including arms control, action against drugs, organised crimes, money laundering, bribery and corruption.

hopes to harness regional resources to foster development and economic growth in the region. COMESA has, too, picked up this very theme which it has incorporated in its free trade area initiative. With the Cotonou moving in the same direction as the dominant trade regimes in the region, possibilities for harmonising these processes can no longer be dismissed as far fetched.

Apart from the foregoing commitments, co-operation would also support inter and intra-ACP co-operation schemes and initiatives. It is expected that co-operation in this area would help promote and develop a regional political dialogue in areas of conflict prevention and resolution; human rights and democratisation. This would be achieved via exchange of information and networking through the promotion of mobility between the different actors of development, in particular civil society. In the past, the ACP States were viciously opposed to the idea of linking human rights and democratisation issues with trade. A new thinking has taken root, however, in that these issues are also covered in the regional integration regimes.⁶⁴⁷ Indeed, it would be foolhardy to ignore these issues given the prevailing international mood, which is strongly advocating for clear measures to internalise respect for fundamental human rights and for states to nature democratic institutions.

7.2.3 Development of the economic sector

On the critical score of macroeconomic and structural reforms and policies, *Article 22* provides that Co-operation in this field would support ACP efforts to implement macroeconomic growth and stabilisation through disciplined fiscal and monetary policies. Partnership here would specifically target those policies that result in the reduction of inflation, and improve external and fiscal balances. These measures would be achieved through strengthening of fiscal discipline, enhancing budgetary transparency and efficiency. Improvement will also be made on the quality, the equity and composition of fiscal policy. Similar measures will target structural policies designed to reinforce the role of the different actors, especially the private sector and improve the environment for increases in business, investment and employment.⁶⁴⁸

⁶⁴⁷ Indeed, the new kids on the bloc – that is the AU and Nepad – have reiterated the centrality of this theme for development in the continent. African foreign Ministers meeting in Johannesburg made a commitment to the Nepad's peer review mechanism that would ensure good governance and democratic principles. Reported in the Mail & Guardian at <http://www.mg.co.za> on the 20th October 2002

⁶⁴⁸ Liberalise trade and foreign exchange regimes and current account convertibility, having regard to the particular circumstances of each country; strengthen labour and product-market reforms;

On economic sector development strategy, *Article 23* creates room for Co-operation to support sustainable policy and institutional reforms and the investments necessary for equitable access to economic activities and productive resources. Co-operation in this area will in particular be designed to develop training systems that would help increase productivity in both the formal and the informal sectors.⁶⁴⁹ These measures would, no doubt, augment similar provisions under the SADC Protocol and the COMESA Treaty to address macro economic sector development.⁶⁵⁰

Adequate provision is also made under *Article 24* for the potentially lucrative but often neglected Tourism sector. Co-operation in this field will aim at the sustainable development of the tourism industry in ACP countries and sub-regions. Assistance to tourism is in recognition of the sector's increasing importance to the growth of the services sector in ACP countries and to the expansion of their global trade. The Agreement also recognises the ability of the Tourism sector to stimulate other sectors of economic activity, and the role it can play in poverty eradication. That the east and southern Africa region boasts an enormously rich but awfully under-developed Tourism resource is no longer in doubt. The problem within the region has been that Tourism players compete against one another instead of pursuing complementary policies to harness this vital resource. Within the SADC Protocol, an entire sectoral programme has been committed to the development of tourism.⁶⁵¹ Similar disciplines are duplicated in the COMESA Treaty and the EU-SA Agreement. One hopes that this important co-operation would go along way to revamp this otherwise hugely under-utilised yet vital sector.

encourage financial systems reforms. These help to develop viable banking and non-banking systems, capital markets and financial services, including micro-finance; improve the quality of private and public services; and encourage regional co-operation and progressive integration of macroeconomic and monetary policies.

⁶⁴⁹ Capital, credit, land, especially as regards property rights and use and development of rural strategies aimed at establishing a framework for participatory decentralised planning, resource allocation and management. Others are agricultural production strategies, national and regional food security policies, sustainable development of water resources and fisheries as well as marine resources within the economic exclusive zones of the ACP States. Any fishery agreement that may be negotiated between the Community and the ACP States must pay due consideration to consistency with the development strategies in this area. Also covered is the area of economic and technological infrastructure and services, including transport, telecommunication systems, communication services and the development of information society.

⁶⁵⁰ See *Article 26* and *Annex V* of the SADC Protocol.

⁶⁵¹ The Tourism Sectoral Development Protocol

The Agreement provides that Co-operation programmes and projects will support the efforts by the ACP countries to establish and improve their legal and institutional framework and resources for the development and implementation of sustainable tourism policies and programmes. Co-operation will also be geared toward revamping the sector in an effort to improve its competitive position in particular for small and medium-sized enterprises (SMEs). This measure would be achieved through investment support and promotion, product development including the development of indigenous cultures in ACP countries, and strengthening linkages between tourism and other sectors of economic activity.

7.2.4 Promotion of the private sector investment

There have been, in the past, very little or no involvement of the private sector in the formulation of decisions, protocols, and so forth within most regional groupings. Due to this non-inclusive process, the private sector has often reacted lethargically to regional integration programs. This is the outcome of the statistic outlook in many countries and also within the region and it might explain why there is often unwillingness by the private sector to invest time and resources to participate in the trade liberalisation programs.⁶⁵² Like we indicated earlier, all regional regimes have redressed this defect and that fairly comprehensive provision is made for the private sector participation.

Investment and the entire corpus of the private sector development is treated to a comprehensive regime of disciplines. Co-operation in this area would be targeted to support the necessary economic and institutional reforms and policies at national and/or regional level.⁶⁵³ This measure would aim at creating a favourable environment for private investment, and the development of a dynamic, viable and competitive private sector.⁶⁵⁴ Co-operation in this regard would also support and improve the quality, availability and accessibility of financial and non-financial services to private enterprises, both formal and informal.⁶⁵⁵

⁶⁵² See Ernest, Trade Reform and Regional Integration in Africa supra at p. 411

⁶⁵³ See *Article 21* of the Agreement

⁶⁵⁴ The promotion of public-private sectors dialogue and co-operation; the development of entrepreneurial skills and business culture; Privatisation and enterprise reform, development and modernisation of mediation and arbitration systems.

⁶⁵⁵ This would be achieved by catalysing and leveraging flows of private savings, both domestic and foreign, into the financing of private enterprises and by supporting policies for developing a modern financial sector including a capital market, financial institutions and sustainable micro-finance operations. Other measures are the development and strengthening of business institutions and intermediary organisations, associations, chambers of commerce and local

In recognition of the central role the private sector investment play in economic growth and acknowledging the need to take steps to promote such investment, Parties undertake to implement measures to encourage participation in their development efforts by private investors.⁶⁵⁶ Under *Article 74* co-operation in this respect would, through financial and technical assistance, support the policies and strategies for investment and private sector development as set out in the Agreement.

Parties will also take necessary measures and actions, that help to create and maintain a predictable and secure investment climate as well as enter into negotiations on agreements, which will improve the climate for the growth of the private sector investment.⁶⁵⁷ The EU on its part has pledged to encourage its private sector players to invest and to provide specific assistance to its counterparts in the ACP countries under mutual business co-operation and partnerships. This edict, then, clearly creates a synergy of purpose with the same pledge featuring prominently under the EU-SA Agreement.⁶⁵⁸

The importance of capacity building cannot be over-emphasised in view of the fact that most of the east and southern Africa infrastructure is either largely undeveloped or non-existent. This veritable handicap renders regional states functionally wanting in international competitiveness. It is also recognised that most private sector plays in east and southern Africa lack crucial knowledge on the availability of investment opportunities in the regional and the international market. The Agreement proposes to address this deficiency by disseminating information on investment opportunities and

providers from the private sector supporting and providing non-financial services to enterprises such as professional, technical, management, training and commercial support services. Also to be supported are institutions, programmes, activities and initiatives that contribute to the development and transfer of technologies and know-how and best practices on all aspects of business management co-operation.

⁶⁵⁶ See *Article 75*, the Agreement, however, would only target those who comply with the objectives and priorities of ACP-EC development co-operation and with the appropriate laws and regulations of their respective States.

⁶⁵⁷ Room is made for Co-operation to promote business development through the provision of finance, guarantee facilities and technical support aimed at encouraging and supporting the creation, establishment, expansion, diversification, rehabilitation, restructuring, modernisation or privatisation of dynamic, viable and competitive enterprises. This venture covers all economic sectors as well as financial intermediaries such as development finance and venture capital institutions, and leasing companies. This measure would be achieved by encouraging inter-firm linkages, networks and co-operation including those involving the transfer of technology and know-how at national, regional and ACP-EU levels, and partnerships with private foreign investors which are consistent with the objectives and guidelines of the ACP-EC Development. See *Article 74* of the Agreement

⁶⁵⁸ See chapter five on the aspect of private sector development - the EU would further support capacity building for domestic investment promotion agencies and institutions involved in promoting and facilitating foreign investment.

business operating conditions in the ACP States to all stakeholders in commerce and industry.⁶⁵⁹

Parties have also undertaken to promote national, regional and ACP-EU private sector business dialogue, co-operation and partnerships, in particular through an ACP-EU private sector business forum. The Agreement pledges support for operations of an ACP-EU private sector business forum whose main objective would, among other things, be to facilitate dialogue within the ACP/EU private sector and the bodies established under the Agreement. The forum will also help to analyse and periodically provide relevant bodies with information on the whole range of issues concerning relations between the ACP and EU private sectors in the context of the Agreement or, more generally, of economic relations between the Community and the ACP countries.⁶⁶⁰

The treatment on private sector investment promotion is an immensely important innovation on the part of the ACP States. It stands to reason, as we have indeed reiterated in previous chapters that the private sector is the veritable engine to development. The Lome was fundamentally flawed to have failed to make adequate provision in support of the private sector development. The EU-SA Agreement has also been criticised for lacking adequate mechanism to advertise and make available investment opportunities in the Agreement to the private sector. The EU-SA Agreement commits a fairly detailed coverage with regard to the development of the private sector. The Cotonou must, however, be commended for making ample provision for the promotion of the Private Sector Investment.

The typical investor – be they local or foreign - are for the most part jittery and indecisive on the appropriate investment portfolio unless the market is right and there are clear guarantees for the return on their investment. It is in this vein that *Article 77* of the Agreement makes provision for an increasing availability and use of risk insurance as a risk-mitigating mechanism in order to boost investor confidence in the ACP States. To

⁶⁵⁹ Other areas of endeavour would be to facilitate partnerships and joint ventures by encouraging co-financing, sponsor sectoral investment fora to promote partnerships and external investment. Support would also be made available to the ACP States to attract financing, with particular emphasis on private financing, for infrastructure investments and revenue generating infrastructure that is critical for the private sector. *Article 74* of the Agreement

⁶⁶⁰ In the same vein the EU would help to analyse and provide the relevant bodies with information on specific problems of a sectoral nature relating to, *inter alia*, branches of production or types of products at regional or sub-regional level. See *Chapter 7* of the Cotonou Agreement

respond to lack of risk cover that normally inhibit investment in the east and southern Africa region, provision is made for risk-capital for equity or quasi-equity investments, guarantees in support of domestic and foreign private investment and loans or lines of credit.⁶⁶¹

A similar measure is not provided for under the EU-SA Agreement or the SADC Protocol despite its obviously huge benefaction potential. COMESA is in good shape on this score with its reinsurance institution already in place. Further provision is made for support on the basis of complementary and value added with respect to private and/or public initiatives and, whenever feasible, in partnership with private and other public organisations.⁶⁶²

The Agreement enjoins Parties within the scope of their respective competencies, to promote and protect either Party's investments within their respective territories. In this respect, Parties have, under *Article 78*, affirmed the importance of concluding, in their mutual interest, investment promotion and protection agreements, which could also provide the basis for insurance and guarantee schemes. This provision is not surprising given the protracted incidence of instability that bedevils some of the ACP States. It would be much easier for SADC to borrow a leaf from COMESA and set up a re-insurance entity to drive this process and thereby benefit from the EU's goodwill under the Cotonou.⁶⁶³

7.3 The Rules of Origin regime

The Rules of Origin include a tolerance threshold for ignoring non-originating material but – unlike Cotonou, where this threshold has been set at 15 percent – the GSP sets the level at 5 percent, and this does not apply to textiles.⁶⁶⁴ The EU has shown sufficient

⁶⁶¹This is made conditional on the conditions laid down in *Annex II* "Terms and Conditions of Financing" to the Agreement. Also Loans from the Bank's own resources would be granted in accordance with its statute and with the terms and conditions laid down in *Annex II* to the Agreement.

⁶⁶² Parties would within the framework of the ACP-EC Development Finance Co-operation Committee undertake a joint study on the proposal to set up an ACP-EC Guarantee Agency to provide and manage investment guarantee programmes. See *Article 77* of the Agreement

⁶⁶³ It is notable that COMESA already has a re-insurance body that serves its member States. The Agreement establishing the African Trade Insurance Agency (ATIA) came into force on 20th January 2001 and the six states that have signed and ratified the Agreement are Burundi, Kenya, Malawi, Uganda and Zambia. At a previous meeting, the COMESA Central Bank Governors decided that all COMESA countries should take advantage of the financial resources made available by the World Bank through IDA credit in an attempt to widen the membership of the ATIA. See also <http://www.comesa.int>

⁶⁶⁴ Stevens, et al supra at p.78

commitment to standardising the rules of origin for all its preferential trade arrangements. This is more so in respect to improvement to the rules of origin, safeguard measures and tolerant thresholds. It is therefore essential that the ACP States ensure that this process is based on 'best practice', which, in most if not all cases, will require the application of the Cotonou provisions to all beneficiaries as well as simplifying them for the LLDCs.⁶⁶⁵

The SADC Protocol allows for cumulation within the region. This provision could be used as an impetus to encourage regional co-operation in production to boost the export trade to the EU market.⁶⁶⁶ The only complication here is that some SADC States double membership in the COMESA, which has its own origin and cumulation disciplines. The best way forward for the two dominant regional regimes is to work toward a formula for harmonisation in order to configure synergies and iron out any difference among them.

Matambalya⁶⁶⁷ notes that production cumulation encourages the ACP economies to collaborate in the production of goods for eventual export to the EU market. It is noteworthy that the Lome is the only EU trade arrangement that allows both the EU and the beneficiary States to participate in production cumulation. One hopes that the cumulation rule would encourage intra-ACP trade as well as ACP-EU trade. At the same time, third countries can still supply the developing partner market, provided the prices of their intermediate produce are sufficiently lower than EU prices to more than offset the EU duty on the final product.

The differences with the Rules of Origin in the agreement with Morocco compared with those of Cotonou are important. The EU is committed to the harmonisation of the rules of origin in all its free trade agreements. It is essential that the ACP States resist any further restriction on the already onerous rules of origin, which they have to fulfil in order to obtain preferential access to the EU market. For instance, confining cumulation of origin to the member States of the regional partnership agreement and excluding other non-SADC, or non-ACP developing countries in the region, would seriously undermine

⁶⁶⁵ Supra at p.89

⁶⁶⁶ Bilateral cumulation with the EU is permitted under *Article 3* but surprisingly given the objectives of economic integration in the Mediterranean region, cumulation between the Mediterranean countries is permitted only with Algeria and Tunisia (*Article 4*). Also unlike the Cotonou there is no derogation procedure in the Mediterranean Agreement.

⁶⁶⁷ Matambalya supra at p.97

regional integration and the general attractiveness of the region to the coveted foreign direct investment.

Commentators note that under the present arrangements, each ACP country maintains its own border restrictions and does not discriminate between products from the EU and other non-regional suppliers.⁶⁶⁸ A European Union producer has therefore to decide between exporting to the developing partner's market or jumping over the border restrictions and servicing the partner's local or regional market via import-substituting foreign direct investment. These decisions would, however, depend solely on the transaction costs of exporting versus the costs of producing in the partner country and the size of the market.⁶⁶⁹

The argument goes that since only the EU has preferential access (guaranteed by treaty) to all of the ACP countries that have concluded co-operation and partnership agreements, it will tend to be a more attractive location for investors than any one of the sub-regions.⁶⁷⁰ Yet despite its preferential head start, no animated investor activity has been witnessed in the east and southern Africa region during this long spell of time. The investor apathy in the east and southern Africa region must, therefore, lie somewhere else – certainly not the realignment of the cumulating procedures.

7.4 Dispute Settlement Procedures

The vital disciplines on dispute settlement are set out in brevity under *Article 98* of the Cotonou. The Article provides that any dispute arising from the interpretation or application of the Agreement between one or more Member States or the Community, on the one hand, and one or more ACP States on the other, shall be submitted to the Council of Ministers. Between meetings of the Council of Ministers, such disputes shall be submitted to the Committee of Ambassadors.⁶⁷¹

⁶⁶⁸ *supra* at p.58

⁶⁶⁹ With separate free trade agreements for each ACP sub-region, the product coverage, transitional arrangements, rules of origin and other details of the agreements can be expected to differ. Countries will wish to maintain the integrity of their border restrictions against other countries, so the transaction costs of trade, including regional trade, will rise. Economists contend that with these features in place producers (EU and non EU alike) will have an increased incentive when deciding how best to service the ACP market of economies of scale and lower transactions costs to locate in the EU rather than an ACP country.

⁶⁷⁰ Stevens, et al *supra* at p.59

⁶⁷¹ These dispute settlement procedures appear to go beyond WTO disciplines. It must be underscored here that the WTO procedures have been greatly strengthened by the Uruguay Round's decision to change from a 'consensus to accept', a dispute panel report to 'consensus to reject'. A party to a dispute may refuse to implement the panel's decision if they are unwilling to accept retaliation.

The Cotonou provides that where the Council of Ministers does not succeed in settling the dispute, either Party may request settlement of the dispute by arbitration. To this end, each Party is entitled to appoint an arbitrator within thirty days of the request for arbitration. In the event of failure to do so, the Agreement allows either Party to ask the Secretary-General of the Permanent Court of Arbitration to appoint the second arbitrator. The two arbitrators would in turn appoint a third arbitrator within thirty days. In the event of failure to do so, either Party may ask the Secretary-General of the Permanent Court of Arbitration to appoint the third arbitrator.

The Agreement further provides that unless the arbitrators decide otherwise, the procedure applied shall be that laid down in the optional arbitration regulation of the Permanent Court of Arbitration for International Organisations and States. The arbitrators' decisions shall be taken by majority vote within three months. Each Party to the dispute shall be bound to take the measures necessary to carry out the decision of the arbitrators. For the application of this procedure, the Community and the Member States shall be deemed to be one Party to the dispute.

Unlike SADC and COMESA that are not a customs union, the EU has the requisite competence to appear as a party before the Dispute Settlement Board. SACU is a customs union and so qualifies to appear as a party on behalf of its member States. There are definite advantages in appearing as a region. The overriding one being that States that are members to a customs union are able to pull resources together and offer a united front in the event of a dispute.

Dispute settlement processes are an expensive affair and more so for the strained resources of a developing country. This would, in part, explain the lustre participation in the WTO's DSB by developing countries. The non-participation by the third world countries in the world's premier arbitration panel should not be construed to mean that these States are without complain or at all. Quite to the contrary most of these countries

The EU-Morocco Agreement provides for the Association Council to deal with disputes. The majority decision is binding on both parties although it is unclear what sanctions may be used where a Party fails to implement the arbitrator's decision. This is a potentially useful innovation, which the ACP States should seriously consider to incorporate into a future trade agreement with the EU. In our view, the Cotonou Dispute Settlement Procedures are functionally flawed and not altogether satisfactory.

harbour numerous petitions against the wealthy western nations but for want of where-withal elect to forebear their rights and opt to suffer in silence.

As with the SADC Protocol, the designation of the Council of Ministers as the first court of instance for dispute settlement procedures is ill advised and an entirely incompetent mechanism. Disputes that arise here are essentially of commercial nature and time is always of essence. The Council of Ministers is a political organ whose meetings are sporadic and far between. This is a situation, which renders them wholly unsuited for processing urgent commercial disputes.

It is arguable that by the time the Council of Ministers is properly constituted and set to function irreparable damage would have been done to a member States' economic interests. Resolution of disputes of this nature is better left to bodies that are specially tooled to urgently process them. Again no provision is made for parties to access the WTO's dispute settlement procedures should they choose to do so. Such a provision is important since it offers Parties an option to petition the more efficient and experienced hand of the WTO's dispute settlement expertise. It may well be that the EU is not keen to settle scores with its economic proteges in the often-abrasive WTO dispute settlement forum. The EU is comfortable with an in-house mechanism by which to iron out issues with what it considers its principal ally in the global economic politics. This is the point where consultations and conciliation mechanisms become critical.

7.5.1 The quest for the WTO compliance

Parties to the Agreement underscore the importance of active participation in the WTO as well as in other relevant international organisations by becoming members of these organisations and closely following their agenda and activities.⁶⁷² To this end Parties agree to co-operate closely in identifying and furthering their common interests in international economic and trade co-operation in particular in the WTO, including participation in setting and conducting the agenda in future multilateral trade negotiations.⁶⁷³

The envisaged co-operation only reiterates an already entrenched tradition of partnership in the WTO that spans the incredible space of four decades. The EU-ACP partnership

⁶⁷² See Article 39 of the Agreement

⁶⁷³ In this context, particular attention shall be paid to improve access to the Community and other markets for products and services originating in the ACP countries.

has over time proven a formidable force in the WTO trade talks. It is perhaps in this respect that commentators disagree with the EU's lame excuse, which foresees difficulties in achieving an extension of a waiver for a post-Lome regime.

It is of interest that Parties are also agreed on the importance of flexibility in WTO rules to take account of the ACP's level of development as well as the difficulties faced in meeting their obligations. *Article 40* identifies the main area of concern hereto as the need to ensure a better operation of international commodity markets and to increase market transparency.⁶⁷⁴ Parties have reaffirmed their willingness to step up consultations between them in the international fora and organisations dealing with commodities.⁶⁷⁵

The main area of flexibility in the WTO rules that gravely concerns the ACP States and one that the Cotonou fails to address regards the principle of reciprocity and differentiation. It is important, nay expedient, that the WTO rules be appropriately realigned to reinvent these two crucially beneficial facilities. It is not much of an overstatement to aver that without these twin support mechanisms for deferential treatment, the ACP economies are ruefully incapable of holding ground in the ferociously competitive global commerce.

It is noteworthy that the SADC Trade Protocol and the COMESA Treaty recognise and give effect to the twin principles of differentiation and asymmetry.⁶⁷⁶ The EU-SA Agreement does pay homage to this regime as well.⁶⁷⁷ This is why it is inconceivable that in view of the glaring economic disparities between the North-South divide the WTO envisages a system of reciprocity across the border save for the LLDC States. It is all the

⁶⁷⁴ The Parties have further agreed on the need for technical assistance to enable the ACP countries to implement their commitments. The EU has, pledged to assist the ACP States in their efforts, in accordance with the provisions set out in the Agreement, to become active members of these organisations, by developing the necessary capacity to negotiate, participate effectively, monitor and implement these agreements

⁶⁷⁵ To this end, exchange of views shall take place at the request of either Party: regarding the operation of existing international agreements or specialised intergovernmental working parties with the aim of improving them and making them more effective, consistent with market trends. When it is proposed to conclude or renew an international agreement or set up a specialised intergovernmental working party. The aim of such exchanges of views shall be to take account of the respective interest of each party. They may take place, where necessary, in the framework of the Ministerial Trade Committee

⁶⁷⁶ The SADC the Protocol, at *Article 19* as read with *Article III*, obligates parties to a reduction of subsidies within 8 years for all States in the region. This article empowers the Committee of Ministers to grant a "grace period" and elaborate "appropriate criteria for the consideration of such applications

⁶⁷⁷ See Annex 1 of the TDCA for the list of agreed derogation to standstill and rollback items

more frightening that the EU has willy-nilly picked up this infamous chorus for which it has taken every opportunity to drumbeat to the dazed ACP States.

In view of the objectives and principles set out in *Article 35*, Parties have agreed to conclude new WTO compatible trading arrangements, progressively removing barriers to trade between them and enhancing co-operation in all areas relevant to trade. Parties agree that the new trading arrangements would be introduced gradually and recognise the need, therefore, for a preparatory period.⁶⁷⁸ The Cotonou is essentially a transitional Arrangement that allows time and space for a negotiated post-Lome Partnership. It is, however, not clear what preparatory period the Agreement is alluding to here.⁶⁷⁹

It is possible that the Agreement refers to a time-bound arrangement within which time the ACP States would be expected to meet the contracted disciplines. Experience has, however, shown that the ACP states have never been faithful to the contracted time-bound obligations. It has been a frustrating exercise with the result that the ACP States have always stagnated in the very same hapless position they were in at the signing of the Agreement if not worse.⁶⁸⁰

⁶⁷⁸ In order to facilitate the transition to the new trading arrangements, the non-reciprocal trade preferences applied under the Fourth ACP-EC Convention shall be maintained during the preparatory period for all ACP countries, under the conditions defined in *Annex V* to the Agreement. In this context, the Parties reaffirm the importance of the commodity protocols, attached to *Annex V* of the Agreement. They agree on the need to review them in the rubric of the new trading arrangements, in particular as regards their compatibility with WTO rules. This would be gone into with a view to safeguarding the benefits derived therefrom, bearing in mind the special legal status of the Sugar Protocol.

⁶⁷⁹ *Article 37* states that economic partnership agreements would be negotiated during the preparatory period, which shall end by 31 December 2007 at the latest. Formal negotiations for the new trading arrangements shall start in September 2002 and the new trading arrangements shall enter into force by 1 January 2008, unless earlier dates are agreed between the Parties. All the necessary measures shall be taken so as to ensure that the negotiations are successfully concluded within the preparatory period. To this end, the period up to the start of the formal negotiations of the new trading arrangements shall be actively used to make initial preparations for these negotiations.

⁶⁸⁰ It is noteworthy that the Agreement leaves it open for the ACP States that are in a position to enter into the negotiations of the economic partnership agreements to do so. This provision is more of a mockery than an honest room to exercise an option. What is obvious here is that the ACP States would have some other option from which to make a choice. It would have been better for the EU to provide for an alternative regime from which the ACP States could elect wither way. The only alternative that is yet to be designed is one that makes provision for the LLDCs. This they will do at the level they consider appropriate and in accordance with the procedures agreed by the ACP Group, taking into account regional integration process within the ACP. In 2004, however, the Community, will assess the situation of the non-LDC, which, after consultations with the Community, decide that they are not in a position to enter into economic partnership agreements. Upon this assessment, the Agreement provides that the EU will examine all alternative possibilities, in order to provide these countries with a new framework for trade, which is equivalent to their existing situation and in conformity with WTO rules.

Negotiations for the economic partnership agreements would notably aim at establishing the timetable for the progressive removal of barriers to trade between the Parties, in accordance with the relevant WTO disciplines. What is important to note here is the fact that most of the ACP countries have heavily liberalised their markets under the IMF and World Bank driven SAPs. In any case liberalisation is not and should not be a priority for the States in the region. These States's main concern, rather, is building supply and demand side capacity infrastructure that would improve market access to the lucrative but ever elusive western market. The other twin concern is capacity to diversify their production portfolio. These are germane issues and concerns which the post-Lome regime should focus on and not the exhausted theme of liberalisation.⁶⁸¹

The Cotonou makes provision for negotiations to take account of the level of development and the socio-economic impact of trade measures on ACP countries, and their capacity to adapt and adjust their economies to the liberalisation process. In this sense, negotiations are structured in such a manner as to ensure the necessary flexibility to necessitate the duration of a sufficient transitional period and the final product coverage. The provision for this space would also take into account sensitive sectors, and the degree of asymmetry in terms of the timetable for tariff phase-out, while remaining in conformity with the prevailing WTO disciplines.⁶⁸²

7.5.2 The significance of the WTO compatibility

To a certain extent the rules administered by the WTO are more stringent than the old regime under the GATT. Increasingly exceptions from MFN treatment are now viewed in a more sceptical light than in times past. In the opinion of the EU, the preferential access provided to ACP exports was justified under Article XXIV of the GATT read in the light of *Part IV* and, in particular, *Article XXXVI par. 8*. Under this provision

⁶⁸¹ For its part, the EU's trade liberalisation would build on the *acquis* and aim at improving current market access for the ACP countries through *inter alia*, a review of the rules of origin. There is nothing wrong with increasing the ACP's market access portfolio to the EU market. The question to address is whether this is a priority area. This is a relevant question in view of the fact that ACP States have over the years utilised only a fraction of their allocated quota of export portfolio to the EU market.

⁶⁸² To assure the success of all these programmes the Agreement binds Parties to closely co-operate and collaborate in the WTO with a view to defending the arrangements reached, in particular with regard to the degree of flexibility available. The Community pledged, under the Agreement to start by the year 2000, a process, which by the end of multilateral trade negotiations and at the latest 2005 will allow duty free access for essentially all products from all LDC. This would be build on the level of the existing trade provisions of the Fourth ACP-EC Convention and which will simplify and review the rules of origin, including cumulation provisions, that apply to their exports.

developed countries 'do not expect reciprocity' for preferences given in trade negotiations to LLDCs.⁶⁸³ This position was challenged in 1993 by the GATT Panel established to investigate Latin American complaints concerning the European banana regime. The after-shocks of this challenge are still being felt, and their implications for the EU's non-multilateral system is as yet uncertain.

The banana dispute showed with frightening clarity that, rather than being just an irrelevance, the Lome could prove to be a serious embarrassment. This provided a stimulus to find a new formulation that would remove the danger. The initial response to the challenge presented to the Lome was for the EU to seek and obtain in 1994 a waiver from the MFN rule under GATT *Article XXV*. This removed the immediate questions about the validity of the Lome. But while the waiver, since renewed by the WTO, has provided some respite, the problem has not gone away.⁶⁸⁴

In its judgement on the EU banana regime, the WTO Dispute Settlement Panel brought into question the compatibility of the entire Lome relationship with international trade rules. The dispute on bananas illustrated that the precise terms of a waiver can be the subject of a close scrutiny with the aim of striking down aspects of the regime that have not been supported unambiguously.⁶⁸⁵

Preferential treatment for products originating in ACP States as required by the relevant provisions of the Convention is designed to promote the expansion of trade and economic development of beneficiaries. This endeavour should be pursued in a manner consistent with the objectives of the WTO disciplines and with the trade, financial and development needs of the beneficiaries. The main caveat to this trade relief is that such a

⁶⁸³ See Stevens, et al, *supra* at p.27

⁶⁸⁴ The WTO Panel issued a report in May 1997, which upheld the complaint by the Latin American States. Importantly, the report did not take issue with the duty-free preferences for the ACP, but found fault with aspects of the licensing system.⁶⁸⁴ The EU appealed, but the appellate body upheld the Panels' decision. A subsequent dispute in the autumn of 1998 between the USA and the EU over whether the latter's policy changes agreed after the appeal ruling dealt adequately with the complaint only added to the reverberations. Although targeted at one product, the dispute has much wider implications.

⁶⁸⁵ Stevens, et al propose that in the absence of any guidance from the committee, it would still be open to any aggrieved WTO member to file a complaint under the dispute settlement mechanism. For example, if the USA considered that the EU-SA Agreement disadvantaged its exporters, it might post a complaint. But this would be risky. There is very little guidance available on how the weasel words of *Article XXIV* are to be interpreted. As the banana dispute has shown, the WTO has given birth to a strong dispute settlement mechanism. After Lome: A strategy for ACP-EU Relations *supra* at p supra at p.31

differential relief should not raise undue barriers or create undue difficulties for the trade of other contracting parties.⁶⁸⁶ It is not immediately clear what amounts to 'undue barriers in this provision. It is common cause that any preferential treatment would subject non-beneficiaries to a considerable level of market access disadvantage. The degree of this inconvenience would of course depend on the amount of trade that go between the countries in question.

The idea then, in the Cotonou, is that all the ACP States will be required to conclude REPAs with the EU, which in essence will be free trade agreements. These Agreements will have to conform to *Article XXIV*. The Enabling Clause does not apply between developed and developing country free trade area arrangements, which means the only rule that will govern these arrangements, is *Article XXIV*.⁶⁸⁷

The EU insists that these free trade areas will have to be in accordance with the WTO rules, which stipulate that substantially all trade (more than 90%) between the two parties need be liberalised over a period of not more than 12 years. This is a fundamental departure from the non-reciprocal preferential access to the EU market that ACP countries have enjoyed since 1975. However, LLDCs will continue to have non-reciprocal preferential access to EC markets in view of the WTO rules allowance for their special and differential treatment.⁶⁸⁸

The chequered Lome history clearly affords credence to the view that waivers are not difficult to secure. More importantly, the EU opts to ignore or counter the call by the ACP countries and various voices within Europe for the 15 EU and 71 ACP member States to combine their political influence if need be. Such a combined force would

⁶⁸⁶ Annex 2: Decision of the GATT Council under *Article XXV:5* Granting a Waiver to the Lome Convention, 9 December 1994 (L/7604)

⁶⁸⁷ None of the ACP sub-groupings (SADC, SACU, EAC, CEMAC, UEMOA, CARICOM and the Islands of the Pacific) are capable of concluding such free trade agreements in the short to medium term. They have barely established trade regimes within their own regions. Within the Pacific region, none exists currently, and there is potential for them to forge closer relations with the East Asian bloc. Even SADC has only just completed its negotiations on its trade agenda, while SACU has yet to make progress in its restructuring. See also R.H Thomas *The EU-SA TDCA: Precedent or Complicating factor* supra at p.19

⁶⁸⁸ There are three main pegs in the WTO agreements under which members may seek justification for discriminatory treatment of one group of trading countries vis-à-vis others (which is what preferences are). They are namely; if the countries concerned are creating a free trade area or customs union (covered by *Article XXIV*). The other is if the trade partners are developing countries subject to special and differential treatment' (covered by the 1979 Enabling Clause), and lastly if a waiver has been obtained (under Art. XXV). See Stevens "EU-SADC Trade Relations, supra at p. 26 and Kato Lambichts: "A post-Lome Convention Trade Regime supra at p.1

supply the necessary numerical weight to achieve any waivers for the ACP States would require for the WTO compliance.⁶⁸⁹

Keet contends that if the joint ACP-EU effort produces counter-demands elsewhere in the WTO for quid pro quo concessions, this would in turn require further joint effort and wider alliances to be built with other developing countries by the ACP-EU alliance.⁶⁹⁰ This strategy is not altogether impossible or unusual to master. It is indeed in keeping with the general bargaining process and trade-offs that characterise decision-making within the WTO framework.

