



UNIVERSITY OF CAPE TOWN

**THE REGULATION ON TRADE BARRIERS UNDER SADC AND  
EAC: ASSESSING THE EFFECTIVENESS OF THEIR LEGAL  
FRAMEWORK**

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Research dissertation presented for the approval of the senate in partial fulfillment of the requirements for the degree in Masters in International Trade Law in approved courses and minor dissertation. The other part of requirement for this qualification was the completion of a programme of courses.

**September 2014**

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## **DECLARATION**

Research dissertation presented for the approval of the senate in partial fulfillment of the requirements for the degree in Masters in International Trade Law in approved courses and minor dissertation. The other part of requirement for this qualification was the completion of a programme of courses.

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

Nancy Washinga Kamau

## **ACKNOWLEDGEMENTS**

I am grateful to the Almighty God for His sufficient grace, his divine wisdom, love, strength and guidance that has brought me this far.

I extend my sincere gratitude to my supervisor Mr. Marumo for the valuable guidance and support he provided including his comments and criticism.

Special appreciation goes to my mother Mrs. Jennifer Kamau for inspiring me to pursue my dreams. May God bless her for the sacrifices she has made that have enabled me to complete my studies. I remain forever indebted to you.

I thank my elder siblings Mike and Helen for setting up a good example for me. I love you so much and appreciate your love and support. To my auntie, Mrs. Margaret Njoroge for being a second mum to me. Thankyou for your words of wisdom and guidance all through.

I also take this opportunity to acknowledge my fellow LLM colleagues at the University for their continued unwavering support that has seen the completion of this study.

Finally I must appreciate that in writing this research, I owe much to all the authors whose written work played a crucial part for its success.

Thank you all.

## **ABBREVIATIONS**

AEC	Africa Economic Community
AU	Africa Union
CET	Common External Tariff
COMESA	Common Market for Eastern and Southern Africa
CU	Customs Union
EAC	East Africa Community
EACJ	East Africa Court of Justice
ECA	Economic Commission for Africa
EU	European Union
FTA	Free Trade Area
GATT	General Agreement on Trade and Tariffs
IGAD	Inter-Government Authority and Development
NAFTA	North American Free Trade Agreement
NEPAD	New Partnership for Africa's Development
NTB	Non- Tariff Barriers
OAU	Organization of Africa Unity
OECD	Organization for Economic Co-operation and Development
RECs	Regional Economic Community
RISDP	Regional Indicative Strategic Development Plan
ROO	Rules of Origin
RTAs	Regional Trade Agreements
SACU	Southern Africa Customs Union
SADC	Southern Africa Development Community
SADCC	Southern Africa Development Coordination Conference
SPS	Photo-Sanitary Measures
TBT	Technical Barriers to Trade
TRALAC	Trade Law Centre for Southern Africa
UNECA	United Nation Economic Commission for Africa
UNCTAD	United Nations Commission on Trade and Development
WTO	World Trade Organization

# **THE REGULATION ON TRADE BARRIERS UNDER SADC AND EAC: ASSESSING THE EFFECTIVENESS OF THEIR LEGAL FRAMEWORK**

## **Abstract**

There are more regional integration initiatives in Eastern and Southern Africa than anywhere else in Sub-Saharan Africa. These include Common Market of Eastern and Southern Africa (COMESA), East Africa Community (EAC), Southern African Development Community (SADC), Southern Africa Customs Union (SACU) and Inter-Governmental Authority on Development (IGAD). Owing to the scope of this study, only the trade liberalization initiatives under SADC and EAC will be evaluated. The trade liberalization strategies will focus on the intra-regional level.

This study entails a comparative study of key legal provisions facilitating elimination of trade barriers within SADC and EAC trade blocs respectively. The study identifies the underlying objectives that inspired the countries to enter the said regional trade agreements. It will focus on the mechanisms adopted to liberalize free movement of goods in the SADC Free Trade Area and the EAC Customs Union respectively. Since both RTAs carry a firm commitment to take affirmative measures to reduce barriers to intra-regional trade, the respective trade agreements should contain a legal framework that will drive the trade liberalization objectives. The study seeks to determine whether the legal frameworks in the SADC and EAC trade regimes is a viable tool to eliminate trade barriers and in turn foster a deeper level of integration. The aim of the study is to ascertain whether their constitutive legal framework is effective enough to achieve this goal.

The study concludes that while the SADC FTA and the EAC custom union have already been launched, the levels of intra-regional trade remains low. This is caused by failure of some member states to meet their commitments to eliminate tariff barriers, the surge of non-tariff barriers and multiple memberships of SADC and EAC members with other regional trade blocs. This study is founded on the belief that lack of enforcement of community law at national and community level is slowing down the implementation of treaty commitments. This paper recommends that the solution to these problems include; getting members whose commitments are outstanding to take steps to align their customs

laws to the agreed bench mark, compelling members to refrain from imposing non-tariff barriers, increasing customs cooperation and conducting trade on a rule based manner. For these goals to be achieved there is need to strengthen institutional structures to monitor the implementation as required and harmonise various integration policies in both SADC and EAC.

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## CHAPTER ONE

### 1. INTRODUCTION

#### 1.1 Overview of Economic Integration in Africa

Economic integration is a major agenda item for African nations. Increasing intra-regional trade is central to the drive for integration. Attempts to achieve economic integration began in the continent over two decades ago when African leaders signed the Abuja Treaty in 1991. The treaty established the African Economic Community (AEC) whose key objective is to promote economic, social and cultural development in a view increase economic self-reliance and promote a self-sustained development in African counties.<sup>1</sup> The drafters anticipated that AEC's objectives would be achieved through a gradual process involving six stages each to be completed within a given time frame.<sup>2</sup> The first stage involved the strengthening of existing RECs and creating others where they do not exist. This was to be achieved by 1999. The next stage involves the elimination of tariff and non tariff barriers. The targeted deadline for this was 2007. The third stage envisages the establishment of a free trade area and customs union at the level of each REC, to be completed by 2017. The fourth stage involves the coordination and harmonization of tariff systems among the RECs in a view of establishing a continental customs union with a common external tariff by 2019. The fifth stage envisages the establishment of an African common market which will secure the free movement of persons, the right of residence and establishment to be completed by 2023.<sup>3</sup> The final stage envisages the establishment of a Pan-African Economic and Monetary Union with a single African currency.<sup>4</sup> The motivation for establishing RECs under the Abuja Treaty was to use them as building blocks for the eventual continental Economic Community. The OAU was replaced by the Africa Union (AU) in 2001. The AU builds on and accelerates the objectives of the OAU and the Abuja Treaty.<sup>5</sup>

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<sup>1</sup>Article 3(1)(a) of the African Economic Community Treaty.

<sup>2</sup>Article 3(2) of the African Economic Community Treaty.

<sup>3</sup> Ibid.

<sup>4</sup> Article 6 of the African Economic Community Treaty.

<sup>5</sup> Article 3, Constitutive Act of the African Union.

In terms of the stages of the Abuja Treaty, stage 1 (to be achieved by 1999) has been achieved. Significant progress has been made since the Lagos Plan of Action in forming regional economic communities to foster trade and economic integration. A recent report revealed that there are currently 17 regional trade blocs in the continent.<sup>6</sup> The implementation of the next two stages is ongoing. Some regional economic communities (COMESA, EAC, ECOWAS and SADC) have set up free trade areas while others have not reached this stage yet.<sup>7</sup> Progress towards stages 4 and 5 regarding the formation of a continental customs union and common market respectively (to be achieved by 2019 and 2023 respectively) has yet to start. The regional trade agreements have gone far in reducing tariff levels among members of the RECs. Important progress has been achieved in SADC and EAC with realization of a free trade area and the formation of a customs union respectively.<sup>8</sup> While states in the EAC's customs union have achieved complete internal tariff elimination and proceeded to launch a common market, SADC member states are yet to achieve complete internal tariff elimination and move on to establish a customs union. According to the Abuja Treaty framework, SADC has until 2017, another four years, to accelerate the attainment of fully fledged customs unions. While significant progress has been reached towards tariff elimination in both EAC Customs Union and SADC FTA, implementation of commitments to eliminate non tariff barriers in both RECs is ongoing.

This study will focus on only two RECs, the East Africa Community and the Southern African Development Community. The communities do not vary too significantly in their structures as both share the common objective of creating a larger economic space for trade among their members through the gradual elimination of tariff and non tariff barriers to trade.<sup>9</sup> Second, both are active in the field of economic integration. They envisage the progress through the various stages of economic integration and are indeed progressing on the stages though at different paces. This study will focus on the liberalisation of trade in goods following the provisions of Article XXIV GATT which deals with the establishment of customs union and free trade areas.

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<sup>6</sup> 'Economic Development in Africa Report' UNCTAD 2013 at 46

<sup>7</sup> Ibid at 57

<sup>8</sup> Ibid at 99

<sup>9</sup> Article 75 EAC Treaty and Article 3 SADC Protocol on Trade.

### **1.1.1 An overview of the market integration model**

The three prominent regional blocs in Eastern and Southern Africa (SADC, EAC and COMESA) have a common goal to pursue a market led regional integration.<sup>10</sup> This approach has its foundation in the neoclassical international trade theory which promotes free trade, exploits economies of scale and creates a more competitive business environment.<sup>11</sup> This integration model envisages a linear process of trade barrier elimination from a free trade area to the deepest level, a political union.<sup>12</sup> It calls for the establishment of free trade areas where tariffs are removed among member states but each country retains its own tariff against non-member states. This would be followed by a customs union where the free trade area remains in place and members impose a common external tariff. The next stage involves the formation of a common market with the free flow of factors of production. Finally an economic union would be formed with the unification of monetary and fiscal policies. If political sovereignty is given up, an economic union becomes a federation or political union with common legislation and political structures. The removal of tariffs and non-tariff barriers across borders is sometimes referred to as shallow integration while deep integration involves the creation of common policies. Deep integration involves more complex policy harmonisation and coordination among member states, such integration requires a higher degree of adherence to the rule of law.

The market led integration has its potential gains such as: increased production arising from specialization according to comparative advantage, increased output arising from the better exploitation of economies of scale and improvements in terms of trade of the bloc in comparison to the rest of the world (Baldwin 1997). African countries have pursued regionalism especially market integration to solve the problems created by small African economies.<sup>13</sup> However economists criticized this model and questioned whether an increase in the volume of trade was the main determinant of whether a trade bloc increased welfare. According to Viner, the important issue was whether a trade bloc

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<sup>10</sup> 'Economic Development in Africa Report' UNCTAD 2013 at 98

<sup>11</sup> Richard Gibb, *Regional Integration and Africa's Development Trajectory: meta theories, expectations and reality*, (2009) *Third World Quarterly*, Vol: 30 No. 4, at 708.

<sup>12</sup> *Ibid.*

<sup>13</sup> 'Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities' a joint publication by the Economic Commission for Africa and the African Union (2006) at 35.

created or diverted trade. According to McCarthy, the most favorable conditions for trade creation are not characteristics of developing countries and that as a result regional integration among developing countries is likely to have immaterial effects on their patterns on trade. Aly argued that the laissez-faire integration did not work in the African context because trade is conducted on a very limited scale between African countries.<sup>14</sup> In such circumstances, continuing with the model was useless and proved to be insufficiently workable. The difficulty with these arguments is that they condemn market integration model on the basis of the current low levels of trade, which is precisely what the adoption of the model is aimed at transforming.

### **1.1.2 An overview of the developmental integration model.**

While the linear market integration approach focuses more on the removal of tariff and non tariff barriers to trade, the development led integration goes further to include cooperation in the planning and implementation of productive activities. The development integration agenda hence includes structural transformation, regional infrastructure and private sector development. Development integration model was developed as a response to the perceived shortcomings of the market integration model which focuses almost exclusively on border measures.<sup>15</sup>

Market led integration focusing on the elimination of tariff and non-tariff barriers have been the hallmark of African integration efforts. Cooperation in trade liberalization and development is one of the pillars of the EAC.<sup>16</sup> The EAC trade regime is governed by chapter 11 of the treaty. The trade liberalization initiative under the EAC is to be achieved through a series of steps, starting with establishment of a customs union, followed by a common market and eventually a monetary union.<sup>17</sup> The East African Customs Union Protocol became operational in 1st January 2005 and achieved complete internal tariff elimination by 2010 following the end of the 5 year transitional period. This is a major milestone in the integration agenda which was followed by the launching of the common market on 1st July 2010.

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<sup>14</sup> Ibid at 43.

<sup>15</sup> T. Hartzenberg, 'Regional integration in Africa' Staff working paper No. ERS D 2011-14. World Trade Organization (2011)

<sup>16</sup> Article 74 EAC Treaty.

<sup>17</sup> Article 5(2) EAC Treaty.

The SADC trade regime is set up and governed by the SADC protocol on trade whose objective is to liberalize goods and services on the basis of fair, mutually beneficial and equitable trade agreements.<sup>18</sup> In keeping up with WTO's provisions which requires FTA to eliminate tariffs on substantially all trade, SADC members agreed that there should be a total elimination of tariffs of at least 85 per cent of all trade among members by 2008.<sup>19</sup> The SADC integration efforts have led to significant progress towards internal tariff elimination and plan to have the area progress to a customs union. The relatively faster pace at which EAC is progressing can be attributed to a number of factors. These include its comprehensive and elaborate constitutive instruments and the superiority of community law over national law which creates certainty to which system of law is applicable in a given situation.

### **1.1.3 Economic effects of regional economic integration**

During the last decade, several authors have explored the subject of regional economic integration and the most cited theoretical argument in favour of regional integration is that it allows for exploitation of comparative advantage within the region. This allows nations to specialize in the production of products best suited to their resource and labour endowments, without the interference of tariff or other impediments to trade, which in turn leads to rapid economic growth as a result of increased intra-bloc trade.<sup>20</sup> For developing countries, regional integration is said to offer a possible route for overcoming the disadvantages associated with small markets as it offers the benefit of allowing countries to pool their economic resources.<sup>21</sup> Many developing countries have realized that to operate in isolation denies them the market size benefits, opportunities and influence in this rapidly globalizing and competitive environment. There are at least four economic gains to be obtained from a larger market size: increased competition, exploitation of economies, variety of product and reductions in internal inefficiencies.<sup>22</sup>

Some studies have concluded that economic integration has led to trade imbalances, increased financial market volatility and fostered less-effective

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<sup>18</sup> Article 2(1) SADC Protocol on Trade.

<sup>19</sup> Article XXVI GATT.

<sup>20</sup> M. S. Leclair, *Regional Integration and Global Free Trade: Addressing the Fundamental*, (1997) at 1.

<sup>21</sup> M. Schiff and A. Winters, *Regional Integration and Development*, (2003), World Bank Publication, at 50.

<sup>22</sup> *Ibid* at 50-51.

macroeconomic policies. According to Venables the relatively larger countries in a trade bloc attract the manufacturing sectors hence derive more benefits from the partnership.<sup>23</sup> According to Collier, integration between developing countries tends to benefit the richer countries in the trade blocs.<sup>24</sup> So far, there is no consensus on this, and researchers have yet to reach definitive conclusions. However most agree that national borders present considerably greater impediments to regional integration than had previously been imagined. There is strength in countries trading in a bloc as they are better placed to influence trade terms in multilateral negotiations in the global market.

From the earlier discussions it is clear that the long term goal for both SADC and EAC extends beyond shallow integration and both aim to achieve deep integration. With it leads to the creation of other dynamics such as greater predictability of national policies which has two major benefits. Firstly it is essential to attracting foreign direct investments. Second, it facilitates political dialogue between partner states and strengthens their negotiating power in international arena.<sup>25</sup>

## **1.2 RESEARCH QUESTION**

A notable feature of the framework for integration under AEC Treaty is the use of regional economic communities as building blocks for the continent wide community. Another feature is the conspicuous absence of an emphasis on the role of law in the economic integration process. The arguments raised in this paper rely on the appreciation of the role that law plays within the WTO system in regulating international trade relations. It is important to make sure that the trade agreements place effective restraints on every government's behavior that fails to comply with trade commitments. It is argued that such a system of restraint works best if it is based on rules agreed to in advance and then applied to individual problems by neutral and objective adjudicators.<sup>26</sup> This will help

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<sup>23</sup> A.J. Venables 'Winners and losers from regional integration agreements' (2003) *Economic Journal* at 113.

