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UNIVERSITY OF CAPE TOWN
ADVANCED SCHOOL FOR LEGAL STUDIES-FACULTY OF LAW

**ECONOMIC PARTERSHIP AGREEMENTS AND
REGIONAL INTEGRATION: A CASE STUDY OF
THE SOUTHERN AFRICA CUSTOMS UNION AND
THE SOUTHERN AFRICAN DEVELOPMENT
COMMUNITY**

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LLM DISERATION

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DECLARATION

Research dissertation presented for the approval of senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation.

The other part of the requirements 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 of Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of the university, and that this dissertation conforms to those regulations.

.....

Mwanahawa Aziza Mdee

University of Cape Town

DEDICATION:

To Daddy, Mama, Furaha and Maseabata

University of Cape Town

ACKNOWLEDGMENT:

Ka Sesotho hothoe 'Motho ke motho ka batho' [I am because we are] I would therefore like to thank the following people.

To Lineo Mdee, Frank Mdee Furaha Mdee and Maseabata Mdee for your unfailing love and support, you are all my anchors.

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ABSTRACT

The Southern African Customs Union (SACU) and the Southern African Development Community (SADC), like many other regional organizations in Africa, have chosen regional integration to advance their various developmental goals. This is despite the many challenges that regional integration efforts within Southern Africa face. Alternatively, Economic Partnership Agreements (EPAs) are redefining the trade relationship between the European Union (EU) and the African, Caribbean and Pacific (ACP) group, which encompasses Southern African countries. Whereas the premise of the relationship had been the preferential, non-reciprocal treatment of the ACP countries, reciprocal trading relations will now be the definitive characteristic. The EU's rationale for redefining the relationship is based on the need to secure compatibility with World Trade Organization (WTO) rules, as well to promote the development of the ACP countries. However, an onslaught of protest has beset the potential impact that reciprocity, the hallmark of the EPAs, will have on the ACP countries. Many authors have argued that there are alternative WTO compatible ways of continuing the preferential non-reciprocal treatment, which would not adversely impact the ACP countries. Consequently, this dissertation explores the relationship between the EPAs and regional integration within SACU and SADC. The central proposition of this paper is that EPAs will have an adverse impact on the organizations' regional integration efforts. It is argued that the most detrimental affect of the EPAs will be caused by the splintering of regional organizations, and the impact of reciprocity. In the course of presenting this argument this paper will also highlight the continued significance of regional integration, as well as the overtly problematic nature of the legal alternatives to the EPAs.

ABBREVIATIONS

ACP	African, Caribbean Pacific
AEC	African Economic Community
AGOA	African Growth and Opportunity Act
AU	African Union
BLS	Botswana, Lesotho and Swaziland
BNLS	Botswana, Namibia, Lesotho and Swaziland
CET	Common External Tariff
COMESA	Common Market for Eastern and Southern Africa
CPA	Cotonou Partnership Agreement
EBA	Everything But Arms
ECOWAS	Economic Community of West African States
EDF	European Development Fund
EEC	European Economic Community
EPAs	Economic Partnership Agreements
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Area
IPR	Intellectual Property Rights
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
LPA	Lagos Plan of Action
LDC	Least Developed Country

MFN	Most Favoured Nation
NAFTA	North Atlantic Free Trade Agreement
NEPAD	New Partnership for African Development
OAU	Organization of African Unity
OCT	Overseas Countries' and Territories
REC	Regional Economic Community
RI	Regional Integration
RISDSP	Regional Indicative Strategic Development Plan
RTA	Regional Trade Area
SACU	Southern African Customs Union
SADC	Southern African Development Community
SDT	Special and Differential Treatment
SSA	Sub-Saharan Africa
TDCA	Trade Development and Co-operation Agreement
TRIPS	Trade Related Aspects of Intellectual Property Rights
WTO	World Trade Organization

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CHAPTER 1

INTRODUCTION

1.1 Background and the introduction of the central argument.

In many respects, developing countries have sought regional integration (RI) as the device to propel them into a new era of development and economic prosperity.¹ Within an African context, the importance of regrouping countries was further strengthened by the need to deconstruct the artificial borders that had been imposed, and thus became a post-colonialism mantra.² The belief in the importance of integration and its' consequent pursuit has continued, despite its admittedly limited success on the continent, amidst what has been referred to as a 'puzzling web of overlapping, contradictory and ineffective agreements.'³ In this regard, Southern Africa is no exception. There is a litany of socio-economic challenges that the region faces. Consequently, regional organizations such as Southern African Development Community (SADC) and the Common Market for East and Southern Africa (COMESA) continue to search for new approaches to RI to enable them to tackle these challenges. Although technocrats profess 'integration fatigue', the advancement of regional efforts continues.⁴

Simultaneously, the Regional Economic Partnership Agreements (referred to as EPAs) are being concluded between the Africa, Caribbean and Pacific countries (ACP) and the European Union (EU). The EPAs will redefine the long-standing trade relationship between these two blocks. The impetus to redefine this trade relationship arises out of the need to secure WTO compatibility. The Lome Convention, which had previously regulated the trade relationship between the two blocks, violated WTO rules, and was under constant legal scrutiny. It is commonly understood that to ensure compatibility with the WTO rules,

¹ Dot Keet 'The implications of the EU's proposed 'Regional Economic Partnership Agreements' with respect to regional integration and development in Southern Africa' 16 available online at http://www.tni.org/archives/archives_keet_implications [accessed 1st May 2009].

² Comas Ochieng 'EU-ACP Economic Partnership Agreements and the Development question: Which way now?' (2007) 10 2 363 at 365 available online at <http://www.sarpn.org/documents/d0002203/index.php> [accessed 1 May 2009].

³ Axel Borrman et al EU/ACP Economic Partnership Agreements: Impact, Options and Prerequisites' (2005) 40 3 *Intereconomics* 169.

⁴ TRLAC 'Post conference report' http://www.tralac.org/cause_data/images/1694/tralac_Annual_conference_Report_20091007.pdf [accessed 3rd January 2010].

the relationship between the ACP countries and the EU will have to be re-established on the basis of reciprocal trading, as opposed to preferential treatment.⁵

The emphasis on reciprocity has therefore received a barrage of criticism as the ACP group comprises of some of the world's poorest countries; 40 of the 77 countries are classified as a Least Developed Country (LDC).⁶ As a result, many ponder the impact that a reciprocal trading relationship will have on the developing countries' economies. The question that then arises is whether the WTO rules do not provide an alternative strategy which would allow the trading relationship to continue in a non-reciprocal form. The issue as to whether or not there is scope within the WTO rules to continue to allow preferential access to the ACP countries has thus been the subject of much contention.

The EPAs have consequently been the focus of much condemnation from many sectors. Some authors have alleged that that would 'lead to the destruction of livelihoods'.⁷ In addition to this, many civil society groups have alleged that there are WTO compliant alternatives to EPA. They propose that these would circumvent many of the potentially adverse consequences.⁸

Ultimately, the EPAs will constitute a Free Trade Area (FTA) between the EU-ACP countries.⁹ This falls in step with the global trend towards trading in this form. A recent estimate by the WTO shows that more than 70 per cent of world trade is now being conducted through Regional Trade Agreements (RTAs).¹⁰ The EPAs represent an FTA between two trading blocks with wildly divergent levels of development. In this, they are unique, as never before has the multilateral trading system played host to a North-South FTA between such economically diverse trading communities, covering such a wide spectrum of both trade, and non-trade matters. The EPAs are therefore important in that they will establish legal precedents for how future North-South relationships are structured. How to incorporate this trading relationship into WTO rules, while accounting for developing countries' economies, therefore poses tremendous challenges to WTO.

⁵ C Ochieng (note 2) at 365.

⁶ The Secretariat of the African, Caribbean and Pacific group of states 'The ACP group' available online at: http://www.acpsec.org/en/about_us.htm [accessed 20 May 2009].

⁷ Julio Godoy 'EU Stands to increase market share in Africa with EPAs' available online at <http://ipsnews.net/africa/nota.asp?idnews=40936> [accessed 25 November 2009].

⁸ D Keet (note 1) at 1.

⁹ A Free Trade Area is a form of a Regional Trade Agreement. This will be discussed in detail in chapter 2

¹⁰ Jayati Ghosh 'North-South RTAs reinforce existing inequalities' available online at http://www.centad.org/focus_27.asp [accessed 3 January 2010].