It is very important that the ACP States begin as soon as possible the task of building consensus within the WTO in support of a waiver. It would be imprudent to rely on the EU to do this. Achieving such a consensus would require overcoming a range of possible objections from other developing countries and transition economies, as well as from some developed States.⁶⁹¹ The CAP upon which the ACP preferences hinge has, no doubt, withstood many attempts at fundamental reform. It would, however, be imprudent for the ACP to assume that it will not succumb to reciprocity pressures in the next decade.

Matambalya correctly predicts that the CAP must yield to a number of unavoidable factors. These burgeoning eventualities include the concurrent onslaughts of the cost to EU's consumers and taxpayers, the demands of EU enlargement to the east, and the next Round of WTO talks.⁶⁹² If that were to happen, and there a very likelihood that it would, then the repository that had sustained the ACP preference regime would have crumbled. And with it the honeymoon that has been the ACP and by extension states in the east and southern Africa region's exports to the EU market.⁶⁹³

⁶⁸⁹ Dot Keet: 'Regional Economic Partnership Agreements -Implications for Regional Integration and Development in Southern Africa', IDG Occasional Paper No.21 TIPS Workshop Proceedings, supra at p.35

⁶⁹⁰ Ibid.

⁶⁹¹ As the banana panel demonstrates, it is also vital that any waiver be drafted in such a way as to provide support for all those facets of the current trade regime that the ACP wish to protect. The required level of specificity will make the task of achieving a consensus more difficult because it will reduce the scope for compromise through the use of general terminology. See Francis Matambalya: *The Merits and Demerits of EU Policies* supra at p.9

⁶⁹² Supra at p.15

⁶⁹³ Commentators contend that the WTO 'problem' is an intractable' one since none of the pegs' that support discrimination in favour of certain developing countries but not others is entirely fool-proof.⁶⁹³ They point out that none of them provides a fully robust justification for the EU-ACP trade regime. Even variations within the GSP could be subject to challenge. This was illustrated at

Whatever may be the legal postulates with regard to the WTO compatibility, one aspect is not in doubt at all here. That is, the onus is on the ACP to negotiate not only with the EU but, probably more importantly, other developing countries and industrialised States with preferential trade deals outside the GSP such as USA and Canada to develop a consensus in favour of continuation of reciprocity. In view of the changing attitudes toward the utility of reciprocity, this challenge is certainly not going to be easy. That export preferences sustain the level of exports for states in the east and southern Africa region is not in doubt at all. The main point of concern is how long it will last these States to step out of this kids glove treatment and take the bull that is international competition by its horns.

7.6.1 The Cotonou in the realm of the EU-SA Agreement

The EU-SA agreement has been touted as an example of the type of trade agreement the EU has in mind for ACP countries.⁶⁹⁴ South Africa's exclusion from Lome IV prompted the new government in 1994 to look for other avenues to access the wealthy EU market. The EU responded with a free trade agreement offer to South Africa.⁶⁹⁵ In terms of the WTO rules, this would have required the elimination of duties on "substantially all trade".⁶⁹⁶

the very end of the research project, when Brazil announced that it was lodging a complaint against the treatment by the EU of exports from the Andean Community of instant coffee. The special preferences for the Andean States are provided within the GSP – what has been called in this Report the 'Super GSP'. Similarly, *Article XXIV*, which covers free trade areas and customs unions, might not provide defence against a challenge by an aggrieved State. The treatment accorded to the EU-SA Agreement, if it is concluded, may provide case law that would then apply to REPAs. See Stevens, et al, supra at p.8

⁶⁹⁴ The EU is also negotiating trade and co-operation agreements with some Mediterranean-basin countries such as Israel, Morocco, Tunisia and Egypt. Almost all SADC countries also form part of the COMESA, which extends as far north as Egypt. Trade deflection would occur if Egyptian goods are imported at no duty into Tanzania, and then filter through to other SADC countries as being of Tanzanian origin via Kenya within the EAC free trade area. This could happen in the absence of strict rules of origin, proper certificates of origin, or a system of verifying the certificate of origin. Such trade deflection would prevent the gains from lowering administrative trade barriers within the SADC to be realised. See Gavin Massdorp: Imani Development Limited; a Study of the Impact of introducing Reciprocity Trade Relations Between European Union and the SADC Region; IGD Occasional Paper No. 21 TIPS Workshop Proceedings Braamfontein South Africa at p.50 at p.17

⁶⁹⁵ South Africa expressed its dissatisfaction with the EU's proposed free trade agreement. Thomas opines that at the core of South Africa's dissatisfaction is the view that the EU stood to benefit disproportionately from such an arrangement, and more particularly, that it would not be compatible with South Africa's current commitments to and future vision for relations with its southern Africa neighbours. Rosalind H. Thomas: "Trade Liberalisation Issues Affecting SADC within the context of the Forthcoming post-Lome IV Negotiations"; Seminar Report - Dar Es Salaam 5-7 May 1998 at p.49

⁶⁹⁶ The EU interpreted this to mean 90 percent of current exports to South Africa and a similar percentum of the latter's exports to the former. On South Africa's insistence, it was accepted that the free trade agreement would be asymmetrical in timing, but that it would allow South Africa ten years

South Africa had requested Lome status in respect of its trade access together with cumulation.⁶⁹⁷ It argued, then that a free trade agreement with the EU would have adverse repercussions both domestically⁶⁹⁸ and for the SADC regional partners. This is particularly the case since Lome grants its ACP members preferential non-reciprocal access to the EU markets.⁶⁹⁹ A free trade agreement between the EU and South Africa, particularly where the latter is in a custom union with a group of, mainly least developed countries, and intends a free trade agreement with similar groupings would definitely complicate the regional alignment in southern Africa.⁷⁰⁰

As it turned out, the EU would not accommodate South Africa's Lome ambitions on the ground that the country has a modern infrastructure. The EU also argued that South Africa's economy has a distinctly different profile from that existing in an average ACP country. Thirdly and more importantly, that South Africa's full admission to the Lome membership would endanger the WTO waiver applicable to the Lome. After extensive rounds of negotiations, South Africa ended up with a qualified membership to the Lome in addition to the EU-SA Agreement, which would henceforth define its relationship with the member countries of the EU.

South Africa's qualified Lome membership excludes it from the trade and aid benefits that accrue to the ACP States. This position, however, significantly empowers South Africa to act in solidarity with the ACP countries during the period of renegotiations on future EU-ACP relationship. The rapidly expanding market for South Africa in Africa, together with South Africa's political and social affinities with the rest of the continent, bestows on South Africa a natural leadership mantle for the ACP States.⁷⁰¹

in which to reduce duty against EU imports. See Chapter Six above on the EU-SA Agreement (TDCA)

⁶⁹⁷ but no participation in Stabex or Sysmin facilities and no access to EDF funds

⁶⁹⁸ Especially for the R&D programme

⁶⁹⁹ This is clearly in line with *Part IV* of the GATT *Article XXXVI: 8* and the Enabling Clause.

⁷⁰⁰ Commentators argue that this would erode the non-reciprocal status that both SACU and SADC have with the EU, as a whole. See also R.H. Thomas: "Regional Arrangements & The WTO: The case of the SADC: Paper submitted for presentation at the 8th Annual Conference of the African Society of International & Comparative Law; Cairo, Egypt, 2-5 September 1996 at p.25

⁷⁰¹ In the Southern African region there are clear signs of an accelerated breaking down of barriers and the bringing into play of the benefits of regional integration. See also the Keynote Address by Michael Laidler, the EU Ambassador to South Africa; to the South African Business at the "The EU-SA Trade, Development and Co-operation Agreement and Lome: the implications" South African Business and the European Union in the context of the New Trade and Development Agreement 18 June 1999 Rand Afrikaans University Johannesburg, Seminar Report, supra.p.13

One overriding factor to be born in mind always is that South Africa is an African country and a developing economy at that. This explains why, at the outset, South Africa had hoped to be admitted as a full member of the Cotonou rather than have to trade with the EU on the exorbitant most favoured nation basis together with certain unilateral concessions under the heading of the GSP. It is agreed that although South Africa's per capita income of approximately US\$3000 is by far higher than most developing countries, this statistic is strongly qualified by a wide disparity in the levels of development of its population.⁷⁰²

Strategically speaking, South Africa thus finds itself astride two trade regimes, which one might argue also characterise its state of development. We would now move to examine how this North-South duality positions South Africa in the pedestal of leadership in the precarious southern Africa economic equilibrium.

This is the stage where the EU-SA Agreement becomes an important reference point. Whether the EU-SA Agreement serves as a model for the successor Lome or not there are several important implications and lessons, which can be drawn from the South Africa negotiating experience. This would help more particularly in formulating the ACP position in respect of the successor Lome, as well as the strenuous process of negotiations. South Africa is actively contributing to the formulation of positions relating to these discussions, to the actual discussions, as well as to the research work that has to be done in support of the negotiations.⁷⁰³

Should one imagine SACU, SADC, COMESA, Africa and ultimately the ACP region as representing a series of concentric circles, South Africa's present potential role in this structure could be pictured as an important overlapping factor. Links⁷⁰⁴ opines that South Africa has a vast potential to trigger development and economic growth, regional

⁷⁰² This is understandable especially in view of the fact that approximately 19 million South Africans, representing almost half the population, must be considered poor in the sense that their incomes fall below the poverty line. Indeed the Gini-coefficient (measure of inequality in society) is considered to be one of the highest in the world. This means that the top 20% of the South African population accounts for 70% of national expenditure, whereas the bottom 20% of the South African population for a mere 1%. This puts South Africa among the countries with the highest income inequality in the world. A recently published UN report indicated that if one takes "white South Africa" as a country of its own ranking of per capita income groups, it would occupy 13th place next to Spain. If one did the same with "black South Africa", it would occupy 113th place next to the Democratic Republic of the Congo (DRC)

⁷⁰³ H.E Elias Links, the TDCA Seminar Report, supra at p.24

⁷⁰⁴ Supra at p.25

co-operation and integration, and technological advancement and capacity building in each of the concentric circles. South Africa is overall being considered as the favourite to provide this important catalyst for development in the southern Africa region in particular and for the African continent as a whole. This is where the EU-SA Agreement kicks in.

One thing is clear though, that the EU-SA Agreement cannot be a model for the successor Lome. It would indeed be ironical were the contrary be true. South Africa embarked on the negotiations leading to the EU-SA Agreement because it was considered by the EU to be a non-typical ACP country and therefore not eligible to be included in most of the provisions of the Lome. The EU-SA Agreement must be seen as a bilateral agreement reached between the EU and a relatively industrialised developing country. How then can the very platform upon which SA was denied membership be used as a model for a post-Lome regime? It is inconceivable that the ACP States should be accorded the same treatment as South Africa. This would diminish the very logic upon which South Africa was denied full Lome status when it very much desired such membership.

While not a model, the EU-SA Agreement can and should be an important source of hard lessons for the ACP countries. The Agreement is, no doubt, a product of hard and lengthy bargaining in which haggling to promote the vested interests of various EU lobby groups often held sway over the latter's professed intention to promote growth, development and democracy in the developing world. The demands on the capacity, both in government and civil society, were also significant.⁷⁰⁵ Davies ⁷⁰⁶ notes that a major challenge will be to dissect the lessons at various levels and to take them into the negotiations that would commence in September 2002 between the EU and the ACP countries.⁷⁰⁷

There are, however, some less satisfactory features of the EU-SA Agreement. One is that the EU has introduced areas of non-merchandise trade into its demands. There are sections in the EU-SA Agreement on services trade and on the free movement of capital. It must be emphasised, however, that these disciplines do not at the present appear firm

⁷⁰⁵ See chapter five on the EU-SA Agreement

⁷⁰⁶ Dr, Robert Davies: "Implementation of the EU-SA TDCA: The Department of Trade and Industry Perspective; South African Business and the European Union in Context supra at p.42

and onerous commitments for South Africa. It is clear that the EU wishes to extend its agreements in these areas for the post-Lome regime. Stevens, McQueen and Kennan⁷⁰⁸ suggest that it may be necessary for any ACP Regional Economic Partnership Agreements (REPAs) negotiators to exercise extreme caution in ensuring that firm commitments are not introduced into the agreements.

Again, provisions in the EU-SA Agreement use a system for establishing originating status that is significantly different from that employed both under the Cotonou and under the GSP and the EU's other trade accords. The EU-SA origin rules incorporate a detailed list of products and specify the value added or process that are required in respect of each to transform non-originating materials into originating products. Since the origin rules vary from product to product, it is not possible to state whether the EU-SA Agreement rules are more or less onerous overall than those of the Cotonou. Economists contend that a comparison is possible on a product to product basis.⁷⁰⁹ Such a laborious expedition is, however, beyond the limited confines of this work.

One must, nonetheless, acknowledge the importance of establishing, as a matter of priority, whether or not the EU-SA Agreement is a precedent for the system that Europe will attempt to apply to any post-Lome regime. ACP diplomats in Brussels are convinced that the SA-EU Agreement will become a model for Europe's future relations with other African nations.⁷¹⁰ The fact that the EU is moving to jettison the current system of reciprocal EU trade preferences is no longer an issue. The real question is whether the post-Lome regime would be fashioned on the EU-SA framework. Commentators believe that the EU-SA Agreement is an indication of what Brussels want to conclude with the ACP States.⁷¹¹ Some commentators have expressed the view that it would be consistent for the EU to secure different agreements with the ACP group and South Africa.⁷¹²

⁷⁰⁷ Negotiations for the successor Lome commenced in earnest last September 2002

⁷⁰⁸ *supra* at p. 70

⁷⁰⁹ Stevens, et al *supra* at p.71

⁷¹⁰ SA-EU Trade: "Trade Pact could harm South Africa's neighbours and disrupt World Trade" *Financial Mail*, October 1999 at p.1

⁷¹¹ Says the group's deputy secretary general, Carl Greenidge in the *Financial Mail*, October 1999, *supra* at p.1.

⁷¹² . "ACP countries are worried, says Brussels based development analyst Eileen Sudworth. "If the South Africa deal is the best an African Goliath can achieve, then what kind of Agreement would countries that do not have the South Africa leverage be able to obtain from the EU?" *Financial Mail* October 1999 at p.1

Some commentators contend that the EU's shifting foreign trade policies is in actual sense a self-serving manoeuvre. Goodison⁷¹³ belongs to the school of thought that hold the view that the EU trade policy is being driven not by the developmental needs of African economies, but by the need for the EU to position itself within an increasing competitive global economy. Its policy on free trade areas therefore has a decidedly strategic justification, namely; 'the need for the EU to reinforce its presence in particular markets and to attenuate the potential threat of others establishing privileged relations with countries which have traditionally been economically important to the EU.

The Cotonou's main potential benefits for South Africa lie in manufactured goods that most ACP countries do not produce or export. The EU-SA Agreement remains restrictive, albeit to a much lesser extent than comparable "association agreements" with Mediterranean countries, in agricultural products and agro-industries, where most ACP countries would begin their struggle for development and industrialisation.⁷¹⁴

The benefits that South Africa receives from Cotonou membership include important opportunities for co-operation and integration with the ACP States. This will assist South Africa in redressing its historically isolated position, especially *vis-à-vis* its neighbours in the SADC region. South African companies are eligible to tender for projects in all ACP countries financed from the 8th European Development Fund (EDF) and amounting to Euro 7.5 billion.⁷¹⁵ South Africa is also a full member of the institutions of the Cotonou namely the ACP-EU Council of Ministers, the ACP-EU Committee of Ambassadors and the ACP-EU Joint Assembly.⁷¹⁶ The manner of interface effectively places South Africa at the vintage point from where to influence integration processes in the east and southern Africa region.

⁷¹³ P. Goodison, "Emerging EU Policy on FTAs", (ERO.NNA/NNCCI), June 1996. Given the objective of the MoU signed by the SADC Secretariat and the US government, one can well understand the EU's apprehension. See also R H Thomas: 'Regional Arrangements and the World Trade Organisation (WTO): The Case of the Southern African Development Community (SADC)'; supra at pp.9-10

⁷¹⁴ Dr. Robert Davies, supra at p.42

⁷¹⁵ It is reliably understood that a number of South African companies have already been awarded tenders in ACP countries, which are financed in terms of this fund. See remarks by Michael Laidler, infra, at p. 13

⁷¹⁶ The ACP is made up of 71 States including South Africa. See also the Keynote Address by Michael Laidler, the EU Ambassador to South Africa; to the South African Business and the EU in context of the TDCA Seminar Report, supra.p.13

7.6.2 The Cotonou and the SADC Trade Protocol

A key argument against the REPA proposal by the EU is that reciprocal trade liberalisation can only be introduced between equal trading partners, otherwise most of the benefits will accrue to the developed member of the free trade area. A counter argument, however, is that SADC has concluded the Trade Protocol that would lead to an eventual free trade area, despite the asymmetry between the South African economy and those of the other SADC countries. Massdorp⁷¹⁷ explains that in the case of SADC, South Africa's strong economic position is seen as a stimulus for equitable growth and development in the region. But this is not happening. If anything, the opposite is true – a huge trade imbalance in favour of South Africa.

The other argument is that the economic size disparity between South Africa and the rest of the region is much lower than between the EU and SADC – the combined size of the EU economies is 240 times that of SADC economies combined.⁷¹⁸ This argument does not seem to help matters either. The mere fact that the EU is less of a giant to SADC than is South Africa is no excuse for South Africa's economic emasculation of the SADC economies. What is important is for South Africa to move decisively and address this gapping disparity, which will be worsened by South Africa's aggressive venture into the world market. The result of this adventurous feat by South Africa is to tie her SADC partners to unwholesome trade disciplines that are none of their making.

As members of the ACP group, trade between the SADC States and the EU has always, to a large extent, been regulated by the Lome Convention. This is why economic commentators argue that the Lome provides the most favourable terms, while the GATT/WTO disciplines provide the least favourable.⁷¹⁹ SADC and COMESA would conduct, as they have indeed done for the last four decades, most of their international trade with the EU under the Cotonou. This option provides the greatest certainty and, consequently, the most reliable export stability for the preference recipients among all

⁷¹⁷ Munetsi Madakufumba - South African Research and Development Centre; the IGD Occasional Paper No. 21 TIPS Workshop supra at p. 46

⁷¹⁸ Ibid

⁷¹⁹ AWEPA: South African Accession to the LC: the background issues and questions" in Central Europe and Southern Africa in transition", AWEPA Conference Documents, Vienna Oct. 1992: BI B17, and Stevens C et al.: "EU-South African Trade" in International Affairs vol. 69, No. 1, 1993: 92-94. See also Stevens, et al supra at p.101

the EU trade regimes. It is plausible within the framework of this study, to investigate the extent to which these trade links interface within the southern Africa region.⁷²⁰

SADC aims to establish a free trade area and as such would be a natural partner for the EU in the proposed REPA arrangement. However, at the moment SADC is constrained by a number of both internal and external factors in moving in that direction. Until these problems are overcome, it will be difficult for the EU to negotiate a REPA with the SADC. These reasons are institutional, political, legal and economic. Massdorp⁷²¹ contends that SADC is yet to achieve a high level of integration and the institutional structure currently is not conducive to negotiating regional trade arrangements. This is highlighted by the difficulties in making progress with the SADC Trade Protocol and indeed with the other protocols.

The Lome has always determined the terms of SADC's trade with the EU, which is one of the most important trade partners, for a quarter a century. Whatever is agreed over the next two years, it is likely that there will be substantial changes. The gist of the argument is that, despite its limitations, the Lome has had considerable value to SADC member States. Like we have pointed out before these advantages run the risk of dilution over the next decade regardless of what happens in the ACP-EU negotiations for a post-Lome regime. This is why it is expedient for SADC to start evaluating its medium-term strategy.

South Africa will require twelve years to reach full reciprocity with the EU.⁷²² This is considered to be a rapid schedule for restructuring its economy to deal with the downside effects of the greater economic might of the EU. Given this fact, it is highly unlikely that progress will be made before 2012⁷²³ for any of the ACP regional institutions to arrive at coherent and workable free trade areas amongst themselves before the EU-SA agreement become fully reciprocal. This raises concerns about what time frame is reasonable for even considering any free trade agreement with the EU by the ACP member States. Certainly, SADC would need to reconsider this issue should it

⁷²⁰ Stevens, et al supra at p.111

⁷²¹ Massdorp: IGD Occasional Paper No. 21 TIPS Workshop Proceedings supra, at p.50

⁷²² See discussion on the TDCA at chapter five above

⁷²³ Certainly for some, not even by 2020

fail to succeed in establishing its own free trade area within the eight-year time frame as set, which begun to run as from 2000.⁷²⁴

SADC is far from graduating to a customs union status. Legally any agreements, which the EU proposes to enter with SADC, would have to be signed with individual members. SACU could be expected to negotiate jointly. But there are difficulties with this too. It must be pointed out that Lesotho is in the category of the least developed countries, and therefore has a guaranteed access to the EU and hence it is entitled to a special negotiating mandate.⁷²⁵ The wide range of tariffs that are operational currently within the region further complicates the process. Those countries with high tariffs will be at a disadvantage relative to the SADC countries with more liberal tariffs. There will also be immediate competitive effects and potential effects on the location of future investment in the region.⁷²⁶

The EU is unwilling to let regional issues affect its negotiating stance and has shifted all responsibility for reconciling regional dimensions to South Africa.⁷²⁷ It is clear that the EU-SA / Cotonou / SADC configuration complicates integration processes in the region. Parties must in this vein prepare themselves for a truly abrasive engagement on the appropriate legal instruments that would catapult the EU-ACP States into the new millennium.

⁷²⁴ R H Thomas on the EU-SA TDCA Regional Workshop on Cotonou-ACP-EU Agreement supra at p.19 See Chapter Five for a detailed discussion on the proposed SADC free trade area

⁷²⁵ Massdorp, IGD Occasional Paper No. 21 TIPS Workshop Proceedings supra at p.56

⁷²⁶ A further complication concerns the concluded EU-SA Agreement. South Africa is also a member of SADC. Since one of the objectives of the REPA is to strengthen regional integration, a mechanism would have to be found to link the two free trade area Agreements. Furthermore, BLNS countries are linked to South Africa through the SACU. As such they are *de facto* part of the EU-SA Agreement. They could not therefore also be part of a separate free trade area with the EU through SADC. See Imani Report supra at p.58

⁷²⁷ An illustration of this stance is the EU's recent interpretation of an obscure annex to successive Lome Conventions on trade between Swaziland and governments to applying the same customs duties to EEC imports as those applied to "the other country in the customs union i.e. South Africa. CF - European Research Office, "The EU-SA Free Trade Negotiations: Regional Implications", April 1996. See also R. H. Thomas Regional Agreement & the WTO 8th Annual Conference, supra at note 126

7.7 Implications for integration processes in the region

Economists are of the view that the benefits emanating from the trade relationship between the EU-ACP have been noticeable.⁷²⁸ For example, the stability and predictability of the trade preferences became an import incentive for investment. This was particularly apparent when Lome IV was concluded in December 1989 for a period of ten years instead of the usual five. Non-reciprocal preferential access created more favourable market conditions and progressively stimulated economic growth in certain of the beneficiary countries although the extent and distribution of these benefits has been limited.⁷²⁹

Another dynamic effect is what has come to be known as the 'lock in' of policies. The argument goes that the Cotonou would create a system of trade liberalisation and other obligations between the EU and east and southern Africa region. The threat of sanctions against defaulting member States would presumably prevent them from reneging on their obligations. This in turn would improve investor perception, especially of the SADC region, and therefore increase investment. As a result the region would benefit from effects such as technology transfer and employment creation. Kato,⁷³⁰ however, pours cold water on such prospects. He opines that the experience of many attempted regional integration schemes in Africa has been that signatory countries have done very little to keep their obligations after signing a regional contractual agreement. This would explain the perennial trade wars that dog many regional integration regimes in Africa today.

Some economic commentators have advanced the argument that southern Africa's policy regimes will gain more credibility as a result of the Cotonou partnership with the EU.⁷³¹ This argument has its origin in the NAFTA experience. In this regard, economists have argued that the primary benefit of NAFTA to the Mexican economy has been a gain in policy credibility as a result of its economic policy obligations, vis-à-vis Canada and the

⁷²⁸ Rosalind H. Thomas: The EU-SA TDCA Regional Workshop on the Cotonou-ACP-EU Agreement supra at p.4

⁷²⁹ Countries clearly benefiting from the advantages of the trade preferences given under the successive Lome Conventions were limited in number and have included Fiji, Jamaica, Kenya, Mauritius and Zimbabwe. These countries were able to use the preference successfully to diversify from trading in traditional primary commodities and their by-products (e.g. coffee, cocoa, banana and sugar) into non-traditional exports such as clothing, processed fish and horticulture and floricultural products. See Commission of the European Communities (1996). 'Green Paper on relations between the European Union and the ACP countries on the eve of the 21st Century: Challenges and options for a new partnership' COM (96) 570 final, Brussels 20 November.

⁷³⁰ Massdorp, IGD Occasional Paper No. 21 TIPS Workshop Proceedings supra at p.17

⁷³¹ R H Thomas Regional Arrangement & the WTO 8th Annual Conference supra at p.25 note 126

USA under the Agreement. Cassim⁷³² argues that although there might be some merit in this argument, the Mexican case was very specific and must be treated as such. Indeed not only are the Mexicans and USA economies contiguous and do register a high level of trade with each other, yet the Mexican government was also suffering a serious credibility crisis prior to the agreement.

In view of the recent political developments in east and southern Africa and the other myriad negative socio-economic perceptions regarding the economic viability of the region, there is no doubt that the region too is in dire need of a credibility jerk-up. This argument implies that even if a free trade area agreement may have a negative effect on an economy from a static point of view, this might be offset by the gain in credibility, especially if it results in increased foreign and domestic investment.⁷³³

Thomas⁷³⁴ begs to disagree and contends instead that, such an outcome has only been proven in the case of Mexico. She postulates that the mere fact of states entering a free trade area with the EU may not have similar effects in southern Africa. She singles out South Africa, which she says, did not negotiate a TDCA with the EU primarily to gain credibility. The point taken by Thomas no doubt holds considerable force. One must, however acknowledge the fact that the EU-SA Agreement carries substantial credibility spin-off for South Africa in particular and the east and southern Africa region in general. It is also true that issues such as labour market flexibility and corruption may influence perceptions of a country's policy credibility more than its trade agreements.⁷³⁵

Free trade areas are operationally difficult to administer. The South African government has spent substantial financial and human resources on negotiating a trade agreement with the EU. This did not only include the financial cost of consultants, but also the opportunity cost of spending valuable time and resources negotiating the Agreement. Government officials could have spent the time and resources on a variety of other critical issue areas, for example on WTO matters. If this is a critical issue for South

⁷³² Rashid Cassim: A critical Assessment of the Impact Study; IGD Occasional Paper No.21 TIPS Workshop, supra at p.20

⁷³³ Ibid.

⁷³⁴ See Rashid Cassim, supra at p.20

⁷³⁵ Ibid.

Africa, it is an even more burdensome endeavour for other states in the region that are less endowed in resource outlay.⁷³⁶

On the one hand, Cotonou preferences would literally divide SADC in half and could weaken it as a regional entity. On the other hand, the continued or reinforced dependence of half of its member States on the Lome type trade provisions could contribute towards perpetuating their status as LDCs. This at the expense of encouraging the processes of the convergence in economic strategies and levels of economic development between them and other developing countries through targeted regional programmes. In the result, it is a catch 22 situation from which regional states would have to work extra harder to extricate themselves.

States in the east and southern Africa region already have virtual free access to the EU market under successive Lome and yet the result since 1975 has been limited. Nevertheless, there have been clear benefits in a number of SADC countries as a result of this free access. Diversity and expansion of exports coupled with new investments have been experienced in several countries. Whilst Mauritius has been an outstanding example in this regard, several other SADC countries have experienced significant investment in export production targeted toward the EU market. Such investment could be expected to continue and possibly increase under the REPA.⁷³⁷

It stands to reason that the lesser and least developed countries' fundamental need is to have the time, policy 'space', and political right to pursue their own economic development and diversification needs. These countries also crave to identify their essential requirements and optimal strategies with respect to external economic relations and external inputs. It is only within such strategically conceived framework that improved financial and technical assistance, and increased foreign investment can be made to be useful or at least much less exploitative.⁷³⁸

⁷³⁶ Ibid.

⁷³⁷ Massdorp states that the least developed countries would benefit most from the REPA in this respect given that the LLDCs would retain their market access facility, IGD Occasional Paper No. 21 TIPS Workshop Proceedings *supra* at p.61

⁷³⁸ UNCTAD World Investment Report reveal that profits rates for foreign direct investment in Africa - at an average of 25% - were much higher than in either developed or developing countries for most years between 1980 and 1984. Its most recent study reveals that profit rate rates are now running at 29% for foreign investors in Africa. See also Rashid Cassim 'A critical assessment of the Impact Study, *supra* at p. 31

Economic commentators are united in the conviction that reciprocity of trade preferences will open up the regional markets to EU exports.⁷³⁹ This development, they argue, could thwart the objective of SADC to use trade integration to achieve industrial development and diversification. This is so in view of the fact that regional producers would be unable to compete with EU producers, particularly in manufactured goods.⁷⁴⁰ This scenario would also contribute to the de-industrialisation of SADC economies since local manufactures would not be able to compete with highly subsidised agricultural and sophisticated industrial goods that would come from the EU.⁷⁴¹

The foregoing argument flies in the face of the Lome experience in this regard. States in the east and southern Africa region have interfaced with the EU under Lome for a considerable period of time yet none of this partnership materialised. It cannot be argued that the Lome preferences were such that the EU firms found them terribly onerous to penetrate the SADC market. The EU firms could have easily accessed the regional market if they so wished but they did not. There is no indication that the continued negative attitude displayed by EU firms towards the region would undergo any significant change upon the implementation of the proposed REPAs.

Another major drawback at this stage is the weak level of market and economic integration. States in the east and southern Africa region still have a long way to go before their macro-economic policies are conducive to a free trade area between themselves, let alone being conducive to conclude a REPA with the EU.⁷⁴² The SADC States are discouraged by the time, human, financial and other policy resources it demanded from South Africa to reach an agreement with the EU after 21 rounds and 40 months of negotiations. Most ACP countries are less endowed with resources and may lose valuable opportunities if they have to negotiate similar agreements with the EU.⁷⁴³ It

⁷³⁹ Thomas says that this could thwart SADC's objective of using trade integration to achieve industrial development and diversification because regional producers are unlikely to be able to compete with EU producers, particularly in manufactured goods, R.H Thomas Trade Liberalisation Issues, SADC-EU Seminar Report *supra* at p.49

⁷⁴⁰ See Massdorp: Study of the Impact of introducing reciprocity, IGD Occasional Paper No. 21 TIPS Workshop *supra* at p.14

⁷⁴¹ It would appear reciprocal regional free trade areas are at the core of the EU's post-Lome scenarios, even though the EC is being prevailed upon to provide alternatives for the LLDCs in the ACP group. Such preferences would be in the form of continued LC-type preferential access to the EU market. For non-LDC ACP countries the preferred pegs would be an inclusion into the EU's GSP for access to the EU market. Dot Keet; IGD Occasional Paper No.21 TIPS Workshop, *supra* at 31

⁷⁴² Massdorp, IGD Occasional Paper No. 21 TIPS Workshop *supra* at p.14

⁷⁴³ Kato Lambrechts, Preface to the IGD Occasional Paper No.21 TIPS Workshop, *supra* at p.1

is in view of this concern that the Cotonou has promised financial support for capacity building in the ACP human resource development.

Indeed the time taken for SADC to negotiate its own Trade Protocol, the time it is taking to renegotiate the SACU agreement; and the time for the EU-SA Agreement to come to fruition, all indicate that it will not be easy for the EU to negotiate a REPA with regional States. The anticipated time frame may not be realistic. Furthermore, at a recent SADC/EU Seminar on Trade Liberalisation there was a strong statement by the participants from the SADC region that the region was not ready, and was unlikely to be ready by the time envisaged, to negotiate a REPA with the EU.⁷⁴⁴ One is inclined to wonder whether the ACP States would ever have enough time to integrate their battered economies into the World Trade System. If Lome has been in existence for more than four decades, what, then, would be the measure of sufficient time for the ACP States to mature into competitive economies?⁷⁴⁵

7.8 Concluding Remarks

In chapter two we noted that regional trade arrangements in east and southern Africa region have been intended as a mechanism for enhancing the competitiveness of national and regional economies of the member States. Indeed, the motivating force for Regional Trade Arrangements extends beyond trade and encompasses far broader issues.