<sup>24</sup> P. Collier (2008) 'The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It' Oxford University Press (2008).

<sup>25</sup>J. Whalley, 'Why do countries seek Regional Trade Agreements?' (1996) NBER Working Paper No. 5552 at 20.

<sup>26</sup>Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' (1999) 8 *Minnesota Journal of Global Trade*.

ensure that the expectations of the parties are fulfilled.<sup>27</sup> Relying on the good will of governments and GATT officials to reduce trade barriers and promote international trade was unlikely to succeed unless both substantive and procedural laws accompanied those objectives.

Secondly, another feature is reluctance of states to enforce regional agreements based on the fear that RTAs will jeopardize sovereignty. A variety of strategies have been adopted by countries seeking to safeguard their sovereignty. These include framing commitments in broad terms and retaining the authority to interpret the obligations. From a legal perspective, the parties concerned will not find it easy to comply with the obligations contained therein. When it comes to the promotion of economic integration, the governments involved have to decide some additional issues. How will they, for example, ensure non-discriminatory treatment and put a stop to nontariff barriers in the markets of the other states parties to the agreement? How will their national policies be affected? What happens in case of non-compliance? The answers to these questions should be provided for in the legal instruments in question.<sup>28</sup> Community laws take the form of treaties establishing regional organizations, protocols, regulations, decisions, principles, objectives and general undertakings.<sup>29</sup> States can also choose to establish institutions with weak central organs. Some governments are beginning to realize the need to relinquish sovereignty at times in order to promote economic development. A case in point is the EAC Treaty which grants sovereignty to the EAC institutions and organizations.<sup>30</sup>

Thirdly, the more salient feature is the relation between community law and national law. The EAC Treaty elevates community law above national laws.<sup>31</sup> The SADC Treaty states that member states shall take all necessary steps to accord the Treaty the force of national law.<sup>32</sup> This provision simply means that direct applicability of community law is not guaranteed. This provision has neither a defined time frame for the legislation to be enacted nor a sanction for non-compliance. This could mean that

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<sup>27</sup> John Jackson, 'World Trade and the Law of GATT'.

<sup>28</sup> G. Erasmus, 'Is the SADC trade regime a rules-based system?' (2011) SADC Law journal Vol 1 at 18.

<sup>29</sup> R. Oppong, Legal aspects of regional integration, (2011) chapter 7.

<sup>30</sup> Article 8(4) EAC Treaty.

<sup>31</sup> Ibid.

<sup>32</sup> Article 6(5) SADC Treaty.

individual member states are free to apply different approaches in deciding how treaty provisions will be accommodated by national legal systems. While the EAC does not provide for direct applicability of community law, it however contains a provision that each partner state shall within twelve months from the date of signing of the treaty secure the enactment and the effective implementation of such legislation as is necessary to give effect to the treaty.<sup>33</sup>

Promotion of economic integration is at the heart of both EAC and SADC trade regime. Accordingly, the SADC and EAC instruments aim to stabilize and remove tariff and non-tariff barriers to trade and also harmonize customs duties and internal taxes. SADC has made significant progress in liberalizing trade. Most SADC countries have reduced and eliminated tariffs and quotas under the Protocol of trade. Two critical constraints seem evident. First, it is not very clear whether all members' states remain committed to integration in such behind the border issues. Second, advancing on such regulatory integration appears to be constrained by overlapping membership of the majority of SADC countries in other regional initiatives that is the famous spaghetti bowl effect. While EAC has been successful in meeting its deadline for establishing a customs union, SADC has extended its period for launching its proposed customs union. Creation of a free trade area and a customs union confers tariff preferences between the members of the blocs concerned. Recent studies indicate that EAC and SADC been instrumental in promoting intra-regional trade and attracting foreign direct investments.<sup>34</sup> However intra-regional trade as a share of the total trade remains low compared to the levels observed in other continents.<sup>35</sup> Low intraregional trade reflects limited progress towards implementing trade agreements, improving customs administration, cumbersome regulatory frameworks among other factors. EAC's move to achieve deeper integration would require a higher degree of member states' commitment to fulfill treaty objectives which in turn requires a stronger adherence to the rule of law. Whether the elimination of trade barriers results to increased trade is ultimately a question that is beyond legal

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<sup>33</sup> Article 8(2) EAC Treaty.

<sup>34</sup> 'Strengthening Regional Economic Integration for Africa's Development' UNCTAD Economic Development in Africa Report ( June 2011) at 25

<sup>35</sup> 'The State of Intra-African Trade and Investment' UNCTAD Economic Development in Africa Report 2013, pp 28-30

analysis. The role of the legal frame work is to create the necessary enabling environment for the conduct of trade by providing predictability and stability. This research aims to answer the following question:

1. Whether the legal framework in the SADC and EAC RTAs is effective to eliminate trade barriers and further foster a deeper level of economic integration?

### **1.3 OBJECTIVES OF THE STUDY**

For developing countries and in particularly African countries, economic integration is a response to mitigate effects of small size national markets.<sup>36</sup> On one hand, it is seen as an opportunity for sustained growth of the economies.<sup>37</sup> On the other hand, despite countries concluding RTAs, implementation of the ambitions expressed within the agreed schedules is not impressive and non tariff barriers still persist as major obstacles to trade.<sup>38</sup>

This study argues that African countries wishing to engage in regional integration should accept greater legal discipline in matters of International Trade law. The establishment of the RTAs introducing legal discipline will ensure that the trade regimes that they establish and participate in are effective. In order to be effective, it is contended that a legal measure must induce the kind of conduct desired and the desired conduct must in turn achieve the economic benefit desired.<sup>39</sup>

### **1.4. JUSTIFICATION OF THE STUDY**

Stakeholders in both public and private sector are keen to see the implementation of the trade liberalization objectives of both blocs so as to reap the benefits of integration. Implementation of the EAC customs union and the SADC free trade area has left a few gaps and stakeholders would like to see these gaps addressed to pave way for subsequent stages of integration. The significance of this study is that it attempts to answer some of the concerns regarding implementation and makes recommendations on the way forward. The extended period of implementation of reforms arises from institutional incapacity. It

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<sup>36</sup> Economic Development in Africa Report', UNCTAD 2013 at 50

<sup>37</sup> Article 3(1) Treaty establishing the African Economic Community.

<sup>38</sup> 'Economic Development in Africa Report', UNCTAD 2013 at 57

<sup>39</sup> R. E. Hudec, Developing Countries in the GATT Legal System, (2011) at 138

is important to note that the longer the time taken to introduce reform at institutional and regulatory levels, the longer the gains from trade liberalizations will be delayed.

Effective trade arrangements require legal instruments which reflect with sufficient degree of precision the intention of the parties with regard to the method of implementation and compliance.<sup>40</sup> The obligations which the members have accepted should be clear in order to ensure that the intended results are achieved. In order to engage in effective regional integration, it is important that the benefits that flow from regionalism are emphasized in the legal structure put in place to facilitate the achievement of those benefits. Lack of legal clarity is often encountered in the drafting of the RTAs, making such arrangements less effective. Uncertainty, unpredictability, non-compliance, non-transparency and a lack of remedies will undermine the benefits to be gained.<sup>41</sup> Private firms and traders are the most likely to be negatively affected. Investors will also shy away from markets where they do not enjoy the protection of the law and cannot enforce their rights.

## **1.5 RESEARCH METHODOLOGY**

The sources of research material will consist of both secondary and primary sources. Primary sources will include the General Agreement on Trade and Tariffs, the East Africa Community Treaty, the East Africa Customs Union Protocol, the SADC Protocol on Trade, The SADC Treaty and other relevant regional trade agreements.

Secondary sources will be heavily relied on and include textbooks on international trade law, regional integration, articles and journals on international trade law, economic law and other related subjects.

Other information will be drawn from databases of inter-government institutions such as EAC and SADC websites respectively. Useful information will be drawn from official website of WTO, African Development Bank, UNCTAD etc

## **1.6 OVERVIEW OF CHAPTERS**

The structure of the paper is as follows:

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<sup>40</sup> Gerhard Erasmus, 'Is the SADC trade regime a rules-based system?' (2011) SADC Law journal Vol 1 at 19.

<sup>41</sup> Ibid

## **Chapter one**

This is an introductory chapter to the thesis. It will cover the background of the study, research question, research methodology, scope and relevance of the study.

## **Chapter two**

This chapter will focus on the WTOs regulatory regime for regional integration. The analysis conducted in this chapter will involve an evaluation of Article XXIV. It will consider the legal provisions relating to the establishment of a free trade area and customs union. The chapter aims to show that the provisions of Article XXIV are flexible enough to cater for the interests of developing countries.

## **Chapter three**

This chapter will discuss the approaches adopted by EAC and SADC with regard to economic integration. This chapter will focus on the respective trade liberalization objectives particularly initiatives to facilitate free movement of goods. It will discuss the rules relating to elimination of tariff and rules of origin in that regards. This will be followed by a discussion of whether they have complied with their internal obligations to eliminate trade barriers.

The main focus will be on how successful both have been at implementing their tariff elimination agenda and to what extent their respective legal framework has helped to achieve this objective. This chapter will conclude that the potential benefits from these trade regimes will only be realized with effective compliance with commitments undertaken therein. It will be revealed that lack of legal clarity encountered in the drafting of these agreements creates uncertainty making such agreements less effective. Finally it will highlight the lessons to be drawn by SADC from the experience in EAC.

## **Chapter four**

These chapters will analyze legal constraints facing the regional economic integration in both SADC and EAC. It will discuss the overall over view of the rules relating to elimination of non tarrif barriers (NTB) in the form of state imposed administrative and technical requirements that are an obstacle to free movement of goods. It will also examine the mechanisms contained in the legal instruments to secure compliance and

monitor implementation of agreed decisions. For compliance to be effective there is need for development of strong institutions that will uphold the rule of law even when political will fails.

### **Chapter five**

A conclusion will be drawn in regards to address the gaps in the legal structures put in place to promote economic integration. It will also include possible recommendations to guide policy makers in their pursuit for deeper trade liberalization pursuits.

## **CHAPTER TWO**

### **2. REGIONAL ECONOMIC INTEGRATION AND THE WTO**

#### **2.1 INTRODUCTION**

Trade in goods at the multilateral level is governed by the World Trade Organization's General Agreement of Trade in Goods (GATT). The GATT is solely concerned with the promotion of free trade norms concentrating on the reduction of tariff and non-tariff barriers to trade. Although no text of the WTO framework contends that it is an international trade constitution, scholars have argued that it constitutes an international trade constitution having the capacity to provide an international legal framework of binding norms of substantive law, which have a significant impact on private individuals at domestic level.<sup>42</sup> The GATT was originally intended to be an interim agreement pending the establishment of the International Trade Organization (ITO). Due to the failure to ratify the Havana Charter the GATT became a vehicle for international economic cooperation. With the growing complexity of the system, contracting parties met in Uruguay Round to come up with the Marrakesh Agreement. The agreement was signed in 1994 to establish the WTO. The WTO Charter adopted during the Uruguay Round gives the world a multi-lateral rule-based system of conducting trade that has a distinct legal personality.<sup>43</sup>

The legal authority governing formation of regional trade agreements (RTAs) at the multilateral level is Article XXIV GATT read together with the Understanding on Interpretation of Article XXIV. The two types of economic integration governed by the GATT are customs union (CU) and free trade area (FTA). This chapter starts by giving an overview of reasons why States pursue regionalism while they are still parties to the wider WTO multi-lateral system. It then proceeds to examine the WTO requirements for formation of regional economic integration. This is followed by a discussion of whether the SADC and EAC RTAs comply with the requirements for the establishment of a free trade area and customs union respectively.

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<sup>42</sup> G. Evans, *Lawmaking under the Trade Constitution: A study in Legislating by WTO* The Netherlands: Kluwer Law, International (2000).

<sup>43</sup> *Ibid.* at 10.

## 2.2 REGIONALISM AND MULTILATERALISM PERSPECTIVES.

WTO rules regulate trading relations between states and in formulating trade policies states often have diverse policy goals such as achieving equity in the distribution of wealth and improving the overall quality of life of citizens.<sup>44</sup> As there are many players all with different expectations, needs, agendas and capacities trade negotiations at the multi-lateral level have proved very problematic making decisions difficult to arrive at. The proponents of regionalism argue that the motivations driving governments towards regional arrangements reflect frustration with the paucity of multi-lateral negotiations.<sup>45</sup> While a number of trade issues are being negotiated on the multilateral level (i.e. the ongoing Doha trade negotiations of the WTO), the past decade saw an increase of trade negotiations taking place on the regional levels. As of 15th June 2014, 585 RTAs (counting both goods and services) had been notified to the WTO. Out of these 379 are in force.<sup>46</sup> The attraction to intra-regional trade liberalization is that, politically it may be easier for governments to liberalise among their neighbours than to do so multilaterally.<sup>47</sup> Nevertheless, the proliferation of RTAs should not be taken as an indication that they are replacing or substituting the multilateral trading system. The existence of a relationship between regionalism and multilateralism is very important for global trade governance. It can be argued that RTAs, by moving at a faster pace than WTO rules while sharing the WTO's goals, strengthens the latter.<sup>48</sup>

It also has to be realized that RTAs, being small in nature, can be more effective in tackling new areas such as services, investment and intellectual property protection, cooperation in competition policy, technical standards and government procurement than multilateral rule-making.<sup>49</sup> As already stated in Chapter One, African countries have not been left out in the pursuit for regional integration. African countries have pursued

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<sup>44</sup> S Woolcock, 'Regional Integration and the Multilateral Trading System' in Regional Trade Blocs, Multilateralism and the GATT. T Geiger and D Kennedy at 115.

<sup>45</sup> Sutherland Report, 'The future of the WTO', World Trade Organization 2004, at 19 para. 61.

<sup>46</sup> See [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm), accessed on 3<sup>rd</sup> July 2014.

<sup>47</sup> Robert Z. Lawrence, 'Regionalism, Multilateralism, and Deeper Integration: Changing Paradigms for Developing Countries', In C. Roe Goddard, Patrick Cronin and Kishore C. Dash (eds.), *International Political Economy: State-Market Relations in a Changing Global Order*, (Basingstoke: Palgrave Macmillan, 2003). at 403.

<sup>48</sup> J Bhagwati, *Writings on international economics* (2000) at 170.

<sup>49</sup> Whalley, 'Why do Countries Seek Regional Trade Agreements?' ,at 74.

regional integration to overcome development constraints that are characteristic of African economies, that is, small economic size, lack of structural complementarities manifested by low value primary export products and dependence on imports of intermediate and final goods. Sub-Saharan Africa, with the exception of South Africa have small markets, this makes domestic market diversification difficult. Economic integration has been pursued to transform Africa's economies, to unleash industry and business and to assist the region become part of the world's economy.<sup>50</sup>

The motivation for allowing RTAs is the recognition that their purpose is to facilitate trade between the constituent territories and not raise barriers to trade to other WTO members who do not belong to that RTA.<sup>51</sup> One advantage of RTAs is that they allow freedom of trade through closer integration of the economies of the countries who are parties to such agreements.<sup>52</sup> Though regional integration initially works independently, it is perceived that at a certain point it will knock down protective barriers and open a path to not only regional but possibly global trade liberalization.<sup>53</sup> Regionalism when viewed in this manner, that is seeking to advance liberalization in areas where multilateral trade negotiations may have been exhausted, may well become a stepping stone for global trade liberalization.<sup>54</sup> The Uruguay Round echoed the same when it concluded in the Preamble of the Understanding of the interpretation of Article XXVI, that closer integration between economies of the countries through voluntary agreement will contribute to the expansion of the world trade.