In light of the above, it is imperative for one to have a clear understanding of the possible impact that the EPAs will have on integration efforts within the region. Consequently, this dissertation investigates RI, EPAs and well as how they relate to integration efforts within the Southern African Customs Union and the Southern African Development Community. The central thrust of this paper argues that EPAs will have a detrimental effect on RI efforts within SACU and SADC. This is despite the fact that in principle, the EPAs should have bolstered RI.

The focus on both SACU and SADC is not a terse decision. Both are poised to play substantive roles in any future RI efforts in the area. SACU is the oldest customs union in the world, having celebrated its 100th year anniversary this year. Although only dealing with trade in goods, the organization has been lauded as one of the most advanced and successful examples of regional and formal co-operation on the African continent.¹¹ Recognizing the potential of the organization, the SACU Council of Ministers has recently highlighted how the organization has come to represent more than ‘just a trade and revenue arrangement’.¹² They have consequently called for a ‘roadmap to move towards an economic community and monetary union’.¹³ Declarations such as this add weight to the contention of SACU being used as a vehicle to drive deeper regional integration in the area.¹⁴ Conversely SADC, though a relatively young organization encompasses all the Southern African countries.¹⁵ Although the organization only comprising of 14 out of the 47 Sub-Saharan African states, it accounts for half of the area’s aggregate Gross Domestic Product.¹⁶ Furthermore, SADC has fully embraced the RI agenda. This is not only exhibited in terms of the SADC Trade Protocol, which recently led to the establishment of a SADC FTA but additionally, the organization through the Regional Indicative Strategic Plan (RISDP), has specifically laid out a calculated plan for RI. In light of these factors, a close examined of any impediments to both SACU and SADC’s RI efforts needs to take place.

¹¹ Peter Draper ‘Bigger SACU could lead the way’ Available online:

http://www.saiia.org.za/index.php?option=com_content&view=article&id=332:biggersacucouldleadtheway&catid=67:development-through-trade-opinion&Itemid=204 [accessed 20 April 2009].

¹² SACU Press Statement ‘Outcome of the Special SACU Council of Ministers Meeting held on 17 September 2009 in Ezulwini Swaziland’ <http://www.sacu.int/docs/pr/2009/pr0917.pdf> [accessed 10 January 2010].

¹³ Supra.

¹⁴ P Draper (note 11) at 1.

¹⁵ The Southern African countries are Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

¹⁶ International Security Studies ‘SADC RISDP’

http://www.iss.co.za/af/regorg/unity_to_union/pdfs/sadc/risdp/c2.pdf available online accessed 15th May 2009].

In order to pre-empt some possible criticisms, the following caveats are offered. Firstly, the objective of this paper is not to demonize the EPAs. In analysing the EPAs, there is a dire need to filter ‘the hyperbole from the reality’.¹⁷ The EPAs should neither be regarded as either panacea, or plague for Southern Africa, a critique that can be equally levelled at both critics and supporters of the EPAs. To regard the EPAs as either is to gloss over a number of important advantages and disadvantages. The principle advantage is that previous trade arrangements that Southern Africa had with the EU was constantly under legal scrutiny.¹⁸ Ensuring that the region has a WTO compliant trade regime with the EU would galvanize the legal status of the trading relationship out of its precarious position. This in turn would potentially aid in establishing market stability and attracting investment in the region.¹⁹ In addition to this the ACP countries under the EPAs have more favourable access to the EU, though the price of this improved access will be addressed in this paper. Nonetheless, there are two sides to the coin, both positive and negative aspects to the EPAs; this should not be lost sight of. The scope of this paper however is limited to exploring the negative impact that the EPAs will have on RI within SACU and SADC.

Secondly, this paper is written mindful of the various, undeniable obstacles that SACU and SADC will face in their RI efforts. The EPAs are not accountable for pre-existing issues. However, it will be argued that that the EPAs have either exacerbated, or in some instances created new challenges.

There still exists much contention as to whether or not RI efforts are the most appropriate tool for African countries to use in pursuing their developmental needs. Authors have argued that the favourable conditions needed to secure the benefits from RI are not present.²⁰ In light of this, it has been proposed that it would be more beneficial for the continent to pursue regional co-operation while only looking to RI as a long-term goal.²¹

¹⁷ European Center for Development and Policy Management ‘The interim Economic Partnership Agreements between the EU and the African states: contents, challenges, and prospects’ 14 available online at http://www.ecdpm.org/Web_ECDPM/Web/Content/Navigation.nsf/index2?readform&http://www.ecdpm.org [accessed on 3 January 2010].

¹⁸ Bonpas Onguglo and Taisuke Ito ‘How to make EPAs WTO compatible? Reforming the rules on regional trade agreements’ 26 *Discussion Paper No. 40* available online at http://www.ecdpm.org/Web_ECDPM/Web/Content/Content.nsf/vwPrint/04BE83528CC369ADC1256DA4004AD303?Opendocument [accessed 7 October 2009].

¹⁹ Louise Curran et al ‘The Economic Partnership Agreements: Rationale, Misconceptions, and non-trade aspects’ 9 available online at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Knowledge/25120389-EN-DRAFT-EPA-PAPER-WITH-LC-AND-DB-23-24-AUG-07-CLEAN.PDF> [accessed 25th May 2009].

²⁰ Margret Lee ‘Regionalism in Africa: A part of the problem or part of the solution?’ 1 available online at <http://www.polis.sciencespobordeaux.fr/vol10ns/lee.pdf> [accessed 18 October 2009].

²¹ The distinction between regional integration and regional co-operation will be discussed in the following chapter.

Although the above is an important argument, this dissertation is not premised on the efficacy of using RI to further developmental and economic objectives. Rather, it examines the *de facto* situation where RI structures continue to be the mechanism chosen by African leaders to propel the development of their countries.

Furthermore, this paper will not attempt to look at *each* individual aspect of the EPAs which may have bearing for RI. Instead, a far more focused investigation will be undertaken. Therefore, only factors found to have the most pernicious impact on RI will be examined.

As is the case with most research, this dissertation has a temporal cutoff date. Accordingly, no developments after January 2010 will be considered.

This dissertation is documentary research based. The primary resources that have been consulted are in journal articles, WTO agreements and interpretive guidelines, International treaties and declarations, textbooks, policy documents and newspaper articles. This information was primarily found in academic libraries and the internet.

1.2 Outline of paper

The structure of the paper is as follows.

Chapter 1 will consist of a background discussion of the various issues, as well as an introduction of the central argument of the paper.

Chapter 2 is a general overview of RI. The purpose of this chapter will be to firstly, give an understanding of what RI is, and how it relates to other concepts such as regionalism and regional co-operation. The focus will then turn to an analysis of some of the most salient benefits and disadvantages of RI. In the subsequent section the African context is examined. This section will investigate why the continent and consequently, Southern Africa appears to be afflicted by 'integration fever'. In examining this issue the historical significance of RI on the continent is revealed. The objective of this section is to provide insight into why RI continues to be held in high esteem, despite the fact that it has been fraught with a plethora of problems, and has failed to deliver the expected economic and developmental aspirations.

Chapter 3 assesses the framework of the EPAs within the context of SACU and SADC. This chapter will be divided into two parts. In the first part, an assessment of the historical context of the various organizations pertinent to this dissertation, namely SACU, SADC and EU-ACP countries takes place. Consequently, in the first section of this chapter an overview of SACU and SADC will be given. This will then be followed by an evaluation

of the trade relationship between the EU and the ACP countries, from the Lome Agreement through to the EPAs. This historical overview is important in that it will provide insight on the role of RI within SACU and SADC. It will also display to what extent legal commitments have been undertaken by these regional organizations to achieve this goal.

The second part of this chapter will constitute an examination of the Cotonou Partnership Agreement, coupled with an outline of the negotiating process leading to signing of the interim Economic Partnership Agreement. This will take place to shed light on the fact that in principle, the pillars of the EPAs had been designed in such a way as to strengthen RI efforts, although this would prove to not be the case. To provide a more holistic assessment of the regional organizations' trade relationship with the EU, an outline of the Trade Development and Co-operation Agreement (TDCA), South Africa's FTA with the EU, will be given. In addition to this, a consideration of the negotiations will reveal the emergence of contentious issues, which would later prove to have a detrimental impact on RI.