We have walked through the body of the Cotonou Agreement and have noted that despite its transitional character it nonetheless replicates other regional regimes in item coverage. We have noted that the Cotonou, like other regional instruments, covers a wide spectrum of sectors. These sectors are technology, foreign direct investment, money and finance, services, labour markets, government procurement, environment and competition policies. We have argued that this comprehensive coverage is within the much wider framework of integrating the region into the global economy.

⁷⁴⁴ SADC/EU Seminar on Trade Liberalisation, Dar Es Salaam 5-7 May 1988

⁷⁴⁵ The degree of asymmetry between the EU and the east and southern Africa economies is currently too large. Admittedly it is too soon in the day to seriously consider a move towards free trade between the two regions, even one that allows for asymmetry in implementation. This lustre performance notwithstanding economic commentators insists that the Lome preferences will cease to have any practical value during the second half of the next decade. They argue that at best, the ACP has a window of opportunity, which must be used to best effect. See Massdorp, IGD Occasional Paper No. 21 TIPS Workshop, supra at p.50

We have commented that the Cotonou does well to unequivocally acknowledge the different needs and levels of development for the ACP countries and regions. The chapter has noted that the Cotonou is crafted in a deliberate fashion in order to build on and strengthen integration process in east and southern Africa region in a coherent and efficient manner. This chapter has highlighted the centrality of the Private sector interest in enhancing investment opportunities. We have noted the unmistakable synergy in the treatment of the private sector in all the regional agreements under review.

We have noted that despite the Cotonou's comprehensive coverage of regional integration friendly features, the problem, however, resides with the absence of economies of scale given that the regional States, with the exception of South Africa, deal in primary exports only. We have argued that such an undiversified economic base severely constrains intra-regional trade. The chapter has pointed out that the Cotonou's coverage of the services trade is more comprehensive than similar efforts undertaken in other regional instruments. We have pointed out that the services sector rolls out the road map to the economic growth infrastructure and hence deserve to be treated to more comprehensive disciplines.

We have noted that the central theme of bringing the private sector aboard the integration processes resonates in all the regional instruments. The Cotonou has nonetheless surpassed other instruments by making broader commitments on the private sector support and development. The Cotonou, for instance, pledges support for operations of an ACP-EU private sector business forum whose main objective would, among other things, be to facilitate dialogue within the ACP/EU private sector and the bodies established under the Agreement. We have noted that this important innovation will bring together all entrepreneurs in the region for the common good of investment promotion.

On the all-important question of rules of origin we have noted that the EU is committed to the harmonisation of the rules of origin in all its free trade agreements. We have urged that the regional States must resolutely object to any further restriction on the already onerous rules of origin, which they have to fulfil in order to obtain preferential access to the EU market. Our view on this matter is that the Cotonou has, for obvious reasons performed dismally on its coverage of the origin rules. We have also argued that

provisions on the dispute settlement disciplines are clearly inadequate as a catalyst for regional integration.

We have pointed out that the main area of flexibility in the WTO rules that gravely concerns the ACP States and one that the Cotonou fails to address regards the principle of reciprocity and differentiation. We have urged for more flexibility in the WTO on this score to augment integration processes in the region.

We have noted that strategically speaking, South Africa thus finds itself astride two trade regimes, which one might argue also characterise its state of development. We have then demonstrated how South Africa is strategically placed right at the vintage point within the Cotonou framework to augment and ultimately actualise the deepening of integration processes in the region.

The chapter has identified and explained what measure the Cotonou should contribute to integration processes in the east and southern Africa region. We have argued that SADC and COMESA would conduct, as they have indeed done for the last four decades, most of their international trade with the EU under the Cotonou. This option provides the greatest certainty and, consequently, the most reliable export stability for the preference recipients among all the EU trade regimes.

We have reviewed the prospects for the proposed REPAs and have examined in some detail the arguments advanced for and against these arrangements. We take the view that although these arguments carry substantial merit, it is nonetheless unlikely that the proposed REPAs would differ from the Cotonou structure in any significant measure.

Chapter Eight: The Dilemma of Regional Integration in Southern Africa:

Is intra-bloc co-operation the answer?

8.1 Introduction

In the preceding chapters we have examined three main preferential Agreements that conglomerate in the east and southern Africa region. These are; the EU-SA Agreement, the SADC Protocol and the Cotonou Agreement. We have noted that a number of important events, which have a bearing on regional integration initiatives and indeed which would tend to complicate the process are occurring within the eastern and southern Africa region. These events are happening simultaneously with a global march toward greater liberalisation. It is noteworthy that many of the SADC members are party to COMESA (hereinafter 'the two blocs) and have within the latter agreement adopted a programme to deepen trade relations amongst themselves. To what extent does this confuse even further, the two regimes' integration agenda? The complexity obtaining here is magnified by the existence of two customs unions, that is the SACU and the EAC within the precincts of the two regimes.

No doubt the biggest challenge facing regionalism in east and southern Africa is the dilemma occasioned by the confluence of COMESA and SADC trade regimes in the region. This chapter examines the implication of the SADC-COMESA-Confluence for the integration process in the east and southern Africa region. The two blocs have numerous common internal weaknesses, which call for urgent restructuring if they are to survive the challenges posed by the wind of globalisation. The chapter would highlight areas of common weaknesses between the two blocs. This discourse would help to demonstrate the necessity for co-operative approach. We will then explore and seek to explain the motivation that drives states to double in identical regional regimes. The proliferation of identical regional regimes has raised serious concerns as to the viability of this nascent regional integration process. The chapter would review what commentators have suggested as being the best way forward and argue that the options given thereby fail to address the root cause of the problem.

One particularly central threat that runs through the two blocs' objectives is the ultimate desire to realise an African Economic Community. We suggest that the best way to achieve the stated objective is to begin this difficult process from the known to the unknown. We then look at the role the two foremost customs unions - EAC and SACU -

should play in actualising this enduring dream. South African is, owing mainly to its advanced economic structures, at a vantage position to influence the process of deepening integration in the region. We examine how South Africa factors in this fascinating integration equation.

In the final analysis, we argue that the reality of the proliferation of identical regional regimes is here to stay and this hard fact should be acknowledged as a first step to looking for workable programs to deepen integration in the region. We argue that the practical answer to this regionalisation conundrum lies in co-operative approach. We then demonstrate the necessity for such co-operative approach.

The chapter then identifies areas that are ripe for a co-operative approach between the two blocs and shows the respective implications of such discourse. The chapter concludes that given the southern Africa track record in region integration and the current regional and national challenges, the path of regional integration can be expected to proceed haltingly with disputes among member states and diversions, as countries focus on national priorities. We argue, in the main, that co-operation will go along way in allaying some of these unavoidable integration undercurrents.

8.2 Motivation for multiple membership

The key regional organisations and preferential trade arrangements that exist within the eastern and southern Africa region are as follows: SADC, SACU, the EUSA Agreement, EAC, the COMESA, the CBI and the Cotonou. Countries in the region invariably double membership in these regimes to varying degrees. Double membership, however, features prominently in the SADC and COMESA. Memberships of each of these groupings influence not only trade patterns in the region but also the implementation of the two regimes' respective integration disciplines. Intra-regionally, there are three tiers of relations:⁷⁴⁶ SACU and the EAC which together exhibit the deepest level of integration; SADC which until 1992 pursued sectoral co-operation; and COMESA which has attempted to foster market integration among the countries of the east and southern Africa and Indian Ocean Islands. Botswana and South Africa are the only countries that have not ventured membership in the COMESA.⁷⁴⁷

⁷⁴⁶ In addition Tanzania is a member of the newly-re-established EAC initiative, Mauritius is a member of the Indian Ocean Commission (IOC) and five of the SADC countries participate in the CBI

⁷⁴⁷ R. H Thomas, Trade Liberalisation issues, supra at p.42

A study of the variables that determine whether a country will join another in a bilateral arrangement found that political relations, proximity, common borders, openness to trade and small economic size are all but cumulatively important.⁷⁴⁸ These variables were found to be important in explaining whether agreement will be sustained. Although most African countries conclude regional agreements with their neighbours, they have not always pursued open trade regimes, nor have political relations always been cordial.⁷⁴⁹

Some commentators advance the view that countries with good political relations will probably have similar ideals.⁷⁵⁰ This makes negotiations and reaching consensus on a broad range of issues much easier. There will also be more willingness to cede sovereignty in certain policy areas to the regional body made up of members with which each country has good relations. The intractable political instability in several parts of Africa may be important in explaining the unwillingness to develop strong regional institutions and the lacklustre performance of the existing regional integration initiatives.

One notably strong persuasion for multiple memberships in different regional groupings that succinctly captures the convoluted regionalism equation in sub-Saharan Africa is the hope to get aboard the gravy train of donor funding.⁷⁵¹ Most of these states maintain membership in numerous regional regimes not for purposes of promoting trade but with a hope of tapping on the gravy train of donor funding.⁷⁵² For instance, SADC's sector projects are for the most part donor funded and so are COMESA's. Given the burden that is brought to bear on national priorities, especially the incidence of grinding poverty

⁷⁴⁸ Brada et al, 1993 in Thomas Trade liberalisation issues at p.42

⁷⁴⁹ See discussion on implication of COMESA-SADC Confluence at chapter 8 below.

⁷⁵⁰ See for example Ernest Aryeetey: 'Sub-Saharan Africa Experiences with Regional Integration: Trade Reform and Regional Integration, seminar, supra at p. 414

⁷⁵¹ Pundits fault the aid approach pointing out that the system is susceptible to corruption whilst trade is not. Developed countries have been urged to offer Developing countries a fair trade deal and the latter would build their own roads, hospitals and schools with taxation revenue like other nations. See remarks by Mutuma Mathu at <http://www.nationaudio.com> infra

⁷⁵² One reflective commentator has severely criticised the aid syndrome in the most unflattering terms. He avers that developing countries have played the aid game long enough. He counsels that after 40 years of aid and little progress, it is time to change the game. The commentator has a soft spot for the former US President, Bill Clinton's policy of trade in place of aid, which he applauds as a more sustainable and dignified way of solving what he calls 'the African miasma of poverty'. (See Mutuma Mathu in the Sunday Nation, February 17, 2002 at <http://www.nationaudio.com> Indeed it is difficult to fault this reasoning in view of the fact that in the two years the Americans have allowed some African countries duty-free export of textiles to its market, export earnings have grown in leaps and bounds. South Africa, Mauritius and Kenya have particularly ripped windfalls under the AGOA facility. It is estimated that more than 200,000 jobs have been created in Kenya alone owing directly or indirectly to the AGOA export reprieve. (Remarks attributed to the Kenyan Minister of Trade and Industry Mr. Nicholas Biwott reported in the Daily Nation online on February 17, 2002 at <http://www.nationaudio.com>

in the region, no state would let pass an opportunity to anchor its membership to an organisation that would cushion such budgetary constraints.⁷⁵³

The two blocs have been recipients of a generous share of donor funding for project development in their respective spheres of influence. It then goes without saying that countries that maintain double membership in these trade regimes stand to benefit twice in donor-supported projects within their borders.⁷⁵⁴ Donor support is a direct and immediate benefit. It is unlike intra-regional trade promotion activities whose benefits may or may not mature. Trade liberalisation disciplines, too, are more onerous than the soft pickings availed by donor-funded projects. This is why most of these states are happy to anchor membership unto any regional bloc that has the potential to attract direct foreign funding for projects that would ultimately trickle benefits to their respective countries.

8.3.1 Implication of the SADC-COMESA confluence

Like we have noted before, the biggest challenge facing regionalism in the east and southern Africa region is the conflict between COMESA and SADC⁷⁵⁵. The two blocs bring together 23 countries, ranging from Angola in the South to Egypt in the north. COMESA groups the relatively more industrialised Kenya, Mauritius and the least industrialised Djibouti, Ethiopia, Somalia, and Zambia. Moreover, COMESA encompasses about five other regional groups, with some members belonging to three

⁷⁵³ Although the anti-aid protagonists point out that what Africa needs is open trade that will make her people prosperous. Trade will benefit the farmer and give incentives for more production; Africa cannot be productive through aid, they argue. A keen analysis of the situation in Africa reveals two important points. The fact that aid has helped little in reviving economies on the continent. Many aid recipients have been losing ground economically. Seventy countries are poorer than they were in 1980, 43 are worse off than they were in 1970. See remarks by James Shikwati, in the Daily Nation on July 10, 2002 at <http://www.nationaudio.com>

⁷⁵⁴ When it comes to sharing these resources, the EU has expressed its desire to work with fewer regional organisations selected by the ACP member states themselves. No doubt, the geographical coverage, capacity of each of the two blocs and moreover, the economic integration mandate qualifies them to more donor funding under the Cotonou facility. (See the statement by Commissioner Nielson, at <http://www.comesa.int> supra)

⁷⁵⁵ Thomas notes that the old SADC was focused on sector/project co-ordination, while its sister institution the PTA (the present COMESA) was oriented towards trade and finance. This historical division of labour is now complicating matters within SADC. This conflict is caused mainly by a significant change of course by SADC towards trade integration an area that was previously a preserve of COMESA. See R. H. Thomas, 'Regional Arrangements and the WTO: The case of the SADC: Paper submitted for presentation at the 8th Annual Conference of the African Society of International and Comparative Law, Cairo, Egypt, 2-5 Sept. 1996 at p 12

different trade regimes. For instance, Tanzania belongs to SADC and the EAC, and Lesotho, Namibia and Swaziland are members of SADC and SACU at the same time.⁷⁵⁶

In this polarised scenario, the potential for conflict of interest is real and looms large like a colossus over the two blocs' integration initiative. It is already evident that arriving at consensus necessary for the implementation of regional integration policies within the two blocs is often difficult. Proliferation and duplication of functions give rise, at the regional level, to conflicts over mandates and to a divided loyalty among governments. At the governmental level, the effect of this conflict is to impose heavy financial and administrative burdens on the already strained member states' domestic budgets. The regional institution's budgets are invariably too small for the Herculean tasks governments routinely assign to them.

The contrary view now being raised is that smaller regional bodies are more viable in the short run. It is argued that such smaller but well-functioning units would then form a bigger bloc in the long run.⁷⁵⁷ It is imperative for the two blocs to take key strategic decisions about their own future. It is no secret that as commentators grapple with the issue of overlapping membership, and what it portends for deepening integration in the region, the two blocs are not relenting in their zest to expand.

A couple of years ago the two blocs would probably have had a better sense of the outer limits of their own geography. Right now, it is guesswork because institutional expansion would inevitably come at the expense of deepening the integration process. The greater the number of countries, the higher the number of unknown variables and, therefore, the more complex the overall equation. It is possible that the two blocs have not carefully evaluated how expansion will impede the deepening of integration. It is the same challenge that the Europeans themselves encountered as they deepened their own integration through the monetary union while expanding eastward at the same time.⁷⁵⁸

In moving toward trade integration in the last few years, SADC, which embraces 11 COMESA states, has adopted measures that involve tariff reductions and the removal of

⁷⁵⁶See Louis et al *supra* at p. 480

⁷⁵⁷ Indeed, some SADC member states have expressed their desire to break away from COMESA. Louis et al *supra* n. 3 at p. 467

⁷⁵⁸ See chapter three for a detailed discussion on the EU's integration experience

non-tariff barriers.⁷⁵⁹ It seeks greater co-ordination of external tariffs and the promotion of the free movement of capital and people. It also has an interest in setting up regional infrastructure authorities and a development bank. COMESA on the other hand has similar objectives and has set up the very same copycat structures to vehicle her toward the much-coveted ultimate goal of a common market. The co-existence of the two blocs is certainly questionable considering the congruence of their objectives and their individual circumstances.⁷⁶⁰

The two blocs make provision to accommodate members with prior obligations to other regimes.⁷⁶¹ The only caveat is that the affected members are urged not to renew such membership upon its expiry in the case of COMESA and to immediately review such membership in the case of SADC.⁷⁶² This also means that once a CET has been established in 10 years time, SADC members who are in COMESA would find it extremely difficult to maintain their double membership. This is due to the fact that a common market with a CET is a deep form of integration that would not lent itself to double membership in other regimes within the region.

Whenever the innovative adulteration of a free trade area and customs union fundamentals is allowed within a region, the result is a diluted customs union that is rendered overly irrelevant to its core functions. This is true for the SACU and the EAC customs unions.⁷⁶³ The states that constitute the membership of these customs unions are in the habit of moonlighting membership in other trade regimes where they are often called upon to give trade concessions that are unsavoury to the customs union edifice.

⁷⁵⁹ *Article 3* of the SADC Trade Protocol

⁷⁶⁰ In general, regional integration arrangements in sub-Saharan Africa have been characterised by a number of peculiar features, not always present in other arrangements elsewhere. These includes, existence of multiple objectives, absence of strong supranational institutions, inadequate sanctioning authority, non-implementation of harmonisation provisions, lack of political commitment, unclear perceptions about gains, inadequacies in the distribution of the gains from integration, inadequate compensation mechanisms and stringent trade liberalisation schemes. See for example Ernest, Trade Reform and Regional Integration Seminar, *infra*, at p.408

⁷⁶¹ *Article 180* of the COMESA Treaty provides that where, by virtue of obligations under an existing contract entered into by a Member State and such a Member State is unable to comply with the provisions of this Article, the Member State shall, upon the entry into force of the Treaty, notify the Council of this fact.

⁷⁶² The Member State shall, however, not renew or extend such contract at its expiry. Member States agree to the gradual establishment of a common external tariff in respect of all goods imported from third countries within a period of ten years from the entry into force of the Treaty and in accordance with a schedule to be adopted by the Council. See *Article 180 supra*

⁷⁶³ See discussion on EAC below

Article 49 of the COMESA Treaty, is one such case in point. Member States have undertaken to remove immediately upon the entry into force of the Treaty, all the then existing non-tariff barriers to the import into that Member State of goods originating in the other Member States and thereafter refrain from imposing any further restrictions or prohibitions.⁷⁶⁴ The difficulty here is that Lesotho, Namibia and Swaziland (LNS) constitute the SACU, which is a common market with a CET. In which case it is impractical for them to participate in COMESA's tariffication program, particularly when the dominant member in this case South Africa is not in agreement.

At the time of the signing of the SADC Trade Protocol, which provides for the gradual liberalisation of intra-regional trade⁷⁶⁵, 10 of its members had already effected 70 percent tariff reduction under the COMESA Trade Liberalisation Program.⁷⁶⁶ Thomas⁷⁶⁷ notes that the overlap in membership of the various arrangements in the region could hamper implementation of the SADC Trade Protocol. She explains that the SADC tariff lines would be higher than those of COMESA until at least 2006 and therefore trade between SADC members that also belong to the COMESA fold would be conducted under the COMESA arrangement. The foregoing scenario implies that the SADC Trade Protocol will only effectively cover non-COMESA SADC members. This proposition is explained by the fact that importers will clearly choose to pay the lower rates of customs duties under the COMESA umbrella.

In any event these states are, for all intents and practical purposes, South Africa's economic proteges. Indeed, the SACU tariff lines are set by South Africa, which means,

⁷⁶⁴ Provision is made for the purposes of protecting infant industry. A Member State may, impose for the purposes only of protecting such industry for a specified period to be determined by Council, quantitative or like restrictions or prohibitions on similar goods originating from the other Member States. This would be on condition that the measures are applied on a non-discriminatory basis and that the Member State shall furnish to Council proof that it has taken all reasonable steps to overcome the difficulties faced by such an infant industry. (See *Article 61* of the Treaty) Provision is also made where a Member State encounters balance-of-payments difficulties arising from the application of the provisions of the Treaty. In which case the affected member may impose for the purpose only of overcoming such difficulties for a specified period to be determined by the Council, quantitative or the like restrictions or prohibitions, on goods originating from the other Member States. (See *Article 83* of the Treaty)

⁷⁶⁵ With regard to trade in Goods *Article 3* states that the process and modalities for the phased elimination of tariffs and non-tariff barriers shall be determined by the Committee of Ministers responsible for trade matters (CMT) having regard to specific matters. This process involves front-loading by the more developed members such as South Africa and Zimbabwe whilst the least Developed states like Mozambique and Zambia are allowed to back-load hence the principle of asymmetry and differentiation in tariff reduction.

⁷⁶⁶ This excludes Botswana and South Africa who are non members

⁷⁶⁷ Trade Liberalisation Issues, Seminar Report supra at p.45

therefore, that no adjustment can be effected to the tariff lines without its prior approval. It is unlikely that South Africa is going to disrupt the SACU balance by conceding to COMESA's overtures - where it has no membership in the first place. The other complication on tariffication is that SACU's goods are in free circulation hence South African products would easily percolate into COMESA through one of the COMESA-SACU member states. Effectively, therefore, South Africa would indirectly benefit from a much lower COMESA tariff rate without incurring the corollary obligation of committing its membership to the regional body.

A number of studies have indicated that regional integration in sub-Saharan Africa generally and in southern Africa in particular are not significant determinants of intra-regional trade flows.⁷⁶⁸ Stimulus to intra-regional trade is more likely to come from the development and growth of the national economies and from a reduction of trade costs. The complementarities and tensions between the objectives of regional integration as envisioned by the two blocs and those of the domestic economic policy need to be explored if intra-regional trade is to be infused with the much needed buoyancy.

Ernest questions, for example, the impact of eliminating subsidies or infant industry protection assuming that these do not fall under permitted exemptions as required in terms of the two blocs' instruments on the domestic economy.⁷⁶⁹ This provision, he argues, runs counter to the principle that intra-regional growth can only spring from the growth of the domestic economy. It is also no secret that for the struggling regional industries to acquire international competitiveness, the injection of subsidies is an unavoidable option.

A summit of the heads of states held in Lusaka in January 1992 agreed to a merger of the two blocs. The argument was that the merger would make co-operation within the region effective by reducing duplication of activities. The effort was also seen as a means to a faster movement toward an African Economic Community through a single sub-regional

⁷⁶⁸ See Ernest Aryeetey: 'Sub-Saharan African Experiences with Regional Integration: Trade Reform and Regional Integration in Africa: Papers presented at the IMF African Economic Research Consortium Seminar, on Trade Reform and Regional Integration in Africa, Dec. 1-3, 1997; IMF Institute Washington, D.C at p. 459

⁷⁶⁹ Ibid.

group in eastern and southern Africa. The proposal seemed credible, given that the objectives of the two organisations clearly indicate many cases of duplication.⁷⁷⁰

8.3.2 Regime amalgamation and the donor factor

It stands to reason that in order to promote stable economic groupings, countries in the region should belong to the one economic group that fully represents their interests. This viewpoint assures that it is still possible for countries within COMESA to formalise as sub-regional entities without dual membership. These sub-groupings should be responsible for sectoral projects and harmonisation of macro-economic policies in their respective sub-region.⁷⁷¹ This no doubt, is an ingenious crafting which however falls short of addressing the root of the problem.

All these organisations have the same objectives. The irony is that the ultimate goal of the two blocs is to lay the foundations for a single pan-African trading bloc.⁷⁷² Eventually one of them will have to give up for the other. There have been consistent choruses from some policy makers urging Kenya and Uganda to join SADC so as to unify the regional integration equation. Not everyone is however receptive to this call. Some in SADC are of the considered view that deepening the present level of integration within the SADC should be the immediate priority for member states.⁷⁷³ This move, they opine is the only way to stimulate intra-regional trade rather than a directionless institutional enlargement that would eventually prove too unwieldy to focus programs. It is difficult to begrudge the logic behind this demur. The reasoning is materially merited.

The proposal for merger has largely been greeted with a cold reception among the majority SADC members. This is in part due to SADC's approach to regionalism. Thomas⁷⁷⁴ points out that COMESA is heavily preoccupied with the grand plan of promoting the African Economic Community. Conversely, she posits, SADC is largely

⁷⁷⁰ See Louis et al *supra* at p. 481

⁷⁷¹ In the medium term, calls for the implementation of SAPS within a regional perspective are likely to gain ground. Already, SAPS have helped to eliminate macroeconomic distortions in many of the countries in the region. Studies Mistry: *The New Regionalism: (1995)* *infra* and Thomas in 'Regional Arrangements and the WTO, *supra* at p. 28 (1995) show that countries in the region have implemented far-reaching economic reforms in the past few years and are set to continue in the coming years. A number of countries have market-determined prices, interests rates and exchange rates.

⁷⁷² That wish may come true although COMESA has moved faster than its peers have to implement free trade. This despite the fact that intra-COMESA trade in 1998 was lower than in 1970.

⁷⁷³ See remarks by Mark Ashurst, *supra*

⁷⁷⁴ R. H. Thomas: *Regional Arrangements and the WTO, supra* at p.12

project oriented and tends to attract the involvement of member countries. This observation overlooks the fact that COMESA too has developed numerous sector-oriented projects that are receiving substantial donor funding.⁷⁷⁵

The change of focus is a deliberate strategy on the part of COMESA to counter the monumental challenge posed by its erstwhile neighbour the SADC. Sector oriented projects are without doubt an ideal innovation for developing countries. It stands to reason that this strategy has the potential to attract massive donor funding by far more than the liberalisation program that has been the mainstay of COMESA's regional integration process. Liberalisation disciplines, like we pointed out before, in essence call for more sacrificial commitments from members. The attendant benefits for this otherwise engaging venture are distant and linger to mature whilst the sector project strategy promises instantaneous donor funded project rollout.

The benefits of the projects to member states are direct and therefore more noticeable than the formerly more policy oriented programs of the PTA and COMESA. Moreover, the projects are mostly donor funded, and therefore member states need not dig deeper into the scarce national resources to finance regional projects. More recently, the entry of the more powerful and prosperous South Africa has strengthened SADC at the expense of COMESA. As a result, some countries in southern Africa have expressed the desire to pull out of COMESA, while other potential members have indicated that they would not be taking up membership.⁷⁷⁶ It is, perhaps, on this basis that some commentators have confidently predicted a mass exodus from COMESA to SADC. This eventuality comes at the courtesy of the attraction to the better economic prospects offered by South Africa - the regional economic power-house.⁷⁷⁷

In this thesis we beg to disagree with the foregoing prediction. There is ample evidence to suggest that the predicted exodus may not materialise any time soon. Not with COMESA having received considerable EU and World Bank funding for its integration programs lately.⁷⁷⁸ We have argued before that free project money is too strong an

⁷⁷⁵ See for example, the statement by the Secretary General -Erastus Mwenja, *infra*

⁷⁷⁶ Tanzania has pulled out of COMESA in preference to SADC while Lesotho, Mozambique and Swaziland have indicated that they may not take up their membership after all

⁷⁷⁷ Louis et al op. Cit. n.3

⁷⁷⁸ Under the Cotonou Agreement, 1.3 billion Euros are allocated for regional programmes. At the same time, COMESA has revealed that through member states' joint effort it has been able to mobilise

incentive for these countries to maintain double membership than decamp from COMESA merely to be seen to dance to the South African tune. In spite of its economic muscle, South Africa does not offer anything close to the massive donor funds injected into projects undertaken by each of the two blocs.

If anything, South Africa, its relatively advanced economic structures notwithstanding, is still very much dependant on the very same donor funding for most of its major projects. South Africa's dual economic structures put it in a position of an aid recipient rather than that of a donor for the region. The two blocs' membership consists LLDCs who hope to anchor membership to a supranational body like COMESA and SADC in the hope that these bodies would act as a conduit pipe for donor funded projects to trickle into their territories by virtue of such membership.

In our considered view, the quest for free donor funds is an attraction these struggling economies would be hard put to forbear.⁷⁷⁹ This insatiable zest for donor stipends explains the reluctance on the part of many SADC members to heed their own Protocol's edict to decamp from COMESA.⁷⁸⁰ It is also instructive that the call to reconsider COMESA membership is fronted mainly by South Africa and Botswana, the two sole non-COMESA members. Botswana should be seen in the light of its position as the host country to the SADC seat of power and hence the need to show solidarity with its own home based institution. As for South Africa, the beckoning responsibility to take the leadership role in southern Africa would have been severely constrained had it registered membership with COMESA.

close to US10 billion dollars for investment and infrastructure development. See statement by the Secretary General -Erastus Mwenja- on the Occasion of the Extraordinary Summit to the Launch of the Free Trade Area - 31st October, 2000 supra n. 14

⁷⁷⁹ It was recently reported that COMESA had received a Sh64 million boost from the United States. The money would go to COMESA's Court of Justice and to develop capacity for trade within the jurisdiction of American Growth and Opportunity Act. The US Trade Representative Robert Zoellick was quoted to remark that his government would give scholarships for trade officers in the COMESA member countries to undertake a comprehensive training course on the World Trade Organisation in Geneva. Mr Zoellick is said to have stated that the money was part of a \$10 million programme to develop trade with Africa. Some \$8.7 million will go to an AGOA trade capacity building fund for SADC. Reported in the Daily Nation Online, the East African, Business section Friday, February 15, 2002 at <http://www.nationaudio.com>

⁷⁸⁰ *Article 27* of the SADC Trade Protocol urges member states that have membership in other preferential trade agreements to review the further application of such agreements with a view to attaining the objectives of the Trade Protocol. Though not expressly stated in this edict, is clearly targeted at the COMESA membership whose co-existence with SADC is viewed, as being inimical to the latter's integration objectives.

The reluctance to let go of the gravy train of donor pecks is in our view what oils conflict between COMESA on the one hand and SADC on the other. Disengaging from COMESA in the light of so much promise for better times ahead is too much of a bitter pill for these countries to swallow. And so the two blocs have gone full throttle to outshine each other in program roll-out in a strategy that is meant to captivate donor interest and thence attract more development funds to their fold. Furthermore prior commitments to COMESA's trade liberalisation disciplines render it tactically impossible for these countries to disengage in the medium term.

The proposition for the amalgamation of regions only serves to address the physical corpus of the regimes under review. It is, so to speak, a mechanical re-alignment of countries for convenient regionalisation. These arguments though portend, fail to address the teething problem of the dearth of intra-regional trade and the lustre flow of direct foreign investment in the region. This problem would persist in spite of the larger markets created by the process of regionalisation. The arguments also gloss over the debilitating problem of production and export capacity that has been the long-standing plague to regional economies.

This state of affairs is needless to say inimical to the deepening integration in the east and southern Africa region. It also contradicts the region's grand dream of coalescing into a pan-African Economic Union. This observation then begs the question whether this noble dream is, in fact realisable. We now examine whether, indeed, the existing structures in the region are a pointer to a super-highway for the realisation of an African Economic Community.

8.4.1 The super-highway to the African economic union

Some commentators have suggested that the best way to go about integration in the region is to strengthen the tried and tested regimes and then move forward from here.⁷⁸¹

This thesis postulates that deepening integration with neighbouring countries would lay a firm foundation for spreading outward to the uncharted territory further afield.⁷⁸²

⁷⁸¹ See, for example, Louis et al supra at p.485

⁷⁸² The other shade of opinion proposes that COMESA be broken up into smaller groupings with similar interests. Louis and Abuka explain that, countries near South Africa have common interest in trade, infrastructure, currency and security and these could form a strong regional group. The EAC states of Kenya, Tanzania and Uganda also have had experience with regionalism. They also possess a fairly good infrastructure, have common security interests and share trade which strengthens the case for the EAC. At the same time, so goes the argument, it does not prevent

The starting point, in our view is SACU and the EAC, which are the two established customs unions common to SADC and COMESA respectively. The two unions boast a deeper degree of integration than the two blocs. But there is a linkage between the two customs unions and each of the two blocs. Whereas COMESA is linked to SACU through the membership of the LNS, the SADC is on the other hand connected to EAC via the membership of Tanzania. The question is inevitable, is it possible that a jointer of the two well-grounded customs unions would offer the much-needed road map and act as a super-highway to greater and deeper integration in the region? There is no ready answer to this fascinating question.

It is safe to point out that there is certainly great wisdom in an attempt by the two blocs to commence their economic recovery program by moving from the known to the unknown. The SACU and EAC experiences offer far greater insights and lessons in the quest by the two blocs to take the trade partnership to the higher order of a common market. Mwenja seems to harbour this vision.⁷⁸³ He notes that the smaller regional groupings can be a fast track for COMESA's march to a common market. In order to allow South Africa to be a part of the regional trade regime SADC is also advocating a free trade area by 2008. According to Mwenja after SADC achieves a free trade area the east and southern Africa region would effectively link the Cape to Cairo.⁷⁸⁴ He is convinced that this is not a pipe dream any more as it was in the time of Cecil Rhodes.

Whether this grand much would become a reality in the foreseeable future only time will bear the proponents out. One thing is for certain though and that is the fact that the two blocs are in agreement that the final objective of their integration is to contribute to the implementation of the provisions of the Treaty Establishing the African Economic Community.⁷⁸⁵ In order to actualise this grand idea it behoves the two blocs to partner

Burundi the DRC and Rwanda from joining this grouping. This school of thought espouses the view that, the formation of a sub-group to cover Djibouti, Eritrea, Ethiopia, Somalia and Sudan may be appropriate. The remaining countries, it is suggested, should consider joining any of the three subgroups. It has been suggested that the PTA should remain and specialise in areas that cut across all countries in the region. In this regard, the PTA should deal with intra-regional trade liberalisation and work toward the unification of the sub-groupings for a future COMESA. The argument concludes that this dichotomy would help to establish more coherent and cohesive regional groupings.

⁷⁸³ Statement by the Secretary General -Erastus Mwenja- supra n. 14

⁷⁸⁴ Ibid.