### **2.3 SUBSTANTIVE REQUIREMENTS FOR REGIONAL TRADE AGREEMENTS**

At the heart of the GATT is the principle of non-discrimination characterized by the most-favoured-nation (MFN).<sup>55</sup> The MFN Clause is regarded as the central organizing rule of the GATT and the world trading system of rules it constituted.<sup>56</sup> The MFN

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<sup>50</sup> ECA, 'Annual Report on Integration in Africa (ARIA) 2002- Overview' Paper presented at the African Development Forum III (Addis Ababa, 2002), at 3.

<sup>51</sup> Article XXIV para 4 GATT.

<sup>52</sup> Ibid.

<sup>53</sup> Richard E. Baldwin, 'The Causes of Regionalism', Volume 20 No. 7, November 1997, at 865-888.

<sup>54</sup> Ibid. at 883-885.

<sup>55</sup> Article 1 GATT

<sup>56</sup> Sutherland Report, 'The future of the WTO', World Trade Organization 2004, at 19. para. 58.

principle essentially requires that there should be equal treatment for all trading partners.<sup>57</sup> It requires that the best tariff conditions extended to any contracting party of the GATT had to be automatically and unconditionally extended to every other contracting party.<sup>58</sup> FTAs and CUs by definition violate the MFN principle, since merchandise from FTA or CU member countries is given preferential tariff treatment compared to merchandise from non-member states. However, the negotiators behind the drafting had to compromise and include an exception to the MFN principle. RTAs are an exception to the general rule subject to compliance of certain conditions. The two forms of RTAs recognized under the GATT are customs union and free trade areas. The RTAs have both external legal obligation that apply with relations with non-member countries and internal obligation that apply between members.

The underlying rationale behind Article XXIV was that the GATT would as a rule allow formation of an RTA but only as a reward for fully fledged liberalization in the form of either a customs union or an FTA among the constituent members. The formation of these agreements is allowed because they have been recognized to promote trade liberalization through the removal of barriers to substantially all the trade between members of such agreements. This purpose is reflected in the requirements for formation of customs union and free trade areas listed in paragraph (5) and (8) of Article XXIV of the GATT. Additionally these two types of RTAs are regarded as capable of helping developing economies implement domestic reforms and open up to competitive market pressures at sustainable pace thus facilitating their integration in the world economy.<sup>59</sup>

### **2.3.1 External requirements for the formation of RTAs**

A decline of tariffs within the RECs may potentially have trade diversion effects (Viner 1950). This will occur when partner states import relatively expensive goods from the growing industrial center rather than more efficient global producers thereby lowering their overall welfare. The exporting country will gain as regional industry relocates to its soil and real wages rise as a result. The net welfare impact will be positive if the trade

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<sup>57</sup> Article 1 GATT.

<sup>58</sup> Ibid

<sup>59</sup> J. Crawford and R. Firoentino The Changing Landscape of Regional Trade Agreements Discussion Paper No. 8 (WTO, 2005) available at [www.wto.int/english/res-e/booksp-e/discussion-paper\\_s\\_8-e.pdf](http://www.wto.int/english/res-e/booksp-e/discussion-paper_s_8-e.pdf), last assessed on 3<sup>rd</sup> July 2014.

creation effect dominates the trade diversion effect.<sup>60</sup> This will likely happen if the bloc members are competitive and have diversified production structures. Recognizing the fact that some regional trade agreements may have trade diversion effects, Article XXIV (5) provides that members of RTAs should not raise import duties beyond those that existed before the formation of the RTAs on trade with other third countries.

Article XXIV (5) allows the establishment of a customs union if the duties and other regulations of commerce imposed upon its formation to trade with non-member states are not more restrictive than those applicable in the constituent territories before the customs union was formed.<sup>61</sup> This requirement was clarified in paragraph 2 of the Understanding on the Interpretation of Article XXIV of the GATT 1994, indicating that evaluations in application of Article XXIV (5) (a) requires that it should be based upon an overall assessment of weighted average tariff rates and of custom duties collected. Similarly the formation of FTAs is allowed provided the duties and other regulations of commerce maintained by each constituent state at the formation of the FTA to trade with non-members states shall not be higher or more restrictive than those existing in the same constituent territories before the FTA was formed.<sup>62</sup>

### **2.3.2 Internal requirements for the formation of RTAs**

Article XXIV (8) lays out the internal requirements for the formation of CU and FTA with the goal of maximizing trade creation between the parties to the RTA through elimination of duties and other trade restrictions on trade within the RTA. A customs union is defined as a substitution of a single customs territory for two or more territories so that duties and other restrictive regulations of commerce are eliminated with respect to substantially all trade between the constituent territories.<sup>63</sup> An additional requirement for the custom union is the establishment of a common external trade regime with a common external tariff policy.<sup>64</sup> An FTA is defined as a group of two or more customs territories in which the duties and other regulations of commerce are eliminated on substantially all

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<sup>60</sup> Viner J (1950) *The Customs Union Issue*, Carnegie Endowment for International Peace. New York.

<sup>61</sup> Article XXIV (5) (a) GATT.

<sup>62</sup> *Ibid.* at para. 5 (b).

<sup>63</sup> *Ibid.* at para. 8 (a) (i).

<sup>64</sup> *Ibid.* at para. 8 (a)(ii).

trade between the constituent territories in products originating in such territories.<sup>65</sup> A FTA unlike a CU establishes only a standard for the internal trade between the constituent members and there is no requirement for the formation of a common external trade policy for trade with third countries.

## **2.4 COMPLIANCE WITH ARTICLE XXIV OBLIGATIONS**

Under International law there is no hierarchy of treaties except for the supremacy of the provisions of the UN Charter over any other international Agreement which is expressly provided for in Article 103 of the UN Charter. Equating the supremacy of WTO rules over RTAs is possible if we take into account Article 41 of the Vienna Convention on the Law on Treaties which is considered the customary law of treaties. Article 41 allows parties to a multi-lateral treaty to conclude a subsequent agreement that modifies the former treaty if the treaty itself allows for the possibility for such modification. Normally, an RTA would violate the WTO's most-favoured nation principle, which essentially requires that there should be equal treatment for all trading partners.<sup>66</sup> However, Article XXIV allows for the establishment of RTAs, provided they satisfy certain specified requirements. Since Article XXIV of the GATT allows the creation of RTAs, by virtue of Article 41(1), the latter kind of treaties are consistent with the provisions of the GATT subject to satisfying the specified requirements relating to establishment of CUs and FTAs. This means that RTAs are subservient to the rules of the WTO in the same manner as ordinary legislation of parliament in a domestic legal context would be to provisions of the constitution.<sup>67</sup> Furthermore, WTO rules dealing with RTAs mandate that, if any contacting party enters into a custom union or FTA, they are obliged to notify the WTO promptly and make any such information to WTO members as may be necessary to make any appropriate recommendations.<sup>68</sup> Where the members of the notified RTA are not prepared to modify the proposed RTA, they will not be permitted to maintain such agreement or allow it to enter into force.<sup>69</sup>

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<sup>65</sup>Ibid.at para. 8 (*b*).

<sup>66</sup> Article 1 GATT

<sup>67</sup> T. Cottier and M. Foltea, 'Constitutional Functions of the WTO and Regional Trade Agreements' at 43.

<sup>68</sup> Article XXIV par 7(*a*).

<sup>69</sup> Article XXIV par 7(*b*).

Compliance with Article XXIV will be evaluated on the following basis: the substantially all trade requirement, the neutrality of trade restrictiveness requirement, the notification requirement, and the prescribed transitional period.

#### **2.4.1 The substantially all trade requirement**

The requirement that duties and other regulations of commerce must be eliminated with respect to substantially all the trade is very important in assessing the compliance of RTAs with WTO rules. What constitutes substantially all trade is vague and undefined. The term substantially suggests that some trade may be left out of a liberalization scheme or that a member country may keep in place some duties and other restrictive regulations of commerce. Ideally members of a custom union may maintain in their internal trade certain restrictive regulations of commerce that are permitted under Articles XI to XV GATT. The issue is to what extent member countries must remove barriers to trade in their internal trade liberalization programmes. An agreement on the interpretation of the term 'substantially' in the context of Article XXIV (8) has never been reached by the GATT contracting states.<sup>70</sup> This failure to agree on the definition of 'substantially all the trade' can be attributed to the desire of members to give themselves latitude to exclude sensitive sectors from trade liberalization. Article XXIV (8) offers some flexibility to the constituent members of a custom union and FTA when liberalizing their internal trade.<sup>71</sup> However the Appellate Body in the Turkey Textiles case warned that there is no scope to interpret this flexibility in a broad way because it must not be forgotten that the word 'substantially' qualifies the word 'same'. Article XXIV (8) therefore requires something closely approximating 'sameness'.<sup>72</sup> The traditionally favored approach to the interpretation of the phrase 'substantially all trade' requirement is a quantitative approach.<sup>73</sup> This approach focuses on a certain percentage typically between 80 and 90 per cent of trade between member countries.

The East African Customs Union Protocol was signed on 2<sup>nd</sup> March 2004 after more than four years of protracted negotiations and became operational in 1<sup>st</sup> January

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<sup>70</sup> Panel Report, Turkey- Textile Case, para 9.148.

<sup>71</sup> Ibid. para. 9.146.

<sup>72</sup> Appellate Body Report, Turkey- Textile Case, para 50.

<sup>73</sup> European Commission, Clarification and Improvement to GATT Article XXIV Provisions.

2005. The elimination of duties to all merchandise trade among partner states was achieved in 2010 following the end of the 5 year transitional period. The establishment of a common external tariff (CET) in trade between partner states and third countries is essential to the formation of a customs union. The protocol establishes a three band common external tariff: a minimum rate of 0 per cent on raw materials, a middle rate of 10 per cent for intermediate products and a maximum rate of 25 per cent rate for finished goods imported into the region from third countries.<sup>74</sup> The EAC CU has satisfied both the internal tariff elimination requirement and the common external tariff requirement. The adoption of the CET by the Partner States, ending the practice of partner states charging different national tariffs and observing the provisions of EAC customs protocol are expected to contribute significantly towards enhanced simplicity, rationalization, and transparency of EAC Partner States' tariffs.<sup>75</sup>

The SADC Protocol on Trade was signed in 1996 and the implementation of the SADC FTA began in 2001. Since 2008 producers and consumers have paid no import tariffs on an estimated 85 per cent of intra-SADC merchandise trade with most of the remaining 15 per cent comprising sensitive products. This was only the minimum conditions for an FTA and the maximum tariff liberalization was to be achieved by January 2012, when the tariff phase-down process for sensitive products was expected to be completed.<sup>76</sup> However for Mozambique, the process will only be completed in 2015 in the case of imports from South Africa. Since the substantially all trade requirement is not clear and the fact that SADC has reached an exceptional level of tariff elimination, this requirement has been complied with. Despite the fact that Angola, Seychelles and DRC are still in the process of joining the proposed free trade area, most commentators argue that SADC Trade Protocol is compliant with Article XXIV (8) b.<sup>77</sup>

In concluding this discussion, the study briefly considers the requirement on elimination of other regulations of commerce. It is important to realize that there are shortcomings in the interpretation of this requirement. An overall assessment of other

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<sup>74</sup> Article 12 EAC Customs Union Protocol.

<sup>75</sup> H.M. Stahl, 'Tariff Liberalization impacts of the EAC Customs Union in perspective', at 3 *tralac* Working Paper no. 4 (2005), [www.tralac.org](http://www.tralac.org).

<sup>76</sup> 'SADC Integration milestones', available at, <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/> last assessed on 3<sup>rd</sup> July, 2014.

<sup>77</sup> Grimett, Protection and compliance at 222.

regulations of commerce is difficult. This would require examining individual measures, regulations, products covered and trade flows for which qualification is difficult. For instance SADC member States are required to implement measures which will lead to the elimination of all existing forms of non-tariff barriers (NTBs).<sup>78</sup> Accordingly member states must also refrain from imposing any new non-tariff measure. Similarly EAC member states are obliged to remove all existing non-tariff barriers and are prohibited from imposing new NTBs.<sup>79</sup> Although this shows a step towards elimination of NTBs on the part of SADC and EAC, the fulfillment of this requirement is difficult to measure as non-tariff barriers are still very high in both regions.<sup>80</sup>

#### **2.4.2 The neutrality of trade restrictiveness requirement**

The neutrality of trade restrictiveness requirement is contained in Article XXIV (5). This requirement is such that members of FTAs should not raise import duties beyond those that existed before the formation of the FTA on trade with other third countries.

Paragraph 2 of the Understanding on the Interpretation of Article XXIV clarified that the duties to be taken into consideration are the applied rates of duties. In this respect the SADC member states have agreed not to raise import duties beyond those that were in existence before the Trade Protocol.<sup>81</sup> They have also agreed not to grant less favorable treatment to third countries than they give to member states where export duties and quantitative export restrictions are applied. This shows compliance on the part of SADC with Article XXIV (5).

The next goal for SADC is the establishment of a customs union when all the member states' tariff regimes are expected to be liberalized and a common external tariff adopted.<sup>82</sup> The target schedule for formation of the SADC CU was 2010, however this is still pending.<sup>83</sup> The main challenges facing the transition from an FTA to a CU can be attributed to the lack of efficient implementation of tariff liberalization provisions by

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<sup>78</sup> Article 6 SADC Protocol on Trade.

<sup>79</sup> Article 13 EAC Customs Union Protocol.

<sup>80</sup> See discussion at 4.1

<sup>81</sup> Article 6 SADC Protocol on Trade.

<sup>82</sup> F. Njini, SADC Limp Towards a Common Market, Trade Law Centre for South Africa (13 August 2010), available at [www.tralac.org](http://www.tralac.org).

<sup>83</sup> See Desk Assessment of the Regional Indicative Strategic Development Plan 2005- 2010, at 14.

members and the complexity created by multiple memberships of SADC member states in other RTAs with similar integration ambitions.<sup>84</sup>

### **2.4.3 The notification requirement**

As the formation of a regional integration scheme is an exception to the MFN principle, member countries are required to notify the WTO their intention to form RTAs. Article XXIV (7) (a) sets out the requirement for contracting parties that decide to enter into a CU or FTA. A party so deciding must notify the contracting parties and must make available to them any information regarding the proposed union or area. Though it does not expressly lay down any specific notification format to be followed by countries wishing to form a regional trading arrangement; the language used suggests that what is to be notified is prospective not retrospective. However in practice RTAs have been notified after their establishment. SADC notified WTO of its intention to form an FTA in August 2004<sup>85</sup> while the implementation of the SADC FTA actually began in 2000. The EAC trade regime was notified under Article XXIV GATT on 9th October 2000 and has since embarked its pursuit for regional economic integration. Based on state practice, it can be presumed that both SADC and EAC are have complied with the notification requirement.

### **2.4.4 The prescribed transitional period for implementation**

The last requirement deals with the period of implementation. The period between the entry into force of an RTA and complete liberalization between its members is called an interim agreement. Under Article XXVI (5) (a), an interim agreement should include provisions for the formation of CU or FTA within a reasonable time. In the Understanding on Article XXIV, the reasonable period of time is ten years which can be extended in exceptional cases.<sup>86</sup> SADC implemented the minimum conditions for the establishment of the FTA after 8 years of phased tariff reduction. This is two years earlier than the specified limit. Notwithstanding the fact that a few members of SADC are not party to the FTA, its implementation in 8 years (from 2000 to 2008) means that those who had not implemented it had a grace period of two years and 2010 was the final year

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<sup>84</sup> Ibid at 34.

<sup>85</sup> See Desk Assessment of the Regional Indicative Strategic Development Plan 2005- 2010, at 16.