A study of the legal milieu takes place in **chapter 4**. Accordingly, Article XXIV of General Agreement on Tariffs and Trade (GATT), General Agreement on Trade in Services (GATS), the Enabling clause, and a Generalised and Non Reciprocal System of Trade Preferences for Developing Countries (GSP) in all its attenuated forms, will be expounded upon. Following this, a review of the veracity of some of the arguments proposing a legally compliant alternative to the EPAs takes place. In examining legal alternatives, this chapter will also investigate the possible impact that the Doha Development round of negotiations may have.

The objective of this chapter is to understand why the preferential trade relationship between the EU-ACP countries was found not to be WTO compatible. In addition to this, the chapter addresses what alternatives to the EPAs would not only look like, but the possible ramifications that it would have for the market access of the ACP countries.

Mindful of the above considerations, **chapter 5** will examine some of the most cogent ways that EPAs will affect the integration process. These will be assessed from two perspectives; the splintering of regional organizations, and the impact of reciprocity.

Chapter 6 reflects on the many varied issues that have been raised in earlier sections then proceeds to draw the various themes together, and then finally recommendations and conclusions will then be made.

CHAPTER 2

GENERAL OVERVIEW OF REGIONAL INTEGRATION

In the first part of this chapter, various concepts such as regionalism, RI and regional cooperation will be discussed and defined. This will then be followed by a more detailed examination of regional integration, the different theories surrounding it, as well as the potential advantages and disadvantages. The focus then turns to RI within an African context as its particular significance on the continent is examined.

2.1 Definitions and clarifications²²

The literature on RI and regionalism is undoubtedly voluminous. However, theoretically these areas remain difficult terrain to manoeuvre. One of the factors contributing to this is that a degree of ambiguity continues to be attached to various concepts. This arises because authors do not define terms in an identical way. This, in turn leads to the emergence of ‘gray areas’ which are typically displayed by the manner in which different authors treat regionalism, regional co-operation, and regional integration.²³

In light of the above, in order to mitigate against any arising confusion the following definitions will be adopted. Firstly, regionalism will be understood as the blanket term relating to all ‘efforts [made] by a group of nations to enhance economic, political or cultural interaction’.²⁴ This definition therefore embraces *both* [my emphasis] efforts made towards RI and regional co-operation.

Alternatively, regional co-operation and RI will be understood as two distinctive concepts. The principle difficulty with using the terms synonymously is that ‘it creates the impression that any two countries that are co-operating are engaged in a process that will eventually led to integration’.²⁵ This, is however not the case as on many occasions states collaborating on a particular effort would have no intention of ultimately integrating their economies.²⁶ It is important to bear in mind that the impetus that gives rise to regionalism, regional co-operation and RI may be the same.

²² R Mukamunana and K Moeti ‘Challenges of regional integration in Africa: Policy and administrative implications’ 2005 *Journal of Public Administration* 90 at 91 available online at http://repository.up.ac.za/dspace/bitstream/2263/4746/1/Mukamunana_Challenges%282005%29.pdf [accessed 28 November 2009].

²³ Supra.

²⁴ M Lee (note 20) at 1.

²⁵ Henry Mutai *Compliance with international trade obligations, The Common Market for Eastern Africa* (2007) 32.

²⁶ Supra.

Having clarified the definitions, the following section undertakes a more detailed analysis of regionalism, regional co-operation and regional integration. This is followed by an outline of the approaches to RI.

2.1.1 Regionalism

It is commonly accepted that there have been at least two waves of regionalism.²⁷ The first wave took place in the 1950s and was initiated by the establishment of the European Economic Community (EEC) in 1957. This organization was the forerunner to the European Union.²⁸ In order to gain trade benefits with the EEC, developing countries proceeded to establish their own regional structures. However, most of these efforts, particularly within developing countries failed as regionalism lost significance as the multi-lateral trading system, which together with its emphasis on trade liberalization, gained momentum.²⁹

The second wave of regionalism took place from the 1970s. It was spurred by the stagnant Uruguay round of negotiations, and the consequent dissatisfaction with the multi-lateral trading system.³⁰ This wave of regionalism took place on a far larger basis. Not only was there a resurgence of many old agreements such as Mercosur³¹, but the USA, who had prior to this been an ardent critic of regionalism, embraced it in the formation of the North Atlantic Free Trade Area (NAFTA).³² In addition to this, within a developing country context there was an emergence of North-South regional efforts.

While only 125 RTAs were notified during the GATT years. Since the establishment of WTO up to April 2002, a further 125 new RTAs have been notified. This represents an average of 15 notifications annually.³³ This proliferation of RTAs has led many authors to believe that a third wave of regionalism is currently under way. This third wave of regionalism is commonly referred to as 'open regionalism'. It is novel in that as opposed to

²⁷ Marvin Leshaba 'A critical analysis of Africa's efforts at regional integration' *Center for Policy Studies Policy Briefing* 30 at 2.

²⁸ Mills Soko 'Regionalism and the WTO: opportunities and dangers for Africa' (2004) 11 2 *South African Journal of International Affairs* 31 at 31.

²⁹ Food and Agricultural Organization of the United Nations 'Executive summary on regional integration' 4 available online at <http://www.fao.org/DOCREP/004/Y4793E/y4793e03.htm> [accessed 18 October 2009].

³⁰ M Soko (note 28) at 31.

³¹ Mercosur is the regional trading agreement between Argentina, Brazil, Paraguay and Uruguay

³² Food and Agricultural Organization (note 29) at 5.

³³ Peter Sutherland 'The future of the WTO: addressing the institutional challenges in a new millennium' 21 *Report by the Consultative Board to the former Director-General Supachai Panitchpakdi* available online at http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm [accessed 15 July 2010].

shielding countries from the global economy as had previously occurred, this third wave of regionalism directs its efforts towards ‘engaging with globalisation and the global market’.³⁴

2.1.2 Regional co-operation

Regional co-operation refers to ‘a collaborative venture between two or more partners, with common interests in a given issue’.³⁵ Such initiatives may be ad-hoc and take place on a far more limited basis and as opposed to RI efforts, do not require long-term commitment.³⁶

What distinguishes regional co-operation from other related concepts is its inherent flexibility. Countries have the freedom to identify priority areas without being subject to the pressure to liberalize trade, as is the case with many integration models.³⁷ Although it does not *necessarily* [my emphasis] lead to RI, it should be noted that enhanced cooperation between countries could act as a stimulus for RI.³⁸

2.1.3 Regional integration

At its most basic, RI arrangement is a preferential agreement between countries who agree to reduce both economic and non-economic barriers to trade.³⁹ Authors offer varying definitions such as Harlow who defines RI as

a process by which a group of nation states voluntarily and in various degrees have access to each other’s markets and establish mechanisms and techniques that minimize conflicts and maximize internal and external economic, political, and social and cultural benefits of their interaction.⁴⁰

Alternatively, Asante states that RI is

a process whereby two or more countries in a particular area join together to pursue common policies and objectives in matters of general economic development in particular economic field of interest to the mutual advantage of all participating states.⁴¹

³⁴ Hubert René Schillinger ‘Revisiting regionalism in Southern Africa’ 11 available online at <http://library.fes.de/pdf-files/bueros/namibia/05258.pdf> [accessed 21 January 2010].

³⁵ M Lee (note 20) at 3.

³⁶ Steven Radelet ‘Regional integration and Cooperation in Sub-Saharan Africa: Are Formal Trade Agreements the Right Strategy?’ 1999 20 *African Economic Policy paper* 3.

³⁷ M Lee (note 20) at 3.

³⁸ H Mutai (note 25) at 32.

³⁹ Economic Commission for Africa ‘Assessing Regional Integration in Africa: rationalizing Regional Economic Communities’ 21 available online at <http://knowledge.uneca.org/member-states/observatory-on-regional-integration/aria-assessing-regional-integration-in-africa/aria-assessing-regional-integration-in-africa> [accessed 22 October 2009].

⁴⁰ R Mukamunana (note 22) at 92.

⁴¹ Asante definition of regional integration as discussed in M Lee (note 20) at 4.

However, it is submitted that although the above definitions vary, at their core they embrace the same essential elements. Both describe a process whereby countries merge certain aspects of their economies together. This convergence then leads to positive spin offs effects, which although originating with the economic field have a ‘domino effect’ and thus reverberate throughout many other areas.

2.2 Approaches to Regional Integration

When analysing RI there is an overwhelming number of different approaches that have been adopted within the literature. In the following section only two approaches will be examined; the market integration model and the developmental integration model. These two models have been chosen because they served as the basis for many other approaches to RI, but they are furthermore the most pertinent to SACU and SADC.