⁷⁸⁵ Article 178 of the COMESA Treaty deals with relations with the African Economic Community. The SADC Trade Protocol sets out the objectives of the Protocol namely, among other things, to further liberalise intra-regional trade in goods and services on the basis of fair, mutually equitable

with other regional economic communities in the continent.⁷⁸⁶ The two blocs would have to implement their respective trade disciplines with due consideration to the provisions of the Treaty Establishing the African Economic Community.⁷⁸⁷

We now move to examine the strategic positioning of each of these advanced customs unions and how they relate to the two blocs in so far as they offer possibilities for deepening regional integration and ultimately catapult the region to the promised land of the African Economic Union. Given its domineering position and the new role it is playing as a pace-setter for economic growth in the region, we shall also examine the role and where South Africa factors in this integration equation.

8.4.2 The EAC factor in the integration equation

One of the initially successful regional groupings in eastern and southern Africa, especially during the colonial period, was the East African Community (EAC). The three countries making up the EAC, namely Kenya, Tanzania and Uganda had achieved significant integration during the colonial period. The treaty for the establishment of the Community provided for the removal of all trade barriers, and the community had a common external tariff and exercise duty plus common services. Tension that had emerged in the pre-independence era heightened in the post-colonial period as Kenya opted for a market-oriented approach, while Tanzania and Uganda leaned more toward a socialist system.⁷⁸⁸

This tension was exacerbated by disputes over the distribution of benefits. Kenya, being more industrialised than the other two derived a higher benefit than Tanzania and Uganda. Efforts to use the East African Bank to promote balanced industrial development failed because the bank focused its financing only on viable projects which largely favoured Kenya. These problems, among others, resulted in Tanzania and Uganda pressing for dissolution. The closure of the Kenya-Tanzania border was followed by

and beneficial arrangements, complimented by Protocols in other areas. The other related object is stated to be a contribution toward the improvement of the climate for domestic, cross-border and foreign investment. At the same time, the Protocol aims at enhancing development, diversification and industrialisation of the region. See the preamble to the Trade Protocol

⁷⁸⁶ Such groups like ECOWAS and also to revisit the Protocol on Relations between the African Economic Community and the Regional Economic Communities.

⁷⁸⁷ In the final analysis the Common Market or its successor, would then, at a time to be agreed upon between the Common Market or its successor and the African Economic Community, be converted into an organic entity of the African Economic Community.

⁷⁸⁸ See Louis, et al supra at p.476

political tension between Tanzania and Uganda during the 1970s. All these developments were exacerbated by the internal conflicts in the regional group. The Community finally collapsed in 1976.⁷⁸⁹

More recently, there have been serious efforts toward the revival of the East African Community.⁷⁹⁰ This has come about, in part, with a realisation by Kenya that being the biggest of the three economies there are benefits it could derive from a reconstituted and expanded market.⁷⁹¹ In addition, Uganda, which is landlocked, requires both Kenya and Tanzania's port facilities. As a result, the three countries have now promoted currency convertibility. Furthermore, they have also agreed to join onsite supervision of banks with branches across borders. At the level of immigration, an Eastern Africa passport is due for issuance to facilitate travel within the region. The EAC Parliament has been opened and the same is properly constituted and is fully operational.⁷⁹² With regard to policy co-ordination, the three countries have agreed to read their budgets on the same day as well as to a co-ordinated approach to foreign investment.⁷⁹³

⁷⁸⁹ Several lessons emerged from the experience of the regional integration efforts under the EAC (Ibid.)

⁷⁹⁰ Now coined the East African Co-operation. A meeting of a task force in Arusha, Tanzania, made recommendations to the draft protocol on the establishment of the East African Customs Union. The draft was then presented to the meeting of the EAC Permanent Secretaries responsible for Trade, Finance and Regional Co-operation, for further consideration. Some of the areas covered in the draft Protocol are the elimination of internal tariffs; harmonisation of commodity description and coding systems; establishment of the EAC Common External Tariff; simplification and harmonisation of customs documentation and procedures; harmonisation of exemption regimes; and EAC Rules of Origin. The Council of Ministers met on May 17 and 18 to consider and adopt the draft protocol. See the Daily Nation Online, the East African business section on Tuesday, May 14, 2002 at <http://www.nationaudio.com>

⁷⁹¹ Although the three partner states have argued that the advantages of an East African bloc, with a single market of 80 million people, far outweigh the disadvantages of surrendering their sovereignty, officials are still jittery over the uncertainties, which the changes would create. EAC officials say that the regional Union will create new business opportunities, improve revenue collection and attract direct foreign investment. Report by David Kaiza in the Daily Nation Online, the East African business sections on Monday, April 15, 2002 at <http://www.nationaudio.com>. At the heart of the stalemate is the demand by Uganda and Tanzania that goods from Kenya be subjected to a tax of 15 to 16 per cent, while their own goods enter Kenya at the zero rate. Fears that goods from Kenya, which has a more robust manufacturing industry, will swamp Uganda and Tanzania have bogged down progress on the economic and political integration of the community.

⁷⁹² The three countries for the first time read their budgets on the same day as a show of commitment to a common monetary area. The first East African Community's budget was presented in the regional parliament in Arusha in the backdrop of \$3 million (Sh237 million) in outstanding contributions by the three member states. Kenya's former foreign minister, the late Dr Robert Ouko was the last to read the budget for the collapsed community – the forerunner of the current one – at the same venue in 1977. The Daily Nation Online, the East African business section on Friday, May 3, 2002 at <http://www.nationaudio.com>

⁷⁹³ Louis et al supra at p. 476

Economic commentators point out that several measures need to be put in place to address issues relating to the distribution of benefits or the design of a special regional assistance vehicle.⁷⁹⁴ Yet as the Kenyan economy stagnates, Tanzania is looking south not just for investment but also for technology and skills.⁷⁹⁵ The courtship is, however, not entirely happy. The logic of merging national markets into regional trading blocs is based on the potential for exports. The potential to develop Tanzania as a base for manufactured exports remains untested, and it is unlikely to happen without money from South Africa. That would require big business in Johannesburg to play the kind of role in promoting new African industries like Germany assumed when it bankrolled the EU.⁷⁹⁶

South Africa must, however, move swiftly to address the high tariff lines it still maintains against its regional partners. Tanzania's exports such as cigarettes and textile, which could sell in South Africa, are hit with duties of up to 45 percent. The injustice of this asymmetrical tariff rate has not, however, deterred Tanzania from the appeal to anchor unto SADC's regional bandwagon.⁷⁹⁷ Tanzania reasons that if the potential for economic integration can be realised, the SADC promises far bigger rewards. As the poor sibling in each family, Tanzania has a good claim to preferential trading terms with any of these regional groupings in the run-up to free trade. Its decision to quit COMESA reflects the limited promise of a group dominated by Kenya has to offer.⁷⁹⁸

⁷⁹⁴ They contend that for future co-operation, Uganda may need to develop its power industry with greater market opportunities in the region for distribution in mind, while the exploitation as well as the management of the Lake Victoria environment is an area that appears appealing for regional co-ordination.

⁷⁹⁵ One commentator has put it more sarcastically that the role of a deserted husband falls to Kenya, the largest economy in COMESA grouping and until recently Tanzania's principal trading partner. (See the Business Day, 10th October 2001). It is a mark of the smaller country's gradual recovery and Kenya's decline that Tanzania in effect has chosen a future in league with South Africa. Historically Kenya has played a dominant role, but Tanzania is playing a very crucial role. The Tanzanian Minister of industry and Trade -Mr. Iddi Simba recently remarked; " We are a bridge between the EAC and SADC. We are committed to the SADC, as indeed we are for historical reasons to the EA Co-operation. We really want to play both of them at the same time". (See Mark Ashurst, writing from London - Business day 10th October, 2001)

⁷⁹⁶ Mark Ashurst, *ibid*

⁷⁹⁷ The chairman of the EAC Committee on Transport, Trade and Investment, Mr Yona Kanyomzi, said that Tanzania's position had complicated matters for the EAC Customs Union because it meant that while Kenya and Uganda did not belong to SADC, Tanzania's interests in it would inevitably be binding on both countries. See the Daily Nation Online the East African business section Tuesday, May 14, 2002 at <http://www.nationaudio.com>

⁷⁹⁸ There have been reports suggesting that Uganda is preparing to follow Tanzania to join SADC - all of which, from a vantage point of Nairobi, must make a sorry spectacle: the hoary old bride Tanzania and their closest neighbour Uganda running into the arms of the rich suitor from the South. See Mark Ashurst *supra* n. 68

The downside, however, for South Africa in opening up its market for Tanzania is that Kenyan goods would easily find their way into the South African market via the EAC customs union. This eventuality could witness a situation where even Egypt in the far north exports its products to South Africa through Kenya under COMESA and Tanzania via the EAC into SADC. The counter-argument to this is that South Africa stands to benefit immensely through the reverse view of the scenario.

What may hurt South Africa the most is where either under the Cotonou or COMESA arrangement cheap subsidised goods from the Far East markets percolate through these countries into South Africa's market. This, perhaps more than anything else, is the treble effect that South Africa fears when contemplating how far to open its markets to regional partners. There is no telling from exactly whence imports would be sourced in such a free circulation preferential trade area. The grim reality is made even worse by the weak to non-existence customs administration structures in some of these countries.

The EU notes that there is scope for sub-regional organisations like EAC and SACU to assume the role of Regional Authorising Officer.⁷⁹⁹ The EU is thus satisfied that this approach is fully consistent with the Cotonou Agreement and, that it would provide an incentive towards coherence of the integration programmes. The most important observation by the EU is to the effect that the lack of coherence is among the main causes of the limited results of integration in the region so far. It is difficult to begrudge this valid point of view. Lack of program coherence no doubt slows down the whole process of deepening integration. Besides regional partnership program coherence would lead to the most effective use of the scarce resources.

8.4.3 The SACU factor in the integration equation

The preamble to the COMESA Treaty states that Parties take cognisance of the unique situation of Lesotho, Namibia and Swaziland (LNS) arising from their membership of

⁷⁹⁹ The EU has taken the view that three of the present regions can be maintained: these are the Caribbean, the Pacific and West Africa. It is suggested that the Central African region could correspond to membership of CEMAC. The East Africa, SADC and Indian Ocean Commission geographic coverage corresponds to the combined membership of COMESA and SADC. Both organisations have a declared purpose of economic integration, but there are 9 ACP States belonging at the same time to both organisations. The EU, therefore, takes the view that Eastern and Southern Africa and the Indian Ocean could constitute a single programming region. SADC is however vehemently opposed to this manner of regional programming and it goes without saying that COMESA would take the same position. Statement by Commissioner Nielson *supra*

the SACU and the Common Monetary Area.⁸⁰⁰ The Article provides further that the parties are also conscious that calling upon the LNS countries to implement immediately certain provisions of the Treaty may cause dislocation or fundamental disturbances to their economies.⁸⁰¹

Article 1 of the Treaty, however, provides that without derogating from the generality of the provisions of the Treaty, the provisions of the Protocol shall apply for the purposes of establishing a framework of special arrangements in regard to the participation of the LNS countries in the Common Market.⁸⁰² The LNS States have been granted a five (5) year derogation from the application of the provisions of the Treaty relating to tariff reduction and the removal of non-tariff barriers the establishment and maintenance of a common external tariff most favoured nation treatment and monetary co-operation.

The corollary to this derogation is one very positive indicator of co-operation between COMESA and SACU. The LNS countries have been obligated to take such measures, including those of a structural, economic and technical nature as will make possible the progressive increase in trade and economic co-operation with the other Member States. The LNS must also pursue socio-economic policies that will be conducive to the fulfilment of the objectives of the Treaty. On this score the Secretariat must be updated with reports on progress made with respect to obtaining the concurrence of the other members of SACU and the CMA to extend concessions granted in the context of SACU and the CMA to the other Member States.⁸⁰³

Indeed provisions on the LNS are couched in such terms as to suggest that COMESA would rather the LNS severs its SACU membership in order to fully participate in the former's integration programs. The five-year derogation awarded to the LNS would, in

⁸⁰⁰ See the preamble to chapter 22 of the COMESA Treaty

⁸⁰¹ *Annex III* contains the Protocol relating to the unique situation of Lesotho, Namibia and Swaziland

⁸⁰² COMESA and its predecessor, the PTA permitted SACU members to enlist membership under a special protocol, which afforded them derogation from the obligations under the Treaty as long as they were parties to the SACU Treaty. For obvious reasons, this exemption was not going to be applied to South Africa if it had decided to join COMESA. As South Africa has taken a decision, in keeping with its membership of both SACU and SADC, not to join COMESA, this latter expectation is merely academic.

⁸⁰³ *Article 3* provides that the Council, acting on the proposal of the Intergovernmental Committee, may make recommendations to the LNS countries concerning the measures and projects to be undertaken in furtherance of the provisions of the Protocol. It also states that for the effective implementation of the provisions of this Protocol the Secretary-General shall undertake studies and make appropriate recommendations to Council on the practical aspects of and any other matters relating to the implementation of the Protocol.

our view, have to be extended *ad infinitum*. To expect otherwise is a dim wishful thinking. There is no indication that the LNS would want to take flight from the SACU nest that is amply feathered by the big brother - South Africa. Equally, and as we have indicated earlier, it is not probable that South Africa would concede to manoeuvres by COMESA to upset SACU's common market strictures by acceding to LNS concessions for COMESA's Member States.

It is significant, though that COMESA has a special provision for the LSN owing to their SACU membership yet no equivalent provision is made for the EAC save for the general indication to co-operate in various aspects.⁸⁰⁴ It is curious too, that no mention, let alone functional provision, is made regarding SADC whose majority membership belong to COMESA as well. Indeed for the sake of the EAC clear provisions have been made for co-operation to augment the latter's integration initiatives. This alignment smacks of a clear case of double standards. Whereas COMESA commits itself to facilitate the integration of the EAC, it gives lukewarm support for the SACU common market. COMESA in fact stops short of urging the LNS to decamp from the SACU fold and be committed solely to its mandate.

The very same irony resides with the SADC, which has made direct reference to SACU as a close partner for integration while avoiding any mention of the COMESA whose membership double in the SADC as well. This ambivalence goes along way to explain the tension and suspicion that obtains between the two blocs. The two blocs tend to avoid and compete against each other than make direct overtures for co-operation. It is clear that SACU is treated as a part and parcel of the SADC in the like manner the EAC is treated as part and parcel of the COMESA. The only other notable feature is that whilst Tanzania is a core member of the EAC and a committed member of SADC⁸⁰⁵ none of the SACU members are committed to COMESA. The LNS membership in the COMESA is still doubtful in view of these countries' indication not to ratify the COMESA Treaty.

Although the LNS membership is still on hold, it is difficult to see how the three can make concessions to COMESA where the dominant member - South Africa - is openly

⁸⁰⁴ Article 178 makes provision for relations with the African Economic Community

⁸⁰⁵ Indeed, it had to quit COMESA to vindicate the pledge to its commitment to the SADC and its southern Diaspora

opposed to such overtures. In any event, South Africa sets the SACU tariff lines in which case any adjustment thereto can only be effected with the concurrence of the latter. Quite admittedly, this is an eventuality that is unlikely to crystallise in the foreseeable future. The scenario is different with the EAC whose dominant member - Kenya - is a key player in the COMESA. The EAC can therefore afford to give concessions to COMESA without much complication, which is not to say the same with the LNS under SACU and SADC.

Membership of the LNS in the COMESA is the one element that more than anything else manifests the deep-seated rivalry between the two blocs. The LNS are indeed South Africa's economic proteges and if they were to be won over to COMESA's side the former and Botswana would effectively be isolated. This scenario does not bode well for SADC's integration and SACU's common market. The practicability of the LNS maintaining membership in the COMESA whilst still members of the SACU is a hard school altogether. The fundamentals on which the two regimes operate are clearly irreconcilable.

It is safe to state that by seeking concessions from SACU, COMESA is expanding the space for intra-regional trade. It is possible that a meeting of trade concessions from the SACU common market and the EAC would go a long way to deepen integration efforts in the region and knit SADC and COMESA securely together. The only possible downside to this discourse is the fact that such concessions would dilute the essence of a customs union to the point where the utility of the union would be rendered irreverent to its own beneficiaries.

It is true to aver that the unity of purpose in trade is what the two blocs aspire for in their desire to ultimately realise that elusive dream of a Pan-African Economic Community.⁸⁰⁶ It is, therefore, arguable that the SACU-EAC axis might as well prove to be the incentive that would move the regional integration vehicle into the fast lane of the highway to the Pan-African Economic Community. Our thesis is that for such an eventuality to be actualised there would have to be greater co-operation between the two

⁸⁰⁶ *Article 3* of the COMESA Treaty states that in the final analysis it is hoped that co-operation would ultimately contribute towards the establishment, progress and the realisation of the objectives of the African Economic Community. See also the preamble to SADC Trade Protocol

blocs. Such co-operative approach would ensure unity of purpose between the two blocs' customs unions, which would spread to the region at large.

8.4.4 The South African factor in the integration equation

Like we pointed out earlier, SADC progressed to its current high profile regional integration edifice by dint of the South African membership. SADC has now become, not only COMESA's main challenger for regional resources, but that it is a pacesetter for the deepening of integration in the region. It is indeed not far-fetched to suggest that COMESA's galloping race toward a common market have everything to do with the meteoric rise of SADC to become a formidable regional economic adversary to the former.⁸⁰⁷

The end of open conflict in southern Africa in 1993⁸⁰⁸ as well as the advent of a democratic South Africa in 1994 saw the emergence of the new SADC and the COMESA as the dominant regional trade blocs. Both institutions went all out to attract the young state.⁸⁰⁹ Mistry express the view that the overlap between SADC and COMESA, and the sensitivities related to South Africa's membership in one and non-membership in the other, are likely to present problems for integration in the region.⁸¹⁰ He contends that some of these problems arise from the asymmetric trade patterns in the region. South Africa enjoys a significant trade surplus with the region, and this has been enhanced by a sharp rise in South Africa's exports to the region in particular and to the rest of the continent generally in the post-democratic period.

At the advent of democratic rule in South Africa, COMESA with its clear and ripe objectives for the formation of a common market was a natural favourite outfit for the former than the then spurious objectives fronted by SADC. Yet in the face of this clear-

⁸⁰⁷ Although Mwenja disagrees with the contention that COMESA is blindly rushing the free trade area program. He scoffs at those harbingers of doom noting that there are those who are genuinely frightened about the implications of the COMESA free trade agreement. Some might even suggest that the pace is too fast for them, he says. According to Mwenja, however, the root cause of this hesitation is lack of information and the fear of the unknown noting that the cynics will see problems but serious entrepreneurs see opportunities. See statement on the Extraordinary Summit to the Launch of the Free Trade Area supra

⁸⁰⁸ Angola being an exception and the Mozambique peace process was well on track

⁸⁰⁹ R. Davies, "South Africa Joining SADCC or SADCC Joining South Africa: Emerging Perspectives on Regional Economic Co-operation After Apartheid", in A Van Nieuwkerk and G Van Staden (eds.), *Southern Africa at Cross-roads: Prospects for the Political Economy of the Region*, 1991 at p.237

⁸¹⁰ The period 1990-94 recorded a 24 percent increase in the dollar value of South Africa's exports to the region. Ernest, *Trade Reform and Regional Integration Seminar*, supra at p.439

cut divide, South Africa elected to join the SADC - obviously the weaker of the two blocs. Thomas is of the view that this informed election on the part of South Africa suggests that COMESA's advanced integration process was less appealing to South Africa.⁸¹¹ This view finds favour with the priorities, which South Africa harbours, for the economic rival of the region.

South Africa's perspective is that of a comprehensive approach to regional development that encompasses a regional industrial strategy. This approach includes regional infrastructure projects and the harmonisation of the financial sector, which should be on the SADC agenda and not merely free trade. It is however possible that there were other reasons that motivated South Africa to prefer SADC to COMESA. One of the obvious reasons is the geographical location of South Africa in relation to other SADC members. This geographical proximity offered far greater and favourable prospects for regional integration than the almost nebulous COMESA fraternity. The other important reason is the role the disbanded SADCC had played in mobilising frontline states in the struggle against the emasculating apartheid regime. Upon its political emancipation, joining fellow comrades at arms in SADC was the only natural and logical thing to do on the part of South Africa.

It is important to keep in mind that, while government contributes to the environment within which business decisions, including location are made, it does not take such decisions. Undeniably, South Africa as the dominant economy in the region, and given its current privileged international status, is uniquely positioned to make a positive contribution to the international investor image and the competitiveness of the region. A query in this regard is whether South Africa can afford to concentrate on regional issues while domestic challenges to policymakers are beckoning uncomfortably.⁸¹² By joining SADC, South Africa realised it could not 'go it alone when dealing with advantaged nations. The clear thinking is that although it is a relatively rich country, South Africa cannot survive as an island that is surrounded by the sea of regional poverty.

In view of the massive incidences of inequality still subsisting in South Africa's societal strata and the concomitant ongoing process of transformation, it is unlikely that South Africa would effectively play the role of the paymaster general for the region in the same

⁸¹¹ Trade Liberalisation Issues, *supra*, n.31

manner Germany did for the EU. Unlike Europe, the number of LLDCs in the region is such that it is near impossible for South Africa to assume the responsibility of allaying the resultant distribution costs without plunging its nascent democracy into chaos. Suffice to state that the challenges that encumber regional growth in the east and southern Africa region are legion and therefore far beyond the limited resources that South Africa is in a position to offer in offsetting the resultant distributional costs.

South Africa has to grapple with the problem of poverty, disease, inequality, and democracy in infancy as a country as well as a part of the region. Policy-makers must understand that the country's destiny is interwoven with that of the region. It is not within the competence of this work to delve into this vexing question. Suffice to posit that, as the undisputed regional economic powerhouse, South Africa has effectively assumed the daunting mantle of regional leadership. By that very description, much is expected, nay demanded, of South Africa beyond its national borders.

South Africa must, therefore, rise to the challenge of giving leadership on the way forward not only to its SADC flock but to the wider region and the continent as a whole. In our considered view, South Africa can and should play a pivotal role in building bridges between the two blocs in order to spur intra-regional trade.⁸¹³ In so doing, South Africa would have given a fresh impetus to the much-hyped grand match to an African Economic Community.

8.5.1 Locating areas of common weaknesses

The two blocs have numerous internal weaknesses that are common to both and which call for urgent restructuring if they are to survive the rampaging wind of globalisation. One issue of critical significance is the fact that the two blocs share membership of states with diverse characteristics and economic interests and the recorded benefits accruing to a member of such a large regional grouping are minuscule. We now examine, albeit in brevity, some of the areas of common weakness that co-operation would seek to address.

⁸¹² See Ernest, Trade Reform and Regional Integration Seminar, *supra* n. 43 at p.439

⁸¹³ It is noteworthy that South Africa is already living up to this calling by playing a leading role in the Nepad initiative. On the 9th July 2000, the moribund OAU was given a descend burial and in its place a new horizon for the economic emancipation of Africa in the name of the African Union (AU) was born. With South Africa firmly in the driver's seat, and appropriately so, the African Union must be taken as the true manifestation of the much-talked about African Renaissance.

(a) Overlapping common market areas

Most countries in sub-Saharan Africa have membership in more than one regional arrangement. Problems arise when the various groupings have conflict means in which to achieve sometimes similar objectives.⁸¹⁴ The membership of the Common Monetary Area (CMA) closely overlaps that of SACU, except for the absence of Botswana from the former. The CMA operates under the Multilateral Monetary Agreement (MMA), which is supported by bilateral arrangements between South Africa and its partners.

Thus, and as earlier indicated, within east and southern Africa region, there are forms of integration that are more important to some members than others. Then there is the EAC on the other end of the regional pendulum.⁸¹⁵ The two blocs have to swing precariously between these already established customs unions.⁸¹⁶ The result is the irreconcilable adulteration of common market fundamentals with those of a free trade area. This scenario then renders the entire corpus of a common market completely dysfunctional and to that extent nugatory.

An important consideration is COMESA's intention to erect a common external tariff. The SADC countries that have membership in the COMESA may not be in a position to extend zero tariff preferences to non-COMESA members. Taking account of the fact that one SADC country, South Africa, accounts for the bulk of intra-SADC trade, it can be expected that very little intra-SADC trade would be generated as a result of the SADC Trade Protocol.

Thomas warns of the confusion that is likely to ensue from having two parallel arrangements, SADC and COMESA, with significant overlaps in memberships.⁸¹⁷ She cautions that liberalising intra-regional trade may be confounded and confused rather than facilitated in view of this unwholesome complexity - our emphasis. In addition, there is the Cross-Border Initiative that is a fast-track regional integration regime that commenced in 1993. Its mandate is for member countries to lower tariffs to those of the lowest-tariff members - which under structural adjustment programs have already

⁸¹⁴ Many of the ECOWAS member states also belong to UEMOA but UEMOA is widely perceived to be a means for countering what is seen by the French to be a growing Nigerian influence in the sub-region. See Ernest Trade Reform and Regional Integration Seminar at p. 411). It thus poses a challenge to the cohesion of ECOWAS.

⁸¹⁵ See discussion on the EAC equation below

⁸¹⁶ Ernest, Trade Reform and Regional Integration in Africa, *supra* at p. 410

⁸¹⁷ R. H. Thomas, Trade Liberalisation Issues, Seminar Report, at p.45

reached levels as low as 5 percent. This initiative, too, has membership overlapping across the two blocs.⁸¹⁸

The SADC Trade Protocol at *Par.3* provides that a member state “shall not be obliged to extend [presumably to other member states] the preferences of another trading block” of which it is already a member at the time that the Protocol came into force. This last provision clearly covers both SACU and COMESA. The problem with such a condition is that enforcement and administration of the divergent tariff regimes by member states will be extremely difficult, given the weakness of customs border controls within their territories. This applies to South Africa as well. Thomas suggests that it would have been better had member states attempted either to simplify their arrangements by rationing down or alternatively, give more consideration to mechanism for accommodating these arrangements.⁸¹⁹ In our thesis, the latter suggestion -that is finding mechanisms for accommodating these arrangements is the preferred way forward.⁸²⁰

(b) Non-implementation of treaty provisions

In spite of its diversity, emphasis on regional trade liberalisation remains the norm in regional integration. Like SADC the current COMESA economic integration program lays too much emphasis on trade liberalisation through the removal of tariffs and non-tariff barriers. It also urges the elimination of administrative and institutional barriers to trade flows and transits traffic facilitation. This mania for trade liberalisation is not sufficiently tempered with an industrial and investment policy, which it appropriately should.

A major feature of African integration efforts is that very limited progress has been made in implementing integration policies, in particular harmonising tariff codes and classifications, and introducing positive integration policies. The harmonisation of agricultural, industrial, energy, fiscal, and monetary policies, which has been envisaged in some treaties and the Lagos Plan of Action, has not taken place.⁸²¹

⁸¹⁸ Ernest, *Trade Reform and Regional Integration in Africa*, at p. 439

⁸¹⁹ In line with the FDB’s “variable speed, multiple geometry” approach to integration. See R. H. Thomas, ‘Regional Arrangements and the WTO’ *supra* at p. 23

⁸²⁰ See the discussion on intra-bloc co-operation below

⁸²¹ For example, the decision by ECOWAS to harmonise agricultural policies and adopt a common position during negotiations on international commodity agreements was disregarded during the WTO negotiations. This trend can be attributed to the unwillingness of governments to make regional objectives a priority.

The slow implementation of the tariff reduction program for the two blocs has meant that a number of countries have missed an opportunity to facilitate trade.⁸²² In recognition of the slow pace of the COMESA implementation schedule, the COMESA treaty now has an important innovation. The concept of multi speed or variable geometry provides for a group of countries to move faster in regional economic integration process than the slower-moving ones, which would otherwise default in implementing contracted programs.⁸²³ With co-operation, the two blocs stand to benefit immensely from this sustainable trade partnership.

The result of the jumbled membership in the region is that the removal of non-tariff barriers is likely to proceed with difficulty. Indeed, the calculation of tariff equivalents is much easier in theory than in practice, and negotiations are likely to be complicated. In the SADC case, restrictive import licensing, administrative delays, bureaucratic contortions, stipulations of sources of supply, and prohibitions on importation of certain goods may prove to be serious challenges in this regard. In the area of co-operation, SADC would benefit by borrowing a leaf from the COMESA arrangement to implement a more practical approach to the reduction of non-tariff barriers. It is noteworthy that, in their recent meeting the two blocs have agreed to share experiences and harmonise their approach in dealing with this recurrent non-tariff barrier conundrum.⁸²⁴

(c) Inadequate compensation mechanisms

Since most integration arrangements include countries with varying levels of economic development, the emphasis on trade integration means that gains from integration will be unevenly distributed. This requires that equity issues be dealt with effectively at the initial stages of the negotiations.⁸²⁵ It is obvious that the two blocs have not adequately

⁸²² The loss of this opportunity can be gleaned from examining the standard deviation of tariff rates, which measures the dispersion of rates around their mean value – the argument being that highly dispersed rates are evident of discriminatory tariffs that may distort production and consumption decisions. See Louis et al, Trade Reform and Regional Integration Seminar, supra at p. 470

⁸²³ The same applies to the settlement of disputes arising from interpretation or in the course of implementation of the treaty. See Mwencha. J. E. O: 1997, "COMESA; A Building Block for the African Economic Community, "AEC News Letter, vol.1, pp.17-18 See also Louis et al, Trade Reform and Regional Integration Seminar, supra, at p. 471

⁸²⁴ One of the issues that invariably hamper intra-regional trade is the Non-Tariff Barriers regime and we discussed this at great length. Some of the non-tariff barriers such as import/export permits and quotas are easy to eliminate. However, important measures such as sanitary and phyto-sanitary, standards, quality assurance and metrology can be used as a non-tariff barrier. See also Chapter three above

⁸²⁵ For instance, in the European Union's integration experience, Germany, the undisputed economical power-house undertook to bankroll and thereby helped to assuage all distributional pressures which unfolded in the wake of this process.

addressed the potentially explosive question of distribution of gains. The inadequacy of the distributive measures arises from a fundamental uncertainty about whether the expected gains from integration will indeed materialise.⁸²⁶ A failure, however, to address this pertinent issue is the very antithesis to a successful integration framework.

(d) Stringent trade liberalisation schemes

Attempts to reduce the costs of regional trade liberalisation on member countries have resulted in stringent programs of trade liberalisation. The rules of origin that limit participation on the basis of value added and ownership of enterprises reduces the potential number of participants in trade liberalisation schemes. Even though the domestic manufacturing base is small, the trade liberalisation schemes of a number of countries in the region further restrict the proportion of output that can actually be exported to regional markets under the scheme.⁸²⁷

(e) Absence of strong supranational institutions

The transformation of SADCC into SADC and the track record of the PTA/COMESA have highlighted the urgent need for institutional capacity building. SADC's institutions require the development of capacity to formulate, co-ordinate, harmonise, manage and implement capability of national structure adjustment program so as to make them responsive to the objectives of economic integration that are being pursued by member states.⁸²⁸ COMESA has moved fast on the establishment of the PTA bank, PTA insurance, a Clearing-House and the COMESA Court of Justice. The viability of these institutions and their sustainability are matters yet to be tested.⁸²⁹ SADC has not achieved this level of institutional diversity as yet.

⁸²⁶ Less economically endowed COMESA states fear that according trade preferences to all members would lead to an asymmetrical distribution of benefits which would mainly benefit Zimbabwe and Kenya, countries with stronger industrial base. Efforts by the COMESA Secretariat to convince countries that removal of tariffs represents an income transfer from government to the private sector met with limited success. Matters were not helped by the absence of an effective compensation mechanism. (See also Ernest, Trade Reform and Regional Integration, Seminar, supra at p.411)

⁸²⁷ Ernest Trade Reform and Regional Integration, Seminar Report, supra at 412

⁸²⁸ Supra at p.459

⁸²⁹ *Article 23* of the COMESA Treaty provides for the General Jurisdiction of the Court, which shall have jurisdiction to adjudicate upon all matters that may be referred to it pursuant to the Treaty. *Article 26* of the COMESA Treaty allows any person – be they natural or artificial- that is resident in a Member State to refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of the Treaty. The caveat being that such person shall not refer the matter for determination to the court until they first exhaust the local remedies in the national courts or tribunals of the Member State.

In respect of the African approach to integration, Hettne⁸³⁰ argues that "... judging from the results of integration, it is not the number of regional organisations that counts. He postulates that to the extent that one can speak of a new regionalism in the African context, the trend should rather be from single issue organisations to consolidate, multidimensional regions with some supranational authority, ranging from economic development to security".⁸³¹ The recently launched AU initiative seems to fit well into Hettne's perspective. Our view is, however, that to nature intra-regional trade a lean and focused instrument like the Nepad is the way to go.

No doubt, most operating regional institutions lack the legal backing to implement or enforce treaties and protocols.⁸³² The result is a lack of transparency in the implementation of the treaties. The lack of supra-nationality allows the progress of the integration process to be captured by vested interests. If private economic agents have a complaint regarding the operation of the Protocol or article of the agreement, for example, this has to be made to a national government body. Such a body would in most cases be the one that sanctioned the policy that contravened the treaty in the severe storms that are normally generated by integration undercurrents.⁸³³

(f) Inadequate sanctioning authority

In the absence of credible supranational institutions, the treaties often do not have effective sanctions against member states pursuing policies that conflict with the articles of the agreement. Even where the penalties are spelled out⁸³⁴ the cost of not implementing the treaty may be perceived to be less than the benefits of doing so. This perception by member states is more likely where for instance in the case of SADC and COMESA members of the union not implementing the articles of the agreement.⁸³⁵ The risk of free riding is also too very real in these nascent regimes.