<sup>86</sup> Understanding on Article XXIV, para. 3.

for the fulfillment of this requirement. SADC can still seek to extend the transitional period by approaching the Council of Trade in Goods. This should be done in line with the decision by Mozambique to have fully complied with the FTA by 2015. The EAC on the other hand has complied with this requirement as the East African Customs Union Protocol which entered into force in 1st January 2005 operated as a fully fledged customs union from 1st January 2010 following the end of the 5 year transitional period.

## **2.5 CONCLUSION**

All the member states in SADC and EAC are WTO members as well. Being WTO members they are obliged to comply with the multilateral requirements for RTAs. As observed in this chapter, though the provisions of Article XXIV may seem vague, it cannot be said to be meaningless and not capable of compliance. In so far as EAC is concerned, compliance with Article XXIV requirements regarding the formation of a customs union has been satisfied. Similarly, SADC FTA has indeed complied with the free trade area requirements set out in the WTO rules. If SADC envisages deeper integration, efforts should be made to ensure compliance with the requirements regarding formation of a customs union. The launch of the EAC Customs Union by 2010 and the launch of the SADC FTA by 2008 are benchmarks against which members' compliance can be assessed. This progress raises the demand for legal certainty and uniformity in interpretation and application of the community law which creates the need for autonomous and permanent regional judicial bodies.

## **CHAPTER THREE**

### **3. COMPLIANCE WITH REGIONAL OBLIGATIONS TO ELIMINATE TRADE BARRIERS**

#### **3.1 INTRODUCTION**

In chapter one it was observed that regional economic integration has been recommended to, and embraced by, African countries as the key to improved trade performance and economic development. While chapter two considered compliance of the RTAs with the external trade (multilateral) obligations, this chapter will consider whether they have complied with their internal legal obligations to eliminate trade barriers on intra-regional trade. These internal obligations are found in their own legal instruments and apply between the members themselves. The potential benefits from these trade regimes will only be realized with effective implementation of regional commitments to eliminate trade barriers.<sup>87</sup> In order to assess the level of compliance of the trade rules established by EAC and SADC, it is important to consider the trade liberalization objectives that have driven economic integration in both blocs. Knowledge of the regime's trade liberalization objectives permits an accurate judgment to be made as to the effectiveness of the regime.<sup>88</sup> This chapter will evaluate the trade liberalization process in SADC and EAC. It will start with an overview of the historical background and proceed to consider the trade liberalization objectives. This will involve a discussion of the provisions relating to elimination of tariffs and rules of origin in that regards. This chapter will examine the level of compliance with the commitments to eliminate tariff barriers in the Customs Union Protocol and the Protocol on Trade respectively. It will conclude that for economic integration to be effective, member states must ensure that national implementation should be in line with the community aspirations. Uncoordinated executive practices of member states and insufficient harmonization of national laws result in fragmented outcomes, legal uncertainty and administrative duplication.

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<sup>87</sup> Regional Indicative Strategic Development Plan (2003) at 25.

<sup>88</sup> H. K. Mutai, 'Compliance with International Trade Obligations' Kluwer Law International (Volume 11) at 27.

### **3.2 HISTORY AND THE TRADE LIBERALIZATION OBJECTIVES IN THE EAC AND SADC**

Immediately after decolonization, almost all the development resolutions adopted by the OAU called for ‘the economic integration of Africa as a prerequisite for real independence and development.’<sup>89</sup> The Abuja treaty provided for the creation of five RECs in the five regions recognized by the OAU that is North, West, Central, East and Southern Africa.<sup>90</sup> The motivation for establishing RECs under the Abuja Treaty was to use them as building blocks for the eventual continental Economic Community. The OAU was replaced by the Africa Union (AU) in 2001. The AU builds on and accelerates the aim of the OAU and the Abuja Treaty.<sup>91</sup>

In East Africa, regional integration initiatives date back to 1919 when the former EAC Customs Union between Kenya, Uganda and Tanzania existed. However this community lasted only until 1977 when it collapsed among disputes over the distribution of benefits from integration as well as fundamental political differences.<sup>92</sup> The new EAC was established in 1999 with the signing of the EAC Treaty and entered into force in July 2000. Initially the community consisted of Kenya, Uganda and Tanzania, but subsequently extended to include Burundi and Rwanda in 2007. Both EAC and SADC adopted the market model of integration, though the EAC arrangement is unique in the sense that, rather than adopting the progression described in the economics literature<sup>93</sup>, which involves a move from a free trade area (FTA) to a customs union and then to a common market, the FTA and customs union stages in the EAC were implemented simultaneously.

Article 5 of the EAC Treaty sets out the objectives of the community as follows: to develop policies and programs aimed at widening and deepening cooperation among member states for the mutual benefit in the political, economic, social and cultural fields, research and technology, legal and judicial affairs. To achieve these objectives partner states have undertaken to establish among themselves a customs union, a common

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<sup>89</sup> Article 2 Charter of the Organization of the African Unity.

<sup>90</sup> Article 1(d) Treaty establishing the African Economic Community.

<sup>91</sup> Article 3, Constitutive Act of the African Union.

<sup>92</sup> J. M. Kikwete ‘Regional Alternatives and National Options’ in OECD, *Regional Integration in Africa* (OECD) Publications, (2002) at 151- 153.

<sup>93</sup> B. Balassa, ‘the theory of economic integration. Homewood, ILL: Richard D Irwin. Inc ‘(1996) at 2.

market, a monetary union and, ultimately a political federation.<sup>94</sup> The EAC's trade liberalization strategy is set out in Chapter 11 of the EAC Treaty. The first step involves the establishment of a customs union which involves elimination of duties in respect of all merchandise trade within the territory<sup>95</sup> and the establishment of a common external tariff applicable to trade between member states and third parties. Once this was achieved, the next step will be the formation of common market.<sup>96</sup>

Regional integration in Southern Africa was formalized in 1980 with the formation of the South African Development Coordination Conference (SADCC) which was an initiative of the frontline states.<sup>97</sup> SADCC was initially directed towards the political liberalization of the region and reduce dependence on the then apartheid era in South Africa. Most of the countries of Southern Africa ultimately achieved political independence, but against a background of mass poverty, economic backwardness and the threat of powerful white minority ruled neighbors. Economic and social development through regional integration was regarded as the next logical step after political independence. The SADC Treaty which came into force in 1992 established the South Africa Development Community (SADC) transforming SADCC into SADC. The objective shifted to include economic integration.<sup>98</sup> SADC currently consists of fifteen members including Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

Article 5 of the SADC Treaty, sets out the economic objectives of SADC as follows: to promote sustainable and equitable economic growth, alleviate poverty and enhance the standard and quality of life of the people through regional integration; to achieve sustainable utilization of natural resources and effective protection of the environment; maximize productive employment and utilization of the region's resources among others. The region sought to achieve its goals of regional co-operation and integration through implementing the SADC Trade Protocol on Trade. The Protocol on

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<sup>94</sup> Article 5(2) EAC Treaty.

<sup>95</sup> Article 75 EAC Treaty.

<sup>96</sup> Article 76 EAC Treaty.

<sup>97</sup> Angola, Botswana, Lesotho, Mozambique, Swaziland, Tanzania and Zambia.

<sup>98</sup> Article 1 SADC Treaty.

Trade which establishes the SADC trade regime is actually older than the EAC Treaty having been signed in 1996. It came into force four years later in 2000 after it had been ratified by twelve out of the fifteen members of SADC.<sup>99</sup> It seeks to promote liberalization of intra-regional trade in goods and services; based on fair, mutually equitable, and beneficial trade arrangements; to enhance economic development of the region and the creation a Free Trade Area covering the member states.<sup>100</sup> Although the SADC Treaty and the SADC Trade Protocol does not contain a scheduled strategy for economic integration, the strategy is set out in the Regional Indicative Strategic Development Plan (RISDP) of 2003. This strategic plan articulates the roadmap for SADC's integration and provides for the establishment of a free trade area by 2008, a customs union by 2010, a common market by 2015, monetary union by 2016 and the introduction of a single currency by 2018.<sup>101</sup> Although the RISDP is not a legally binding instrument, it enjoys significant political legitimacy as the strategic plan for SADC integration.

### **3.3 THE REGULATION OF TARIFF BARRIERS WITHIN THE EAC CU**

Free movement of goods is a principal element in a customs union. The free movement of goods between member states generally requires the creation of a free trade area within which tariffs imposed on goods originating within the area (as defined in rules of origin) are eliminated.<sup>102</sup> This is because import tariffs increase the cost of imported goods hence providing protection to domestic producers of identical or substitutable goods. Intra-African trade is still faced with relatively high tariffs.<sup>103</sup> High tariffs reduce consumer's welfare enhancing opportunities, arising from access to reasonably priced regional imports. Market access conditions are not only determined by tariffs but also non-tariff barriers. For this reason the drafters of the EAC Customs Union Protocol included

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<sup>99</sup> Angola, Democratic Republic of Congo and Seychelles are not participants in the trade regime created by the Protocol.

<sup>100</sup> Article 2 SADC Protocol on Trade.

<sup>101</sup> 'SADC Regional Indicative Strategic Plan' available at [http://www.sadc.int/files/5713/5292/8372/Regional\\_Indicative\\_Strategic\\_Development\\_Plan.pdf](http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf), last assessed on 3<sup>rd</sup> July 2014 at 80-81.

<sup>102</sup> H. K. Mutai, 'Regional trade integration strategies under SADC and the EAC: A comparative analysis' SADC Law Journal Vol. 1 (2011), at 84.

<sup>103</sup> Economic Development in Africa Report, UNCTAD 2013 at 51

provisions for the elimination of customs duties<sup>104</sup>; the elimination on non-tariff barriers (NTB)<sup>105</sup> and the establishment of a common external tariff.<sup>106</sup>

### **3.3.1 Tariff elimination in EAC**

The Customs Union Protocol envisaged that the move towards a fully-fledged customs union with free circulation of goods was to be gradual and be attained within a transitional period of 5 years from 2005.<sup>107</sup> The EAC treaty focused on achieving deep integration through a series of incremental steps based on the principles of variable geometry. This principle allows for progression in co-operation among groups within the community at different integration speeds.<sup>108</sup> The justification for this principle is based on the understanding that the EAC Partner States are at different levels of economic development and that the existing imbalances, which could be exacerbated by the customs union, need to be addressed. Keeping up with this principle, the partner states agreed that goods to and from Uganda to Tanzania shall be subject to immediate duty free treatment.<sup>109</sup> Goods from Uganda and Tanzania into Kenya shall be duty free.<sup>110</sup> However goods from Kenya to Uganda and Tanzania were grouped into two categories. Category A, goods were eligible for immediate duty free treatment.<sup>111</sup> Category B goods from Kenya were subject to gradual tariff elimination phase out over a five year period.<sup>112</sup>

The main features of a Customs Union include: duty-free and quota-free movement of goods among the partner states; elimination of internal tariffs and other charges of equivalent effect and the establishment of a Common External Tariff (CET) to be levied upon imports from third parties (countries outside the region).<sup>113</sup> Achieving this will require simplification and harmonisation of trade documentation and procedures;

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<sup>104</sup>Article 10 EAC Customs Union Protocol.

<sup>105</sup>Ibid Article 13.

<sup>106</sup> Ibid Article 12.

<sup>107</sup> Article 11 CU Protocol.

<sup>108</sup> Article 7 (e) EAC Treaty.

<sup>109</sup> Article 11(2)a of EAC CU Protocol.

<sup>110</sup> Article 11(2)b of EAC CU Protocol.

<sup>111</sup> Article 11(3)a of EAC CU Protocol.

<sup>112</sup> Article 11(4) of EAC CU Protocol.

<sup>113</sup>Article XXIV (8) (a) GATT.

<sup>114</sup>a common valuation method for tradable goods for tax (duty) purposes<sup>115</sup> and customs cooperation. Accordingly, the implementation of the EAC custom union has progressed with internal tariffs having been eliminated. Many policies, standards, regulation, procedure and practices have been harmonized and some are still in the process. Consensus has been reached on various areas which include common commodity, description and coding system<sup>116</sup>; common rules of origin and the regulation on free ports and common export promotion schemes. Further, the member states are applying a common external tariff (CET) applicable on trade with third parties. Since the start of the EAC custom union in 2005, trade in the region has been growing very rapidly. The total intra-trade in 2007 between the original member states (Kenya, Uganda and Tanzania) increased by 22 per cent reaching the value of USD 1 973.2 (EAC Trade Report 2008). In addition, total tax revenues have been increasing in all partner states despite the initial fears that implementation of the CET would negatively affect government revenues. This is partly attributed to improved trade and economic performance coupled with better customs administration at national levels.

The tariff liberalization in respect to intra-regional trade within the anticipated deadline is quite impressive and was followed by the launching of the common market in July 2010. The consolidation of the EAC Customs Union shall provide a springboard for the implementation of the Common Market. The objective of EAC's Common Market is to operate a single market with common trade laws, common taxes and critically, the free movement of labour, capital, goods and services.<sup>117</sup> Free movement of factors of production under the Common Market builds on the free movement of goods under the Customs Union.

### **3.3.2 EAC Rules of Origin**

Rules of Origin are an essential feature of free trade agreements because they are used to determine the goods that are eligible for preferential treatment.<sup>118</sup> In a single customs territory, goods move either from one member state to another or they enter the territory

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<sup>114</sup> Article 7 of EAC CU Protocol.

<sup>115</sup> Article 8 of EAC CU Protocol.

<sup>116</sup> The EAC Commodity Coding system implemented in all the Partner States.

<sup>117</sup> Article 4 EAC Common Market Protocol.

<sup>118</sup> F Flatters, 'SADC Rules of Origin Undermining Regional Free Trade', (2002) *www.tips.org.za*, at 2.

from a third country. Goods coming from a third country are subject to the CET and therefore do not require any rules of origin. When these goods are exported to another member state they do not require any rules of origin as they have already been subjected to the CET. Though fully fledged customs unions do not require rules of origin, the EAC requires these rules due to the progressive nature of the integration and the many exceptions to the CET.<sup>119</sup> About 59 products are termed as sensitive products and are exempt from the CET.<sup>120</sup> Sensitive products may be imported at specific tariff levels that are higher than 25 per cent but lower than WTO tariff bindings.<sup>121</sup> The EAC Customs Union Protocol provides that the goods are eligible for community tariff treatment only if they originate in the Partner States.<sup>122</sup> The EAC Rules of Origin sets out four criteria under which goods can be accepted as originating in member states. The first criterion categorises, goods that are wholly produced in partner states.<sup>123</sup> The second criterion categorizes goods produced wholly or partially from material imported from outside the partner states where the cost insurance and freight (CIF) value of the imported materials does not exceed 60 per cent of the total cost of the materials used.<sup>124</sup> The third criterion categorises goods produced wholly or partially from imported material whose value added accounts for at least 35 per cent of the goods ex-factory cost.<sup>125</sup> The fourth criteria categorises goods that are classified under a tariff heading other than that under which they were imported.<sup>126</sup>

Though these rules appear to be straight forward, they have raised disputes over their application. For example, Tanzania did not allow motor vehicles assembled in Kenya to enter Tanzania duty free on the ground that requirements of the rules of origin

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<sup>119</sup> H. M. Kibet, 'Regional trade integration strategies under SADC and the EAC' SADC Law Journal Vol. 1 (2011) at 86

<sup>120</sup> H. M. Stahl, 'Tariff liberalization Impacts of the EAC Customs Union in Perspective' tralac working paper no. 4/2005 at 4.

<sup>121</sup> Ibid

<sup>122</sup> EAC CU Protocol Article 14.

<sup>123</sup> 'Rule 4(a) EAC Rules of Origin' available at <http://www.customs.eac.int/index.php?>, last assessed on 20<sup>th</sup> June 2014.