2.2.1 Market integration

Market integration ‘is [a] linear progression of [the various] degrees of integration’⁴² It is premised on the belief that ‘intensified regional trade promotes economic development’.⁴³ The chief architects of the discourse relating to market integration are Balassa and Viner.⁴⁴ Viner’s work in this area falls directly within the sphere of neoclassical free-trade theory, which advocates for free trade, unconstrained by regional trade arrangements.⁴⁵ Balassa’s work in 1960s was built on Viner’s earlier framework.

Market integration theory distinguishes between the following phases of integration.

a) Free Trade Area: Preferential trade area were a group of countries either lower or eliminate both tariff and non-tariff barriers to trade amongst themselves. These are however, still maintained against the rest of the world.⁴⁶

b) A Customs Union is preferential arrangements where not only there are no tariffs between member states, but the group collectively adopts a common external tariff (CET) in relation to all non-member countries.⁴⁷

⁴² M Lee (note 20) at 1.

⁴³ Mareike Meyn ‘The Progress of Economic Regionalisation in Southern Africa –Challenges for SADC and COMESA’ in A Bosl, *et al Monitoring Regional Integration in Southern Africa yearbook Volume 5 2005* 188.

⁴⁴ R Mukamunana (note 22) at 93.

⁴⁵ H Schillinger (note 34) at 29.

⁴⁶ Anne Krueger ‘Are Preferential Trading Arrangements Trade-Liberalizing or Protectionist’ (1999) 13 4 *Journal of Economic Perspectives* 105 at 111.

⁴⁷ H Mutai (note 25) at xxxii.

c) A Common Market embodies the characteristics of a customs union, but furthermore provides for the free flow of all the factors of production.⁴⁸

d) An Economic Union occurs when all the features of a common market accompanied by the the harmonization of monetary and fiscal policies.⁴⁹

e) A Political Union is the most advanced form of integration within this model. A political union embodies all the features of an economic union. The distinguishing factor between the two is that monetary and fiscal policies are not simply harmonized, but unified.⁵⁰ This requires the adoption of a common market and the creation of a supra-national body which then takes over the domestic policy.

	Free Movement of Goods	Common External Tariff	Free Movement of Capital and Labour	Harmonization of Macro-economic policies	Supra-National institutions
Free Trade Area	Present				
Customs Union	Present	Present			
Common Market	Present	Present	Present		
Economic Union	Present	Present	Present	Present	
Total economic integration	Present	Present	Present	Present	Present

The above table is a diagrammatic representation of the different phases of the market integration model.⁵¹

It is important to note that although in terms of the theory, the different forms of integration are easily identifiable each with its own discernable characteristics; *de facto* the

⁴⁸Supra.

⁴⁹Supra.

⁵⁰M Lee (note 20at 3.

⁵¹Adopted H Mutai (note 25) at xxxi.

situation is far more complicated. Many integration arrangements will display overlapping characteristics falling in between stages while secondly, in other instances ‘titles will often be aspirational’⁵² rather than describing a particular phase of integration.

2.2.2 Development integration

Development integration arose in response to the problems associated with the market integration model. Developmental integration is premised on the belief that ‘for regional economic integration to work, it must first and foremost focus on equitable regional development’.⁵³ To achieve this, development integration required significant political co-operation and made provision for large-scale state intervention; therefore rejected the more *laissez faire* approaches to RI. Rather than prioritising the economic sector, developmental integration looked to political and administrative co-operation.⁵⁴ The governments of respective countries’ are tasked with the promotion of trade co-operation, harmonization of administration as well as ensuring the equal distribution of trade benefits.⁵⁵

Despite the stated objectives, this model proved to be too difficult to implement as it required a great deal of political commitment from member states.⁵⁶

The first part of this chapter began in a theoretical manner as various theories, definitions and approaches were examined. This took place in order to firstly, provide the historical context to how RI has emerged. An examination of the two most commonly adopted approaches to RI followed this. This has bearing to the central argument as the market integration and development integration strategies are the most salient to the RI initiatives of SACU and SADC. The SACU is a customs union as understood in terms of market integration approach. Although the subsequent investigation of SACU will reveal that the organization bypassed the earlier phase of FTA. Alternatively, SADC has utilized both approaches in its experience with RI. The organization had originally embraced more of a developmental approach but in recent history has aligned its RI strategy in term of the market integration approach. A clear understanding of these approaches and how they relate to SACU and SADC will allow the impact of EPAs on the organizations’ RI efforts to be much easily examined.

⁵² Supra.

⁵³ M Lee (note 20) at 4.

⁵⁴ M Meyn (note 43) at 189.

⁵⁵ Supra.

⁵⁶ R Mukamunana (note 22) at 94.

2.3 Advantages of Regional Integration

There are a number of potential benefits that can be gained from RI. These range over a wide spectrum encompassing political, economic and social and aspects. The following section examines these.

Perhaps the most obvious benefit that a country can gain from RI is the benefits associated with trading as a larger block. The creation of a larger market allows countries to benefit from economies of scale, as they pool together limited resources.⁵⁷ In addition to this, RI further allows countries to re-emerge on the global market not as individual states but rather as larger fortified economies therefore benefiting from increased bargaining power in negotiations.⁵⁸ RI also acts as a stimulus for a number of other benefits. For example, the increased cooperation between countries can potentially lead to greater political stability and more effective conflict resolution efforts as trust begins to build between neighbouring countries.⁵⁹ Greater political stability in turn is a draw card for Foreign Direct Investment (FDI), which can then aid in knowledge and technological transfers.⁶⁰ Moreover, RI agreements may also help in 'locking in' political and economic reforms. This rings especially true when there is a supervisory mechanism with strong sanctions imposed for non-compliance. A RI agreement lauded for its supervisory role is the EU.⁶¹

Viner's classic treatise on customs union usually serves as the starting point when examining the possible welfare effects of RI. Prior to Viner's work, it had been assumed that any steps towards liberalizing trade would be welfare enhancing.⁶² This fallacy was however, debunked when Viner examined the welfare distorting effect which could be created by customs union.⁶³

Viner proposed that RTAs could either have trade creating or trade diverting effects. Trade creation occurs when, as a result of the formation of the arrangement, trade barriers are reduced and there is a consequent increase in trade flows.⁶⁴ Conversely, trade diversion

⁵⁷ Supra.

⁵⁸ Economic Commission for Africa (note 39) at IX.

⁵⁹ Supra.

⁶⁰ Economic Commission for Africa (note 39) at 24.

⁶¹ The union requires that all countries prior to joining the union have met the 'Copenhagen criteria' laid down by Article 6(1) of the Treaty on The European Union. One of the stipulations is that a country must show that it observes democratic principles, the rule of law, human rights and provides for special protection for minority groups.

⁶² Jagdish Bhagwati in James Mathis 'Regional Trade Agreement in the GATT/WTO: Article XXIV and the internal trade requirement' (2002) VI.

⁶³ This is discussed in more detail below.

⁶⁴ A Krueger (note 46) at 107.

occurs when the formation of a RTA leads to the production of a good moving from a more efficient to a less efficient producer.⁶⁵ When this occurs, countries within the agreement purchase a product ‘from a higher cost sources within the agreement, solely because of their tariff advantage over the lower cost sources outside the agreement’.⁶⁶ Therefore in terms of Viner’s analysis, in principle, the welfare effects of a customs union were ambiguous.⁶⁷ However, where trade creation trumps trade diversion positive welfare gains result. Ultimately, the impact on an individual country will be determined by its particular circumstances which would then have to be empirically determined.⁶⁸

Another aspect, which may determine the ultimate welfare effects of RI, is the level of market liberalization in a specific country. Where a country has a relatively liberalized economy, the costs of integration are reduced, and there is a greater likelihood of trade creation trumping trade diversion.⁶⁹

Market integration theory put forward a different perspective in explaining the welfare impact that RI may have. The theory postulates that static and dynamic gains from trade as one of the central benefits.⁷⁰ Dynamic gains from RI occur when ‘as a result of intra-regional trade liberalization there is increased output and productivity effects’.⁷¹ Static gains from trade are determined by the relative sizes of trade creation, trade diversion and resource allocation.⁷² Dynamic gains from trade are generally larger than static gains, however they only accrue in the long run.⁷³ They include economics of scale, the possible stimulation of investment, the more efficient allocation of resources and increased competitiveness. The increase in competitiveness acts as a catalyst for another economic benefit, as producers continuously strive to produce a better product, the desire to continuously innovate facilitates steps into research and development, creating new knowledge and leading to better quality products at lower prices.⁷⁴ Dynamic efficiency therefore accounts for the processes whereby prices are lowered and quality is improved in the long run as a result of competition between rivals.⁷⁵

⁶⁵ A Borrmann (note 3) at 171

⁶⁶ A Krueger (note 46) at 115.