⁸³⁰ B. Hettne, "The New Regionalism: Implications for Development and Peace", in B. Hettne and A. Inotai, Research for Action – *The New Regionalism: Implications for Global Development and International Security*, 1994, at p.30

⁸³¹ See also R. H. Thomas, 'Regional Arrangements and the WTO' supra at p. 26

⁸³² The ECOWAS secretariat, for example, has a few powers to force governments to implement trade liberalisation measures. See Earnest, *infra*

⁸³³ Ernest Trade Reform and Regional Integration, Seminar, supra at p. 412

⁸³⁴ As in the case of the revised ECOWAS Treaty

⁸³⁵ For instance, most of the SADC countries have resolutely failed to heed the edict in their Trade Protocol to decamp from COMESA. In fact, one of the countries - Zambia - is happy to play host to COMESA's seat of Power whilst another core SADC member - Zimbabwe - has already

COMESA has a regional court, which is yet to prove its mettle in deepening integration.⁸³⁶ Given the limited participation of the private sector concerns in the enforcement of treaty obligations, it is unlikely that this institution will live up to its mandate to deepen integration the same way the European Court has disciplined member states to adhere to covenanted treaty provisions.

(g) Lack of political commitment

Shaw has observed that the basic issue confronting regionalism in Africa is compatibility with established political economies and ruling classes.⁸³⁷ And when these are, like is the case for states in the region, outward-oriented towards extra-continental integration, intra-continental connections remain undeveloped and unimportant – our emphasis. He contends that regional leaders will adopt integration approaches that allow them to preserve their national interests completely. It is obvious that in this scenario, self-preservation takes precedent over the overall regional good.⁸³⁸ This lack of seriousness is also reflected in the manner in which regional groupings are inaugurated.⁸³⁹

Due to their colonial history and the subsequent unsevered umbilical cord of aid dependency manifested in the likes of the Cotonou⁸⁴⁰, all the regional players have structures that favour western markets for local products. The odd exception is South Africa, which exports a substantial quantity of its products to the region and the continent at large. Even then just fewer than 50 percent of its exports end up in the western market, in particular the European Union. This would explain, in part, why South Africa opted to join the SADC instead of COMESA.

The foregoing perceptions are further complicated by the proclivity of politicians and bureaucrats not to pay attention to economic considerations. Instead political expediency coupled with narrow national interests, that is defined by pressure groups from within is

signed in on the COMESA free trade area disciplines that was recently launched. See also Ernest Trade Reform and Regional Integration, Seminar, *supra* at p. 412

⁸³⁶ See the note on the COMESA court *supra* n. 103

⁸³⁷ See Ernest, *supra* at p. 412

⁸³⁸ See Ernest Trade Reform and Regional Integration, Seminar, *supra* at p. 412

⁸³⁹ The PTA authority adopted recommendations to transform the PTA into COMESA in 1992. However, at the summit meeting of Heads of States of the three countries that had formerly been members of the EAC, it was agreed to reactivate co-operation of the three East African countries. The Heads of States ratified the recommendations of the council of ministers mapping out the form that the co-operation would take in November 1993. Subsequently, the protocol to establish the secretariat for East African Co-operation was signed in November 1994. See Ernest *supra* at p. 412

allowed to take precedent.⁸⁴¹ As it is, COMESA is faced with tremendous difficulty in coping with a membership that has become more fractious, where many of the state parties show signs of nations in disintegration.⁸⁴² The SADC arrangement is not without blemish either. The institution is going through the very same malaise that COMESA has had to grapple with. Member states are beginning to default on their membership dues to particular SADC institutions.⁸⁴³

A major draw back to regional integration in the COMESA area is that countries with few or no common interest have tried to integrate. Many of the countries have little trade among them and indeed have well established trading links with countries outside the region. For many countries, production structures that were developed during the colonial era have not changed and often do not favour intra-regional trade. Regional groups have been established with little regard paid to the requisite initial conditions for integration. This convoluted stated of affairs has not only diverted attention from the wider goal but in many cases has led to wasteful duplication of activities.⁸⁴⁴

(h) Lack of trade liberalisation co-ordination

The inhibiting factors within the region arise from the failure to co-ordinate trade liberalisation programs across countries. For example, a country would reduce external tariffs faster than its neighbours would and this give way to internal pressure especially by manufacturers producing items subject to competition from imports. Such pressure would result in a policy reversal or slowdown in the process of liberalisation. Another possibility is the use of non-tariff barriers by neighbouring countries that inhibit the free flow of trade due retaliatory restrictions. There is, therefore, a need for enhanced co-ordination among the two blocs member States to reinforce commitment to contracted trade liberalisation policies.⁸⁴⁵

⁸⁴⁰Previously the Lome Convention

⁸⁴¹See discussion in McCarthy, "Regional Integration for Developing Countries at Different Levels of Economic Development- Problems and Prospects" 4 *Transitional Law and Contemporary Problems*, No 1, spring 1994 at pp.10-11. See also A. Hazelwood, "The end of the East African Community: What are the lessons for regional integration schemes?" 18 *Journal of Common Market Stud.* 1979, pp. 53-54

⁸⁴² For example, Burundi, Rwanda, Sudan, Somalia, Zaire, and to some extent, Ethiopia and Eritrea.

⁸⁴³ At the Annual Consultative Conference in 1995, for example, the Executive Secretary reported financial crisis within the agricultural research organisation - SACCAR, as a consequence of member states not paying their dues.

⁸⁴⁴ Louis et al, *supra* at p. 480

⁸⁴⁵ *Supra* at p. 481

Both these arguments carry considerable measure of persuasive force. But they fail to address the current integration realities obtaining in the region. In addition, the experience of the European Union and North America has persuaded regional policy makers that the benefits from regional integration extend well beyond static welfare gains, to dynamic benefits that affect the development prospects of regional economies.⁸⁴⁶ But then, for the present, what is the obtaining reality?

8.5.2 Acceptance of the obtaining reality

It is not lost to keen observers that states in the east and southern Africa region, which form the bulk of the ACP membership, have been and still are unable to fully utilise quotas reserved for them under the Cotonou.⁸⁴⁷ The reason for the under-utilisation of this crucial facility has been traced to lack of export and production capacity. It is unlikely that a mere mechanical realignment of regional regimes would help cure these structural and capacity problems. The real problem resides, in the main, with individual states. These problems can only be addressed once states in the region fundamentally change their production structures and revamp the export portfolio to stimulate intra-regional trade. This possibility resides, in the final analysis, within the borders and juridical competence of each member state.

The common objectives of the two blocs as provided in their respective instruments, is to promote co-operation and development in all aspects of economic activity, particularly in trade, industry, transport, communication, agriculture, natural resources, and monetary affairs.⁸⁴⁸ The two blocs have the overall aim of raising the standards of living for their people and of fostering closer relations among its member states. Importantly, the two blocs hope to eventually create a free trade area that would permit free movement of goods, capital and labour within the sub-region and contribute to the economic growth and development of the continent. Basically the two blocs are concerned not only with achieving trade integration, but also harmonisation of agricultural, industrial,

⁸⁴⁶ Ernest Trade Reform and Regional Integration, Seminar, *supra* at p. 459

⁸⁴⁷ This facility has since expired and been replaced by the Cotonou which is a transitional arrangement to allow for negotiation for a post-Lome dispensation – See chapter seven for a detailed discussion of the Cotonou

⁸⁴⁸ The preamble to the SADC Protocol and that of the COMESA Treaty

transportation, energy, fiscal, and monetary policies.⁸⁴⁹ These multiple objectives find expression in the perception that integration would lead to greater self-reliance.⁸⁵⁰

The reality of the regional integration process in the east and southern Africa is that there are two blocs, which have co-existed alongside each other for a considerable length of time. One aspect that comes out clearly is the fact that South Africa's entry into the equation as a regional power broker has suddenly upset the balance of regional trade equation in the region. It is common knowledge that regional integration in southern Africa, with the exception of SACU, does not have an impressive track record. Despite this glaring fact, SADC is growing, and attempts to invigorate regional integration are being pursued, as the signing of the SADC Trade Protocol indicates. Factors contributing to this optimism include the new role South Africa is playing in the region, which despite misgivings on certain counts is expected to contribute to the development of the region.⁸⁵¹

The admission of South Africa as a member of SADC has seen the once moribund organisation suddenly reinvent itself to an economic entity with enough muscle to challenge COMESA's once dominant position. Sensing an eminent threat to its very existence that would have been engendered by a mass exodus of its members to SADC, COMESA has come out fighting. This is a natural reaction that is expected of a bloc that has dominated trade issues in the region for over two decades. One would want to inquire why all over a sudden COMESA is keen on admitting the LNS to its fold. These countries, save for South Africa, have been around all along.

COMESA has gone out full blast to intensify and fast-track its integration activities with the aim of committing member states to obligations that would keep them fully preoccupied and therefore away from the beckoning SADC incentives. On its part, SADC has moved to urge its members that are in COMESA to review their membership.⁸⁵² Until recently, therefore, the reality of regional integration in southern

⁸⁴⁹ Until its transformation, for example, SADC was the only large regional grouping that did not have trade integration as an objective.

⁸⁵⁰ Ernest Trade Reform and Regional Integration Seminar, *supra* at p.410

⁸⁵¹ *Supra* at p. 459

⁸⁵² Despite the express provisions of *Article 27* of the SADC Protocol, some of the SADC members still maintain membership in the COMESA and there is no sign that Zimbabwe, Mauritius and Zambia, in particular, would review this position in the foreseeable future. The three are part of

Africa has been antagonistic as the two blocs fight it out to preserve the common pool of membership, which they share.

Nothing exemplifies the intense rivalry between the two blocs more than their current pre-occupation to out-do each other in admitting as many new members as possible from the other bloc's ranks.⁸⁵³ Certainly, such expansion goes against the more rational view that deepening of regional integration alliances must first take place before enlargement. It is now trite in regional integration experience that the larger the number of members and the greater the economic diversity, the wider the likelihood of problems with implementation.⁸⁵⁴

Our thesis rests on the premises that the reality of double membership and therefore open antagonism should be acknowledged as a fast step to identifying ways and means of harnessing synergies in the two bloc's programs for co-operative approach.⁸⁵⁵ This point leads us to investigate what should be the way forward for the two blocs. It is not difficult to see that the two blocs have an overriding objective of paving the way for an Economic Community for Africa. The two blocs can and should easily harness areas of synergy in their programs so as to walk the path of co-operation that would spread out to other regions in the continent and climax into the desired goal of an Economic Community for Africa.⁸⁵⁶

the recently launched COMESA free trade area and appear to have resigned to the reality of their double membership.

⁸⁵³ Thomas laments that the co-existence between the two blocs is becoming more ludicrous as SADC admits new members from the COMESA stable. Such a move was sanctioned by the agreement by SADC Heads of State in 1997 to admit both the DRC and the Seychelles to the SADC fold. She argues that it is only a matter of time before Madagascar, Kenya, Rwanda and Uganda come knocking. According to Thomas, should this influx happen, SADC will then effectively have "swallowed" COMESA, and both RSA and Botswana would by default, have joined the organisation they have steadfastly rejected all these years. See Trade liberalisation Issues, Seminar Report supra at p. 45

⁸⁵⁴ As Aryyeetey and Oduro have observed a small number of members to start with (as per the EU experience) who have a specific goal, may be the best way to approach integration efforts. See Aryyeetey and Oduro, (1996) " Regional Integration Efforts in Africa: An overview", in Regionalism and the Global Economy: The case of Africa; The Hague: FUNDAD (See also R. H. Thomas Trade Liberalisation Issues, Seminar Report, supra at p. 45)

⁸⁵⁵ Within the SACU negotiation rounds member states push to the furthest recesses of the agenda any discussion of relations within SADC and COMESA. This does not bode well for the development of sound policies and inter-linkages between the diverse institutions and makes a mockery of the Abuja Treaty's call for building blocks to fuse together the Pan-Africanist vision for a continent-wide common market. . See R. H. Thomas; 'Regional Arrangements and the WTO, supra at p.26

⁸⁵⁶ This is where the crucial question of regional co-operation and integration that is treated under *Article 28* of the Cotonou Agreement kicks in. Co-operation in this area would provide effective assistance to achieve the objectives and priorities which the ACP States have set for themselves in the context of regional and sub-regional co-operation and integration.

This strategy is, of course, good riddance for the new kid on the bloc - the Nepad initiative. With the two blocs coalescing into joint ventures at policy synergy and spreading out to other regions, the Nepad initiative would find a smooth highway via which to roll out its economic growth programs for the benefit of this economically vanquished continent. Nepad is a scheme similar to the Marshall Plan. Its key focus is in getting African governments to work together to improve the continent's infrastructure by attracting \$64 billion a year in investment.⁸⁵⁷ The germane question begging at this juncture is what, then are these areas of synergies upon which the two blocs would built co-operative approach to deepen the integration agenda.

Areas of co-operation are many and self-evident. Before we unload some of them, let us first address the salient issue regarding the necessity for intra-bloc co-operation. Of course we have, in passing, stated several reasons as to why the thesis of collaborative approach is viable but for the avoidance of doubt, these issues deserve further clarification. This is, per force, an important hurdle to overcome before we qualify to cross the bridge of dilemma to the assured side of regional co-operation. This discourse would help explain the need for a co-operative strategy in deepening integration in the east and southern Africa region.

⁸⁵⁷ President Wade of Senegal had developed the Omega Plan and President Mbeki of South Africa on the other hand developed the Millennium Action Programme (MAP). These two initiatives were coming out with a vision and a programme of action for Africa's economic recovery in this globalised world economy. The leaders realised the two documents were talking of more or less, the same thing and they were brought together into the new partnership. (See the East African Standard Online at <http://www.eastandard.net> on Saturday, June 29, 2002) Nepad protagonists have contended that this facility is an instrument to be used by the African Heads of State to attract donor funding and foreign investments in Africa. In this regard, they argue, it gives in wholesale to the neo-liberal view of the western world and Africa's subordinate position. The protagonists contend that the actions proposed in the various sectors of the African economy are therefore nothing but a shopping list for areas in which donor funds are needed and foreign investments to be attracted. Given the political conditions prevailing in Africa today, neither donor funds nor foreign investments will help change the situation for the majority of the African poor. Resources are likely to continue being wasted in useless internal wars, corruption, unproductive enterprises and flight of capital. On the other hand, a much more sympathetic reading of Nepad would contend that it makes an important step in the leaders' and governments' accepting that something is rotten in the state of politics in Africa. (A commentary by Prof. Anyang' Nyong'o, in the Daily Nation Online in the East Africa business section, at <http://www.nationaudio.com> on Monday, April 15, 2002. If you ask Mbeki, he will tell you that African partnership begins here in Africa and that is why Nepad is committed to regional integration. The Nepad puts a lot of emphasis on collective self-reliance for development of Africa. African economies in terms of global economic transactions are too small to go it alone and under the current circumstances it is very important that they maximise their domestic potentials for development. See also <http://www.eastandard.net> on Saturday, June 29, 2002

8.6.1 The Case for intra-bloc co-operation

Mistry, pinpoints and correctly so in our view, the structural fundamentals that underpin economic growth in the current global dispensation.⁸⁵⁸ He posits that not so long ago, comparative advantage was used to explain patterns of international trade and the success of some countries over others in the world markets. He opines that more often than not, such advantage was seen to accrue mainly to countries which had natural resources, particular qualities of human capital, a surplus of financial capital, and an advanced economic infrastructure by way of functioning markets and institutions.

Mistry contends further that the notion of static comparative advantage based on these endowments has given way to a different notion of more rapidly shifting dynamic competitive advantage which is based less on factors of production.⁸⁵⁹ He lists the new phenomenon as the possession of market share, global brands, and sophisticated process and information technology capabilities. He adds to this the ability to access and interpret knowledge and the systemic dexterity, which requires considerable flexibility in labour and factor markets and you sure have your edge on the global trade equation. In our view, fundamental as they are, these are distant attributes for the economically malnourished sub-Saharan African countries.

In view of Mistry's seminal remarks, however, one thing becomes immediately crystal clear. That is to say, in addition to expanding the effective size of markets and improving access to export markets and providing incentives for foreign direct investment the main challenge facing the two regional blocs is how to spur economic growth and investment through increased productivity. Increased productivity will require a restructuring and diversification of the productive base. Again the two blocs cannot compete in the global markets in terms of high productivity and high quality on the basis of low labour wages alone. Access to technology and technical know-how is critical.

It is only through greater regional co-operation and networking between domestic, regional and international partners, that the two blocs would be able to improve access to technology and other resources. This measure will enhance the two bloc's productivity

⁸⁵⁸ P. S Mistry, " The New Regionalism: Impediments or Spur to future multilateralism?" In Teunissen, J (ed.), *Regionalism the Global Economy: The case of the Latin America & the Caribbean*, 1995, See also R. Thomas in *Regional Arrangements and the WTO*, supra at p. 28

⁸⁵⁹ Ibid.

and competitiveness in the global marketplace.⁸⁶⁰ A common front on the international plane is also a formidable tool in bringing pressure to bear in the increasingly turbulent negotiations for the lucrative global market.

A further problem that call for urgent redress is the inherent inconsistencies in the implementation of the COMESA free trade area, the proposed SADC free trade area and the CBI tariff reduction programme. This scenario may not, however, constitute a problem, *de facto*, as all COMESA countries abide by the agreed timetable of implementing a COMESA free trade area. Only two countries in SADC – South Africa and Botswana – will not have implemented the free trade area. This is, nonetheless, an area in which the COMESA Secretariat will need to work closely with its SADC counterpart to ensure that implementation of the respective free trade disciplines are not contradictory.⁸⁶¹

The CBI is a facility through which the two blocs' respective Secretariats would need to enlist the support of short-term technical assistance inputs to augment the process. This is an area where co-operation between the two blocs would engender immense intra-regional trade spin-offs. The opposite route is one that leads to chaos and disharmony in the implementation of integration disciplines in the region.⁸⁶² The latter option is entirely undesirable in the face of efforts to augment the momentum to regional prosperity.

Related to the establishment of the free trade area are the removal of the non-tariff barriers and the simplification of the two bloc's Rules of Origin and Value Added Criteria.⁸⁶³ One particularly troublesome non-tariff barrier is the amount of documentation required to move goods between and amidst the two blocs markets.

⁸⁶⁰ COMESA in brief, <http://www.comesa.int>, at p.7

⁸⁶¹ Indeed on the Regional economic integration front, *Article 29* of the Cotonou Agreement provides that co-operation shall support the development and strengthening of the capacities of regional integration institutions and organisations set up by the ACP States to promote regional co-operation and integration.

⁸⁶² COMESA News & Publications : Statement by the Secretary-General on the Official opening of the COMESA/EU Forum - 26th October, 2000, see also <http://www.comesa.int> at p.7

⁸⁶³ COMESA has been working on levels of value-added content and COMESA Rules of Origin for some time now. The view of the Secretariat is that the Rules of Origin should not be based on an added value criterion alone. In fact firms will try to reduce added value, through reducing costs and becoming more efficient and so rules of origin based on just added value may be counter-productive in promoting intra-regional trade. Added value rules are also arbitrary in nature, complex to apply and introduce a high risk of fraud. Given these drawbacks the rules of origin study proposed by the COMESA Secretariat is not to be limited to added value criteria only and will address other issues of regional trade. , <http://www.comesa.int>, at p. 8

COMESA has addressed the problem of the multiplicity of customs documents, by designing the COMESA Customs Document, or COMESA-CD, which was scheduled for introduction by all COMESA member states by July 1997.⁸⁶⁴

SADC would do well to borrow a leaf from this technological innovation to harmonise operations in this critical area of trade. Co-operative intervention in this vital trade liberalisation area would facilitate intra-regional trade thereby deepening the process of regional integration. We now undertake a broad examination of some of the fertile ground upon which a co-operative approach between the two blocs can and should be built.

8.6.2 Co-operation overtures and the legal framework

The foregoing discussion has made a strong case for greater co-operation between the two blocs in all aspects that would stimulate intra-regional trade.⁸⁶⁵ The reality of the co-existence for the two blocs must be acknowledged and the strengths provided by diversity inured and exploited for the common good of the region. Our thesis is that common structure and basic features already exist in the jurisdiction of the two blocs to warrant a coalescence of effective harmonisation of development programs. A co-operative approach would ensure that mutual avoidance that has been the *modus operandi* of the two blocs is turned into constant consultation and economic fence building.⁸⁶⁶ Indeed COMESA makes express provision for co-operation with organisation and NGOs in the region. One fails, therefore, to see why this vital collaborative networking is not extended to SADC – its neighbour per-excellence.⁸⁶⁷

⁸⁶⁴ See also *Chapter Six* of the COMESA Treaty

⁸⁶⁵ *Article 179* of the COMESA Treaty states that “In the context of realising its regional integration objectives, the Common Market may enter into co-operation agreements with other regional communities. The co-operation referred to in par. 1 of this Article shall be subject to prior approval by the Council. See *Article 27* of the SADC Trade Protocol which conveys similar provisions

⁸⁶⁶ *Article 180* of the COMESA Treaty provides that Member States may be members of other regional or sub-regional organisations with other Member States or third countries for the purpose of strengthening co-operation among themselves. The Common Market is also mandated to maintain such continuous working relations with the Organisation of African Unity, the United Nations and such intergovernmental or governmental organisations as would assist the Common Market in the implementation of the provisions of the Treaty. What is curious here, though, is the fact that among the many bodies that are specifically cited as co-operating partners with the COMESA, SADC is nowhere in the list. This is disturbing in view of the fact that a number of COMESA members double as SADC members.

⁸⁶⁷ The Treaty provides further that COMESA would establish such continuous and close working relations with intergovernmental and non-governmental organisations in east and southern Africa with a view to strengthening the institutional capacity of the Common Market and assisting it in the implementation of the provisions of the Treaty. Other organisations specifically mentioned

It is noteworthy that in the recent past, the two blocs have taken deliberate steps to close ranks and work along synergies in the regional trade initiatives.⁸⁶⁸ In a recent press conference, the respective secretariats for the two blocs revealed that they had been meeting to continue the work they began in Lusaka, Zambia in July 2001.⁸⁶⁹ It was noted that these meetings are aimed at mapping out general principles and modalities of co-operation.⁸⁷⁰ The two bloc's Secretariat explained that when they met in Lusaka an agreement was reached to concentrate efforts at the initial stage of co-operation on an audit of all projects and programmes being implemented by the two institutions, particularly in the trade and transport sectors. The two blocs shared experiences and information on progress made in the trade sector.

It is encouraging to note that the Chairpersons of the two blocs have also recently agreed on a proposal to establish a Task Force at the level of the two Secretariats reporting to the appropriate institutional structures on the areas of co-operation and joint activities.⁸⁷¹ The proposed Task Force will be a framework for co-operation between the two organisations. It is proposed that the Task Force meet twice a year alternately between Gaborone and Lusaka with flexibility for extra-ordinary meetings as and when required. It is expected that once established, the Task Force would carry out an audit of all projects and programmes being implemented by the two institutions including those in the pipeline in order to identify areas of common interest.⁸⁷²

for co-operation purposes under the provisions of *Article 181* are the United Nations Economic Commission for Africa and the African Development Bank.

⁸⁶⁸ On the Regional economic integration front, *Article 29* of the Cotonou provides that co-operation shall support the development and strengthening of the capacities of regional integration institutions and organisations set up by the ACP States to promote regional co-operation and integration. The two blocs are set to benefit immensely from this enabling infrastructure

⁸⁶⁹ Briefing note to the media by SADC Executive Secretary, Dr Prega Ramsamy and COMESA Secretary General, Mr Erastus Mwencha on the outcome of the second meeting of the SADC-COMESA Task Force 23rd October, 2001 http://www.sadc.int/english/archive/mr02_19102001.html

⁸⁷⁰ This is where the crucial question of regional co-operation and integration that is treated under *Article 28* of the Cotonou Agreement kicks in. Co-operation in this area would provide effective assistance to achieve the objectives and priorities which the ACP States have set themselves upon the context of regional and sub-regional co-operation and integration.

⁸⁷¹ The proposal was agreed to at a meeting in Cairo, Egypt between the Chairperson of SADC, Dr Sam Nujoma, President of the Republic of Namibia and the Chairperson of COMESA, Sir Anerood Jugnauth, Prime Minister of the Republic of Mauritius. The meeting was also attended by Prof. Saitoti, the then Vice President of Kenya representing the COMESA Rapporteur; and Mr Justin Malewezi, representing the Deputy Chairperson of SADC and the Chief Executives of the two organisations, Dr Prega Ramsamy of SADC and Mr Erastus Mwencha of COMESA.

⁸⁷² During the third Task Force meeting the two sides identified further areas of collaboration which include: Harmonisation of customs procedures and legislation, as well as to develop regional code of ethics for Customs Officers and a Regional Customs Bond Guarantee Scheme. It was also agreed to convene a joint technical meeting on non-tariff barriers with a view to developing a co-ordinated programme for their elimination. It was further agreed to develop a regional legal framework for mutual recognition and implementation of standards, quality assurance, accreditation and metrology. Again, Parties agreed to design a regional programme on the harmonisation of Sanitary and Phyto-

It is important to note that the two former protagonists have now chosen the logical path of a joint venture in place of wasteful belligerency. Of course, the few areas identified for co-operation do not take this partnership to the optimal level, as one would have expected. The current effort must, however, be applauded for what it signifies. It must be credited as a good beginning that would eventually usher in a new regional dispensation of rigorous co-operation for greater regional economic prosperity. Quite clearly, much ground still need to be covered in this novel co-operation exercise.⁸⁷³

Ideally, one cannot talk of co-operation without first identifying the requisite econo-legal framework within which such a partnership would be augmented. A collaborative initiative cannot exist in the vacuum. The preamble to each of the two blocs' trade instruments already gives credence to the co-operation exercise. The legal framework for this discourse is therefore appropriately in place to augment the process. *Article 3* of the Treaty details the aims and objectives of the COMESA. The foremost aim is to attain sustainable growth and development of the Member States by promoting a more balanced and harmonious development of its production and marketing structures. It is also geared to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programmes to raise the standard of living of its peoples and to foster closer relations among its Member States.

Under COMESA's proposed Common Market, member states would co-operate in the creation of an enabling environment for foreign, cross border and domestic investment including the joint promotion of research and adaptation of science and technology for development. SADC on the other hand aspires to similar objectives.⁸⁷⁴ The two blocs rightly take cognisance of the global imperatives underpinning regional trade hence undertake to co-operate in strengthening relations between the region and the rest of the world and the adoption of common positions in international fora.

sanitary measures and co-operating in the preparation of an infrastructure master plan for east and southern Africa. The other area of partnership is to set up a joint CNS/ATM System implementation Task Force to audit the work so far done by COMESA and SADC and make recommendations. See the task force report at http://www.sadc.int/english/news/mr05_30042002.html

⁸⁷³In fact COMESA is confident that this co-operation should be taken further afield. The Secretary-General says that time is now ripe for COMESA to establish functional co-operation with ECOWAS and other regional groupings because business will always transcend political environment. The establishment of the Eastern and Southern Africa Business Organisation (ESABO) is highly instructive in this regard. See Statement by the Secretary General on the Occasion of the Extraordinary Summit to the Launch of the Free Trade Area - 31st October, 2000 *supra*

⁸⁷⁴ See Statement by the Secretary General on the Occasion of the Extraordinary Summit to the Launch of the Free Trade Area - 31st October, 2000 *supra*

The two blocs have in general more common objectives than diversity. There are clear areas of synergy in the two blocs' core aims that can and should be explored for greater economic growth in the region. Our thesis is, therefore, that these areas of synergy should be coalesced into a veritable tool of harmonisation to deepen integration in the region. We now move to review some of the specific areas of synergy that provide a fertile ground for co-operative work between the two blocs. There are many areas that display unmistakable commonality between the two blocs.

8.7 Co-operation and the WTO compatibility

(a) Detection and investigation of dumping and subsidy practices

The two blocs could partner in the detection and investigation of dumping and subsidy practices and in imposing agreed measures to curb such practices.⁸⁷⁵ A specific remedy would be sought where there is evidence of dumping or export of subsidised goods by a third country to the territory of a Member State that threatens or distorts competition in regional trade.⁸⁷⁶ The affected Member States may request the Member State in whose territory the goods are being dumped or exported to impose anti-dumping duties or countervailing duties on those goods from the third country.⁸⁷⁷

(b) Competition policy

In the crucial area of Competition policy the two blocs would agree that any practice which negates the objective of free and liberalised trade should be prohibited. To this end, the two blocs would take positive measures to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the region.⁸⁷⁸

⁸⁷⁵ Article 54 of the Comesa Treaty deals with Co-operation in the Investigation of Dumping and Subsidies. To address the perennial problem of dumping, the Treaty allows a Member State to levy on any dumped product an anti-dumping duty no greater in amount than the margin of dumping in respect of such product. Dumping from a third country into a Member State is expressly prohibited and any affected Member State may, pursuant to the provisions of *par.* 3 of the Article, levy an anti-dumping duty on any dumped products. The same measure applies to subsidies. Similar provisions can be found at *Articles 18-20* of the SADC Trade Protocol

⁸⁷⁶ Proceedings initiated pursuant to the provisions of this Article shall be carried out in accordance with anti-dumping regulations made by the Council.

⁸⁷⁷ Article 51 adds the rider that this measure is only for the purposes of offsetting or preventing dumping, and subject to the provision of *par.* 4 of this Article. For the purposes of the Article, the margin of dumping is the price difference determined in accordance with the provisions of *par.* 2-(b) (ii) of the Article. See also *Article 18* of the SADC Trade Protocol

⁸⁷⁸ Article 52 of the COMESA Treaty provides that except as otherwise provided in the Treaty, any subsidy granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Member States, be incompatible with the

(c) Most Favoured Nation Treatment

To pay homage to the WTO's principal norm of the Most Favoured Nation⁸⁷⁹, the two blocs would undertake to accord the Membership of each other the most favoured nation treatment. To this end no obstacle should be placed in the way of Members from both divide in maintaining or entering into new preferential agreements with third countries provided such agreements do not impede or frustrate the objectives of either bloc. The only caveat being that any advantage, concession, privilege and/or favour granted to a third country under such agreements must be extended to either group's Member States on a reciprocal basis. This very same measure would be extended to the principle of National Treatment.⁸⁸⁰ The result would be that the two blocs prevail upon their respective members to refrain from enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of other Member States from within the region.

(d) Standardisation and quality assurance

The importance of standardisation and quality assurance recites in its coverage of almost all segments of trading activity. Among other things it gives an assurance in the promotion of health, the enhancement of the standard of living, and rationalisation in factors of production. It also ensures the reduction of unnecessary variety of products, the facilitation of inter-changeability of products, the promotion of trade and consumer protection. This regulation also promotes the creation of savings in government purchasing, improved productivity, the facilitation of information exchange as well as, of course, the protection of life, property, and the environment.⁸⁸¹

The two blocs should partner to evolve and apply a common policy with regard to the standardisation and quality assurance of goods produced and traded within the region. The two blocs would then align their membership's national standards bodies to regional, international and other organisations concerned with standardisation and quality

Common Market. A Member State may, for the purposes of offsetting the effects of subsidies and subject to regulations made by the Council, levy countervailing duty on any product of any Member State imported into another Member State equal to the amount of the estimated subsidy determined to have been granted directly or indirectly, on the manufacture, production or export of such products. *Article 19* of the SADC Protocol makes similar provisions on subsidies and countervailing measures.

⁸⁷⁹ *Article 56* of the COMESA Treaty deals with the principle of the Most Favoured Nation Treatment whilst its counterpart in SADC Trade Protocol is promulgated at *Article 28*

⁸⁸⁰ *Article 57* of the COMESA Treaty deals with the principle of National Treatment whilst *Article 11* of the SADC Trade Protocol makes similar provisions

⁸⁸¹ See *Chapter 15* of the COMESA Treaty and *Article 17* of the SADC Trade Protocol

assurance and in the development of activities in standardisation and quality assurance for the achievement of the objective of facilitating intra-regional trade.⁸⁸²

The other important area of partnership is the application of uniform standards and specifications for the inspection and testing of goods traded within the region, so that the results are easily interpreted and co-ordinated in a uniform manner. The two blocs would then adopt a regionally acceptable quality management systems, standards, and develop capacities for quality assurance of products that are traded in the region. This partnership would lead to the usage of a harmonised documentation for the evaluation of the quality of goods traded in the region and in conjunction with customs and other relevant authorities, provide for the ease of movement of samples meant for testing within the region.⁸⁸³

The biggest obstacle to the harmonisation of standard is the huge disparity between South Africa's quality standards and that of its regional partners. It will not be easy to achieve uniformity where South Africa insists on the higher scale of standardisation. Were South Africa's standards to be adopted as the yardstick for regional quality assurance, many states would be driven out of intra-regional trade for want of capacity to meet such a high measure of standardisation. The spotlight, in this case, immediately turns on South Africa, which must look for ways and means to accommodate its less developed regional partners. No easy solutions can be prescribed in the short term. The surest way to overcome this obstacle is for South Africa to launch a concerted campaign aimed at ensuring that there is a fast track transfer of technology to the region in order to revamp regional production capacity. South Africa's established multinationals could partner with those in the region to improve on production quality.

⁸⁸² Further partnership in this sphere would be to encourage the establishment of national standards bodies, and develop their technical capacities so as to enable them to adequately carry out standardisation and quality assurance activities at the national level and to co-operate with other Member States. This would help to promote and enforce standards relating to public health and safety and the protection of the environment by applying appropriate standards for goods produced and traded within the region.