<sup>124</sup> Rule 4(b) (i) EAC Rules of Origin.

<sup>125</sup> Rule 4(b) (ii) EAC Rules of Origin.

<sup>126</sup> Rule 4(b) (iv) EAC Rules of Origin.

were not satisfied.<sup>127</sup> Uganda and Tanzania have been accused of imposing a higher local content requirement for tobacco exports. They demand that 70 per cent and 75 per cent respectively of the inputs into tobacco exports must be from the exporting state.<sup>128</sup> This requirement is inconsistent with EAC rules of origin that requires 35 per cent of local input for goods to qualify as originating from a member state. Another issue is that goods that originate from other partner states even if qualifying under rules of origin attract indirect taxes such as VAT and excise across the borders hence are subject to the same customs clearance processes like any other goods from outside the region. EAC members are yet to fully implement provisions relating to harmonization of customs procedures, other charges on imports to fully realize the intra-regional trade liberalization objective.

### **3.4 REGULATION OF TARIFF BARRIERS WITHIN SADC FTA**

#### **3.4.1 Tariff elimination in SADC**

Similarly the SADC Protocol on Trade provides for the elimination of tariff and non-tariff barriers in intra-SADC trade.<sup>129</sup> The initiative to reduce tariffs began in 2001 and envisaged the establishment of the SADC FTA by 2008.<sup>130</sup> The minimum condition for the FTA was attainment of duty free treatment upon 85 per cent of intra-regional trade among the member states with the remaining 15 per cent comprising of sensitive goods. The elimination of tariffs was to be implemented in stages in a process termed as tariff phase downs, with the more developed countries dismantling at a faster rate. The programme devised by member states provided for the five SACU states<sup>131</sup> to take the lead in removing their tariffs.

The elimination process grouped the types of goods into four categories in which tariffs would be dismantled. The tariffs for category A goods were subjected to immediate duty free at the time of the phase down process i.e. in 2000.<sup>132</sup> Category B

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<sup>127</sup> 'Status of Elimination of Non Tariff Barriers in the East Africa Community' Volume 2( March 2012), at 32, available at [www.eac.int/trade/index.php?option=com\\_docman&Itemid=132](http://www.eac.int/trade/index.php?option=com_docman&Itemid=132); last assessed on 20<sup>th</sup> June, 2014.

<sup>128</sup> Ibid at 33.

<sup>129</sup> SADC Protocol on Trade, Article 3.

<sup>130</sup> Article 3(1)*b* SADC Protocol on Trade.

<sup>131</sup> South Africa, Botswana, Lesotho, Namibia and Swaziland.

<sup>132</sup> P. Kalenga, 'Implementation of the SADC Trade Protocol: A Preliminary Review', *Monitoring Regional Integration in Africa yearbook 2004*, at 18.

products were subject to tariff phase-down to be completed over an eight year period until 2008.<sup>133</sup> Category C products constituted sensitive products (i.e. products that are of unique economic importance to a country and are protected from competition with similar foreign goods) and were subject to a 12 year tariff phase down period to be completed in 2012.<sup>134</sup> Category E products were excluded for preferential trade such as gold, precious stones, firearms and munitions.<sup>135</sup> A special agreement on trade in Sugar was adopted as sugar has been one of the sensitive products and is susceptible to political and domestic influence in the world's sugar producing countries including SADC.<sup>136</sup> This allows non-SACU SADC sugar producers to have non-reciprocal market access based on duty free quotas to the SACU market.<sup>137</sup> The full liberalization of trade in sugar was to be achieved in 2012.<sup>138</sup> However, this is still pending and the sugar arrangement is still in force.

SADC pursued a tariff elimination programme at variable scales of speed in which members were categorized as Developed<sup>139</sup>, Developing<sup>140</sup> and Least Developed.<sup>141</sup> Countries in the 'developed' category were expected to achieve zero tariffs within five years except for sensitive products.<sup>142</sup> Countries in the 'developing' category were expected to achieve the same threshold within an eight year implementation period. The LDC were permitted to achieve their tariff reduction beyond the eight year implementation period but not exceed 12 years.<sup>143</sup> The Trade Protocol adopted the principle of asymmetry in terms of tariff reductions to address the needs of less developed member states and ensure a win win situation prevails.<sup>144</sup>

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<sup>133</sup> Ibid

<sup>134</sup> Ibid at 19.

<sup>135</sup> Article 9 and 10 SADC Trade Protocol provides for goods that can be exempted from preferential treatment.

<sup>136</sup> Preamble of Annex VII Concerning Trade in Sugar.

<sup>137</sup> Articles 4, 5 and 6 of Annex VII Concerning Trade in Sugar.

<sup>138</sup> Ibid at Article 3.

<sup>139</sup> Mainly South Africa but other members of SACU are considered defacto i.e Botswana, Lesotho, Namibia and Swaziland.

<sup>140</sup> Mauritius and Zimbabwe.

<sup>141</sup> Madagascar, Malawi, Mozambique, Tanzania and Zambia.

<sup>142</sup> P. Kalenga, 'Implementation of the SADC Trade Protocol: A Preliminary Review', *Monitoring Regional Integration in Africa yearbook 2004*, at 20.

<sup>143</sup> Ibid.

<sup>144</sup> Articles 3 and 4 SADC Trade Protocol.

SADC member states began implementing the Trade Protocol in 2001 and envisaged the establishment of a Free Trade Area by 2008 when 85 per cent of intra-SADC merchandise trade was expected to be duty-free with most of the remaining 15 per cent comprising sensitive products which was scheduled to be liberalized by 2012.<sup>145</sup> SACU countries completed their tariff elimination by 2008.<sup>146</sup> This can be attributed to the fact that SACU countries as members of a customs union, already had a eliminated their tariffs within the customs union, thus for them to eliminate the tariffs for the purpose of the SADC FTA was less cumbersome in comparison with the procedure entailed for other members. Mozambique negotiated to complete its reduction of tariffs to imports from South Africa by 2015. Zimbabwe was granted derogation (in terms of Article 3(c) of the Protocol) to suspend tariff elimination commitments on sensitive products until 2012 and to be completed by 2014. Although Tanzania was on schedule with its tariff commitments, the government applied for derogation to levy a 25 per cent import duty on sugar and paper products until 2015 to allow for domestic industries to take measures to adjust.<sup>147</sup> Malawi confirmed being on schedule with respect to its tariff phase down offer to the rest of SADC except to South Africa where it stood at around 86 per cent.<sup>148</sup>

The SADC Trade Protocol has been a key legal instrument to the reduction of tariff barriers within the region. The tariff phase-down commitments have largely been implemented however some members are not fully compliant with their commitments.<sup>149</sup> The difficulties being experienced by some countries can be attributed to fear of tariff revenue loss. Another challenge is the fear of South Africa's competitiveness and concerns about protecting infant industries. To cater for this challenges, the Protocol has contains provisions for application of safeguard measures<sup>150</sup> and infant industry protection measures.<sup>151</sup> As observed above, member states have opted to invoke Article 3 (1)(c) of the Trade Protocol which allows derogations from trade liberalization

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<sup>145</sup> 'SADC Integration milestones', available at <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/>; last assessed on 3<sup>rd</sup> July 2014.

<sup>146</sup> See Desk Assessment of the Regional Indicative Strategic Development Plan (2011) at 30.

<sup>147</sup> Ibid.

<sup>148</sup> 2011 Audit of the implementation of the SADC Protocol on Trade by the USAID at 12- 16.

<sup>149</sup> Ibid.

<sup>150</sup> Article 20 SADC Trade Protocol.

<sup>151</sup> Article 21 SADC Trade Protocol.

commitments in so far as tariffs and non-tariff barriers are concerned. As such, the derogation clause has the potential to undermine the overall tariff liberalization objective. The fact that all countries are involved in the process of tariff elimination, any derogation will effectively interfere with the principle of reciprocity operating between SADC members. The Trade Protocol is flawed by the general terms of Article 3 which itself fails to set out the criteria to be considered in determining whether the derogation being sought is necessary. This gives the Committee of Ministers of Trade discretion to decide each application on a case by case basis, instead of being guided by a clear and transparent procedure that is applicable to all Article 3 applications.

The SADC's Regional Indicative Strategic Development Plan (RISDP) envisaged the establishment of a SADC Customs Union by 2010 however the target was not met and has been postponed from time to time. Convergence of the individual country specific tariffs into a common external tariff (CET) will require that SADC countries harmonize their tariff policies. This remains a challenge given the varying level of the economic development of individual countries within the region. The rationale for tariff policies is not the same for all SADC members. Some use tariffs as an industrial policy instrument to protect their sensitive industrial sectors, a few use lower tariffs as a vehicle for their integration into the global economy and most members rely on tariffs to generate revenue for public purposes.<sup>152</sup> Hence negotiating a CET will face challenges of balancing different revenue interests of member states.<sup>153</sup>

### **3.4.2 SADC Rules of Origin**

In an FTA, rules of origin have an additional function since individual countries have varying external tariffs. The rules of origin prevent a situation where imports from third parties would be able to enter an FTA through the country with the lowest external tariff before moving to other FTA members (referred to as trade deflection).<sup>154</sup> The second purpose is to encourage certain regional activities or to protect them from potential competition arising from the formation of the preferential trade regime (the protective

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<sup>152</sup> P. Kalenga, 'Liberalising Trade in Southern Africa' (2008) *www.fesnam.org*, at 96.

<sup>153</sup> Chanda D. 'Regional Integration in Southern Africa focusing on the future of SADC and SACU' (2010) *www.tralac.org* at 24.

<sup>154</sup> F. Flatters and H. Erasmus, 'Rent- Seeking in SADC Trade Liberalization: Rules of Origin and Other Barriers to trade' (2003) *www.tips.org.za*, at 2.

function).<sup>155</sup> Under the protective view, ROO are seen as an instrument to promote development by forcing producers to source inputs in the region in order to qualify for regional trade preference. The design of the ROO should aim to find balance so that only members of the FTA benefit from preferential market access while allowing for flexibility in input sourcing to promote efficiency and competitiveness.

The SADC rules of origin provide for two different criteria under which products can be considered as originating in a member state. The first criterion categorises goods that have been wholly produced in any member state.<sup>156</sup> Rule lists the products which shall be regarded as wholly produced in the member states. The second criterion categorises goods that have been produced wholly or partially from imported materials provided such materials have undergone sufficient working or process within the meaning of paragraph 2 of this rule.<sup>157</sup> Paragraph 2 sets out the conditions to be fulfilled by such products. The current SADC rules of origin are more restrictive as they are more product and process specific than the simpler value added criterion that is used in the EAC Customs Union. While significant tariff liberalization on intra-SADC trade suggests free access for most products, these zero tariffs apply only to imports satisfying the SADC rules of Origin<sup>158</sup>. It is argued that complex rules of origin will seriously impede regional integration in SADC even when tariff barriers to intra-SADC trade disappear (Flatters 2002).

The effect of complex and restrictive rules of origin deprive producers of access to raw materials from low cost international sources and hence can raise the cost of producing a product for sale in the FTA.<sup>159</sup> A recent UNCTAD report revealed that onerous local content requirements in ROO has adverse trade effects in the clothing and textile industries that use inputs not produced in the region (e.g. fabrics).<sup>160</sup> For garments to qualify for SADC preference the rules require that both the fabric and garment have to

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<sup>155</sup> Ibid.

<sup>156</sup> SADC Protocol on Trade, Annex 1, Rule 2 (1) (a).

<sup>157</sup> SADC Protocol on Trade, Annex 1, Rule 2 (1) (b).

<sup>158</sup> Article 12 SADC Protocol on Trade.

<sup>159</sup> Flatters F, 'SADC Rules of Origin: Undermining Regional Free Trade', A paper prepared for Trade and Industry Policy Secretariat (TIPS) Forum, South Africa, at 9-11 September 2002. [www.tips.org.za](http://www.tips.org.za).

<sup>160</sup> 'Current Regional Integration Initiatives in Africa', Economic Development in Africa Report 2013, at 110; available at [http://unctad.org/en/PublicationsLibrary/aldcafrica2013\\_en.pdf](http://unctad.org/en/PublicationsLibrary/aldcafrica2013_en.pdf); last assessed on 5<sup>th</sup> August 2014.

be manufactured in a SADC member state. With very little textile manufacture in this region, the rules adversely limit trade in garments in the SADC region. The high compliance costs with administrative certificates of origin reduce the utilization of tariff preference.

A recent audit on the implementation of the SADC Trade Protocol highlighted the grievances of most members states regarding the complexity of the SADC rules of origin that make them difficult to apply.<sup>161</sup> A major implication of the complex rules of origin is that some traders when faced with stringent rules of origin chose to forego the preferential rate on offer in favour of the MFN rate. For example Woolworths does not use SADC preferences at all in sending consignments of food and clothing to its franchise stores in non-SACU SADC markets. It simply pays full MFN tariffs because it deems the process of administering ROO documentation to be too costly. Estimates indicate that in 2010 it could have benefited from duty savings of US\$ 0.6 million on exports to Mozambique, Tanzania and Zambia a saving cost on imports for franchise holders in these markets of up to 19 per cent and a strong incentive to source more of its products regionally.<sup>162</sup> To reduce tariffs on regional trade only to replace them with restrictive rules of origin undermines the benefits of trade liberalization. This calls for reforms to review the current rules of origin and come up with rules that are more practical for the region.

### **3.5 CONCLUSION**

Economic integration is essential for economic development in both Eastern Africa and Southern Africa regions.<sup>163</sup> Given the small economies with small domestic markets, the creation of an integrated economic space can facilitate efficiencies in production, investment and trade thus increasing the welfare of the people.<sup>164</sup> It is anticipated that the

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<sup>161</sup> '2011 Audit on implementation of the SADC Protocol on Trade by USAID' at 31- 33, available at [http://www.gov.mu/portal/sites/mfa\\_web/Studies\\_to\\_inform\\_decision/Audit\\_of\\_the\\_implementation\\_of\\_SA\\_DC\\_protocol.pdf](http://www.gov.mu/portal/sites/mfa_web/Studies_to_inform_decision/Audit_of_the_implementation_of_SA_DC_protocol.pdf), last assessed on 3<sup>rd</sup> July 2014.

<sup>162</sup> Ian Gillson, 'Addressing Non-Tariff Barriers on Regional Trade in Southern Africa (2011)', at 7; available at [http://siteresources.worldbank.org/INTAFRREGTOPTRADE/Resources/Addressing\\_NTBs\\_Southern\\_Africa.pdf](http://siteresources.worldbank.org/INTAFRREGTOPTRADE/Resources/Addressing_NTBs_Southern_Africa.pdf), last assessed on 3<sup>rd</sup> July 2014.

<sup>163</sup> See discussion at 1.1.3

<sup>164</sup> Economic Development in Africa Report (UNCTAD 2013) at 48

lifting of tariffs will lower costs and lead to an increase of overall welfare.<sup>165</sup> Both EAC and SADC have made significant progress towards tariff elimination. It was observed that whereas EAC member states have completed internal elimination of tariffs, the process is still ongoing within SADC. The relatively faster pace at which EAC is progressing can be attributed to a number of factors. These include its size, political stability enjoyed by the member states, the strong bond that existed between the member during the days of the old East Africa Community and the existence of clear trade liberalization obligations as set out in its Customs Union Protocol. A harmonized customs legal regime comprised of a common tariff structure, a uniform EAC Customs Management Act and Rules of Origin and Customs Regulations were adopted for uniform application in all partner states. On the other hand, the SADC Trade Protocol is flawed by back-loaded and different tariff reduction schedules.<sup>166</sup> In addition the structure of the tariff phase down arrangement is complicated by product-specific rules of origin. The proposed SADC Customs Union could use the EAC the Customs Union Protocol as a model structure to develop its Customs Union legislation. In addition, more flexible rules of origin that require lower thresholds should be adopted by SADC.