⁶⁷ A Krueger (note 46) at 107.

⁶⁸ A Borrmann (note 3) at 171.

⁶⁹ M Meyn (note 43) at 189.

⁷⁰ S Radalet (note 36) at 3.

⁷¹ Economic Commission for Africa (note 39) at 12.

⁷² Radalet (note 36) at 5.

⁷³ Supra.

⁷⁴ Supra.

⁷⁵ Supra.

One criticism that has been made of RTA between developing countries, or so called ‘South-South’ RTA, has been that such agreements rarely exhibit the preconditions necessary to benefit from trade.⁷⁶ For example, developing countries, particularly those located in the same geographically areas often have a comparative advantage in the production of identical goods.⁷⁷ In such an instance, there is little impetus to trade. Conversely, North-South RTAs are able to overcome these challenges. Firstly, countries within a North-South RTA generally have a comparative advantage in the production of different goods; this creates a basis for trade. In addition to this though, these types of RTA tend to experience lower costs from trade diversion. Beyond this, there is a higher possibility that policy reforms will be ‘locked in’ through agreements. South trading partners also stand to benefit from greater potential for technology and knowledge transfers.⁷⁸ The recent proliferation of North-South RTAs will therefore possibly assist developing countries in harvesting the gains from RI. This is another factor contributing to the resurgence of the ‘third wave of regionalism’.

2.4 Disadvantages of Regional Integration

As countries liberalize their economies they lose tariff income, which in the ordinary course of events would have contributed to government revenue. Countries such as Lesotho and Swaziland are endemically dependent on tariff income, which forms a substantial part of government revenue. For example, tariff income accounts for more than 60 per cent of government revenue in Lesotho, while in Swaziland it accounts for up to 70 per cent of government revenue.⁷⁹ If upon liberalizing such countries are unable to diversify their income basis, there would potentially be crippling ramifications.⁸⁰

Another potential drawback to RI is that within the arrangement there may be instances of polarised growth.⁸¹ For example, the larger more developed countries are most likely to gain the benefits of RI as opposed to their less developed counterparts.⁸² This creates ‘winners and losers’ of RI and reneges the very reason that many developing countries enter RI agreements. This may additionally lead to tensions developing between the various members. This was one of the pinnacle reasons that contributed to the collapse of the EAC in

⁷⁶ Economic Commission for Africa (note 39) at 36.

⁷⁷ H Schillinger (note 34) at 12.

⁷⁸ Supra.

⁷⁹ Aurelie Walker ‘The EU SADC EPA: the moment of truth for regional integration’ (2009) 8 *Trade Negotiations Insights* 2 Available online at <http://ictsd.org/i/news/tni/52416/> [accessed 4 December 2009]

⁸⁰ Supra.

⁸¹ H Schillinger (note 34) at 12.

⁸² For a more detailed analysis of this phenomenon see S Radalet (note 36) at 4.

1977.⁸³ An instance in which the emergence of ‘winners and losers’ within an RTA can be seen is in terms of the ‘hub’ and ‘spoke’ effect. This occurs when an RTA is created between much a more developed country on one hand, and a number of smaller countries on the other. The larger country is the ‘hub’, while the smaller countries are the ‘spokes’. The hub, benefits from free access to all markets. On the other hand, the ‘spoke’ countries only have free access to the hub market. This “hub-and-spoke” effect increases the incentive for exporters to invest in the ‘hub’ country, rather than in the ‘spokes’.⁸⁴

The issue of polarised growth can be overcome by employing some form of compensation mechanism. However, creating and maintaining such a mechanism is an onerous undertaking, from both a policy, and an administrative perspective. To date, SACU is the only African RTAs that has managed to successfully devise, and maintain a compensation mechanism.⁸⁵ SACU compensates the BNLS states for being in a customs union with South Africa, which is the economic powerhouse in the region.⁸⁶ This compensation mechanism is however not without many challenges. A more comprehensive analysis of this will take place in the subsequent chapter.

Another administrative challenge incurred in the structuring of RTAs is rules of Origin (ROO)⁸⁷. These can be overly complex and inconsistent.⁸⁸ For example, some RTAs may require that there is certain degree of transformation while others call for a certain degree of ‘local value’ component.⁸⁹

In many countries, the preconditions that are necessary to gain the benefits from RI are rarely present. For example, the market integration approach, as is generally the case with a number of other economic models, is premised on a number of assumptions. These include full employment, disregarding adjustment and transportation costs, and trade within each

⁸³ At the time Kenya, being the most developed member of EAC, was gaining the lion’s share of benefits from integration at the expense of Tanzania and Uganda See further Baruti Katembo ‘Pan Africanism and Development :The East African Community Model’ (2008) 24 *Journal of Pan African Studies* 107 at 110

⁸⁴ M Oster ‘European development policies towards African, Caribbean and Pacific countries: from Lomé to Economic Partnership Agreements’ (2007) 41

⁸⁵ M Meyn (note 43) at 189.

⁸⁶ A more detailed analysis of this will take place in chapter 3

⁸⁷ Rules of origin are the requirements which are used to determine where a good was made. See further the World Trade Organization ‘the WTO to continue work on the harmonization of rules of origin’ http://www.wto.org/english/news_e/pres98_e/pr106_e.htm [accessed 30 November 2009]

⁸⁸ P Sutherland (note 33) at 22.

⁸⁹ Sutherland (note 33) at 22.

country is taken as perfectly competitive.⁹⁰ Theoretical assumptions are far removed from prevailing conditions.

From the above discussion on the advantages and disadvantages of RI, the following comments can be made. The potential benefits to RI would help alleviate many of problems faced by developing countries. This explains the emergence of RI as a primary economic tool.⁹¹ It is therefore clear that the pursuit of RI is not an end itself, but rather because of its potential to capitulate countries into a new era of development.⁹² This belief has reverberated throughout many other areas such as Africa, Asia, and Latin America.⁹³ Looking particularly within a Southern African context, the advantages of RI appear tailor-made to address the regions' various challenges. Such as limited resources, small markets, insufficient bargaining power within trade negotiations, and uncompetitive products. This, yet again underscores the appeal for RI within both SACU and SADC.

That being said though, the disadvantages of RI show that there are a number of pitfalls that countries may encounter in their quest for RI, which in themselves, may lead to a new set of problems.

2.5 Regional integration within an African context⁹⁴

The following section examines the particular relationship that has emerged between Africa and RI, and the subsequent implications.

The pre-eminence that has been given to regionalism on the African continent has stimulated a wealth of analysis and commentaries. Throughout the various exposés a common strain of argument can be traced; being that regionalism within Africa had a twin purpose. On one hand it was pursued as a vehicle for economic development, as was the case with a number of other developing countries. On the other hand, it became woven into the political ideology of Pan-Africanism.⁹⁵ Pan-Africanism was a movement that constituted both a retaliatory measure against the impact of colonial powers, while also calling on the continent's sense of shared political history and ideology.⁹⁶ Regionalism in this regard

⁹⁰ S Radelet (note 36) at 6.

⁹¹ S Mbaye 'Sub-Saharan Africa's leadership to nowhere' *Project Syndicate* <http://www.project-syndicate.org/commentary/mbaye6> [accessed 7 October 2009].

⁹² Food and Agricultural Organization (note 29) at 6.

⁹³ S Mbaye (note 91) at 1.

⁹⁴ The following section deals will largely deal with regionalism. As highlighted in an earlier discussion it is important to remember that regionalism embraces both RI and regional co-operation.

⁹⁵ M Lee (note 20) at 8.

⁹⁶ RMukamunana (note 22) at 90.

became ‘an articulation of continental identity’.⁹⁷ Kwame Nkrumah, one of the great architects of the movement, aptly captured the promise that regionalism held for the continent at the time in the following statement ‘... So long as we remain disunited, so long as we are balkanized, regionally or territorially we shall be at the mercy of colonialism and imperialism’.⁹⁸

The promise that regionalism was perceived to hold for the continent heralded, what would be the beginning of a long, and tumultuous relationship which would later involve organizations such as SADC.