⁸⁸³ The two blocs would consult one another through the Secretariat concerning their common training needs in the field of standardisation and quality assurance. Such information would form the basis for undertaking to co-ordinate among them the use of existing facilities with a view to making them accessible to other Member States. It is also important that the two blocs endeavour to make the activity of standardisation and quality assurance known to all concerned parties. This measure can be achieved through seminars, advertisements, publications, films, discussions, participation of the national standardisation institutions in trade fairs, special national awards and the creation of national quality associations within the Member States.

The two blocs would adopt and apply a harmonised scheme for the certification of goods manufactured and traded in the region and a harmonised scheme for the accreditation of laboratories used for the evaluation of goods produced and traded in the region. In the same breadth regional players would adopt common rules and procedures for the certification marks to be applied on goods produced and traded in the region and for the mutual recognition of each other member's national certification marks, as well as certification and laboratory accreditation schemes.

(e) Rationalization of the Rules of Origin

The controversial and often acrimonious field of origin rules is the foremost trouble area that exercised the wits of the two blocs in their maiden interaction. The two blocs have agreed on the need to streamline Rules of Origin and Customs Procedures and Documentation for the COMESA free trade area and the SADC Trade Protocol.⁸⁸⁴ Co-operation on the Rules of Origin, focussed on Certificates of Origin and procedures for their issuance and how products from Export Processing Zones (EPZs) should be treated in a free trade area.⁸⁸⁵

The two blocs agreed on the need to harmonise Customs Regulations and procedures, including customs documentation and cross-border trade issues.⁸⁸⁶ Agreement was also reached on the development of a model law on national customs procedures and regulation. The two blocs have committed to work out modalities on how the SADC and COMESA customs documents could be harmonised for use with the ASYCUDA

⁸⁸⁴ SADC launched the implementation of the SADC Trade Protocol in September 2000 and COMESA launched the Free Trade Area in October 2000 in which nine countries are actively participating. The SADC Protocol on Trade will lead to the creation of a Free Trade Area by 2008

⁸⁸⁵ There are two schools of thought on this issue. On the one hand, there is an argument for extending FTA preferences to products from EPZs as long as they meet the Rules of Origin criteria. On the other hand, there are proponents for the exclusion of EPZs products from FTA preferences because the producers are given incentives, which are not availed, to those producers operating from outside the EPZ. At the same time the products from the EPZs are not allowed in the domestic market of the country where they are produced.

⁸⁸⁶ *Article 71* of the COMESA Treaty obligates Member States to undertake, where appropriate, to design and standardise their trade documents and the information required to be contained in such documents in accordance with internationally accepted standards, practices and guidelines. The Treaty provides that the simplification, harmonisation and standardisation of customs regulations, documents and procedures and their computerisation will be facilitated by the regional Automated System for Customs Data Centre at the Headquarters of the Common Market. *Article 17* of the SADC Trade Protocol obligates each Member State to use relevant international standards as a basis for its state-related measures, except where such standards would be an ineffective or inappropriate means to fulfil its legitimate objectives.

software or any other compatible customs package. These measures are aimed at facilitating intra-regional trade between the two regional economic blocs.⁸⁸⁷

(f) Customs administration

The dismal performance of customs authorities in the region is a malignant malady that is well documented. The two blocs would reap immense benefits in ensuring that there is simplicity, harmony and standardisation of their respective member's customs regulations, procedures and documents⁸⁸⁸. This measure would ensure the effective implementation of the provision of both the COMESA Treaty and the SADC Protocol and a reduction in the costs and facilitate the speedy movement of goods and services across regional frontiers.

The two blocs would encourage Member States to extend co-operation in the field of trade liberalisation and customs administration.⁸⁸⁹ To this end co-operation would give way to the establishment of a customs union, abolish all non-tariff barriers to trade among themselves and in the long run establish a common external tariff. Co-operation would also be extended to the field of customs procedures and activities. The two blocs would then adopt a common customs bond guarantee scheme and concomitantly simplify and harmonise their trade documents and procedures.⁸⁹⁰ The two blocs would agree to adopt a uniform Code of Ethics for Customs Officers in both regions, and a joint program for training of customs officials in customs valuation and Exchange of Trade Information.

⁸⁸⁷ Other areas of co-operation identified by the two blocs are the non-tariff barriers, customs, Exchange of information on trade statistics and harmonisation of trade facilitation measures. Access to outside markets and regional telecommunication is also marked for co-operative endeavour

⁸⁸⁸ *Article 69* of the COMESA Treaty provides for the simplification and harmonisation of trade documents and procedures so as to facilitate trade in goods and services within the Common Market. The counterpart provisions in the SADC Trade Protocol are to be found at *Article 14* as read together with *Annex 111*

⁸⁸⁹ Under COMESA, there are special undertakings promulgated under *Article 4* of the Treaty. These are meant to promote the achievement of the aims and objectives of the Common Market as set out in *Article 3* above.

⁸⁹⁰ Other areas of endeavour under this rubric is the establishment of conditions regulating the re-export of goods from third countries within the Common Market and the establishment of origin rules of with respect to products originating in the Member States. In recognition of the unique situation of Lesotho, Namibia and Swaziland within the context of the Common Market a temporary exemptions granted to these states from the full application of specified provisions of the Treaty provisions.

The two blocs would partner to ensure the Prevention, Investigation and Suppression of Customs Offences.⁸⁹¹ In this regard the two blocs would exchange lists of goods and publications the importation of which is prohibited in their respective territories. The regional customs authorities would then exchange among themselves lists of goods known to be the subject of illicit traffic between their customs territories and maintain special surveillance over the movement of such goods. Apart from wide consultation, common border posts would be established and necessary steps taken to ensure that goods exported or imported through common frontiers pass through the competent and recognised Customs Offices and travel along approved routes.⁸⁹²

It would be crucial for the two blocs to put systems in place to determine and monitor the goods that were granted preferential treatment on departure from the territory of the requesting Member State. This is for the simple reason that the goods declared as intended for home use in the other Member State, have been duly cleared for home use in that State. This determination should equally be made of goods imported into the territory of the requesting Member State to ensure that such goods have been lawfully exported from that of the exporting Member State.⁸⁹³

To promote the regional export market, the two blocs would agree that re-exports bound for a receiving State shall be exempted from the payment of import or export duties in the importing State.⁸⁹⁴ However, the normal levying of administrative and service charges applicable to the import or export of similar goods in accordance with their customs laws and regulations should be exempted.⁸⁹⁵ This measure would increase the circulation of goods and factors of production in the region. As a result intra-regional trade would be given a major boost for expansion and growth.

⁸⁹¹ Article 66 of the COMESA Treaty deals with the Prevention, Investigation and Suppression of Customs offences. See also *Annex II* of the SADC Trade Protocol

⁸⁹² It is advisable in this regard to exchange among themselves lists of Customs Offices located along common frontiers, details of the powers of such offices, their working hours and any changes in these particulars for the effective operation of the provisions of sub-paragraph (d) of the Article. It is also of paramount importance to endeavour to correlate the powers and harmonise the working hours of their corresponding Customs Offices.

⁸⁹³ Other areas of interest are to ascertain *inter alia* that goods exported from the territory of the requesting Member State have been lawfully imported into that of the importing Member States, and in accordance with the importer's declaration. Special documents, which should be, issued by the customs authorities of the exporting Member State for surrender to the customs authorities of the importing Member State in order that they may certify that the goods were lawfully exported.

⁸⁹⁴ Article 67 of the COMESA Treaty. Also *Annex I* of the SADC Trade Protocol deals comprehensively with the situation where products have acquired an originating status

⁸⁹⁵ See *Part three* of the SADC Trade Protocol

8.8:1 Trade liberalisation, promotion and development

(a) Trade promotion

In this case, partnership would ensure that within the wider free trade area, customs duties and other charges of equivalent effect imposed on imports are eliminated. Non-tariff barriers including quantitative or like restrictions or prohibitions and administrative obstacles to trade among the Member States shall also be removed. It is feasible that co-operation in this area, if successful, would usher in a deeper level of integration. This development would in the long run give way to the establishment and maintenance of a common external tariff in respect of all goods imported into the region.⁸⁹⁶

The expected heavy loss of revenue following the signing of the COMESA Treaty and the SADC Protocol is a matter of serious concern to states in the region. The two blocs can and should partner in this area so as to conclude a Protocol that would address this logjam to liberalisation. Such a Protocol should, *inter-alia*, determine the machinery and formula to be used in the practical trials of carrying out the remedial steps with respect to a member state, which have suffered substantial loss of revenue from import duties as a result of the liberalisation process.

It is pertinently important that the two blocs endeavour to promote a harmonious and balanced development in the region and in particular the need for reducing the disparities among various areas in the region and paying attention to the special problems of each Member State. Particular attention should be directed to the least developed countries and economically depressed areas among their ranks. The two blocs should put in place specific measures designed to strengthen the capacities of this group of States to resolve these problems.

Trade promotion is the WTO's refrain and is as important an endeavour to the two blocs in the region. The two blocs should partner to adopt measures designed to promote trade within the region. Partnership in this vein would, in the main, ensure the development and dissemination of market intelligence and trade information with a view to provide the widest possible knowledge-base for intra-regional trade opportunities. Measures would also be taken to encourage the development of export markets to meet

⁸⁹⁶ *Article 45* of the COMESA Treaty explains the Scope of Co-operation in Trade Liberalisation and Development. Likewise *Article 26* of the SADC Protocol makes provision for Trade Development

the public and private procurement needs. The partnership would actively encourage the undertaking of supply and demand surveys, the organisation of buyers and sellers meetings and other multi-country contact promotion events in order to further identify, promote and exploit the potential for intra-regional trade.

The partnership would go a long way to obtain an undertaking from member states to remove measures that have been identified during the market surveys, which restrict the flow of goods and services to their identified markets.⁸⁹⁷ The partnership would then strengthen and promote export-oriented joint ventures, by encouraging and facilitating enterprise-to-enterprise contacts and support privatisation endeavours through the introduction of trade services or improvement of the trade promotion infrastructure to meet the special requirements of privatised companies. The partnership would encourage the improvement of services relating to trade such as export financing, quality control and standardisation, packaging and specification aspects, warehousing and storage operations, and others that will increase the flow of goods within the region.⁸⁹⁸

(b) Production and export capacity building

It is instructive that during one of their meetings, the two blocs discussed ways and means of ensuring maximum benefits for both regions from the African Growth and Opportunity Act (AGOA). Other measures were also explored to assist member States to gain duty free access to the US market.⁸⁹⁹ This is, no doubt, a positive pro-active co-operative strategy. More resources need to be marshalled to partner in capacitating member states to take full advantage of this potentially lucrative export facility.

The two blocs should partner in increasing the awareness of intra and extra regional trade opportunities. They should also partner in the provision and exchange of computerised trade information in the region through the support of the sub-region-wide

⁸⁹⁷ *Article 70* of the COMESA Treaty urges Member States to undertake to initiate trade facilitation programmes aimed at reducing the cost of documents and the volume of paper work required in respect of trade among the Member States. See also *Article 14* of the SADC Trade Protocol.

⁸⁹⁸ The two blocs could also partner in the exchange of information on matters relating to customs and more particularly to the following: customs legislation, procedures, duties and commodities subject to import or export restrictions. Other areas are information relating to the prevention, investigation and suppression of customs offences as provided for in *Article 66* of the COMESA Treaty and *Article 13* of the SADC Trade Protocol.

⁸⁹⁹ Briefing note to the media by SADC Executive Secretary, Dr Prega Ramsamy and COMESA Secretary General, supra. Also cited at http://www.sadc.int/english/archive/mr02_19102001.html

Trade Information Network (TINET).⁹⁰⁰ Information should also flow on the provision of company data, export or import opportunities, tender invitations issued by national authorities for public procurement, statistical profiles of general and specific product groups. Other essential information that should freely circulate in the region is on restrictive trade practices non-tariff barriers and other related obstacles as stated in the TINET's region-wide standards.⁹⁰¹

The two blocs should as well partner in giving special consideration to the least developed countries and economically depressed areas of the region in the service sector. The two blocs would ideally undertake to maximise the use of the existing potential to respond to the needs of the sub-region and improve investment conditions for the service sector for nationals and foreigners from within the region.⁹⁰² In their recent meeting, the two blocs agreed to explore possibilities of exchanging information particularly trade statistics through the Eurotrace system. The two blocs undertook to invite each other to workshops and meetings on trade issues as well as co-operating in statistics training activities.⁹⁰³

(c) Development of the infrastructure

The state of sub-Saharan Africa infrastructure is what one could term as its Achilles heels to regional economic growth. One of the major pre-requisites for sustainable economic growth for the least developed countries and economically depressed areas in the region is the development of adequate and reliable infrastructure, especially transport and communications.⁹⁰⁴ The absence of appropriate infrastructure remains one of the biggest obstacles to effective regional co-operation. Again, very little progress has been made in regional co-operation toward infrastructure development.

⁹⁰⁰ See also *Chapter 20* of the COMESA Treaty

⁹⁰¹ These standards contain special TINET instructions, *ad hoc* requests, and standing practices, which are subject to change from time to time.

⁹⁰² Another option is to establish a special Fund for Co-operation, Compensation and Development for tackling the special problems of under-developed areas and other disadvantages arising from the integration process.

⁹⁰³ Briefing note to the media by SADC Executive Secretary, Dr Prega Ramsamy and COMESA Secretary General, supra also cited at http://www.sadc.int/english/archive/mr02_19102001.html

⁹⁰⁴ While addressing the ACP Summit, Commissioner Nielson urged that substantial regional funds should continue to be directed to the improvement of infrastructure links between African countries. These links are physical, in terms of roads, railways and maritime transport but also increasingly focussed on communications technology and electronic media. Support to deepening regional economic integration and improving infrastructure and communications are complementary elements of the co-operation strategy in this area. Statement by Commissioner Nielson supra

The foremost disincentive to investor confidence in the region is the poor infrastructure in service provision. Robinson⁹⁰⁵ has observed that despite its 'win-win' characteristics, the level of regional co-operation in infrastructure and natural resources in the past has been disappointingly low. He notes that in the area of energy supply, very few intra-regional supply arrangements exist even though the potential for intra-regional grid connections exists at non-prohibitive costs.

The foregoing focus is certainly true for the SADC region where efforts are currently underway, driven largely by South Africa, to stimulate the development of both infrastructure in roads, rail, ports and harbours, telecommunications and electricity and export industries.⁹⁰⁶ Co-operation would widen coverage of this project to include the entire COMESA region. SADC's international Co-operating Partners, of whom the European Union (EU) is among the major ones, have also accepted the strategic role of transport and communications to sustainable development and to trade and investment in SADC.⁹⁰⁷

The prime area in which the two blocs could strengthen co-operation is that of evolving co-ordinated and complementary transport and communications policies, to improve and expand the existing transport links and establish new ones as a means of furthering the physical cohesion of the Member States within the region. This venture would go along way to facilitate movement of inter-State traffic and to promote greater movement of persons, goods and services within the region.⁹⁰⁸ Co-operation in this regard would cover

⁹⁰⁵ Robinson P 1996, " Potential Gains from infrastructural and Natural Resources Investment Co-ordination in Africa". In Teunissen J. (ed.): *Regionalism & the Global Economy: The case of Africa*: FUNDAD, The Hague

⁹⁰⁶ Entitled the "Regional Industrial Location Strategy" or "RILS ", this initiative aims at identifying development corridors in all the mainland SADC countries. For obvious geographical reasons, Mauritius is not included in this study. The "Maputo Corridor" between Mozambique and South Africa and the proposed "Nacala Corridor" linking Malawi and Zambia are two examples of this strategy.

⁹⁰⁷ The sector has, therefore, received substantial support. In this regard, under the Lome III convention, out of a total envelope of ECU 141 million of the Regional Indicative Program (RIP), approximately ECU 56,4 million or 40% was allocated to transport and communications. Under the First financial Protocol of the Lome IV convention, out of a total allocation of ECU 128 million of the RIP, approximately ECU 44,8 million or 35% went to transport and communications. The amount allocated to infrastructure under the Second financial Protocol of the Lome IV convention is approximately ECU 54,45 million or 45%. This however, includes allocation to the Energy Sector. AWEPA Seminar Report *supra* at p.12

⁹⁰⁸ SADC and COMESA have for a long time been working closely on issues pertaining to trade facilitation including Axle load and vehicle dimensions, Carrier license, Road transit charges, Third Party Motor Vehicle Insurance - the Yellow Card and Advance Cargo Information System/Rail Stock Tracking System. Parties have committed to continue co-operation on these

road, rail, air, maritime, radio and telecommunication, inland waterways and multimodal transport.⁹⁰⁹

Partnership would foster such co-operation among the two blocs as would facilitate the production of goods and facilitate trade in goods and services and the movement of persons. The partnership would give way to the promulgation of regulations to facilitate transit trade within the region and adopt a Third Party Motor Vehicle Insurance Scheme. In their recent co-operation meeting, the two blocs noted that SADC has concentrated on putting in place the policy and regulatory framework for the telecommunications sector which has led to the continued liberalisation of this sector.⁹¹⁰ On its part, COMESA has established COMTEL whose objective is to achieve regional interconnectivity. The meeting agreed that these activities complement each other and therefore they should be co-ordinated in order to reduce transaction costs. This, in our considered view, is a resoundingly logical conclusion.

8.8.2 Private sector and investment promotion

(a) Private Sector Development

It has time and again been reiterated that the private sector is the engine to any country's development. One can not begrudge this basic truism. The private sector is arguably an effective force for the development, progression and reconstruction of the tattered regional economies. It is justifiable to opine that while the government provides the environment within which investment activities can thrive, the ultimate decision whether or not to invest is taken by the private investor. The two blocs should agree to provide an enabling environment within which the private sector can thrive and thereby exploit the vast opportunities offered by the regional market.⁹¹¹

issues to ensure as much harmony as possible between the two regions. SADC/COMESA joint media briefing supra

⁹⁰⁹ The respective Member States shall collect and disseminate to the other Member States meteorological information in order to facilitate the efficient operation of air navigation, coastal shipping, inland water transport and the issuing of cyclone warnings and other adverse weather phenomena. To this end, the two blocs should further agree to establish a Regional Meteorological Centre.

⁹¹⁰ Briefing note to the media by SADC Executive Secretary, Dr Prega Ramsamy and COMESA Secretary General, Mr Erastus Mwencha on the outcome of the second meeting of the SADC-COMESA Task Force 23rd October, 2001.

⁹¹¹ Under *Article 76* of the Cotonou Agreement provision is made for long-term financial resources, including risk capital, to assist in promoting growth in the private sector and help to mobilise domestic and foreign capital for this purpose. To this end, the EU in particular would make available grants for financial and technical assistance to support policy reforms, human resource development and institutional capacity building.

Partnership in this area would take the form of promotion of continuous dialogue with the private sector organs at the national and regional levels to help create an improved business environment for the implementation of agreed decisions in all economic sectors. An opportunity would then be created for entrepreneurs to actively participate in improving the policies, regulations and institutions that affect them so as to increase confidence in policy reforms, raise productivity and lower costs at enterprise level.

To achieve this goal the two blocs should commit their members to move quickly in improving the business environment through the promotion of conducive investment codes, the protection of property and contract rights and the regularising of the informal sector. The rank and file of each bloc's members should undertake to stimulate market development through infrastructure linkages and the removal of barriers and constraints. Co-operation among the regional chambers of commerce and industry would provide up to date commercial intelligence on a regular basis to speed up market response.⁹¹² One of the Cotonou's ingenious innovations is its appeal for the extension of partnership arrangements to civil society, social partners, the private sector and local government.⁹¹³

The two blocs would collaborate with the regional chambers of commerce and industries to establish lending institutions that would primarily cater for the entrepreneurs, especially the small-scale ones. The latter category of enterprises is often met with insurmountable difficulties in their endeavour to obtain credit from commercial banks and finance institutions. Under COMESA a Consultative Committee of the Business Community and Other Interest Groups has been established to provide a link and facilitate dialogue between the business community and other interest groups.⁹¹⁴ The

⁹¹² These establishments would also help encourage sourcing of purchases by governments and parastatals within the sub-region and facilitate and support the exchange of experience and pooling of resources through, *inter alia*, cross-border investments. Most importantly they would strengthen the role of chambers of commerce in national economic policy formulation.

⁹¹³ The Cotonou advocates for support to the private sector and its access to European Investment Bank (EIB) funds. Pillar II of the Cotonou Agreement sees for the promotion of participatory approaches. The Agreement envisages a substantial role for non-State actors in the design and implementation of development strategies and programmes, for example the private sector and economic and social partnerships. The role of civil society is particularly important whilst non-governmental organisations (NGOs) should also be strengthened in order to guarantee a significant contribution to the development process. Further, the participation of these actors depends on certain criteria relating to management and form of organisation. See, for example, *Article 21* of the Cotonou Agreement

⁹¹⁴ Under *Article 18* of the COMESA Treaty, and that goes for the Cotonou as well, provision is made for a greater and more vibrant private sector participation and even widens the scope to include the whole of civil society as development partners. *Article 7* recognises the importance of

Committee is mandated to ensure that the interests of the business community and other interest groups in the Common Market are taken into consideration by the organs of the Common Market.⁹¹⁵ The two blocs should move first in the exploitation of this important network to advance the corporate interests of the region's business community as a whole.

(b) Investment promotion and protection

In the challenging area of investment promotion and protection, the two blocs should partner to accord fair and equitable treatment to private investors and adopt a programme for the promotion of cross-border investment.⁹¹⁶ The two blocs are obligated to co-operate in the creation and maintenance of a predictable, transparent and secure investment climate in the region.⁹¹⁷ For such a climate to mature the two blocs would co-operate in urging their respective Member States to remove administrative, fiscal and legal restrictions to intra-regional trade and investment.⁹¹⁸ It would be helpful for both to exchange information on legislation for patents, trademarks and designs and industrial investment opportunities, processes, technology and other related information.

The two blocs have a common meeting ground in the institution of the CBI. This facility is, no doubt, one veritable vehicle for deepening integration in the region. The CBI covers eastern and southern Africa and the Indian Ocean Islands and is an initiative co-sponsored by the World Bank, IMF, EU and the African Development Bank (ADB). It supports the notion that 'given the on-going economic reform programs in these countries, a parallel set of policy and institutional reform could accelerate growth through regional integration, particularly by fostering efficient cross-border investment and trade

strengthening community organisations and non-profit non-governmental organisations in all spheres of co-operation. This would enhance the contribution of civil society to development.

⁹¹⁵ The Committee would also be responsible for monitoring the implementation of specifically the provisions of *Chapters 24 and 14* of the Treaty and make recommendations to the Intergovernmental Committee.

⁹¹⁶ Investment and the entire private sector development is addressed at *Article 21* of the Cotonou Agreement which provides that co-operation in this area would be targeted to support the necessary economic and institutional reforms and policies at national and/or regional level.

⁹¹⁷ *Article 77* of the Cotonou Agreement makes provision for an increasing availability and use of risk insurance as a risk-mitigating mechanism in order to boost investor confidence in the ACP States. In this regard the EU has pledged to offer guarantees and assist with guarantee funds covering risks for qualified investment.

⁹¹⁸ In the same vein Member States should undertake to increase awareness of their investment incentives, opportunities, legislation, practices, and major events affecting investments and other relevant information through regular dissemination and other awareness promoting activities. Member States can also boost the investment climate by taking necessary measures to accede to multilateral

flows.⁹¹⁹ The European Commission has argued that this initiative results from “ the desire to formulate a programmatic way to promote more effective regional integration” in the east and southern Africa region.⁹²⁰

The CBI emphasis is on outward orientation, particularly openness to the global commerce to ensure greater integration of the sub-region into the world economy. It also campaigns for the avoidance of new institutions and encourages direct involvement of the private sector in the formulation and implementation of a conducive policy/institutional environment. It underpins the need for CBI to be driven by the participants to ensure ownership as a key to effective implementation.⁹²¹ It is imperative for the two blocs to recognise the need for effective resource mobilisation, investment and the importance of encouraging increased flow of private sector investment into the region for economic development.

The two blocs should agree to adopt harmonised macro-economic policies that would attract private sector investment into the region. Intra-bloc co-operation would promote cross-border investment, franchise and agency arrangements and joint venture operations. This partnership would in turn promote the transfer of technology and skills. It also contributes directly to the ongoing process of economic development in the region.⁹²²

agreements on investment dispute resolution and guarantee arrangements as a means of creating a conducive climate for investment promotion.

⁹¹⁹ Some economic commentator, however, take the view that from an economic historical perspective, we cannot rely on direct foreign investment to develop Africa. This is because, they contend, even where direct foreign investment has gone in a big way like in Argentina, the final results have been a catastrophe. See <http://www.eastandard.net> on Saturday, June 29, 2002

⁹²⁰ W. Kennes, “The European Union’s Support for regional Integration in ACP Countries” (*Insert NO.55, June 1994*), Directorate General for Development. See also R. H. Thomas - Trade Liberalisation Issues, *supra*, at p.45

⁹²¹ R. H. Thomas, Trade Liberalisation Issues *supra* at p.45

⁹²² For example tobacco farmers and other agricultural produce and marketing agencies in Malawi and Zambia can enhance their strategic links with processors in Zimbabwe. Similarly, textile producers in Mauritius are re-locating to more cost-effective production centres in Madagascar to improve the competitiveness of their goods.

8.9 Concluding Remarks

There is no gainsaying the fact that the fundamental objective of regional integration in the east and southern Africa need to be clarified. In this connection, it has become abundantly clear that regional integration in the region could divert trade from cheaper international sources. We have demonstrated that this discourse would not enhance the welfare of the region. Quite clearly, we have instead proposed that regional industrial development supported by co-operative infrastructure development and institutional capacity development deserves attention to manage the process of regional integration. We have also pointed out that regional integration should be seen as a component of a regional development strategy, complimented by coherent national policy initiatives.

We have argued that the biggest challenge facing regionalism in the east and southern Africa region is the conflict between COMESA and SADC. We have pointed out that in this polarised scenario, the potential for conflict of interest is real and looms large like a colossus over the two blocs' integration initiative. The chapter has demonstrated that arriving at consensus necessary for the implementation of regional integration policies within the two blocs is often difficult. It is our thesis, therefore, that the proliferation and duplication of functions give rise, at regional level, to conflict over mandates and to a divided loyalty among governments.

We have examined the motivation for multiple membership and have identified one notable strong persuasion for such inclination. We have argued that the motivation that succinctly captures the convoluted regionalism equation in east and southern Africa is the hope to get aboard the gravy train of donor funding. It is our thesis that most of these states maintain membership in numerous regional regimes not for purposes of promoting trade but with a hope of tapping into the gravy train of donor funding. We have opined that the sad reality of overlapping membership is that the SADC Trade Protocol will only effectively cover non-COMESA SADC members. This reality, we have argued, is due mainly to the fact that importers would clearly choose to pay the lower rates of customs duties under the COMESA umbrella. It is our thesis that this jumbled scenario is needless to say inimical to the deepening of the integration process in the east and southern Africa region.

This chapter has illustrated the inevitable namely that it is possible for a jointer of the region's two well-grounded customs unions to lay out the much-needed road map and act as a super-highway to greater and deeper integration in the region. We have opted for a cautious approach that there is certainly great wisdom in an attempt by the two blocs to commence their economic recovery program by moving from the known to the unknown. We have suggested that the SACU and the EAC experience offer far greater insights and lessons in the quest by the two blocs to take the nascent trade partnership to the deeper integration level of a common market.

We have argued that the two blocs are in agreement in so far as the final objective of their integration process is concerned. The two blocs are desirous of contributing to the implementation of the provisions of the Treaty Establishing the African Economic Community. Given this eventuality we have suggested that the two blocs would have to implement their respective trade disciplines with due consideration to the provisions of the Treaty Establishing the African Economic Community.

We have taken the view that although it is a relatively rich country, South Africa cannot survive as an island that is surrounded by a sea of regional poverty. In our considered view, policy-makers must understand that the country's destiny is interwoven with that of the region. Consequently we have argued that it behoves South Africa to take the challenge of giving leadership on the way forward not only to its SADC flock but to the wider region and the continent as a whole. It is our thesis that South Africa can and should play a pivotal role in building bridges between the two blocs in order to spur intra-regional trade.

We have examined areas of common weakness in the region that co-operation would seek to address. The chapter has demonstrated that in order to promote stable economic groupings, countries in the region should belong to the one economic group that fully represents their interests. We have reviewed arguments that propose that countries within COMESA should formalise into a sub-regional entity without dual membership. We have argued that this proposition, though portend, fail to address the teething problem of the dearth of intra-regional trade and the lustre flow of direct foreign investment in the region. Our thesis rests on the premises that the reality of double membership and therefore open antagonism should be acknowledged as a fast step to

identifying ways and means of harnessing synergies in the two bloc's programs for co-operative integration partnership.

The chapter has made a strong case for the necessity of a co-operative approach between the two blocs. We have argued that such partnership would give the regional integration initiative a new impetus to mature the process to greater harmonisation. We have further argued that with these fundamentals in place, a deepening of integration would result which in turn would have a spread effect to other regions throughout the continent. Our considered view is that this is the route to go if the ultimate goal of achieving unity in the pan-African Economic Union is to be actualised.

Chapter Nine: Conclusion and Recommendations

9.1 The findings

The discussion in chapter two helped to highlight a number of features attributable to regional integration patterns. These features did replicate themselves in the subsequent chapters on specific regional integration regimes on the international plane and ultimately those straddling the eastern and southern Africa region.

We have in the main established that regional integration consists of regimes that involve the voluntary linking in the economic and political domains of two or more states to the extent that authority over key areas of national policy is vested in the competence of a supranational body. We have traced the roots of regional integration to the early nineteenth century. We have identified two main broad categories of regional regimes - that is free trade areas and customs unions.

The thesis has demonstrated that regional regimes conglomerate together the so-called 'like-minded' parties hence their agility in the facilitation of tariff phase-out programme on a regional basis. This exercise then eventuates into the totality of free trade worldwide. We have also established that the spirit of regionalism resides in the promotion of trade through liberalization and rapid dismantling of trade barriers. This work has established that the effects of merely phasing out tariffs diminished since tariffs had already come down in subsequent WTO Rounds. Most importantly, though, the thesis

has shown the fact that many countries became used to lower tariffs in the framework of regional arrangements or through the General System of Preferences.

We have established that besides trade liberalisation there are other factors which have fuelled the unending stampede to go the regional integration way. The discussion has, in particular, demonstrated that the main reasons for the regionalism fever are twofold. The slow pace that characterises the multilateral process and the conversion of the US from an ardent multilateralist to an active participant in regionalisation are the main reasons behind the renewed flurry of integration activity.

This work has noted that in fact regional integration processes, where well structured, would facilitate progress in the multilateral talks. In the same breadth, the discussion has demonstrated that the impact resulting from the creation of one regional bloc reverberates across the trade regimes' borders and multiplies its effects into the global realm. This work has shown that regionalism, in spite of its many advantages, is not a smooth running affair and that it has its own muted challenges to contend with.

This discussion has examined the difficult issue of economic welfare benefits that integration processes bring forth. We have established that such welfare benefits are not easy to quantify and that only time would tell whether the new wave of regionalism has realised its free trade objective or is off the mark once again.

We had the occasion to examine the validity of the charge that regionalism creates isolationist clubs of closed economies. In this regard we have noted, in fact, that regionalism has a great potential to spread preferences to third countries. This discussion has, nonetheless, demonstrated that whether the emergence of regional trading blocs leads to more or less effective global negotiations is an open question. Existing empirical evidence is limited with respect to coverage and thus inconclusive.

What has come out clearly in this thesis is the indisputable fact that for the most part, external integration processes trigger the creation of regional regimes. Such processes tend to jolt regional partners into self-preservation counter measures. In this respect we have seen that trade blocs may perhaps be best understood as buffer zones in the turbulent process of emasculating competition that characterises global capitalism. This

thesis has shown that such buffer zones provide time and space for socio-political and economic adjustment for member nations inside the zone. We have seen that the security zone also helps members to co-ordinate policies in order to maximise their individual advantage in competition with third nations for the coveted global market share.

Most importantly, this thesis has identified two characteristics that mark out a successful integration initiative. One of these elements is the availability of commitment institutions such as centralised monitoring and third party enforcement mechanisms. These institutions, we have noted, help to enhance the chances of sustained co-operation by acting as constraints on member states in circumstances where self-help measures alone are insufficient to prevent renegeing on contractual obligations. The second central feature is the presence of an indisputable leader state among the group of countries seeking closer ties as a focal point in the co-ordination of rules, regulations, and policies.

We have seen that such hegemony does help to ease distributional tension by assuming the role of regional paymaster - the focus area of this work. In the main, however, this work has clearly demonstrated that the challenges which integration efforts have had to grapple with elsewhere in the globe are replicated in the integration experience within the eastern and southern Africa region.

We have noted that the WTO framework is premised on the rationale that an open and liberal trading system underpinned by mutually agreed and legally binding rules, is the sure recipe for the growth of the global economy. We have argued that the advent of the GATT/WTO system has infused fresh impetus to free trade commitments in the international trade arena. The agreement is the basis for a global rule based trading system. The thesis has established that one of the WTO's overriding preoccupation is the reduction of the level of protectionism. This work has shown that tariff concessions are linked to non-discrimination through the principle of Most Favoured National treatment. We have also seen that through a series of Rounds, the WTO has significantly contributed to the liberalisation of global commerce.

We have averred that the new institutional system points to the importance of rule based framework to guide the international economic development in the 21st century. Quite

clearly the opposite of rules we have argued is a series of *ad hoc* protective measures that are clearly inimical to the desired goal of a global free market.