EAC is ahead of SADC in terms of complete tariff elimination and the adoption of the CET. The effective implementation of the SADC FTA will be a stepping stone for the establishment of the Customs Union. The establishment of the SADC Customs Union will require supra-national institutions put in place to manage a common external tariff. Following a summit decision in 2005, each EAC member has established a Ministry for EAC affairs responsible for implementation of EAC programs in each member state. Their role is to be the focal point for each partner state's EAC related activities. This model integrative structure can be replicated by SADC states.

Although internal tariff elimination has been completed within the EAC and member states have adopted a CET, free circulation of goods is yet to be achieved. The Single Customs Territory whose aim is to overcome the slow movement of goods is yet to be fully operational. Goods moving from one partner state to another have to undergo

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<sup>165</sup> Ibid at 51-52

<sup>166</sup> F. Flatters, 'SADC Rules of Origin: Undermining Regional Free Trade' (2002) [www.tips.org.za](http://www.tips.org.za), summary page.

customs procedure to enforce standards and collect domestic taxes on goods.<sup>167</sup> Internal customs border controls still exist and the new rules of origin are not being applied uniformly.<sup>168</sup> The EAC Customs Union is being overseen by a Customs and Trade Directorate at the secretariat at the central level, but its implementation is being done by the respective national Revenue Authorities through a decentralised structure. At the moment, each partner state has opted to continue clearing its goods. Even then, national institutions clothed with authority to administer the customs union are obliged to do so in accordance with the objectives of the Treaty as if they were institutions of the community.<sup>169</sup> The success of the single customs territory will require development of strong institutions that uphold the rule of law necessary to drive forward the integration vision. The next chapter will analyze the regional institutions established by the respective RECs put in place to reinforce compliance with economic integration objectives.

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<sup>167</sup> ‘Attainment of a single customs territory in a fully fledged customs union for the EAC’ Final Report (2012) at 3

<sup>168</sup> ‘Single Customs Territory still a document on the shelf as 1<sup>st</sup> July deadline lapses’, The East African News, available at <http://www.theeastafrican.co.ke/news/Single-Customs-Territory-July-1-deadline-lapses/-/2558/2373012/-/yn0tcd/-/index.html>, last assessed on 10<sup>th</sup> August 2014.

<sup>169</sup> *The East African Law Society v The Secretary General of the East African Community* (2011) at 21 para.;15

## **CHAPTER FOUR**

### **4. LEGAL CONSTRAINTS FACING TRADE LIBERALIZATION**

#### **4.1 NON-TARIFF BARRIERS**

Though tariff liberalization in both blocs is impressive there is slow progress in the elimination of non-tariff barriers. Tariffs are undeniably an important trade barrier but non-tariff barriers should not be underestimated. Intra-regional trade faces obstacles arising from several NTBs erected by partner states. Both RTAs provide that member states should refrain from imposing non-tariff barriers.<sup>170</sup> How states will implement this provision is unclear and the vague language in this provision could provide the basis for a range of actions. Translating this provision into reality has been a slow process. In practice member states continue to violate their obligation to eliminate and refrain from imposing non-tariff barriers.

##### **4.1.2 Elimination of non-tariff barriers in EAC**

Though the region has proceeded to launch a common market, it still faces persistent non-tariff barriers which hamper free circulation of goods within the territory.<sup>171</sup> For the common market to be effective there is need for members to eliminate non-tariff barriers. Some of these barriers existed before the coming into force of the common market and ought to have been removed, while others were later imposed despite the existence of a legal obligation for members to refrain from imposing new NTBs. Article 13(1) of the EAC CU Protocol provides for the removal of all the existing non-tariff barriers (NTBs) imposed on goods originating from other member states, and thereafter member states are obliged to refrain from imposing any new NTBs. To ensure this policy was implemented, a mechanism for monitoring the removal of NTBs was to be formulated.<sup>172</sup> As a means of combating NTBs, and pursuant to Article 13 of the Protocol, a system known as the

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<sup>170</sup> Article 6 SADC Protocol on Trade, Article 75(5) EAC Treaty.

<sup>171</sup> See NTBs complaints available at [http://www.tradebarriers.org/active\\_complaints](http://www.tradebarriers.org/active_complaints), last assessed on 20<sup>th</sup> August 2014

<sup>172</sup> Article 13(2) EAC Customs Union Protocol and Article 75(5) EAC Treaty.

Monitoring Mechanism for the Elimination of Non-tariff Barriers in EAC has been developed jointly by the EAC and East African Business Council Secretariats.<sup>173</sup>

In practice, NTBs still exist and constitute a major impediment that obstructs free movement of goods across borders. The reported NTBs are in the form of Customs and Administrative entry procedures, Technical Barriers to trade, Sanitary and Phyto-Sanitary Measures and Specific limitations such as import regulations.<sup>174</sup> The implication of the various NTBs on regional trade is that they impose unnecessary costs for producers that limit trade. Delays caused by cumbersome port administrative procedures create a bottleneck to fast and efficient clearance of imports and exports. Another category of NTBs relates to standards and technical requirements. Ideally, TBT and SPS measures may be maintained by the importing country and are aimed at achieving legitimate objectives such as protection of human, plant and animal health.<sup>175</sup> In applying technical regulations, members are prohibited from treating imported products less favourably than like domestic products.<sup>176</sup> When these standards and technical requirements are imposed unilaterally to protect local industry, they can have a severe restrictive impact on trade which defeats the aspiration to have the EAC operate as a single market with free movement of goods. A recent report revealed that the Standard Bureau of EAC member states have varying procedures for issuance of certification and marks, inspection and testing.<sup>177</sup> For example the Tanzania Food and Drug Authority (TFDA) has for a long time maintained cumbersome testing procedures for food imports into Tanzania. Uganda accused Kenya of discriminating against its sugar by demanding its exporters be licensed by the Kenya Sugar Board. Uganda too has maintained an import ban on beef products from Kenya for a long while on the grounds that it is an SPS measure.<sup>178</sup> The Partner States agreed to take measures, including introducing regulations that would ensure that

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<sup>173</sup> 'NTBs Monitoring Mechanism: Overview' available at [http://www.eac.int/trade/index.php?option=com\\_content&id=114&Itemid=41#](http://www.eac.int/trade/index.php?option=com_content&id=114&Itemid=41#); last assessed on 30<sup>th</sup> June 2014.

<sup>174</sup> 'Let's Rid EAC of These Non Tariff Barriers' Secretary General blogs on dedicated Ministerial Meetings on elimination of NTBs', available at [www.eac.int/sg/index.php?option=com...id...ntbs...blog](http://www.eac.int/sg/index.php?option=com...id...ntbs...blog); last assessed at 16<sup>th</sup> June 2014.

<sup>175</sup> Article 2(2) SPS Agreement.

<sup>176</sup> Article 2.1 TBT Agreement.

<sup>177</sup> 'Status of Elimination of Non Tariff Barriers in the East Africa Community', Volume 2( March 2012), at 18, available at [www.eac.int/trade/index.php?option=com\\_docman&Itemid=132](http://www.eac.int/trade/index.php?option=com_docman&Itemid=132); last assessed on 20<sup>th</sup> June, 2014.

<sup>178</sup> Ibid

products once accepted in one Partner State are also accepted in the market of the other Partner States.<sup>179</sup> Following a recent meeting of the Sectoral Council, the final draft East African Standards were approved and declared EAC Standards.<sup>180</sup> Member states were urged to engage their national bureaus of standards to adopt the East African standards and refrain from applying existing national standards within 6 months as prescribed by the SQMT Act.<sup>181</sup> The regional effort to harmonize standard is a step forward to ensure that the differences in national standards do not restrict trade.

The current online mechanism for NTB reporting system is an important transparency mechanism.<sup>182</sup> The framework monitors the existence of NTBs and suggests ways through which they can be eliminated. This mechanism has helped in reducing NTBs though the process of resolving NTBs is slow as it does not have powers to sanction organs of the state that introduce an NTB. There is need for development of a legally binding enforcement mechanism on the elimination of identified non-tariff barriers. This will work best in a rule based system which will determine whether a non-tariff measure adopted by a member state is necessary to achieve a legitimate public policy such as health, consumer safety, environmental protection and other related concerns verses those that are simply protecting local businesses from competition and impose unjustified barriers on trade. Such a system should contain an enforcement mechanism that would impose penalties for non-compliance.

#### **4.1.3 Elimination of non-tariff barriers in SADC**

While tariff elimination has been largely achieved, the challenge remains with the elimination of NTBs. The legal position in SADC regarding elimination of non-tariff barriers is similar to that of the EAC. Member states are urged to adopt policies and implement measures to eliminate all existing forms of NTBs and refrain from imposing any new ones.<sup>183</sup> One of the flaws of such a provision is that members retain the discretion to adopt measures to eliminate NTBs instead of being guided by a clear

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<sup>179</sup> Ibid.

<sup>180</sup> Following the Sectoral Council on Trade Industry, Finance and Investment meeting held at the EAC Secretariat Headquarters on 30<sup>th</sup> May 2014.

<sup>181</sup> Section 15(1) Standardization, Quality Assurance, Metrology and Testing Act.

<sup>182</sup> As part of the COMESA-EAC-SEDC Tripartite Coordination Mechanism at ([www.tradebarriers.org](http://www.tradebarriers.org)).

<sup>183</sup> Article 6 SADC Trade Protocol

procedure. The Protocol also contains a wide range of provisions relating to Phyto-Sanitary (SPS) measures,<sup>184</sup> Technical barriers to trade (TBT)<sup>185</sup> and quantitative restrictions on imports and exports<sup>186</sup> generally benchmarked to WTO disciplines in these areas. WTO rules requires that SPS and TBT measures are not applied in manner that creates unnecessary obstacles to international trade.<sup>187</sup> For a TBT measure to be deemed necessary to achieve its legitimate objective, it must be based on international standards.<sup>188</sup> For SPS measures to be deemed necessary for the protection of human, animal and plant health they should either conform to international standards<sup>189</sup> or be based on scientific principles.<sup>190</sup> Despite the existence of a similar legal requirement to base SPS and TBT measures on international standards<sup>191</sup>, standard regimes are still characterized by an over-reliance on inspections, certification requirements based on national rather than regional or international standards. In most of the member states there is are often no procedures by which technical procedures are assessed to ensure their consistency with public policy objectives. Consequently technical standards and regulations create unnecessary barriers to trade especially when applied in a discriminatory manner against imports that go beyond issues of purely public interest. For instance the environmental levy on plastic bags in South Africa was introduced to reduce problems associated with litter, but the technical regulation governing it also affects unrelated issues such as the minimum thickness of the plastic to be used as well as the size of the text that must be printed on the bags.<sup>192</sup> This is contrary to the legal requirement that members should specify technical regulations in terms of performance rather than design or descriptive characteristics.<sup>193</sup>

The provision on protection of infant industry found in Article 21 is a potentially dangerous exception. It allows for the possibility of temporary measures to promote

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<sup>184</sup> Article 16 SADC Trade Protocol

<sup>185</sup> Article 17 SADC Trade Protocol

<sup>186</sup> Article 8 SADC Trade Protocol

<sup>187</sup> Article 2.2 TBT Agreement and Article 5(6) SPS Agreement

<sup>188</sup> Article 2.4 TBT Agreement

<sup>189</sup> Article 3.2 SPS Agreement

<sup>190</sup> Article 2.2 SPS Agreement

<sup>191</sup> Article 16 and 17 SADC Trade Protocol

<sup>192</sup> Ian Gillson and Nick Charalambides, 'Addressing non-tariff barriers on regional trade in Southern Africa' (2011) at 8

<sup>193</sup> Article 2(8) TBT Agreement.

infant industries by suspending trade liberalization objectives.<sup>194</sup> It fails to set out criteria of determining what constitutes an infant industry. It also fails to specify a maximum time limit for which such protection should be granted. All these major decisions are left to the discretion of the Committee of Ministers of Trade (CMT) to decide on a case to case basis instead of being guided by a clear and transparent procedure applicable to all such applications.<sup>195</sup> Another form of non-tariff barrier is the SADC restrictive rules of origin, which was already discussed in the previous chapter.<sup>196</sup>

The Trade Protocol does not go further to provide for concrete measure and guidelines to eliminate NTBs. This could be the reason why member states have continued to impose NTBs. This is evidenced from the online web-based mechanism which has been developed to monitor and report NTBs.<sup>197</sup> The online NTB Monitoring Mechanism is a major step forward though it faces challenges including slow progress in resolving the barriers once they have been identified. There is presently no mechanism for ensuring that countries follow a process of either justifying their NTBs or compel them to remove them once a barrier has been notified. The absence of an enforcement mechanism with strict time limits for action and sanctions for non-compliance means each country retains discretion to adopt measures for removing or reforming their NTBs.

#### **4.2 OVERLAPPING MEMBERSHIP**

The legal framework governing economic integration in both EAC and SADC has been unable to prevent member states from belonging to more than one regional economic community. They do not preclude members from maintaining prior trade agreements or from entering new ones. The Customs Union Protocol permits members to honour their commitments in respect of other international organizations to which they belong.<sup>198</sup> The Trade Protocol also allows member states to conclude trade agreements with third parties provided the terms of such an agreement are not in conflict with the provisions of the Protocol.<sup>199</sup> Similarly SADC members are allowed to maintain preferential trade

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<sup>194</sup> Article 21 Trade Protocol

<sup>195</sup> Ibid

<sup>196</sup> See the discussion at 3.4.2.

<sup>197</sup> As part of the COMESA-EAC-SEDG Tripartite Coordination Mechanism at ([www.tradebarriers.org](http://www.tradebarriers.org)).

<sup>198</sup> EACCU Protocol, Article 37(1)

<sup>199</sup> EACCU Protocol, Article 47(4)a

agreements that they belonged to before the Trade Protocol was entered into force.<sup>200</sup> SADC members are also permitted to enter into new preferential trade arrangements among themselves provided that they are not inconsistent with the provisions of the Protocol.<sup>201</sup> This creates a complex web of relations in which states owe multiple allegiance to the trading regimes created in each REC. This allegiance extends to both substantive and procedural obligations. It undermines the implementation of the agreements where a country belongs to two or more integration organizations with conflicting policies. For example Tanzania which was already a member of SADC before EAC came into being is not required to terminate her obligations under SADC. As EAC's customs union already exists, should SADC establish a customs union, it will be technically and legally impossible for Tanzania to apply two different CET. Procedural obligations dictates that in the event of a dispute, states should utilize the agreed upon mechanism to resolve disputes. Since there is no rule of exclusivity of one dispute resolution over another, this means that states are in a position to decide which of the available mechanisms will suit their needs in the case of conflict.