In chronologically order, the most significant treaties and declarations dealing with regionalism are outlined.

The All African People’s Conference was held in 1958 in Ghana. This conference cemented that use of regionalism as a strategy for fostering economic and political development.⁹⁹ This was then followed in 1963 by the establishment of the Organization of African Unity (OAU). The Charter identified regionalism as the backbone for African Unity.¹⁰⁰ In the charter, states committed themselves to ‘coordinate and harmonize their general policies’.¹⁰¹

The Lagos Plan of Action (LPA) established in 1980, was regarded as a major coup for the continent. The LPA was drafted in recognition of the continent’s dismal economic performance, and was touted to lead the effort in an African economic recovery plan.¹⁰² It is generally considered to be the first African led development policy on the continent. It was comprehensive in its scope, covering an array of issues. At its core was the belief in the ‘collective development through regional integration’.¹⁰³ It was altogether an ambitious initiative which set out to establish an African Economic Community (AEC) by 2000.¹⁰⁴ The objectives of the LPA had emerged at the same time at the Structural Adjustment Program supported by the International Monetary Fund and the World Bank. These measures

⁹⁷ M Soko (note 28) at 38.

⁹⁸ R Mukamunana quoting Anyong Nyongo (note 22) at 90.

⁹⁹ H Schillinger (note 34) at 25.

¹⁰⁰ Economic Commission for Africa (note 39) at IX.

¹⁰¹ OAU Charter, Article 2, II.

¹⁰² Lagos Plan of Action, Preamble.

¹⁰³ R Mukamunana ‘Challenges of the New Partnership for Africa’s Development (NEPAD) : A case analysis of the African Peer Review Mechanism’ Available online at <http://upetd.up.ac.za/thesis/available/etd-05272008-162948/unrestricted/01chapter1.pdf> [accessed 10 December 2009] 5

¹⁰⁴ Lagos Plan of Action, Annex II: Implementation of the Plan of Action Article II:A.

supported by the 'Brentton Woods' institutions gained supremacy over the LPA and its objectives, were disregarded.¹⁰⁵

The next momentous action taken to advance regionalism was the Treaty establishing the African Economic Community, more commonly referred to as the 'Abuja Treaty', was signed in 1991.¹⁰⁶ The primary aim of the treaty was to create a framework for the development, mobilization and utilization of material resources in an effort to achieve continental self-sufficiency.¹⁰⁷ This treaty provided a time line for the establishment of AEC. This would take place over 6 stages during a 34 year period.¹⁰⁸ The phases that are laid out by the 'Abuja Treaty' reflect the market integration approach to RI identified earlier in this chapter. It was therefore envisaged that the AEC would move from an FTA, to a CU, followed by a Common Market, and an Economic Union, and then finally embrace total economic integration.¹⁰⁹

To facilitate this objective, a number of existing RTAs ranging from all over the continent, were designated as Regional Economic Communities (REC) which would be the building blocks for the AEC.¹¹⁰ The following RTAs were designated as building blocs: the Eastern Community of West African States, SADC, the Economic Community of Central African States, COMESA and the Arab Maghreb Union.¹¹¹

Despite these earlier efforts, initiatives on the continent soon began to lull. There are a number of reasons for this. Firstly, the OAU had largely been unified by the common goal of the abolishment of apartheid South Africa. Once this occurred, the organization's purpose appeared fuddled. The central problem was that there were a number of continental issues where there was little or no convergence between the members of the organization.¹¹² Examples of such instances include the disputes over Western Sahara and the invasion of

¹⁰⁵ R Mukamunana (note 103) 6

¹⁰⁶ Treaty Establishing the African Economic Community (1991)30 ILM 1241 referred to as the 'Abuja Treaty'.

¹⁰⁷ Abuja Treaty, Article 1(b).

¹⁰⁸ Abuja Treaty, Article 6.

¹⁰⁹ Supra.

¹¹⁰ Abuja Treaty Article 1(d).

¹¹¹ There has been criticism of SACU not being selected as a Regional Economic Community. See further Peter Draper et al 'SACU, Regional Integration and the overlap issue in Southern African Trade Policy Report no 15 available online at

[http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/D9DA3E58E0145FD8C125730C003BB642/\\$FILE/SADC%20EPA%20Paper%20Peter%20Draper%20From%20Spaghetti%20to%20Cannelloni'.pdf](http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/D9DA3E58E0145FD8C125730C003BB642/$FILE/SADC%20EPA%20Paper%20Peter%20Draper%20From%20Spaghetti%20to%20Cannelloni'.pdf) [accessed 22 October 2009].

¹¹² Corinne Packer and Donald Rukare 'The African Union and its Constitutive Act' (2002) 96 2 *American Journal of International Law* 365 at 366 available online at <http://www.jstor.org/stable/2693932> [accessed 30 November 2009].

Benin and the Shaba rebellions.¹¹³ Secondly, there was a dearth of political commitment to RI efforts.¹¹⁴ This was to an extent demonstrated by the decision to adopt Structural Adjustment Programs as opposed to the LPA. In addition to this, the continent's earlier efforts at RI had largely been 'inward looking' and had merely replicated import substitution industrialization policies at a regional level.¹¹⁵ These, amongst a number of other challenges led to widespread consensus of the need to rethink RI efforts.¹¹⁶

Around the dawn of the new millennium, interests in RI were reinvigorated as was first displayed by the Sirte Declaration. It identified that there was an 'imperative need and a high sense of urgency to rekindle the aspirations of our peoples for stronger unity, solidarity and cohesion in a larger community of peoples transcending cultural, ideological, ethnic and national differences'.¹¹⁷ It articulated the intention to establish the African, accelerate the creation of institution of AEC as well as 'strengthening and consolidating REC' which were identified as mechanisms for achieving the objective of the AEC.¹¹⁸

The establishment of the Constitutive Act of the African Union then followed these efforts. This act fully incorporated the provisions of the Abuja Treaty. Its objectives included the need to 'achieve greater unity and solidarity between the African countries and the peoples of Africa'.¹¹⁹ In order to facilitate these efforts the New Partnership for African Development (NEPAD) was also adopted. NEPAD is the developmental framework for the continent, which has subsumed RI as one of its priority areas.¹²⁰ NEPAD is now recognised as one of the programs of the AU.¹²¹

The Pan- African identity has been invigorated by a renewed interest in African renaissance. Albeit the context has changed as the fight for political freedom has been won, but the continent is now waging a struggle for its economic sovereignty.

2.6 Challenges towards African integration

Regional integration therefore presents a possible solution to many of the disadvantages endemic to many African countries. For this reason, it has been lauded as a panacea. Despite

¹¹³ Supra.

¹¹⁴ M Leshaba (note 27) at 11.

¹¹⁵ Supra.

¹¹⁶ C Packer (note 112) at 367.

¹¹⁷ OAU Sirte Declaration, Article 5.

¹¹⁸ OAU Sirte Declaration, Article 8 I, II, a.

¹¹⁹ Constitutive Act of the African Union Article 3a

¹²⁰ Economic Commission for Africa (note 39) at IX.

¹²¹ Supra.

such accolades, RI efforts on the continent in many respects have failed. There are various accounts by numerous authors who have identified reasons for the failure of regional integration on the continent. The following are the most cited. Firstly, RI efforts were not matched by the concomitant political will. In this regard, authors have bemoaned how RI on the continent has been visceral as opposed to rational and rhetorical as opposed to being real and setting out achievable targets.¹²²

The numerous, overlapping memberships to various organizations have also been highlighted as a crippling obstacle to RI in Africa. Presently, there are 14 REC on the continent. Membership to REC across the continent is divided in the following manner. 26 countries are members of at least two arrangements, while 20 belong to three arrangements with DRC being a member of four.¹²³ The overlapping membership's results in the duplication of efforts, and therefore exhausting already scant resources. It is possible to belong to more than one FTA the problem however is that countries are then faced with conflicting obligations such as differing liberalization schedules and ROO. This in turn requires that *more* comprehensive efforts be employed towards the harmonization of policies. This has led some to conclude that 'the range of requirements, multiple customs procedures and paper work, [are] counter to trade liberalization goals of facilitating and simplifying trade'.¹²⁴ This observation further lends merit to the proposal of utilising SACU as a vehicle for deeper integration. All SACU members simultaneously belong to SADC incorporating the two organizations would help mitigate the problem of overlapping memberships.