The thesis has identified *Article XXIV* and the Enabling Clause as the jurisprudential basis for regional regimes within the WTO framework. We have established that the Enabling Clause and *Article XXIV* are the most fundamental exception to the MFN principle. This work has noted that although regional regimes offend not only the letter but also the spirit of the WTO's basic non-discrimination postulate, these regimes are nonetheless tolerated. We have explained that regional regimes are accommodated under the WTO framework due to the fact that they are considered, among other reasons, to be a veritable vehicle to expedite tariff and non-tariff barrier phase out programme.

We have also noted that *Article XXIV* was drafted with the principal objective of closing all possible loopholes by which it could degenerate into a justification for preferential arrangements of less than 100 percent preferences. We have pointed out that regional partners should be seen as the immediate beneficiary of this elaborate rule based international trade framework. It goes without saying, therefore, that regional arrangements in the eastern and southern Africa region are no exception in this regard.

As for the Enabling Clause, the thesis has pointed out that this facility is intended to facilitate full integration of developing countries into the multilateral trading system. We have postulated that this objective would be achieved by providing developing countries with additional flexibility to meet their WTO obligations. We have established that under this clause, arrangements that are exclusively among developing countries can be considered less restrictive, unless the arrangements contemplate the selective removal of non-tariff barriers, in which case approval by the WTO members is required. We have noted that the key caveat for the utility of the Enabling Clause is namely that any such arrangement be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for trade of the other Contracting Parties.

We have noted that the express purpose for granting the exception to regional regimes is explained under *par. 4* of *Article XXIV* as being, to facilitate trade between the constituent territories and not to raise barriers to the trade of other Contracting Parties.

We have discussed the controversy around the WTO's edict that regional regimes cover "substantially all trade" and have submitted that the apparent ambiguity in this provision is entirely undesirable.

We have noted that differences of opinions on the interpretation of the '*substantially-all-trade*' requirement under *Article XXIV* has been the main reason for the subsisting stalemate on the critical question of compatibility with the WTO by various trade instruments. The thesis has also identified another major constrain specifically placed on customs unions. This is that the CET and other trade measures imposed at the time of the formation of a customs union, must be set at a level that is not "on the whole" higher or more restrictive than was imposed by the constituent territories prior to its formation. We have discussed the controversy attending this provision and have submitted that its ambiguity has created a veritable loophole for countries bent on maintaining high tariff regimes against third countries. We have seen how the EU has manipulated this provision to perpetuate its offending CAP policy.

This work has examined the dilemma encapsulating the WTO discipline on reciprocity under *Part IV* of the GATT agreement. We have established that *Part IV* of the GATT did not permit discrimination against other developing countries, since it has endorsed special treatment in favour of all developing countries and not just a sub-group.

The thesis has further established that there are presently no satisfactory multilateral rules that are comprehensive enough to govern the determination of rules of origin. The WTO has however tried to harmonise disciplines on origin rules. These disciplines are that the rules applied by each country must be based on a positive standard namely on what confers origin not what does origin confer. We have argued that this attempt at harmonisation is feeble and therefore incomparable to the more comprehensive origin rules covered by regional regimes.

We have established that both South Africa and the EU contracted the free trade area in order to bolster their external positions and to promote a stronger world trading system. We have noted that both parties will benefit from the expanded home base that the free trade area provides to improve the competitiveness of their respective local and multinational firms. In this work, we have demonstrated that the EU-SA Agreement (hereinafter 'the Agreement') contributes to the desired objective through significant trade

reforms and through the establishment of a bi-national framework of rules that provides greater stability and predictability for trade and investment by both countries.

On the economic score, our thesis is that in signing the Agreement South Africa has accepted certain risks. We have opined that there are clearly no guarantees as to the Agreement's real purport for the fledgling South Africa's democratic institutions. We have noted that since 'the real eating is in the pudding', there is no definitive empirical evidence to indicate whether or not the Agreement is in the overall interest of South Africa. We have argued that given the huge imbalances between South Africa and the EU economies, any negative effects emanating from the Agreement would be felt far more keenly by South Africa than its counterparts in the EU.

It is our thesis that although South Africa is not strictly speaking a developing country – and is even considered a developed nation within the WTO framework – the Agreement provides a kind of case study for new global dynamics. We have underscored the fact that it is the first real agreement between a developed and an emerging market economy that focuses on trade more than it does on aid. We have conceded that the implication of this Agreement on South Africa and its regional neighbours are difficult to predict at least in the short term. The Agreement will have to run some course before the actual implications can be quantified. This work has established that the Agreement makes provisions that are intended to stimulate intra-regional trade and the integration of the eastern and southern Africa region.

We have, however, argued that the last few months into the Agreement have been a huge disappointment on the eagerly awaited flow of foreign direct investments to South Africa. We have noted that the Agreement has rolled out investor friendly incentives that should spur the flow of foreign direct investments. It therefore means that the negative performance of the economy must find an explanation outside the parameters of the Agreement.

We have argued that as much as the global impact of the Agreement would be far much limited, the Agreement is indicative of a new trend in global thinking about relations between the developed and the developing world. We have noted that despite its attractions, the Agreement does, nonetheless, contain notable deficiencies. For instance,

basic energy remains immune to free trade, progress on labour and environmental issues proceed in half steps, and the accession clause is none existent.

On a more optimistic note, we have argued that the Agreement is fairly comprehensive and one that covers not only trade and trade related issues, but also co-operation in economic, social and political matters. We have pointed out that the twin principles of asymmetry and differentiation that characterise the Agreement reflect the developmental status of the EU on the one hand and South Africa on the other. We have argued, however, that the asymmetrical and differential benefits emanating from the Agreement would be eroded by the EU's superior capacity to immediately take up increased production as well as defend their own markets.

We have opined that the Agreement scores well on the WTO most favoured nation and national treatment fronts. We have noted that the Agreement commits the Parties to provide national treatment to investors from the partner countries. It is our thesis, however, that compared to WTO rules the energy security safeguards are sharply circumscribed. We have pointed out that other basic features on tariffs and non-tariff barriers including dumping and countervailing measures to a large extent replicate the WTO disciplines.

We have noted that the provision for an elaborate dispute settlement mechanism is in clear conformity with the WTO disciplines. We have postulated that the Agreement does not preclude Parties from accessing the much-advanced WTO dispute settlement mechanisms should they choose to do so. It is our submission that this leeway is a clear acknowledgement of the superiority of the WTO framework over that of the preferential Agreement.

We have established that the Agreement fails to address the question of accession based on the WTO procedures. We have noted that the WTO's procedure underpins the importance of a free trade agreement being open to third countries. In our considered view this omission renders the Agreement incompatible with the WTO's strategy to coalesce the world commerce into a global village through building blocs in regional integration schemes. We have cautioned that quite clearly the creation of an EU-SA exclusionist trade club does not augur well for the WTO refrain on a tariff free global commerce.

We have established that the main trade concessions in the Agreement are in the area of tariffs. We have also established that the more restrictive non-tariff barrier regime has been largely left undisturbed. We have argued that, in fact the ability of the EU to negotiate reductions in such barriers is seriously constrained by its own unwillingness to scrap the forbidding non-tariff barriers in such sensitive areas as textile and apparel and steel.

One striking feature that has come out clearly in this thesis is the fact that the process of integration in the eastern and southern Africa region involves unequal developing and least developed countries. We have argued that this unequal economic landscape offers unique yet insurmountable challenges for the unfolding integration processes.

We have seen that the main thrust of the SADC Trade Protocol is to facilitate regional economic growth and development through, among others, the creation of a free trade area in the SADC region. We have discussed the significance of the rider to the liberalization process in that it is linked to an industrialization strategy. This strategy, we have argued, is tailor made to improve SADC states' global competitiveness.

The thesis has noted that before ratification of the Trade Protocol most SADC states had liberalized on a large scale under the World Bank and IMF engineered SAPS. We have argued that when one looks at the issue from this perspective, it then becomes abundantly clear that an expedited move to a free trade area would be more demanding in terms of adjustment on South Africa than would be for her SADC counterparts.

We have demonstrated that the Trade Protocol is to a large extent compatible with the WTO disciplines save for some areas of ambiguity, which we have highlighted. It is not clear, for example, between the bilateral trade arrangements and the Protocol as to which one would take precedence in case of inconsistency.

The thesis has alluded to the fact that provisions on trade in services have been made WTO compliant to avoid situations of conflict with the multilateral disciplines. We have pointed out that the service industry is already blossoming in the region only that it is a one way highway shooting from South Africa to the rest of the region. On the obverse side of the coin, however, we caution that with the liberalisation of the services and manufacturing sectors, most firms in the region have been exposed to outside

competition. We have argued that this wind of change has, unfortunately, come suddenly and thereby swept the regional firms off balance before they could put in place necessary structures to position themselves in order to be internationally competitive

We have lauded the fact that the revised dispute settlement provisions strive to ensure certainty and predictability in the settlement of disputes arising under the Trade Protocol. We have noted that this remarkable feat has been achieved by clearly outlining the different phases in the settlement of disputes and linking them to clear cut time frames. We have also noted that the new provisions are based on the same principles underpinning the Dispute Settlement Understanding of the WTO.

This work has highlighted the difficulty created with respect to SACU's *locus standi* before the dispute settlement panel by its insistence on presenting a harmonised tariff regime within the SADC framework. We have argued that in this convoluted scenario, it is unlikely that SACU would be afforded with the requisite competence to gain audience before the panel.

It is our thesis that SACU is the first casualty to suffer the effects of the Agreement. We have argued that the EU-SA Agreement would effectively transform the BLNS's non-reciprocal status to reciprocal duty-free access with serious legal and economic ramifications. In respect of SADC, we find that while its position is not as critical as that of the SACU states, it nevertheless faces a similar dilemma.

We have examined the provision under the EU-SA Agreement that purports to extent trade benefits to SADC member States. We have detailed the various SADC State's sectors that are in the firing line of the EU-SA Agreement. We have, in the main, argued that the principal handicap afflicting the SADC States is the endemic weakness in their supply side structures. We have argued that in view of this enduring handicap, it is inconceivable that these States would be in a position to compete with EU's products in the South African market.

We have argued that the reality of supply side handicap remains true in spite of 'the SADC first' principle which the Agreement has internalised. We have argued, however,

that SADC stands to benefit immensely from the technology transfer opportunity, which the EU-SA partnership offers.

We have noted that trade arrangements in eastern and southern Africa region have been intended as a mechanism for enhancing the competitiveness of national and regional economies of their member States. Indeed, the motivating force for regional trade arrangements extends beyond trade and encompasses other broader issues. We have noted that the Cotonou, like other regional instrument covers a wide spectrum of sectors. These sectors are technology, foreign direct investment, money and finance, services, labour markets, government procurement, environment and the competition policies. We have argued that this comprehensive coverage is within the much wider framework of integrating the region into the global economy.

We have cautioned that in achieving a post-Lome replacement, the ACP States should guard against so easily foregoing the Special and Differential benefits allocated to them under the WTO framework. We have noted that these benefits were to a large extent accommodated within Lome's no-reciprocal preferences. We have argued that the preference regime should be viewed as a strategic amenity in the quest to achieve long-term economic development goals for developing countries. We have singled out the banana case to demonstrate the fact that there are inherent difficulties in trying to serve the interests of the ACP States while at the same time respecting trade agreements within the framework of the WTO disciplines.

We have examined the body of the Cotonou Agreement and have noted that despite its transitional character it nonetheless replicates other regional regimes in item coverage. We have commented that the Cotonou does well to unequivocally acknowledge the different needs and levels of development for the ACP countries and regions. It is our thesis that the Cotonou is crafted in a deliberate fashion in order to build on and strengthen integration process taking root in the eastern and southern Africa region in a coherent and efficient manner.

We have noted that despite the Cotonou's comprehensive coverage on regional integration friendly features, the problem, however, resides with the absence of economies of scale. This concern is founded on the premise that states in the eastern and

southern Africa region, with the exception of South Africa, deal in primary exports only. We have argued that such an undiversified economic base severely constrains intra-regional trade. We have established that the Cotonou's coverage of the services trade is more comprehensive than similar efforts undertaken in other regional instruments. We have pointed out that the services sector rolls out the road map to the economic growth infrastructure and hence deserve to be treated to more comprehensive disciplines.

We have noted that the central theme of bringing the private sector aboard the integration processes resonates in all the regional instruments. We have noted the unmistakable synergy in the treatment of the private sector in all the regional agreements. The Cotonou has nonetheless surpassed other instruments by making broader commitments on the private sector support and development. The Cotonou, for instance, pledges support for operations of an ACP-EU private sector business forum whose main objective would, among other things, be to facilitate dialogue within the ACP/EU private sector and the bodies established under the Agreement. We have noted that this important innovation will bring together all entrepreneurs in the region for the common good of investment promotion.

We have further noted that strategically speaking, South Africa thus finds itself astride two trade regimes, which one might argue also characterise its state of development. We have then demonstrated how South Africa is strategically placed within the Cotonou framework to augment and ultimately actualise the deepening of integration processes in the region.

This work has identified and explained what measure the Cotonou should contribute to integration processes in the eastern and southern Africa region. We have argued that SADC and COMESA would conduct, as they have indeed done for the last four decades, most of their international trade with the EU under the Cotonou. This option provides the greatest certainty and, consequently, the most reliable export stability for the preference recipients among all the EU trade regimes.

We have argued that the biggest challenge facing regionalism in the eastern and southern Africa region is the conflict between COMESA and SADC. We have pointed out that in this polarised scenario, the potential for conflict of interest is real and has the unintended

effect of stifling the region's integration agenda. We have shown that it is already evident that arriving at consensus necessary for the implementation of regional integration policies within the two blocs is often difficult. It is our thesis, therefore, that the proliferation and duplication of functions give rise, at regional level, to conflict over mandates and to a divided loyalty among governments.

We have examined the motivation for multiple membership and have identified one notable strong persuasion for such inclination. We have argued that the motivation that succinctly captures the convoluted regionalism equation in eastern and southern Africa is the hope to get aboard the gravy train of donor funding. It is our thesis that most of these states maintain membership in numerous regional regimes not for purposes of promoting trade but with a hope of tapping on the handy reservoir that is donor funding.

We have opined that the unfortunate reality of overlapping membership is that the SADC Trade Protocol will only effectively cover non-COMESA SADC members. This reality, we have argued, is due mainly to the fact that importers would clearly choose to pay the lower rates of customs duties under the COMESA umbrella. It is our thesis that this jumbled scenario is needless to say inimical to the deepening of the integration process in the eastern and southern Africa region.

No doubt the fundamental objective of regional integration in the east and southern Africa should be clarified. In this connection, it has become abundantly clear that regional integration in the region could divert trade from cheaper international sources. We have demonstrated why this measure would not enhance the welfare of the region.

9.2 Suggested recommendations

We argue for enhanced flexibility in the WTO framework to create space for more innovative arrangements between the north-south and south-south economic divide. This measure would enhance the ability of the struggling developing economies to be fully integrated in the world trading system hence fulfil the WTO agenda of a tariff free trade. There is urgent need to revisit Article XXIV - that is the enabling provision for regional agreements. The vagueness of this provision is the root cause of the current chaos in the character assumed by the different integration instruments vis-à-vis the WTO disciplines.

The WTO rules on the twin principles of reciprocity and differentiation call for clarification. We think there is need for more latitude on this principles in the WTO framework in order to augment the integration processes currently crowding the regional landscape.

With regard to the EU-SA Agreement, it is our considered view that, more attention should be directed at South Africa's capacity, particularly in the short and medium terms. It is important to put the necessary systems in place to take up the export opportunities that would be opened up and hedge against the unwholesome trade effects that are likely to seep through the Agreement. It is thus imperative for the implementation of the Agreement that risks and negative effects are minimised while growth opportunities are maximised.

It is imperative for the South African government in general and the business community in particular to relentlessly pursue the obvious potential benefits offered by the EU-SA Agreement for South Africa's market. More importantly South Africa must ultimately face up to the cumbersome challenge of adjusting its structures of commerce, production and marketing to the exigencies of the global economy, quite independently of this Agreement. South Africa must take an urgent audit in identifying sectors that are vulnerable to competition and encourage their restructuring. In the same vein South Africa must be appraised that for benefits to accrue from the Agreement it must move to scrupulous exploit and diversify its export market.

In our considered view it would have been better, for the sake of harmonisation, that the SADC Trade Protocol overrides all the existing bilateral trade arrangements. We take the view that there are already numerous preferential trade agreements in the region and that therefore SADC should consolidate its gains rather than calling for more free trade agreements. In any case the existing integration regimes duplicate each other in the coverage of trade and development issues.

In order to actualise the prime goal of international competitiveness, SADC and COMESA must reconfigure themselves on the basis of assertive, mutually sustained and beneficial relationships so that they can locate themselves, their neighbourhood, and the rest of the continent into the competitive global economy.

It would be prudent for the ACP member states to object to any further restriction on the already onerous rules of origin, which they have to fulfil in order to obtain preferential access to the EU market. Our view on this matter is that the Cotonou has, for obvious reasons performed dismally on its coverage of the origin rules. Again the Cotonou provisions on the dispute settlement disciplines are clearly inadequate. It is expedient for more work to be put into streamlining these measures to clarify outstanding questions as regards the efficacy and composition of this instrument.

We have called for a jointer of the region's two well-grounded customs unions - that is SACU and the EAC - to lay out the much-needed road map and act as a super-highway to greater and deeper integration in the region. In our considered view, there is certainly great wisdom in an attempt by COMESA and SADC to commence their economic recovery program by moving from the known to the unknown. We have suggested that the SACU and the EAC experience offer far greater insights and lessons in the quest by the two blocs to coalesce the integration processes in the region into the higher order of a common market.

We have noted that both COMESA and SADC are in agreement in so far as the final objective of their integration process is concerned. The two blocs are desirous of contributing to the implementation of the provisions of the Treaty Establishing the African Economic Community. Given this unity of purpose we propose that the two blocs implement their respective trade disciplines with due consideration to the provisions of the Treaty Establishing the African Economic Community. This they have not done.

We take the view that although it is a relatively rich country - by African standards - South Africa cannot survive as an island that is surrounded by a sea of regional poverty. In our considered view, policy-makers must understand that the country's destiny is intimately interwoven with that of the region. Consequently it is imperative for South Africa to take the challenge of giving leadership on the way forward not only to its SADC flock but to the wider region and the continent as a whole. It is our thesis that South Africa can and should play a pivotal role in building bridges between the two blocs in order to spur intra-regional trade.

We have noted common weakness that the proposed co-operation between COMESA and SADC would seek to address in their integration agendas. In order to promote sustainable integration activities countries in the region should belong to the one economic group that fully represents their interests. It is imperative for regional players to address the teething problem of the dearth of intra-regional trade and the lustre flow of direct foreign investment in the region. This obstacle can only be overcome when regional partners tackle the cumbersome baggage of double membership within the region. One way of addressing this baggage is for regional players to identify ways and means of harnessing synergies in both COMESA and SADC programs in order to pave way for a co-operative integration partnership.

We, in particular make a strong case for the necessity of a co-operative approach between the two main regional contenders – COMESA and SADC. Such a partnership would give the regional integration initiative a new impetus to mature the process to greater harmonisation. With these fundamentals in place, a deepening of integration would result which in turn would have a spread effect to other regions throughout the continent. Our considered view is that this is the route to go if the ultimate goal of achieving unity in the pan-African Economic Union is to be actualised.

9.3 The epilogue

As countries in the eastern and southern Africa region undergo political and economic restructuring, the region itself is confronted by the challenges of globalisation. And yet on the global plane controversy still dogs the WTO as to the way forward as the experience at Seattle demonstrates. The world body is facing a barrage of accusations both on the content of trade agreements and for the negotiation process itself. Protestors point to the damaging impact of global trade especially to developing countries' economies. They urge for fair terms of trade rather than the official line of free trade the WTO has adapted.

One of the Key challenges for the eastern and southern Africa region is how to shape the process of regional economic integration to promote intra-regional trade and spur growth. To this end, it is encouraging to see the transformation that is slowly taking place in institutional arrangement to respond to and work to reshape the new regional economic realignment.

It must be underscore the fact that with the new regional economic dispensation complex problems and difficult choices are bound to intensify as the pace of globalisation picks speed whilst countries seek to become more internationally competitive. Admittedly, there are is no easy way forward yet a call for the return of protectionist economic policies and welfare state of the post war period hardly seems like an adequate intervention. Indeed the challenges that emanate from globalisation and the perpetuation of social and economic inequities have to be confronted and addressed.

The mushrooming of regional arrangements is a direct upshot of the failings spurned by globalisation imperatives. Which is why the proliferation of integration processes in the eastern and southern Africa is not an isolated development. This work has helped to highlight some of the legal questions that beg for answers as a result of the said proliferation of regional integration regimes.

Bibliography

Books

- Alberto Fuentes Mohr, *La Creacion de un Mercado Comun; Apuntes historicos sobre la experiencia de Centroamerica* {Buenos Aires: Instituto Para la Integracion de America Latin [intal], 1972.
- Basic Instruments and Selected Documents (BISD) IV Geneva: GATT, 1969,
- Clive Archer and Fiona Butler, *The European Community Structure and Process* {New York: St. Martin's Press 1992}
- Clair Wilcox: *a Charter for World Trade*, New York: MacMillan, 1977,
- Collier, P, P Guillaumont, S Guillaumont and J Gunning, *The Future of Lome: Europe's role in Africa's growth*, CSAE, Oxford University, CERDI, University of Auvergne, Free University, Amsterdam, February 1997
- Carlos Castillo, *Growth and Integration in Central American Integration* {New York: Praeger, 1966}
- Charles Harvey: *The EU-SA Agreement: South Africa, Southern Africa and the European Union* in Talithat Bertelsmann-Scott, Greg Mills and Elizabeth Sidiroopoulos, *Workshop and Cultural Initiative Fund (CWCI) SAIIA*, Jan. 2000
- Clive Archer and Fiona Butler, *The European Community Structure and Process* (New York: St. Martin's Press 1992)
- Customs Union: *A League of Nations Contribution to the Study of Customs Union Problems*, New York: United Nations Department of Economic Affairs, 1947
- Carl Lankowski {ed}, *Germany and the European Community* {New York: St. martin's Press, 1993}
- Canadian Tariff Board: *The GATT Agreement on Customs Valuation Part One: Proposed Amendments to the Customs Act* (1981)
- Daniel Bethlehem: *Regionalism and the World Trading System*: WTO, Geneva, April 1995
- David Grenaway, Thomas Hyclak, and Robert Thornton {eds.} *Economic Aspects of Regional Trading Arrangements* {New York: Harvester Wheatsheaf, 1989}.
- E.A.G. Robinson {ed.}, *Economic Consequences of the Size of Nations* {London: Macmillan, 1960},
- EC: *The Impact and Effectiveness of the Single Market* (Luxembourg: Office for the Official Publication of the EC, 1996)
- Ernst Haas and Phillippe Scmitter, *The Politics of Economic in Latin American Regionalism*, Monograph Series in World Affairs {Denver: University of Denver, 1965}

- Edward Gale, *Latin American Free Trade Association: Progress, Problems, Prospects* {Washington: Office of External Research, US Department of State, 1969}
- *Edward Milenky, *The Politics of Regional Organization in Latin America: The Latin American Free Trade Association* {New York: Praeger, 1973}
- *Ernst-Ulrich Petersmann, Participation of the European Community in the GATT: Internal Law and Community Law Reports. D. O'Keeffe and Henry G. Schermers (eds), *Mixed Agreements*, Deventer: Kluwer, 1984
- Enzo Grilli, *Macroeconomic Determinants of Trade Protection in World Economy*, vol. II September 1988,
- Francis A.S. T. Matambalya: *The Merits and Demerits of the EU Policies towards Associated Developing Countries: An Empirical Analysis of the EU-SADC Trade and Overall Economic Relations within the Framework of the Lome Countries. European Universities Studies, Series V Vol./Bd.2211*
- G. Grossman and K. Rogoff (eds.), *Handbook of International Economics 3* (New York: Elsevier, 1995)
- Hercules Booyen: *International Transactions and the International Law Merchant* (Inter-legal Pretoria 1995),
- Hercules Booyen: *International Trade Law on Goods and Services*, Vol. 2; Inter-legal Pretoria 1999
- Isiah Frank, *The European Common Market: An analysis of Commercial Policy*, New York: Praeger, 1961
- John H. Barton and Bart S. Fisher, *International Trade and Investment: Regulating International Business*, Boston: Little, Brown, 1986,
- Jannette Mark and Gerald Helleiner, *Trade in Services: The negotiations Concerns of the Developing Countries*, the North-South Institute, Ottawa, Canada, December 1998
- John Jackson, *The World Trading System*, The MIT Press, Cambridge, Massachusetts, 1989,
- J. Jackson & Vermulst: *Antidumping law and practice – A comparative study* (1990), New York;
- Juan Alberto Fuentes, *Desafios de la Integracion Centroamericana* {San Jose, Costa Rica: Instituto Centroamericano de Administration Publica [icap], 1989
- J.H Jackson, *The World Trading System* (Cambridge MA: MIT Press, (1989)
- Jeffrey J. Schott: *More Free Trade Areas* (Institute for International Economics, Washington, DC May 1989)

- JJ Schott and Murray G. S, Eds 1988: *The Canada - United States Free Trade Agreement; The Global Impact*, Washington: Institute for International Economics, and Halifax: Institute for Research on Public Policy.
- Jagdish Bhagwati: Regionalism and multilateralism : an overview, in *New dimensions in regional integration*, (Centre for Policy Research Cambridge University Press)
- John Williamson (ed.) *Latin American Adjustment how much has happened?* (Washington: Institute for International Economics)
- Joel Mokyr, *The lever of Riches: Technological Creativity and Economic Progress* (New York: Oxford University Press, 1990),
- Jacques Pelkmans, Alan Winters, and Helen Wallace, *Europe's Domestic Market* (London: Routledge, 1988)
- Jacques Pelkmans, Alan Winters, and Helen Wallace, *Europe's Domestic Market* (London: Routledge, 1988)
- Jose Luis Galvez and August Llosa, *Dinamica de la Integracion Andina* {Lima: Ediciones Banco Popular del Peru, 1974}
- Juliet Lodge {ed.} *The European Community and the Challenge of the Future* {London: Printer, 1989}
- Joseph Grunwald, Miguel Wionczek, and Martin Carnoy, *Latin American Economic Integration and US Policy* {Washington, D.C: Brooking Institution, 1972}
- James Cochrane: *The Politics of Regional Integration: The Central American Case* {New Orleans: Tulane Studies in Political Science, 1969}.
- Jeffrey J Schott: *United States Canada Free Trade: An Evaluation of the Agreement*: Institute or International Economics Washington DC, April 1988
- John H. Jackson, *World Trade and the Law of the GATT: A Legal analysis of the General Agreement on Tariffs and Trade*. Indianapolis: Bobbs-Merrill, 1969
- John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, Cambridge, Mass: MIT Press, 1989
- Kiyoshi Kojima, *Japan and a Pacific Free Trade Area* (London: Macmillan, 1971)
- K. Dam, *The GATT: Law and International Economic Organization* (Chicago: University of Chicago Press, 1970) p.183
- Kenneth W. Dam, *The GATT: Law and International economic organization*, Chicago: University of Chicago Press, 1970

- Krueger Robert (1990) *liberalization and consequences*; Ballinger Publishing Company, 1978.
- Laurence Krause (ed.), *The Common Market: Progress and Controversy* {Englewood cliffs, N.J: Prentice Hall, 1964}
- M. Broszkamp, Meistbegünstigung und Gegenseitigkeit in GATT (Carl Heyman, 1990, Cologne)
- Maasdorp G & Whiteside, A 1993, 'Rethinking Economic Co-operation in southern Africa; Trade and Investment, Harare; Konrad Adenauer stiftung,
- Meinhard Hilf Francis G. Jacobs and Ernst-Ulrich Petersmann (eds.) *The European Community and GATT*, Deventer: Kluwer, 1986
- Miguel Wionczek {ed.}' *Latin American Economic Integration* {New York: Praeger, {1966}}
- Nicholas Owen, Economics of Scale, *Competitiveness and Trade Patterns within the European Community* (New York: Oxford University Press, 1983)
- Oliver Long, *Law and its Limitations in the GATT Multilateral System*, Dordrecht: Nijhoff, 1985.
- Paolo Cecchini, *The European Challenge 1992 - The Benefits of a Single Market* (Aldershot, UK: Wildwood House, 1988)
- Phillippe Schmitter, *Autonomy or Dependence as Regional Outcomes: Central America* {Berkeley: Institute of International Studies, University of California [Berkeley], 1972
- P Nicolaidis, *Liberalising service trade* (Chatham House, 1989 London)
- P Nicolaidis, *Liberalising service trade* (Chatham House, 1989 London)
- Pekka Korhonen, *Japan and the Pacific Free Trade Area* (New York: Routledge, 1994)
- Peter Robson: *The Economics of International Integration* 4th ed. (Routledge: London, 1998)
- Peter Ludlow, *The Making of the European Monetary System* (London: Butterworth, 1982)
- Peter Ludlow, *The making of the European monetary system: A case study of the politics of the European Community* (London: Butterworth Scientific, 1982)
- Robert I Carbaugh: *International Economics* 7th ed. (South-Western College Publishing: 1998)
- Raul Prebisch, *The Economic Development of Latin America and its principal problems* (New York: United Nations Economic Commission for Latin America, 1950)
- Robert Gregg {ed.}, *International Organization in Western Hemisphere* {Syracuse University press, 1968},

- Rodger Hansen, *Central America: Regional Integration and Economic Development*, Studies in Development Progress, no. 1 {Washington: National Planning Association, 1967}
- Rudiger Dornbush and Jeffrey A Frankel: Macroeconomic and Protection, in Robert M. Stern (ed.). *US Trade Policies in a Changing World Economy*, Cambridge, Mass. MIT Press, 1988
- R.M. Bierwagon, *GATT Article VI and the protectionist bias in antidumping laws* (Kluwer Law & Taxation, 1990, Deventer)
- Robert A Isaak: *Managing World Economic Change*, International Political Economy, 2nd ed. Prentice Hall, Englewood Cliffs, New Jersey 07632
- Richard N. Gardener, *Sterling-Dollar Diplomacy*, 2nd ed. (New York: McGraw Hill, 1969),
- Richard Snyder, *The Most Favoured Nation Clause* (New York: Columbia University Press, 1948)
- Richard Pomfret, *Unequal Trade: The Economics of Discriminatory International Trade Policies*, Oxford: Basil Blackwell, 1988,
- Richard Mayne, *The Community of Europe* (London: Victor Gollancz, 1962)
- Robert Bowie et al *The European Community and the United States*, Report of the subcommittee on Foreign Economic Policy of the joint Economic Committee, Congress of the United States {Washington, D.C: US Government Printing Office, 1961}
- Springer: *International Trade Theory and Policy*; (Berlin 1998) at p. 205
- Stephan Haggard, *Developing Nations and the Politics of Global Integration* (Washington, D.C. Kings Institute 1995)
- Stuart Fagan, *Central America Economic Integration: The Politics of Unequal Benefits*, Research series, no 15 {Berkeley: Institute of International Studies, University of California [Berkeley], 1970
- Sidley Dell, *Trade Blocs and Common Markets* {New York: Alfred Knopf, 1963},
- Sidle Dell, *A Latin American Common Market?* {London: Oxford University Press, 1966}
- The Policy of the United States with respect to Customs Unions and Regional Preferential Trade Arrangements, Washington, DC: Advisory Committee on post-war Foreign Policy, Trade Barrier Subcommittee, 1943
- T. Alfred: *Tariff Preferences in Mediterranean Diplomacy*, London: MacMillan, 1977

Talitha Bertelsmann-Scot, Greg Mills and Elizabeth Sidiropoulos SAIIA, eds. 2000 (CWCF)

Thomas Zeiller, *American Trade and Power in the 1960s* {New York: Columbia University Press, 1992}

Thomas Zeiller, *American Trade and Power in the 1960s* {New York: Columbia University Press, 1992}.

Ulrich Everling, "The Member States of the European Community Before their Court of Justice," *European Law Review* 9 {1984}

Viner, J (1950) *The Customs Union issues*, New York: Carnegie Endowment for International Peace

W.A Lewis, *Economic Survey 1919-1939* (London: Allen & Unwin, 1949),

William C. Gruben and John H. Welch: *Economic Review*; Federal Reserve Bank of Dallas, 1994

- Walter Mattli: *The logic of Regional Integration; Europe and Beyond*, (Cambridge University Press: 2000)

William Wallace, *Regional Integration: The West European Experience* {Washington: Brookings Institution, 1994}

Walter Hallstein in Elizabeth Marting (ed.), *The European Community Market: New Frontier for American Business* {New York: American Management Association, 1958}

Zur Meuesten Handelspolitik (Vienna: Commisionslag V.G. Szelinski, 1895)

Zamora & R.A Brand; *Basic documents of international economic law* (CCH, 1990, Chicago) I,

Articles

* Aryeetey and Oduro, " Regional Integration Efforts in Africa: An overview", in *Regionalism and the Global Economy: The case of Africa*; The Hague: Fundad, (1996)

Alec Stone and Thomas Brunell, "Contracting a Supranational Constitution: Dispute Resolution and Governance in the European Community," *American Political Science Review*. YEAR?