The issue of overlapping membership is even more complex in SADC than in EAC. While all EAC members states are members of the COMESA (apart from Tanzania which is a member of SADC): majority of SADC countries belong to one or more of the following regional trade areas: the Common Market for Eastern and Southern Africa (COMESA), Southern African Customs Union (SACU) and the East African Community (EAC). This makes it difficult for member states to negotiate a common external tariff as members have continued to pursue customs union ambitions in other arrangements such as EAC, COMESA and SACU. As a result no consensus has been reached on adoption of common trade policy among SADC member states. Thus the multiplicity of regulations and duplication of procedures operate to create business uncertainties that hamper intra-regional trade. Indeed in a rationalized system with minimum overlapping memberships and no duplication of activities and procedures, member states would find it easier to implement trade protocols of the respective RTA. Multiple memberships remains a major obstacle to free movement of goods as partner states are forced to establish border

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<sup>200</sup> SADC Protocol on Trade, Article 27(1)

<sup>201</sup> SADC Protocol on Trade, Article 27(2)

stations to monitor movement of goods enjoying preferential treatment. These overlaps have a bearing on the costs and the benefits of integration since they tend to absorb human resources, limited financial resources and more fundamentally have implications for the process of deeper integration. Given the divergence in economic conditions among SADC members and overlapping membership, a variable geometric approach within a rule-based system would be an optimal strategy for SADC moving forward.<sup>202</sup>

#### **4.3 DISPUTE SETTLEMENT MECHANISM**

A major feature of a rule based system is manifested by a formal dispute settlement system whose decisions are automatically binding.<sup>203</sup> The WTO provides a useful benchmark since its multilateral trade regime contains unique legal and institutional features. Dispute settlement in international trade law has evolved from the power based mechanisms of the GATT era characterized by diplomatic methods such as conciliation, negotiation and mediation to the rule based mechanisms of the WTO era characterized by independent judiciaries.<sup>204</sup> The WTO Dispute Settlement Understanding (DSU) is described as a central element in providing security and predictability to the multilateral trading system.<sup>205</sup> By providing a rule-based system with an effective adjudicating process for disputes, the WTO has allowed states to enter into binding commitments in the economic sphere.<sup>206</sup> Members are assured that when they make complaints against another states act or omission, such will be dealt with in line with the DSU provisions and the adoption of panel or appellate rulings issued thereafter is compulsory and binding.<sup>207</sup> During the GATT era, the resolutions were not final because they were made by the contracting parties on a political instead of a legal basis. Political consensus in adopting the panel ruling made it possible for the defeated party to oppose its adoption. A

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<sup>202</sup> Tralac Policy Brief, 'Priorities for SADC's regional economic integration agenda (2012) at 3, available at [www.tralac.org/files/.../tralac-Policy-Brief-final-SADC-Summit-2012.pdf](http://www.tralac.org/files/.../tralac-Policy-Brief-final-SADC-Summit-2012.pdf), last assessed on 20<sup>th</sup> August 2014.

<sup>203</sup> P. K. Kiplagat, 'An institutional and structural Model for successful Economic Integration in Developing Countries' (1994) 29 Texas International law Journal, at 40.

<sup>204</sup> J.H. Jackson, 'The World Trading System' (2nd ed., The MIT Press, Cambridge, 1997) pp110–111. See also R. Brewster, 'Rule-Based Dispute Resolution in International Trade Law' (2006) 92 Va. L. Rev. pp 254–256.

<sup>205</sup> Article 3.2 DSU.

<sup>206</sup> Sutherland Report, 'The future of the WTO', World Trade Organization 2004, at 15 para.37.

<sup>207</sup> G. Marceau, 'Consultations and the Panel Process in the WTO Dispute Settlement System supra (Note 108), pp. 29–30.

lesson to be learned from the previous GATT regime is that, when trade is not conducted on the basis of rules, trade disputes will be settled through diplomacy and power considerations. This will compromise the predictability, transparency and certainty of the trade regime.<sup>208</sup>

The EAC and SADC Treaties rate judicial bodies among the main organs of their regional organizations whose primary objective is to adjudicate over disputes that might arise among the member states or in relation to the provisions of the EAC and SADC Treaty respectively.<sup>209</sup> The Trade Protocol specifically provides that the decisions of the SADC tribunal are binding upon parties.<sup>210</sup> This is a step forward to establish institutional frameworks to adjudicate questions of interpretation and implementation of protocols. However the key issue is whether in practice these dispute settlement mechanisms have been utilized to effect compliance of member states to their commitments under the trade regimes. This study will shed light to the practical experience and reveal that governments are reluctant to submit to regional dispute resolution processes, thus limiting the role of regional judicial organs in so far as their role in economic integration is concerned.

#### **4.3.1 Enforcement of regional judicial decisions in EAC**

The EAC treaty establishes a court of justice as one of its principal institutions.<sup>211</sup> The EAC Court of Justice (EACJ) which has been operational since 2001 is the final authoritative forum in matters of interpretation and application of the Treaty.<sup>212</sup> The court has jurisdiction to settle disputes concerning a member state's infringement of Treaty obligations.<sup>213</sup> It is worth noting that the EAC judicial system does not provide for the compulsory requirement and time frames within which member states must adopt the EACJ's rulings. Members are merely obliged to implement its decisions in good faith.<sup>214</sup> As such, member states have discretion to take measures to implement a

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<sup>208</sup> G. Erasmus, 'Is the SADC Trade Regime a Rule-Based System', SADC Law Journal Vol. 1 (2011), at 33.

<sup>209</sup> Article 6 EAC Treaty, Article 9 SADC Treaty.

<sup>210</sup> Article 16, SADC Treaty.

<sup>211</sup> Article 6 of the EAC Treaty.

<sup>212</sup> Articles 33(2), 34 and 37, EAC.

<sup>213</sup> Article 28, 29 and 30, EAC Treaty Treaty.

<sup>214</sup> Article 41(1)c, EAC Customs Union Protocol.

judgment.<sup>215</sup> Another observation is that, political conditions may prevent it from operating on a purely legal basis. This was revealed in the Council's response after the EACJ's ruling in the *Anyang Nyong* case when the court concluded that the election of the Kenyan representatives to the East Africa Legislative Assembly (EALA) contravened Article 50 of the EAC Treaty in so far as no elections were held on that matter.<sup>216</sup> The interim suspension of the inauguration of the EALA was not highly regarded by the Council of Ministers. The Summit responded by amending the treaty provisions to extend the grounds for removal of judges from office.<sup>217</sup> This move was calculated to intimidate the judges and consequently was likely to jeopardize the just resolution of the dispute.<sup>218</sup> Indeed by so doing the security of tenure of the judges was seriously put at risk. Thus member states agreed to limit the regional judicial power which they had established to uphold the rule of law.<sup>219</sup> In a subsequent EACJ case, the judges after careful reasoning concluded that though the Council was entitled to consider the implications of the interim order and identify a solution to the problem resulting from suspension of the EALA activities, the Council's recommendation to restructure the court had no bearing on the solution of the identified problem.<sup>220</sup> Hence the court declared that the impugned amendment process was inconsistent with the spirit and intention of the treaty. Particularly that the amendment of the provision on the grounds of removing judges infringed EAC Treaty Article 38(2).<sup>221</sup> However the court refused to declare the whole amendment process invalid. As such, the court decided to apply the doctrine that its decision had no retrospective effect.<sup>222</sup> The decision of the EAC member states to amend the EAC Treaty following the decision of the EACJ may be seen as a challenge to the legitimacy of the EACJ decisions due to the political impact of that decision.

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<sup>215</sup> Article 38(3), EAC Treaty.

<sup>216</sup> See *Anyang' Nyong'o and 10 others v the Republic of Kenya and 5 others* (interim ruling) 2006.

<sup>217</sup> See judgment in *East African Law Society and Others v the Attorney General of Kenya* (2008) pp 4- 5.

<sup>218</sup> *Ibid* at pp 33- 34.

<sup>219</sup> Article 23, EAC Treaty provides that the court has a duty to ensure the adherence to the rule of law in the interpretation, application of and compliance with the EAC Treaty.

<sup>220</sup> See *East African Law Society and Others v the Attorney General of Kenya* (2008) at 38, para;2.

<sup>221</sup> Article 38(2) provides that where a dispute has been referred to the court, partner states should refrain from any action which may be detrimental to the resolution of the dispute.

<sup>222</sup> *Ibid* at at 44, para; 2.

### 4.3.2 Enforcement of regional judicial decisions in SADC

As some authors once noted, one of the vital components for sustainability of economic integration process is the legitimacy and effectiveness of the dispute settlement mechanisms.<sup>223</sup> Dispute settlement is an essential element of governance in economic integration. It improves the chances of state compliance with their treaty obligations and instills business confidence. One of the enforcement problems is the resistance which many African states have towards an interference of their sovereignty. The reluctance to cede the exercise of some sovereignty powers to an international organization translates into a low degree of institutionalization of interstate cooperation.<sup>224</sup> Economic integration entails an inevitable loss of autonomy over what was once considered internal decisions. It must be acknowledged that by the very nature of the objectives they set to achieve, each partner state is expected to cede some amount of sovereignty to the community and its organs to enable them to play their role.<sup>225</sup> The fear of relinquishing sovereignty is an obstacle to achievement of trade liberalization objectives. Lack of political will to comply with judicial decisions creates an enforcement gap and is an obstacle to the positive role which dispute settlement plays in the economic integration process.

The above observation is true in the context of the SADC tribunal decision in the Campbell case.<sup>226</sup> The refusal of Zimbabwe to comply with the tribunal decision alleging the invalidity of the Tribunal Protocol expresses the unwillingness of member states to be sued in a regional forum which is seen as interference with their own national sovereignty.<sup>227</sup> Further, when the tribunal referred the non-compliance of Zimbabwe to the summit, the summit did not take any action against Zimbabwe however it took an action against the tribunal. The summit's decision to suspend the tribunal in 2010 pending a review of its role and function, and its subsequent close down in 2012 reveals lack of legal autonomy in the judicial organs hence the SADC regional organization still remains a power-based system. The SADC Summit decision represents a major step

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<sup>223</sup> OC Ruppel & Bangamwabo, 'The SADC Tribunal: a legal analysis of its mandate and role in regional integration' *Monitoring Regional Integration in Southern Africa* (tralac), vol. 8 (2008) at 180.

<sup>224</sup> Elisa Tino, 'The role of regional judiciaries in eastern and southern Africa' *Monitoring Regional Integration in Southern Africa* (tralac), (2012) at 140.

<sup>225</sup> See judgment in *Anyang' Nyong'o and 10 others v the Republic of Kenya and 5 others* (2007) at 44.

<sup>226</sup> See *Mike Campbell (PVT) and Others v Republic of Zimbabwe* (2009).

<sup>227</sup> Werner Scholtz, 'Review of the role, functions and terms of reference of the SADC Tribunal', *SADC Law Journal* Vol. 1(2011), at 5.

backwards for economic integration within the organization which it itself aims at being a rule based system. The summit further proposed that a new tribunal protocol will have to be negotiated between member states and its jurisdiction will be limited to resolving disputes between member states concerning the interpretation of the SADC Treaty.<sup>228</sup> This means that individuals' direct access to regional justice would no longer be granted. The absence of *locus standi* for individuals will restrict the number of potential disputes that may be brought before the tribunal. This makes the dispute settlement process unavailable to some of the most important players in the integration process such as consumers, investors and traders. The absence of individual rights of action reveals a desire of the states to dominate the judicial process. Another major concern is the fact that ratification will be required as a pre-requisite for the new Protocol for the Tribunal to enter into force.<sup>229</sup> It may take many more years before the tribunal becomes operational again. The outcome of this will be an ineffective trade regime which lacks a functioning forum to rule on the correct interpretation of the legal provisions. As a result, challenges arising from the implementation of decisions reached will be resolved by political organs such as the Summit of the Heads of States and the Council. Hence a mandatory and transparent mechanism for monitoring the enforcement of regional standards will remain absent.<sup>230</sup>

#### 4.4 CONCLUSION

Regional agreements need to be implemented in order to achieve the objectives for which they have been concluded. Compliance refers to an action (implementation) which is in accordance with the applicable rule or standard. The levels of economic integration envisaged by both communities demand a strong adherence to the rule of law to be effective.

In this chapter it was observed that there is a relatively slow progress in so far as the elimination of non-tariff barriers is concerned. Both regions face a challenge of

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<sup>228</sup> 'The Final Communiqué of the 32<sup>nd</sup> Summit of SADC Head of States and Government' (2012) para 24; available at [http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Communique\\_32nd\\_Summit\\_of\\_Heads\\_of\\_States.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Communique_32nd_Summit_of_Heads_of_States.pdf); last assessed on 5<sup>th</sup> August 2014.

<sup>229</sup> Article 22(3) SADC Treaty.

<sup>230</sup> Amos Saurombe, 'Regional Integration Agenda for SADC "Caught in the winds of change" Problems and Prospects', *Journal of International Law and Technology*, Vol.4(2009), at 104.

member states not complying with the commitments contained in the Customs Union Protocol and the Protocol on Trade respectively. The potential gains from trade liberalization are limited by the imposition of non-tariff barriers which is a violation of the provisions of the respective legal instruments. The potential benefits from these protocols will only be realized with effective compliance with commitments undertaken. Compliance requires more than political will and calls for a proper functioning legal framework. The commitment to eliminate non-tariff barriers remains a challenge. This may be attributed to the current weak regional institutional mechanisms put in place to monitor implementation of the commitments.

Another challenge relates to the inadequacy of regional courts to adjudicate and enforce decisions on disputes relating to violation of treaty obligations by member states. Though both treaties contain legal provisions for dispute settlement, members are reluctant to resort to the dispute settlement mechanisms established by the treaties. It is worth mentioning that an analysis of jurisprudence of these regional judicial bodies reveals that cases brought before them are relatively few. About 16 matters have been brought before the SADC Tribunal since it became operational in 2005.<sup>231</sup> By the end of 2011, the EACJ had rendered about 14 judgments and 29 rulings. This figures are relatively low compared to the European Community Court of Justice which had determined over 350 cases (from 1995 to 2009) relating to the Customs Union and Common Market.<sup>232</sup> Another observation is that the utilization of regional judicial bodies to litigate economic integration issues has been scanty. In the case of SADC, most of the disputes referred to the regional judicial bodies resulted from action instituted by individuals alleging violation of human rights by the member states. Matters such as NTBs, tariff classification or rules of origin have not generated disputes (Erasmus 2011). Disputes should not be manufactured. However the meager participation in dispute settlement mechanism indicates that there is insufficient awareness about the trade liberalization provisions and how to enforce them.

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<sup>231</sup> G. Erasmus, 'Is the SADC Trade Regime a Rule-Based System', SADC Law Journal Vol. 1 (2011), at 31.

<sup>232</sup> See data available at, [http://ec.europa.eu/taxation\\_customs/resources/documents/common/infringements/case\\_law/court\\_cases\\_customs\\_1995-2009\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/infringements/case_law/court_cases_customs_1995-2009_en.pdf), last assessed on 10<sup>th</sup> August 2014.

Establishment of permanent judicial organs reveals the willingness of both EAC and SADC to respect and adhere to the rule of law. They seemed to acknowledge that for a regional integration process to be successful; the rule of law should prevail over political power and create legal accountability. The simple provision of a judicial organ with supra-national jurisdiction is not a guarantee of effective adjudication. The decision of the SADC Summit to close the tribunal and the EAC member states to amend the treaty and the court's jurisdiction demonstrates that member states may disregard the courts' decisions due to the political impact of that decision, leading to low levels of treaty compliance and enforcement. As observed in the case of the SADC tribunal and the EAC case<sup>233</sup>, it is possible to design a supra-national tribunal on paper while at the same time being conscious that political condition may prevent it operating on a legal basis. As such, these RTAs still remain power oriented systems. Experience from the WTO multilateral trade liberalization initiative has shown that it is through the development of jurisprudence regarding implementation of community law that the momentum necessary for effective integration is generated and maintained (Erasmus 2011). The decisions of the Panel and Appellate Body are used as valuable interpretations for future cases.

Consequently, the implementation of key decisions and objectives by member States may stagnate, because of the underlying weaknesses existing in legal and institutional frameworks that do not enforce compliance. As such, the implementation and monitoring of protocols and consequences of non-compliance are lax and depend on the goodwill of individual member states. This state of affairs does not augur well for effective regional integration.

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<sup>233</sup> *Anyang'Nyong'o and 10 others v the Republic of Kenya and 5 others* (interim ruling) (2006).