Other factors identified as hindering RI efforts include low levels of development, economic and political instability; high economic disparities between the various countries; a lack of trade coordination; and the abnormally low levels of intra-regional trade.¹²⁵ In addition to this, the reluctance by some countries to forgo tariff income and liberalize trade, as well as the lack of an effective agency with oversight functions have also hindered integration efforts.¹²⁶

Although many of the advantages outlined above have made RI appear particularly attractive to developing countries, within an African context the foray of dismal conditions have led to a *particular* [my emphasis] penchant for RI. These efforts are then only

¹²² M Leshaba (note 27) at 2.

¹²³ Economic Commission for Africa (note 39) at 51.

¹²⁴ Supra.

¹²⁵ Mareike Meyn (note 43) at 190.

¹²⁶ Economic Commission for Africa (note 39) at 44.

galvanised by the Pan African ideology. Africa has therefore seen RI as its only hope and has continued to cling to it in the hope that it will aid the continent in overcoming its host of problems and allow it enter the world economy in a meaningful way, ending years of marginalization.

In light of this, it is therefore imperative to critically examine any factor which poses to impact negatively on already fledgling RI agenda. It is within this context that the adverse impact of the EPAs becomes particularly ominous, and warrants even close scrutiny.

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CHAPTER 3

THE FRAMEWORK OF THE EPAS WITHIN SACU AND SADC

3.1 Historical overview of SACU and SADC

3.1.1 Southern African Customs Union (SACU)

Although there is speculation that the union originated from an 1886 agreement, common consensus is that the organization was formed in 1910.¹²⁷ The organization was established as a pragmatic solution to the *de facto* economic integration of four separate colonial entities, namely the Union of South Africa and the three landlocked British protectorates of Bechuanaland (Botswana), Basutoland (Lesotho) and Swaziland (BLS).¹²⁸ The 1910 agreement represented a way of accommodating foreign trade and distributing the revenue generated from trade with the rest of the world.¹²⁹ A customs territory was therefore established. There was a CET which was exercised in respect of all goods coming into SACU. Accompanying this was common pool and excise duties, as well as the complete mobility of goods which had been manufactured within the area.¹³⁰ Instead of following the linear path of the market integration model discussed in chapter 2, SACU ‘short-circuited this process’ emerging from the onset as a customs union.¹³¹ The customs territory was however dominated by South Africa. The larger country was responsible for levying of customs, sales and excise duties from all the members. In addition to this South Africa was also responsible for the paying out of incomes. This situation was carried through to the revised SACU agreement in 1969.

The 1969 SACU agreement, negotiated after the BLS states had attained independence, represented the first opportunity the BLS states had to act as independent

¹²⁷ P Draper (note 11) at 1.

¹²⁸ Colin McCarthy ‘SACU at the cross roads’ Available online: http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=55810&cat_id=1027 [accessed 20 April 2009] Namibia was a de facto member of SACU until it joined official in 1992

¹²⁹ Supra.

¹³⁰ N Grobbelaar ‘Small economies and Regional Integration- A mixed record- The case of Botswana’ in A Bosl, *et al Monitoring Regional Integration in Southern Africa yearbook Volume 5 2005* 41

¹³¹ Trudi Hartzenburg ‘Global governance and regionalism: a Southern African (SACU) perspective’ 5 available online at http://www.lan.org.ar/archivos/documentacion/PAPER_DOC61_WP_Hartzenburg_Global%20governance%20and%20regionalism.pdf [accessed 10 January 2010].

contracting parties.¹³² Consequently, some advances were made by the BLS states. These included the introduction of infant industry protection for the BLS countries and more equitable distribution of the revenue fund through a compensatory ‘surcharge’. This compensatory measure was said to both compensate the BLS states for entering into a customs union with a much larger country as well as accounting for the loss of sovereignty in fiscal policies that they experienced.¹³³

Following this the Rand Monetary Agreement was concluded in terms of which the Rand would be maintained as legal tender within Lesotho and Swaziland, therefore establishing a Common Monetary Area (CMA), although provision was made for the individual currencies to still be used.¹³⁴ The Rand Monetary Agreement later developed into the Multilateral Monetary Agreement. In principle under this arrangement, despite the fact that given that currencies were pegged to the Rand, each country maintained its own monetary policy. However, *de facto* the South African Reserve Bank still exercised great dominance.¹³⁵

SACU was not untainted by South Africa’s apartheid policies. However, the organization survived because the BLS countries were unwilling to relinquish the substantial revenues they derived from the revenue sharing formula.¹³⁶ Therefore, despite the fact that the BLS states were opposed to the heinous race based policies, the National Party managed to use SACU to secure a measure of ‘political acquiescence’.¹³⁷

Dissatisfaction over the 1969 agreement was expressed for many years. Despite this, it was only once South Africa had attained democracy that the SACU agreement was revisited again.¹³⁸ Given that the organization still bore its ‘colonial tag’, the African National Congress identified the renegotiation of the SACU agreement as its foremost priority for regional trade.¹³⁹ The 2002 SACU agreement therefore represents a trenchant departure from its predecessors. It is heralded as a victory for regional democracy,

¹³² David Bach ‘Integration through Hysteresis: SACU in a Comparative and Contextual Perspective in A Bosl, *et al Monitoring Regional Integration in Southern Africa yearbook Volume 5 2005* 144.

¹³³ Supra.

¹³⁴ Supra. Botswana had since opted out of the RMA system.

¹³⁵ D Bach (note 132) at 145

¹³⁶ Supra.

¹³⁷ P Draper (note 11) at 1.

¹³⁸ M Soko ‘The political economy of regional integration in Southern Africa’ Available online www.notre-europe.eu [accessed 20 April 2009].

¹³⁹ Chris Alden and Mills Soko ‘South Africa’s economic relations with Africa: hegemony and its discontent’ (2005) 43 3 *Journal of Modern African Studies* 367 at 371 Available online: <http://journals.cambridge.org> [accessed 5th May 2009].

transforming the organization from a body that had been *de facto* unilaterally administered by South Africa, to a democratic institution where all members are equal.¹⁴⁰ Thus, SACU now operates in terms of newly established democratic institutional structures, which largely function on a consensus basis.¹⁴¹

For the purpose of this paper, the most significant provisions of the agreement are the Article 2, Article 6, Article 31, Part 6 and Part 8 of the agreement. These are the sections, which would facilitate deeper RI. Article 2 addresses the objectives of the 2002 SACU agreement. The most pertinent objectives include, firstly economic development, this is identified as a central aim of the organization.¹⁴² Accordingly, its importance reverberates throughout the entire agreement. Related to this, Article 2 highlights the need for the integration of the SACU countries into the global economy.

The admission of new members is dealt with in terms of Article 6; it provides that in order for there has been unanimous agreement by the council.¹⁴³ Article 31 regulates trade relationships between member states and third parties.¹⁴⁴ In terms of this article, member states are required to establish common negotiating strategies that are adopted by the Council. This measure was taken to ensure that SACU members would all begin to adopt more co-ordinated trade policies.¹⁴⁵ Furthermore, member states are prohibited from entering into preferential trade arrangements without the prior consent of member states.¹⁴⁶

Part 6 addresses the irksome issue of revenues sharing, and herein lies one of the most distinctive characteristics of the agreement. The system has been restructured into three parts: The Customs component; the Excise component; and the Development component.¹⁴⁷ The Customs component will be distributed according to the level of 'intra-SACU imports'. This effectively means that the revenue system has maintained its' compensatory as the BNLS states are still compensated by South Africa for the trade benefits that flow to it as a result of

¹⁴⁰ C McCarthy and D Hansohm 'Integration through common policy challenges for industrial policy' in A Bosl, *et al Monitoring Regional Integration in Southern Africa yearbook Volume 5 2005* 150.

¹⁴¹ Supra

¹⁴² The objectives are that member states are to enhance the economic development, diversification, industrialization and competitiveness of Member States.

¹⁴³ SACU 2002 Agreement, Article 6.

¹⁴⁴ SACU 2002, Agreement Article 31.

¹⁴⁵ Catherine Grant 'Southern Africa and the European Union: the TDCA and the SADC EPA' 1 *TRLAC Trade Policy Brief* Available online at https://www.givengain.com/unique/tralac/pdf/20060518_TDCA_SADC_EPA_Grant.pdf [accessed 20 April 2009].

¹⁴⁶ Supra.