A Winter and W. Chang, ' Regional Integration and Import Prices: An Empirical Investigation', *Journal of International Economics*, (2000)

Bela Balassa, "Regional Integration and Trade Liberation in Latin America," *Journal of Common Market Studies* 10 {September 1971}

- B. Hettne, "The New Regionalism: Implications for Development and Peace", in B. Hettne and A. Inotai, *Research for Action – The New Regionalism: Implications for Global Development and International Security, 1994*,
- Canute James, "American Free Trade Area Easier Said than Done", *Financial Times* December 21, 1994 }
- D. Keet: "The European Union's proposed FTA with South Africa: The implications and some counter proposes" *Development South Africa*, Silverton Development Press, Vol. 13 August 1996
- Dickson Yeboah: "Regional Integration and the GATT", *17 World Competition 1, September 1993*
- David Hale, "The Trade Revolution," *The Wall Street Journal*, November 3, 1993
- David Hojman, "The Andean Pact: Failure of a model of Economic Integration?" *Journal of Common Market Studies 20* (December 1981)
- Elisabeth Ferries, "Foreign Investment as an Influence on Foreign Policy Behaviour: The Andean Pact," *Inter American Economic Affairs 33* (Autumn 1979),
- F. Lazar, "Services and the GATT" *Journal of World Trade Vol.1* (1990)
- Fantu Cheru: *Not so brave New World! Problems and Prospects of Regional Integration in post-apartheid southern Africa*, in Bradlow series No. 6, The South Africa Institute of International Affairs, May 1992
- George Koopmann, "Ten Years Andean Pact: A Re-examination," *Inter-economics* (May/June 1979),
- Gary Wynia, "Central American Integration: The paradox of success," *International Organization 24* {Spring: 1970 }
- √J. 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*, New York, St. Martin's Press, (1995)
- Jagdish Bhagwati : " Regionalism and Multilateralism: an overview" in Jaime de Melo and Arvind Panagariya (eds.): *New dimension in regional integration* , Cambridge (Cambridge University Press, 1995)
- Jeffrey Anderson, "Hard Interests and Soft Power, and Germany's Changing Role in Europe", in Katzenstein {ed.}, *Tamed Power*.
- Joseph Nye, "Central American Regional Integration," *International Conciliation 562* {March 1967 }
- J.Quinn and T. Slayton, 'The GATT and the Deep Structure of Customs Administration,' in Quinn and Slayton (eds.) *Non-Tariff Barriers After the Tokyo Round* (Montreal: CCH, 1985)

- Jon Johnson, "The NAFTA Rules of Origin – A New Approach?" Canadian Law Newsletter, American Bar Association, OCT. 1992.
- J.M. Finger, "Trade Liberalisation: A Public Choice Perspective", in R. Amacher, G. Haberler and T. Willett (eds.) *Challenges to a Liberal International Order* (Washington DC: American Institute Enterprise, (1979)
- John Barham and Agnes Forester, "Teething Troubles Continue to Nag at Mercosur Market" *Financial Times* {January 7, 1994},
- Keith Griffin and Ricardo French-Davis, "Customs Unions and Latin America Integration," *Journal of Common Market Studies* 4 {October 1965},
- Kearns, Avery, and Cochrane mentioned above, and Edward Milenky, "From Integration to Development Nationalism: The Andean Group 1965-1971," *Inter-American Economic Affairs* 25 {Winter 1971},
- Kenneth Switzer, "The Andean Group: A Reappraisal," *Inter-American Economic Affairs* 26 {Spring 1973},
- Kevin middlebrook, "Regional Organisation and Andean Economic Integration, 1967-75", *Journal of Common Market Studies* 17 (September 1978)
- Lionel Barber, "Brussels Keeps Shut the Gates to the East," *Financial Times* {Nov. 16, 1995}
- L.K Myteka, "The Saliency of Gains in Third World Integrative Systems", 25 *World Politics*, 1973
- Miguel Wionczek, "The Rise and Decline of Latin American Integration," *Journal of Common Market Studies* 9
- Meine Pieter Van Dijk: "The EU'S Trade Policy for the ACP Countries: Is it Conflicting with Multilateralism?" *Multilateralism versus Regionalism: Trade Issues After the Uruguay Round; The European Association of Development Research and Training Institute (EADI), Geneva Book Series* 19
- Marceau and Cornelis Reiman "Legal issues of Economic Integration 28(3): 297-336, 2001. Kluwer Law International; Netherlands
- M. Footer, "GATT and the Multilateral Regulation of Banking Services" (1993) 27 *International Lawyer* 343
- Michael Rom; "Some Early Reflection on the Uruguay Round Agreement as Seen from the Viewpoint of a Developing Country" *Journal of World Trade* Vol. 28, Dec. 1994
- Mwencha. J. E. O.; "COMESA; A Building Block for the African Economic Community," *AEC News Letter* 1997

- M. Sisulu, et al, (ed.) Reconstituting and Democratizing the SACU, Report of the Workshop held in Gabarone, Botswana, March 1994
- Mahathir: "Leading A Crusade against the West," *Business Week*, April 25, 1994
- M. Stark, 'Valuation Principles: Canadian Customs Duties and Sales Tax' (1988) 36 *Canadian Tax Journal* 1261 at p.1262
- M. Van Empel, "The visible hand of the invisible trade" LIEL Vol. 2 (1990)
- "Mercosur Deadline Slips By", *Latin- American Monitor- Southern Cone* 11 {January 2, 1994}
- Peter Katzenstein, "United Germany in an Integrating Europe," in Peter Katzenstein {ed.}, *Tamed Power: Germany in Europe* {Ithaca: Cornell University Press, forthcoming}
- P.S Mistry "The New Regionalism: impediment or Spur to future Multilateralism?" in Teunissen, J. (ed.), *Regionalism & the Global Economy: The case of Latin America & the Caribbean*, 1995).
- P. Wonnacott and M. Lutz 'Is There a Case for Free Trade Areas?', in J. Schott (ed.), *Free Trade Areas and US Trade Policy*, Washington, Institute for International Economics, (1989)
- Panagariya 'Preferential Trade Liberalization: The Traditional Theory and New Developments', *Journal of Economic Literature*, 38, (2000)
- Phillip Shenon, "Boycot in Order, Malaysian Says," *The New York Times*, Nov.21, 1993.
- P. S Mistry, " The New Regionalism: Impediments or Spur to future multilateralism?" In Teunissen, J (ed.), *Regionalism the Global Economy: The case of the Latin America & the Caribbean*, 1995,
- Paul de Leusse; "D'Union Docaniere Euroeenne" *Revue d'Economic Politique* 4C (1890)
- Paul Leroy – Beaulieu: "De la Necessite de Preparer Une Federation Europeenne", *l'Economiiste Francois* 2 (September 1898)
- P. Goodison, "Emerging EU Policy on FTAs", (ERO.NNA/NNCCI), June 1996.
- P.S Mistry "The New Regionalism: impediment or Spur to future Multilateralism?" in Teunissen, J. (ed.), *Regionalism and the Global Economy: The case of Latin America and the Caribbean*, 1995).
- Robinson P "Potential Gains from infrastructural and Natural Resources Investment Co-ordination in Africa"; In Teunissen J. (ed.): *Regionalism & the Global Economy: The case of Africa: FUNDAD*, The Hague, 1996,

- Robert Jervis, "The Future of World Politics: Will it resemble the Past". *International security* 15, no.3 {Winter 1990/1991}
- Rosen F. Howard: "The US- Israel Free Trade Area Agreement: How Well Is It Working and What Have We Learned? In Jeffrey J Scott, ed., *Free Trade Areas and US Trade Policy*, (Washington DC: Institute for International Economics, 1989)
- R. Davies: "Implementation of the EU-SA TDCA: The Department of Trade and Industry Perspective; South African Business and the European Union in Context
- Rafael Vargas-Hidalgo, "The crisis of the Andean Pact: Lessons for Integration Among Developing Countries, *Journal of Common Markets Studies* 27 (March 1979)
- R. Thomas, 'A South African Perspective on the SADC Trade and Development Protocol', in Schwersensky, S (ed.) *The Maseru Protocol on Trade*, Friederich Ebert Stiftung, 1997).
- Rudolf Hrbek and Wolfgang Wessels, "Nationa-Interessen der Bundesrepublik Deutschland und der Integrationsprozes", in R. Hrbek and W. Wessels {eds.}, *EG-Mitgliedschaft: Ein Vitales Interesse der Bundesrepublik Deutschland?* {Bonn: Europa Union Verlag, 1984}
- R. Davies, "South Africa Joining SADCC or SADCC Joining South Africa: Emerging Perspectives on Regional Economic Co-operation After Apartheid", in A Van Nieuwkerk and G Van Staden (eds.). *Southern Africa at Cross-roads: Prospects for the Political Economy of the Region*, 1991
- Saleem, et al "The WTO: Its Origin, Basic Principles, and Main Rules" *The OPEC Fund Pamphlet Series*; Vienna, Austria, April, 1999
- Stephen Blank, "The Emerging Architecture of Northern America," *The North-South Agenda*, Paper One, and March 1993 (Coral Gables, FL.: North-South Centre, University of Miami,
- Simon Bulmer and William Paterson, "German in the European Union: Gentle Giant or Emergent Leader?" *International Affairs* 72 {1996},
- Simon Bulmer, "Shaping the Rules? The Constitutive Politics of the European Union and German Power," in Katzenstein {ed.}, *Tamed Power*
- Steven, Mcqueen and Kennan: *After Lome: "A Strategy for ACP-EC Relations in 21st Century"* IDS Commonwealth Secretariat
- T. Ostergaard; " Classical Models of Regional Integration - what Relevance for South Africa?" In *Southern Africa after Apartheid - Regional Integration and External Resources*, (B. Oden, ed, 1993) Committee
- Timothy Koechlin and Mehrene Larudee, "The High Cost of NAFTA," *Challenge*, September-October, 1992,

Trebilcock and Howse 'The Regulation of International Trade' Routedledge London and New York 1995)

W.T. Wilford and G. Christou, "A Sectoral Analysis of Desegregated Trade Flows in the Central American Common Market, 1962-1970". *Journal of Common Market Studies* 12 {December 1973}

Walter Mattli and Anne-Marie Slaughter: "Revisiting the European Court of Justice" *International Organization* 52 {1998}

W. Kennes, "The European Union's Support for regional Integration in ACP Countries" (*Insert NO.55, June 1994*), Directorate General for Development.

William Wallace, "Germany's Unavoidable Central Role: Beyond Myths and Traumas," in Wolfgang Wessels and E. Regelsberger {eds.}, *The Federal Republic of Germany and Beyond* (Bonn: Europa Union Verlag, 1988)

Y. Devuyt : "GATT Customs Union Provision and the UR: The European Community Experience", *Journal of World Trade*, Vol 26, 1 Feb. 1992,

Discussion/Working Papers

Anne Graumans: "SADC-EU Co-operation beyond Lome: Between Continuity and Change" FGD Occasional Paper No. 11; Braamfontein 2017 South Africa July 1997

Alec Stone and James Caporaso, "From Free Trade to Supranational Policy: The European Court and integration" Working Paper No. 2.45 {Berkeley: Centre for German and European Studies, University of California, 1996}

Anne Graumans: SADC-EU Co-operation beyond Lome: Between Continuity and Change" FGD: Occasional Paper No.11 Braamfontein 2017 South Africa July 1997

Brigaldino G, 'Africa-Europe relations at a turning point,' in *the Courier*, no 157,

Bhagwati, J: "Regionalism and Multilateralism: An Overview", Columbia University Discussion Paper Series, No. 603; (New York, 1992)

Dot Keet: 'Regional Economic Partnership Agreements -Implications for Regional Integration and Development in Southern Africa', IGD Occasional Paper No.21 TIPS Workshop Proceedings Braamfontein South Africa August 1999

Dot Keet, "Globalization and Regionalism: Contradictory Tendencies, Counteractive Tactics, or Strategic Possibilities?" FGD Occasional Paper No. 18, Braamfontein 2017, (South Africa, April 1999)

Gavin Massdorp: Imani Development Limited; a Study of the Impact of introducing Reciprocity Trade Relations Between European Union and the SADC Region; IGD Occasional Paper No. 21 TIPS Workshop Proceedings Braamfontein South Africa August 1999

Gowa J and E. Mansified 'Allies, Adversaries, and International Trade', paper presented to the American Political Science Association Meetings, (Washington DC, 1991)

- Garner, South Africa's Trade Partners, 1986-1991, at p.29 (London School of Economics Centre for the study of the South African Economy and International Finance; Research Paper No. 6, 1992.
- G. Massdorp: South African Research and Development Centre; the IGD Occasional Paper No. 21 TIPS Workshop, Braamfontein South Africa South Africa August 1999
- Louis A Kasekende and Charles A. Abuka :'Regional Trade Arrangements: Trade Reform and Regional Integration in Africa : Papers presented at the IMF Africa Economic Research Consortium Seminar on Trade Reform and Regional Integration in Africa, IMF Institute (Washington, D. C Dec. 1-3, 1997)
- Mistry, "Regional Dimension of SAPs in Southern Africa", Jan. 1996: Paper prepared for a Fondad Conference on Regional Integration in Africa, , (Johansburg, South Africa, Feb 7-8, 1996)
- Murray Gibbs and Mina Mashayekhi, the main issue in the Negotiations for a Multilateral Framework for Trade in Services in Asia and the Pacific, Selected Papers, Vol. 1, UNCTAD/UNDP, UN, New York, 1990
- Munetsi Madakufumba - South African Research and Development Centre; the IGD Occasional Paper No. 21 TIPS Workshop Braamfontein South Africa August 1999
- Richard Baldwin, "a Domino Theory of Regionalism", Working Paper no. 4465 (Cambridge, mass: NBR, 1993)
- Rashid Cassim: "A critical Assessment of the Impact Study" IGD Occasional Paper No.21 TIPS Workshop, Braamfontein South Africa, August 1999
- R. H. Thomas: "The WTO and Trade Co-operation between the ACP and the EU Assessing the Options" ECDPM Working Paper report on work in progress at the European Centre for Development Policy Management, March 1997
- R. Fernandes *Returns to Regionalism: An Evaluation of Non-traditional Gains from Regional Trade Agreements*, Working Paper No. 1847, World Bank Group, November, (1997)
- R. Thomas: "A South African View of the SADC Trade and Development Protocol" A paper prepared for the FES, (Johannesburg, South Africa, April 1997)
- R.H Thomas; 'Regional Arrangements and the WTO: The case of the Southern Africa Development Community (SADC)', Paper submitted for the presentation at the Eighth Annual Conference of the African Society of International and Comparative Law; Cairo, Egypt, 2-5 September 1996

R. Thomas "Trade Liberation Issues Affecting SADC within the Context of the Forthcoming Post-Lome IV Negotiations" A paper presented at a SADC/EU Trade Liberation Seminar Report, 5-7 May 1998,

Stevens C et al.: "EU-South African Trade" in International Affairs vol. 69, No. 1, 1993

Sudworth, E, and K. Van Hove EU-South Africa Trade Negotiations: Insights into an ACP-EU Negotiating Process (ECDPM Working Paper No. 57) Maastricht: 1998 ECDPM

Conference/Seminar/Policy Reports

Jens Plotner, The European Court and National Courts – doctrine and jurisprudence: legal change in its social Context – Report on France, Working Paper, RSC No. 95/28 (Florence: European University Institute, 1996)

Monica Claes and Bruno de Witte, The European court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context – Report on the Netherlands, working paper, RSC No. 95/26 (Florence: European University Institute, 1995)

Report on the WTO: Consistency of Trade Policies by Major Trading Partners: (Washington DC 1996)

Dissertation

Sophie Meunier, "The Paradox of Unity: European Integration and US-EC Trade negotiations, 1958-1993," dissertation in progress (MIT, Department of Political Science)

Yvonne Asamani: "The WTO and Developing Countries, with Specific Reference to South Africa" an unpublished LLM Dissertation: January 1998

Electronic Sources

<http://www.comesa.int> 2000/10/31

<http://www.sadc.net> 2002/03/16

<http://www.nationaudio.com> 2002/05/22

<http://www.nationaudio.com> 2002/02/17

<http://www.nationaudio.com> 2002/07/10

<http://www.nationaudio.com> 2002/02/15

<http://www.nationaudio.com> 2002/05/14

<http://www.nationaudio.com> 2002/04/15

<http://www.nationaudio.com> 2002/05/03

<http://www.nationaudio.com> 2002/05/14

<http://www.nationaudio.com> 2002/07/21

<http://www.nationaudio.com> 2002/05/11

<http://www.eastandard.net> 2002/06/29

<http://www.eastandard.net> 2002/02/15

http://www.sadc.int/english/archive/mr02_19102001.html 2001/10/23

http://www.sadc.int/english/news/mr05_30042002.html

http://www.sadc.int/english/archive/mr02_19102001.html
http://www.sadc.int/english/news/mr05_30042002.html
<http://www.sadcreview.com/sadc%20intro%202001/frintro2.htm>
<http://www.mg.co.za> 2002/10/20
<http://www.mg.co.za> 2000/06/21
<http://www.africapolicy.org> 2001/04/18
<http://www.wits.ac.za/saia.html> 2000/01
<http://www.eusa.org.za> 1998
<http://www.africarecovery.org> 1999/06/01
<http://stars.coe.fr/doc/doc/adoc04> 1996/07/12

Case-Law

- 1- *Van Gend & Loos case of 1963*: Case 26/62, N.V. Algemene Transport & Expeditie Onderneming Van Gend & Loos V. Nederlandse Administratie der Belastingen, ECR, 1963
- 2- Italian Constitutional Court decision 170/84, Granital, [1984] CML Rev 756
- 3- Case No. 36/74, B.N.O. Walrave and L. J. N. Koch v. Association Union Cycliste Internationale, European Court Reports, {ECR}{1974}, 1405
- 4- Case No. 149/77, Cabrielle Defrenne v. Societe Anonyme Belge de Navigation Aeriene Sabena, ECR {1978}, 1365.
- 5- Case No. 152/84, Marshal v. Southampton and South West Hampshire Area Health Authority (Teaching), *Common Market Law Review* 1 (1986), p.688
- 6- Case No. 152/84 ECJ (1986), 737
- 7-

Journals

- 1- European Law Review
- 2- Common Market Law Review
- 3- Journal of Common Market Studies
- 4- Canadian Tax Journal
- 5- Journal of World Trade,

Trade Instruments

Basic documents of international economic law
 The Trade Development Co-operation Agreement
 The Cotonou
 The SADC Trade Protocol
 The SACU Agreement
 The COMESA Treaty
 The East African Community Treaty
 The NAFTA Agreement
 The Treaty of Rome
 The ASEAN

The APEC
The ADEAN Pact
The CACM

University of Cape Town

Appendix 'A'

Notification of Regional Trade Agreements

Agreements notified under the Enabling Clause to the GATT/WTO and in force on 1 January 2000 and the status of their examination in the Committee on Regional Trade Agreements (excluding RTAs deemed to be inactive as of 1 January 2000)

Description of the Instrument Parties to the Agreement	Date Came Into Force	Notificati on Date	Examinatio n Status
Montevideo Treaty (1980), establishing the Latin American Integration Association - LAIA Argentina, Bolivia, Brazil, Chile, Colombia, Cuba (1998), Ecuador, Mexico, Paraguay, Peru, Uruguay, Venezuela	18.03.81	01.07.82	
Asunción Treaty, establishing the Southern Common Market - MERCOSUR Argentina, Brazil, Paraguay, Uruguay	29.11.91	05.03.92	Under Examinatio n
Cartagena Agreement, establishing the Andean Pact Bolivia, Colombia, Ecuador, Peru, Venezuela	25.05.88	12.10.92	
Tripartite Agreement Egypt, India, Yugoslavia	01.04.68	23.02.68	Report Adopted in 1968
Unified Economic Agreement among member states of the Gulf Co-operation Council - GCC Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates	11.10.84		
Common Market for Eastern and Southern Africa - COMESA Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Tanzania, Uganda, Zambia, Zimbabwe	08.12.94	26.6.95	
West African Economic and Monetary Union - UEMOA Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, Togo	27.10.99	01.01.00	

Bangladesh, India, Lao People's Democratic Republic, Philippines, the Republic of Korea, Sri Lanka, Thailand	17.06.76	02.11.76	Report Adopted in 1978
Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free-Trade Area	28.01.92	30.10.92	
Laos/Thailand	20.06.91	29.11.91	
South Pacific Regional Trade and Economic Co-operation Agreement - SPARTECA Australia and New Zealand and Cook Islands, Fiji, Kiribati, Niue, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Western Samoa	01.01.81	20.02.81	Report Adopted in 1981
Melanesian Spearhead Group Papua New Guinea, Solomon Islands, Vanuatu	1984	7.10.99	
Protocol relating to Trade Negotiations among Developing Countries Bangladesh, Brazil, Chile, Egypt, Israel, Mexico, Pakistan, Paraguay, Peru, Philippines, Republic of Korea, Romania, Tunisia, Turkey, Uruguay and Yugoslavia Protocol relating to Trade Negotiations among Developing Countries	11.02.73	09.11.71	

Appendix 'B'

Regional Trade Agreements Notified to the GATT/WTO and in Force in November 1999

Agreements notified under GATT Article XXIV

Agreement	Date of Entry into Force	Notification Date	Examination Status
1 Treaty of Rome, establishing the European Communities - EC ¹	01.01.58	24.04.57	examination concluded (1957)
2 EC/Algeria	01.07.76	28.07.76	examination concluded (1977)
3 EC/Andorra	01.07.91	25.02.98	under examination by CRTA
4 EC/Bulgaria	31.12.93	23.12.94	under examination by CRTA
5 EC/Cyprus	01.06.73	13.06.73	examination concluded (1974)
6 EC/Czech Republic	01.03.92	13.05.96	under examination by CRTA
7 EC/Egypt	01.07.77	15.07.77	examination concluded (1978)
8 EC/Estonia	01.01.95	30.06.95	under examination by CRTA
9 EC/Faroe Islands	01.01.97	19.02.97	under examination by CRTA
10 EC/Hungary	01.03.92	03.04.92	under examination by CRTA
11 EC/Iceland	01.04.73	24.11.72	examination concluded (1973)
12 EC/Israel	01.07.75	03.07.75	examination concluded (1976)
13 EC/Jordan	01.07.77	15.07.77	examination concluded (1978)
14 EC/Latvia	01.01.95	30.06.95	under examination by CRTA
15 EC/Lebanon	01.07.77	15.07.77	examination concluded (1978)
16 EC/Lithuania	01.01.95	26.09.95	examination not started
17 EC/Malta	01.04.71	24.03.71	examination concluded (1972)
18 EC/Morocco	01.07.76	28.07.76	examination concluded (1977)
19 EC/Norway	01.07.73	13.07.73	examination concluded (1974)
20 EC/Palestinian Authority		30.06.97	under examination by CRTA
21 EC/Poland	01.03.92	03.04.92	under examination by CRTA
22 EC/Certain Non-European Countries and Territories (PTOM II)	01.01.71	14.12.70	examination concluded (1971)
23 EC/Romania	01.05.93	23.12.94	under examination by CRTA
24 EC/Slovak Republic	01.03.92	13.05.96	under examination by CRTA
25 EC/Slovenia	01.01.97	11.11.96	under examination by CRTA
26 EC/Switzerland and Liechtenstein	01.01.73	27.10.72	examination concluded (1973)
27 EC/Syria	01.07.77	15.07.77	examination concluded (1978)
28 EC/Tunisia	01.03.98	23.03.99	under examination by CRTA
29 EC/Turkey	01.01.96	22.12.95	under examination by CRTA
30 Stockholm Convention, establishing the European Free Trade Association - EFTA	03.05.60	14.11.59	examination concluded (1960)
31 EFTA/Bulgaria	01.07.93	30.06.93	under examination by CRTA
32 EFTA/Czech Republic	01.07.92	03.07.92	examination concluded (1994)
33 EFTA/Slovak Republic	01.07.92	03.07.92	examination concluded (1994)
34 EFTA/Estonia	01.06.96	25.07.96	under examination by CRTA
35 EFTA/Hungary	01.10.93	23.12.93	under examination by CRTA

36	EFTA/Israel	01.01.93	01.12.92	under examination by CRTA
37	EFTA/Latvia	01.06.96	25.07.96	under examination by CRTA
38	EFTA/Lithuania	01.08.96	25.07.96	under examination by CRTA
39	EFTA/PLO	01.07.99	21.09.99	not yet transmitted to CRTA
40	EFTA/Poland	15.11.93	20.10.93	under examination by CRTA
41	EFTA/Romania	01.05.93	24.05.93	under examination by CRTA
42	EFTA/Slovenia	01.07.95	18.10.95	under examination by CRTA
43	EFTA/Turkey	01.04.92	06.03.92	examination concluded (1993)
44	Faroe Islands/Iceland	01.07.93	23.01.96	under examination by CRTA
45	Faroe Islands/Norway	01.07.93	13.03.96	under examination by CRTA
46	Faroe Islands/Switzerland	01.03.95	08.03.96	under examination by CRTA
47	Faroe Islands/Estonia	01.12.98	09.12.98	examination not started
48	Croatia/Slovenia	01.01.98	25.03.98	under examination by CRTA
49	Central European Free Trade Area - CEFTA	01.03.93	30.06.94	under examination by CRTA
50	Czech Republic/Estonia	12.02.98	03.08.98	under examination by CRTA
51	Czech Republic/Israel	01.12.97	30.03.98	under examination by CRTA
52	Czech Republic/Latvia	01.07.97	13.11.97	under examination by CRTA
53	Czech Republic/Lithuania	01.09.97	13.11.97	under examination by CRTA
54	Czech Republic/Slovak Republic	01.01.93	30.04.93	examination concluded (1994)
55	Hungary/Israel	01.02.98	24.03.98	under examination by CRTA
56	Israel/Poland	01.03.98	18.12.98	examination not started
57	Israel/Slovenia	01.09.98	18.12.98	examination not started
58	Poland/Faroe Islands	01.06.99	29.09.99	examination not started
59	Poland/Latvia	01.06.99	29.09.99	examination not started
60	Poland/Lithuania	01.01.97	30.12.97	under examination by CRTA
61	Romania/Moldova	01.01.95	24.09.97	under examination by CRTA
62	Slovak Republic/Estonia	12.02.98	03.08.98	under examination by CRTA
63	Slovak Republic/Israel	01.01.97	30.03.98	under examination by CRTA
64	Slovak Republic/Latvia	01.07.97	14.11.97	under examination by CRTA
65	Slovak Republic/Lithuania	01.07.97	14.11.97	under examination by CRTA
66	Slovenia/Estonia	01.01.97	20.02.97	under examination by CRTA
67	Slovenia/Latvia	01.08.96	20.02.97	under examination by CRTA
68	Slovenia/Lithuania	01.03.97	20.02.97	under examination by CRTA
69	Slovenia/Former Yugoslav Republic of Macedonia	01.09.96	20.02.97	examination not started
70	Estonia- Latvia-Lithuania ²	01.04.94	15.06.99	examination not started
71	Turkey/Bulgaria	01.01.99	04.05.99	examination not started
72	Turkey/Czech Republic	01.09.98	12.01.99	under examination by CRTA
73	Turkey/Estonia	01.07.98	12.01.99	under examination by CRTA
74	Turkey/Hungary	01.04.98	12.05.98	under examination by CRTA
75	Turkey/Israel	01.05.97	18.05.98	under examination by CRTA
76	Turkey/Lithuania	01.03.98	08.06.98	under examination by CRTA
77	Turkey/Romania	01.02.98	18.05.98	under examination by CRTA
78	Turkey/Slovak Republic	01.09.98	12.01.99	under examination by CRTA
79	Agreements on Customs Union	08.10.97	06.04.99	examination not started
80	Kyrgyz Republic/ Moldova	21.11.96	15.06.99	examination not started
81	Kyrgyz Republic/ Kazakhstan	...	29.09.99	examination not started
82	Kyrgyz Republic/ Russia	24.04.93	15.06.99	examination not started

83	Kyrgyz Republic/ Ukraine	19.01.98	15.06.99	examination not started
84	Kyrgyz Republic/ Uzbekistan	20.03.98	15.06.99	examination not started
85	Kyrgyz Republic/ ...	15.04.94	01.10.99	examination not started
86	United States/Israel	19.08.85	13.09.85	examination concluded (1987)
87	Canada/Chile	05.07.97	26.08.97	under examination by CRTA
88	Canada/Israel	01.01.97	23.01.97	under examination by CRTA
89	North American Free Trade Agreement - NAFTA	01.01.94	01.02.93	under examination by CRTA
90	Central American Common Market - CACM	12.10.61	24.02.61	examination concluded (1961)
91	Caribbean Community and Common Market - CARICOM	01.08.73	14.10.74	examination concluded (1977)
92	PATCRA	01.02.77	20.12.76	examination concluded (1977)
93	Closer Economic Relations Trade Agreement - ANZCERTA	01.01.83	14.04.83	examination concluded (1984)

Source: http://www.wto.org/wto/english/tratop_e/region_e/webtrtas.htm

Appendix 'C'

Regional Trade Agreements Notified to the GATT/WTO and in Force in November 1999

B. Agreements notified under the Enabling Clause

	Agreement	Date of Entry into Force	Notification Date	Examination Status
94	Montevideo Treaty (1980), establishing the Latin American Integration Association - LAIA	18.03.81	01.07.82	---
95	Asunción Treaty - MERCOSUR	29.11.91	05.03.92	under examination by CRTA
96	Cartagena Agreement - Andean Group	25.05.88	12.10.92	---
97	Tripartite Agreement	01.04.68	23.02.68	examination concluded (1968)
98	Unified Economic Agreement among member states of the Gulf Cooperation Council - GCC		11.10.84	---
99	Common Market for Eastern and Southern Africa (COMESA)	08.12.94	29.6.95	---
100	Preferential Tariffs among members of the Economic Co-operation Organisation - ECO		22.7.92	examination concluded (1992)

101	South Asian Preferential Trade Arrangement – SAPTA	07.12.95	25.04.97	---
102	Bangkok Agreement	17.06.76	02.11.76	examination concluded (1978)
103	Agreement on ASEAN Preferential Trade Arrangements	31.08.77	01.11.77	examination concluded (1979)
104	Laos/Thailand	20.06.91	29.11.91	---
105	South Pacific Regional Trade and Economic Co-operation Agreement – SPARTECA	01.01.81	20.02.81	examination concluded (1981)
106	Melanesian Spearhead Group	1984	07.10.99	---
107	Protocol relating to Trade Negotiations among Developing Countries	11.02.73	09.11.71	---
108	Global System of Trade Preferences – GSTP	19.04.89	25.09.89	examination concluded (1989)

Source: http://www.wto.org/wto/english/tratop_e/region_e/webrtasb.htm

Appendix D
Major Exports of the SADC Countries, 1993

Country	Commodities (% of Total Exports)	Primary Products & as % of Total Exports
Angola	95.4	Oil (86%), Coffee (4%), Diamonds (1.6%)
Botswana	98.0	Diamonds (88.2%), Copper/ Nickel (7.5%), Beef (4.4%)
Malawi	93.4	Tobacco (75%), Sugar (6.1%)
Mozambique	76.3	Fish (27%), Cash-nuts, Sugar, Cotton
Tanzania	79.3	Coffee (24.8%), Cotton 22.9%), Cash-nuts (1.6%), Sisal (4.8%), Manufactures (4.9%), Minerals (5.6%)
Zimbabwe	56.9	Tobacco (20.2%), Gold (5%), Ferrochrome (9%), Maize (6%), Nickel (5.9%), Cotton (5%), Clothing/Textile (4.6%)
Zambia	90.0	Copper (84%), Cobalt (N/A), Zinc (N/A)
Namibia	95.0	Uranium (24%), Diamonds (40%), Base Metals, Beef, Mutton, Lamb, Hides, Pelts, Karakul, % Fish (N/A)
South Africa	70.0	Precious & Semi-precious Metals (12.7%), Base Metals (12.4%), Mineral products (10.6%), Chemical products (4.2%), Machinery & Appliances (3.5%), Motor Vehicles & Parts (3.4%), Vegetable products (3%)

Source: Mayer and Thomas, 1997, Table 5,p.339

Appendix E

GDP per capita, Tariffs and Direction of Trade: Eight SADC Countries, 1995

Countries	GDP per Capita (US\$)	Average pre-SAP Tariffs (%)	Average pre-FTA Tariffs (%)	SADC Shares in Imports	SADC Shares in Exports
Angola	565	11.4	11.4	1.4	0.1
Malawi	172	22.9	7.5	20.3	12.9
Mauritius	2,527	15.3	11.6	8.2	0.9
Mozambique	91	25.5	11.8	22.5	3.9
SACU/RSA	2,661	9.5	8.1	1.6	7.8
Tanzania	75	24.2	3.9	0.5	2.1
Zambia	414	40.2	15.1	23.1	13.1
Zimbabwe	466	9.7.3	11.3	30.3	39.9
Average	1,033	15.1	9.3	4.7	6.4

Appendix F
Direction of SADC Exports (1991 or Most Recent Data)

Countries	World \$ Millions	Europe	North Americ a	Japan	Developing Countries	Africa	Other Developing Countries
Angola	3105.4	25.1	52.6	0.1	20.8	1.5	1.4
Malawi	454.0	46.9	16.5	10.0	13.6	9.5	13.0
Mozambique	239.8	31.3	13.0	6.7	48.8	12.0	0.2
South Africa	17052.0	55.2	12.4	10.8	15.3	6.1	6.3
Tanzania	404.0	59.4	4.5	4.5	30.7	7.1	0.9
Zambia	1347.5	34.5	1.6	29.1	21.8	11.9	13.0
Zimbabwe	1467.6	44.1	7.3	5.5	23.9	17.2	19.2
All sub- Sahara Africa	54657.2	51.2	22.1	5.6	15.4	7.5	5.7
All Developing Countries	708947.0	25.5	24.0	12.0	27.2	2.6	11.3

Source: Mayer and Thomas, 1997, Table 6 p.339