## CHAPTER FIVE

### FINAL CONCLUSIONS

#### 5.1 SUMMARY OF FINDINGS

In Africa, the need for establishing RTAs was recognized under the Organization of Africa Unity (OAU),<sup>234</sup> and is an objective of the African Economic Community (AEC),<sup>235</sup> and the African Union (AU).<sup>236</sup> It was viewed as an avenue for the eventual continental economic community. This shall be achieved through a gradual process involving six stages commencing with a call to create and strengthen existing RECs, elimination of tariff and non-tariff barriers, establishment of a free trade area, a customs union, a common market and finally the establishment of an African Economic Union whereby economic policies will be continentally uniform.<sup>237</sup> The rules of multi-lateral trade system also recognize that the advantage of RTAs is that they allow freedom of trade through closer integration of economies of parties to such agreement.<sup>238</sup> It is viewed that closer integration between parties to such agreements will contribute to the expansion of the world trade.<sup>239</sup>

The AEC was founded on the ultimate goal of promoting economic integration in order to increase self reliance and promote self sustained development.<sup>240</sup> A major aim of these efforts is to expand intra-African trade by eliminating tariff and non-tariff barriers to facilitate the free movement of goods.<sup>241</sup> Significant progress has been made since the Lagos Plan of Action in forming regional economic communities to foster trade and economic integration. Despite the establishment of African RTAs, Africa's share in global trade may be regarded as low and intra-African trade is lower than in other economic regions.<sup>242</sup> Failure of some member states to meet their commitments to eliminate tariff and non-tariff barriers has largely contributed to low intra-African trade.

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<sup>234</sup> Article 2, Charter of the Organization of the African Unity.

<sup>235</sup> Article 4, Treaty establishing the African Economic Community.

<sup>236</sup> Article 3, Constitutive Act of the African Union.

<sup>237</sup> Ibid.

<sup>238</sup> Article XXIV par 4 GATT.

<sup>239</sup> Preamble of the Understanding of the interpretation of Article XXIV.

<sup>240</sup> Article 3(1) Treaty establishing the African Economic Community .

<sup>241</sup> Articles 29, 30 and 31 Treaty establishing the African Economic Community.

<sup>242</sup> See United Nations Economic Commission for Africa (UNECA), Economic Report on Africa 2012: Unleashing Africa's Potential as a Pole of Global Growth, at 21, 42-45.

Implementation of the commitments at each regional level is essential to fast track the realization of a continental common market. Owing to the scope of this study, only the progress of the implementation of the trade liberalization objectives under the EAC and SADC trade regimes were analyzed.

## **5.2 RESPONDING TO THE RESEARCH QUESTION**

Domestic implementation of obligations in agreements establishing FTAs and CUs is critical for the attainment of the objective to eliminate trade barriers in intra-regional trade. In this study effectiveness of the economic integration is assessed based on the level of compliance with the rules relating to intra-regional trade liberalization. This study is founded on the notion that effective compliance requires a higher degree of adherence to the rule of law. A rule based trade regime secures the benefits of trade more optimally by providing a transparent and predictable environment for producers, traders and consumers.<sup>243</sup> Rule based trade agreements display certain substantive as well as procedural features. One of reasons why SADC and EAC can be regarded as rule- based regimes is that they have to function in terms of WTO rules applicable to the creation of customs union and free trade areas.<sup>244</sup> It was revealed that both blocs have complied with the Article XXIV GATT requirements for formation of RTAs.<sup>245</sup>

For the legal framework to be effective, it must contain clearly framed precise norms. Norms are the basis in which regulation and compliance are founded, thus clear and precise norms are essential to effective regimes.<sup>246</sup> Since RTAs carry a firm commitment to take affirmative measures to eliminate or reduce barriers to trade within parties involved, the respective trade agreements should contain elaborate provisions regarding elimination of tariff and non-tariff barriers. Just as the multilateral trade regime is guided by the principle of reducing tariff based impediments to trade,<sup>247</sup> similarly are EAC and SADC trade agreements. Measured in terms of agreements, both the EAC and

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<sup>243</sup> Erasmus G, 'The Consequences of Retaliation in Southern African Trade Relations', tralac Working Paper (2014) at 3.

<sup>244</sup> Article XXIV GATT.

<sup>245</sup> See discussion at 2.4.

<sup>246</sup> H. K. Mutai, 'Compliance with International Trade Obligations' Kluwer Law International (Volume 11) at 27.

<sup>247</sup> Since GATT's creation in 1947 there has been eight rounds of trade negotiations and have all covered lowering of tariffs.

SADC share the same objectives of creating a larger economic space among the members through elimination of tariff and non-tariff barriers.<sup>248</sup> At the time the EAC customs Union was launched, 2010 was the targeted year for removal of all internal trade tariffs. The 2010 goal was achieved. On the other hand 2012 was the targeted year to complete internal tariffs elimination among SADC member states.<sup>249</sup> By 2012 some of the SADC member states had attained the target though some were still behind schedule. When assessing the effectiveness of the terms of the Trade Protocol, it was observed that Article 3(1)(c) by allowing member states to derogate from their commitments undermines the overall objective of tariff elimination. This gives the Committee of Ministers of Trade discretion to decide each application on a case by case basis, instead of being guided by a clear and transparent procedure that is applicable to all Article 3 applications. Another provision that has potential to encourage protectionism is found in Article 21 which allows for the possibility of temporary measures to promote infant industries by suspending trade liberalization objectives. It fails to set out criteria of determining what constitutes an infant industry. It also fails to specify a maximum time limit for which such protection should be granted. The effective implementation of the tariff liberalization in EAC can be attributed to the existence of clear trade liberalization obligations as set out in its Customs Union Protocol and superiority of community law over national law.<sup>250</sup> Another factor is the presence of a harmonized customs legal regime comprised of a common tariff structure, a uniform EAC Customs Management Act, simplified Rules of Origin and Customs Regulations which have been adopted for uniform application in all partner states. A lesson that SADC can learn from EAC is that comprehensive legal instruments with clear terms are essential for effective trade regimes.

Though tariff liberalization in both blocs is quite impressive, free movement of goods within member states is greatly hindered by the presence of non-tariff barriers. Members continue to impose NTBs. The continued existence of NTBs is a result of the weakness of the legal frameworks which fail to provide concrete measures on how to

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<sup>248</sup> Article 75 EAC Treaty, Article 3 SADC Trade Protocol.

<sup>249</sup> 'SADC Integration milestones', available at <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/>; last assessed on 3<sup>rd</sup> July, 2014.

<sup>250</sup> Article 8(4) EAC Treaty.

eliminate NTBs. Both the Customs Union Protocol and the Trade Protocol obliges members to eliminate and refrain from imposing NTBs.<sup>251</sup> The weakness of such provisions is that the decision of how to put a stop to NTBs has been left for the national governments to decide. The legal instruments remain silent on what will happen in the case of non-compliance with this obligation. All this should be provided for in their legal instruments. Though the NTB monitoring mechanism adopted by the EAC-SADC-COMESA tripartite is a positive step towards transparency, no penalties exist for non-compliance.

Achievement of trade liberalization objectives requires strong institutional frameworks capable of withstanding political pressure. From an integration perspective the regional judicial organs of both RECs have played a negligible role in economic integration. Although fundamentally these courts are replications of the European Union Court of Justice (EUCJ), they have not had a similar impact on their regions. Whereas the EUCJ played a central role in the EU integration through its jurisprudence on infringement and annulment actions and preliminary rulings, this jurisprudence has not been translated into the jurisprudence of the regional courts of EAC and SADC. Businesses that are operating in various East African countries are operating in a legal void when it comes to enforcing contracts, leaving them to go for litigation in national courts. The EACJ ruled that the treaty establishing the bloc had locked commercial disputes out of its purview, restricting its mandate to interpretation of the EAC treaty. This means only state organs can move to the court to seek legal redress in a dispute with agencies of other member states. Private firms are the most likely to be affected and will shy away from markets where they are unable to enforce their rights.

Given the low level of compliance with regional judicial decisions coupled with the under-utilization of regional dispute settlement mechanisms, the regional courts have been largely ineffective in fulfilling their integration roles. Ultimately the success of African RTAs and the effectiveness of their courts in reinforcing integration will depend on the political will of the member states and their willingness to meet their treaty obligations and commitments.

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<sup>251</sup> Article 13 EACCU Protocol, Article 6 SADC Protocol on Trade.

### **5.3 RECOMMENDATIONS**

There is great opportunity for EAC and SADC to move towards better economic competitiveness through elimination of barriers to intra-regional trade. The overall assessment is that despite significant progress in trade liberalization through internal tariff liberalization, both blocs can do much better. In light of the above, the following recommendations are made:

#### **5.3.1 Trade compliance monitoring mechanism**

The realization of the SADC FTA is slowed down by country-level implementation problems. This study recommends that a trade monitoring mechanism should be implemented in order to ensure that SADC member states implement agreed tariff reduction schedule and to provide a mechanism for resolving problems on a day to day basis. The effective implementation of the SADC FTA will be a stepping stone for the establishment of the Customs Union. The importance of putting in place an effective and strict mechanism for compliance and strict enforcement of these decisions into community law should be emphasized.

#### **5.3.2. Derogation procedures**

The cumulative effect of derogation clause<sup>252</sup> has the potential to undermine the overall objective of tariff liberalization. SADC Council of Ministers of Trade (CMT) should implement derogation procedures establishing substantive rules and criteria for granting of the grace period. This should provide for a maximum time frame within which the derogation will be granted and outline conditions for which extensions can be granted. In addition sanctions should be imposed against member states that persistently fail without good cause to comply with their obligation upon expiry of the grace period.

#### **5.3.3 Enforcement mechanism for sanctioning non-compliance**

Removal of non-tariff barriers is critical to EAC and SADC integration. This study recommends a review of the NTB Monitoring Mechanism and introduction of penalties for non-compliance with obligation to remove NTBs.

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<sup>252</sup> Article 3(1)c SADC Trade Protocol on Trade.

#### **5.3.4 Revision of SADC Rules of Origin**

Free movement of goods in SADC has been hampered by complicated and restrictive rules of origin. It is recommended that the complex rules of origin be revised and come up with rules that are more practical for the region that will require lower thresholds for regional value addition. This would enable many smaller SADC countries to expand their trade performance. For example, this will allow producers involved in textile production to source cheap inputs from global sources and so increase their export competitiveness. Since majority of the SADC member states are also members of COMESA, this study recommends that they should adopt COMESA rules of origin which are more flexible than those of SADC.

#### **5.3.5 Harmonization of SPS and TBT measures**

As was observed, individual member states continue to apply national testing and procedures and standards on imported products. Member states are recommended to refrain from applying national standards and adopt regional harmonized standards where they exist. Member states should ensure that existing national laws are in line with regional regulations.

#### **5.3.6 Harmonization of custom procedures and internal taxes**

The future success of the EAC's single customs territory will be guaranteed if EAC member states harmonize their structure for collective administration of the customs union which entails collection of taxes at the first points of entry and pooling of revenues collected at the regional level. Member states are recommended to put more efforts to accelerate the simplification of custom procedure and standardization of the required documents. This is desirable under the common market and monetary union steps the community is moving into.

SADC Customs authorities should implement a common policy of automatically communicating the reasons for rejecting values declared by importers and explain how they could determine the value to be applied. This will ensure transparency in the valuation process.

Member states are also recommended to invest in customs administration reforms that cultivate a high level of professionalism and integrity and are more transparent on their procedures.

### **5.3.7 Ensure effective enforcement and compliance with court decisions**

Both regions have not developed the institutions needed for market integration. In particular, trade disputes are still resolved in national courts. There has been insufficient pooling of sovereignty. There is need to replace national courts for trade dispute with a stable regional supra-national system. An appropriate, independent supranational authority should be adequately empowered with rules for enforcing and penalizing any errant behavior by non-compliant members. This study recommends that a number of actions need to be reconciled and this includes the importance of ensuring that judicial decisions made in support of building the RECs are enforced at all levels by the parties involved. Rule-based governance could contribute to the harmonization of the laws of Partner States through development of jurisprudence in the region and address challenges of non-compliance of regional trade obligations.

### **5.3.8 Improve accessibility to justice**

This study recommends that apart from statutory access provided in the Treaty,<sup>253</sup> the EACJ court should establish sub-registries in the partner states in a bid to bring accessibility of justice nearer to the people. This will immensely contribute to the improvement of regional judicial mechanism.

In the case of the SADC Tribunal, a plausible alternative is to allow individuals to litigate before the SADC tribunal with special leave of the court.<sup>254</sup> Another alternative is to create a reference procedure between national courts and the SADC tribunal. This alternative would provide individuals access to the tribunal.

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<sup>253</sup> Article 30 EAC Treaty.

<sup>254</sup> Article 222 CARICOM Treaty, *Trinidad Cement Ltd v The State of the Co-operative Republic of Guyana*(2009).

### **5.3.9 Ensure supremacy of community law over national law**

The EAC Treaty elevates community law above national law.<sup>255</sup> The SADC Treaty states that member states shall take all necessary steps to accord the Treaty the force of national law.<sup>256</sup> This provision simply means that direct applicability of community law is not guaranteed. This study recommends an inclusion of a provision that has a defined time frame for the legislation to be enacted and penalties for non-compliance.

### **5.3.10 Improve dissemination of trade information**

A sizeable number of businesses in EAC are not aware about newly introduced SPS regulations in their countries as well as in other EAC countries. As a result, businesses incur extra costs in form of bribery averaging USD 200 to over 1 000 per transaction.<sup>257</sup> Time is also lost sorting out non-compliance with SPS requirements estimated to upto two days. This calls for sensitization of businesses about SPS requirements related to cross border trade. It was also observed that many informal cross border traders are not yet aware about the simplified rules of origin and are subjected to harassment by border security officials who demand bribes to help goods cross borders.<sup>258</sup> It is recommended that EAC Secretariat increase efforts to disseminate information about the simplified trade regulations to the business community, customs agents and other relevant stakeholders. One of the ways of achieving this could be through the use of regular regional trade fairs and trade expos.

Similarly, it is recommended for the SADC Secretariat to disseminate information regarding regulations, procedures and other rules that govern trade in SADC. Individuals can serve as an effective means for monitoring compliance with community law through their reporting of breaches. Education on community law and creating an accessible means for filing complaints will strengthen their monitoring role.

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<sup>255</sup> Article 8(4) EAC Treaty.

<sup>256</sup> Article 6(5) SADC Treaty.

<sup>257</sup> 'The 2011 East Africa Community Business Climate Index Survey'; available at [http://www.trade.eac.int/index.php?option=com\\_docman&task=doc\\_view&gid=38&tmpl=component&format=raw&Itemid=124](http://www.trade.eac.int/index.php?option=com_docman&task=doc_view&gid=38&tmpl=component&format=raw&Itemid=124), last assessed on 5<sup>th</sup> August 2014.

<sup>258</sup> Ibid.

### **5.3.11 Cooperation in infrastructure**

It has been recognized that while elimination of tariff and non-tariff barriers is relevant, it will not lead to a significant expansion in intra-regional trade given the structural deficiencies which exist.<sup>259</sup> The geographical reality is that three of the EAC members are landlocked and dependent upon the infrastructure of the two coastal members. The EAC needs to develop its railways and ports in order to ease movement of goods. Investment in good quality infrastructure is expensive hence there is need to attract private finance where possible. Currently private investors view multi-country projects more politically risky than single country projects. It is recommended that governments should serve as a check on one another so that an EAC commitment is seen as more credible than a national commitment. The focus on regional infrastructure development will further boost regional trade, investment and integration and make the region economically competitive.

Similarly SADC member states should expeditiously implement the SADC Infrastructure Master Plan Vision 2027. The plan will serve as a strategic framework to guide the implementation of cross-border infrastructure networks in an integrated manner.

### **5.3.12 Increase political will to ensure implementation**

The enthusiasm for economic integration has not been matched by commensurate political will and commitment of member states to effectively implement agreements reached under the integration agreements. Some countries seem not ready for the partial surrender and the pooling of sovereignty, which is critical for the success of any economic integration. Lack of political will and commitment has been reflected in the failure to meet target dates set for the attainment of objectives. This study finally recommends firm political commitment and leadership essential for consistent progression to deeper regional economic integration.

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<sup>259</sup> African Development Bank Report 2010; available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/African%20Development%20Report%202010.pdf>, last assessed on 5<sup>th</sup> August 2014.

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