¹⁴⁷ SACU 2002 Agreement, Article 34.

the union.¹⁴⁸ The majority of the excise pool is distributed according to member states' GDPs. In this manner, it is said to be 'distributionally neutral'.¹⁴⁹ The development component, the third constitutive part of the revenue system, is an attempt to address the disparities in the levels of development of the SACU membership. This component will be allocated according to differences in per capita income, although it is adjusted, the development component continues to maintain a very strong redistributive function.¹⁵⁰

Alternatively, Part 8 of the agreement calls for a harmonized approach to be adopted towards the development of policies within a number of sectors. The harmonization of policies is to take place in industrial development, the agricultural sector, competition law and regulation as well as unfair trade practices.¹⁵¹ Specifically, member states are enjoined to develop 'common policies and strategies'¹⁵² for industrial development; 'ensure co-ordinated development'¹⁵³ within the agricultural sector; 'co-operation in relation to competition law and regulation' as well as calling on member states to 'address unfair trade practices' between member states.¹⁵⁴

Despite embracing a democratic model SACU still faces many challenges. It remains to be seen whether it will be possible to adopt a consensus based model when South Africa contributes over 95 per cent of SACU's GDP.¹⁵⁵ Would the BNLS states be able to stand their ground and not feel compelled to give into South Africa's interests? The divergence in the levels of development between South Africa and the BNLS means that they are influenced by different economic and policy considerations.¹⁵⁶

Secondly, while it is understood that the 2002 SACU agreement represents a 'framework agreement' eight years later not enough has been done to present a more comprehensive plan. This is particularly the case if one looks at the harmonization of

¹⁴⁸F Flatters and M Stern 'SACU revenue sharing: issues and options' 4 Available online <http://www.sega2.org.za/studies.php> [accessed 5th May 2009]

¹⁴⁹ Supra.

¹⁵⁰ Supra.

¹⁵¹ Supra.

¹⁵² SACU2002 Agreement, Article 38.

¹⁵³ SACU 2002 Agreement, Article 39.

¹⁵⁴ SACU 2002 Agreement, Article 41.

¹⁵⁵ P Draper (note 11) at 1.

¹⁵⁶ Colin McCarthy 'The new Southern African Customs Union agreement, challenges and prospects' in A Bosl et al *Monitoring regional integration in Southern Africa yearbook 4-2004* 160.

policies. Although from Part 8 is unclear how the diverging levels of harmonization required in the various sections will be distinguished.¹⁵⁷

Finally, one of the most challenging issues is the revenue sharing formula. Currently, the Lesotho and Swaziland government are severely dependent on the income from the revenue sharing formula, as 60 per cent of Lesotho's and up to 70 per cent of Swaziland total government income accrues from SACU.¹⁵⁸ For Namibia, the figure is less substantial standing at 41 per cent and for Botswana at 20 per cent.¹⁵⁹ The gradual lowering of tariffs is a reality. This takes place not only through commitments to multilateral trade liberalization but, is further given effect to by RTAs such as the EPA. As tariffs are progressively lowered, the size of the customs pool will also shrink.

In addition to this, there have been firm indications that South Africa is no longer willing to 'carry' the BNLS states. For example, in October 2009 the mini-South African budget had already estimated that customs and excise receipts would drop by roughly 20% compared with 2008.¹⁶⁰ Moreover, South Africa's newly established Department of International Relations and Cooperation may seek to administer an aid component in the future. The most likely source of funding has been identified as SACU transfers.¹⁶¹ Even if this was not the case, it is important that the BNLS realize that South Africa cannot indefinitely subsidize them at current levels.¹⁶²

In this regard, Colin McCarthy states that 'the future of customs as a source of revenue is not rosy'.¹⁶³ This has been acknowledged by the SACU members who have stated that 'in order to promote long term economic growth they need to move towards source of income other than SACU revenue pool and advance their fiscal reform processes'.¹⁶⁴ However, significant efforts in this regard have not yet materialized.

¹⁵⁷ Within the different sectors, diverging levels of harmonization are required. While Article 38 addressing industrial development explicitly calls for the adoption of 'common policies'; within agriculture member states are required to ensure 'coordinated development'. With regards to competition law, member states must 'co-operate'.

¹⁵⁸ F Flatters (note 148) at 5.

¹⁵⁹ Supra.

¹⁶⁰ Charlotte Mathews 'SACU transfers cut a blow for South Africa's neighbouring states'

http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&news_id=82401&cause_id=1694

¹⁶¹ Peter Draper and Nkululeko Khumalo 'The future of the Southern African Customs Union' available online http://www.saiia.org.za/index.php?option=com_content&view=article&id=1102&Itemid=204 [accessed 22 October 2009].

¹⁶² Supra.

¹⁶³ C McCarthy (note 156) 167.

¹⁶⁴ WTO 'Continued economic reforms would attract more foreign investment' *Trade Policy Review* 2003 available online at http://www.wto.org/english/tratop_E/tp213_e.htm [accessed 10 January 2010].

On a more positive note, in terms of the new revenue sharing formula South Africa is no longer the residual claimant. This makes it easier for the SACU membership to be expanded. This is because an expanded membership, in the absence of a guaranteed revenue rate is to an extent, far less financial taxing on South Africa.¹⁶⁵

3.1.2 Southern African Development Community

The predecessor to SADC was the Southern African Development Co-ordination Conference (SADCC). The organization was established by the adoption of the Lusaka Declaration. The reason *de entre* for SADCC was the shared goal by the ‘frontline states’ to oppose the apartheid regime.¹⁶⁶ Consequently, its aims were the following; reducing the economic dependence of the region on South Africa; promoting regional integration; and securing international support for its economic liberation plan.¹⁶⁷ In this manner, SADCC was able to present a united front of the Southern African countries against apartheid South Africa. The gradual demise of apartheid policies in a manner analogous to the AU, removed the ‘main political rationale’¹⁶⁸ which formed the basis of SADCC. There was therefore a need to restructure the organization.

The establishment of SADC transformed the organization from a ‘loose association into a legally binding arrangement’, providing a legal framework for co-operation amongst member states.¹⁶⁹ Currently, the organization has a membership of 14 countries.

It has been argued that SADCC had originally rejected the market integration approach and its subscription to ‘neoliberal principles of free trade’¹⁷⁰; as opposed to focusing on trade, the organization placed more emphasis on ‘promoting production and adopting a development integration approach to cooperation’.¹⁷¹ However, the birth of SADC brought with it a change in strategic direction. Consequently, the organization became more identifiable with the ‘dirigiste approach’ to RI.¹⁷² This approach incorporates the

¹⁶⁵ F Flatters (note 148) at 6.

¹⁶⁶ H Mutai (note 25) at 112.

¹⁶⁷ M Soko (note 28) at 10.

¹⁶⁸ C Jacobeit et al ‘Overlapping membership in COMESA, EAC, SACU and SADC; trade policy options for the region and EPA negotiations 38 EPA available online at <http://www.gtz.de/de/dokumente/en-epa-overlapping-memberships-2005.pdf> [accessed 15 May 2009].

¹⁶⁹ RISDP 16 July 2003 3.

¹⁷⁰ H Mutai (note 25) at 113.

¹⁷¹ *Supra*.

¹⁷² Mareike Meyn ‘The progress of Economic regionalism in southern Africa challenges for SADC and COMESA’ 186 in A Bosl, *et al Monitoring Regional Integration in Southern Africa yearbook Volume 5 2005*.

‘promotion of industrial development; while simultaneously working towards the ‘deepening of economic integration and the facilitation of intra-regional trade’.¹⁷³ It therefore accommodates different levels of development within the organization.¹⁷⁴ In this manner, it is a hybrid of the market and the development approaches to RI. Within the context of SADC, the use of the ‘dirgiste approach’ is exhibited by the organizations objective to establish a framework of co-operation which provides for

deeper economic cooperation and integration, on the basis of balance, equity and mutual benefit, providing for cross-border investment and trade, and freer movement of factors of production, goods and services across national borders.¹⁷⁵

In order to facilitate these objectives, the organization assigned designated areas to be the subject of 22 separate legal instruments referred to as protocols. Although initially, the different protocols had been administered by the individual states, there were delays in implementation. In order to facilitate implementation the protocols were then divided into different directorates which are managed by the SADC secretariat in Gaborone.¹⁷⁶

The SADC Trade Protocol was concluded in 1996. The Protocol is one of SADC’s most important legal instruments, and is further testament of the organization embracing more of a free market approach. The main objective of the Trade Protocol is to ‘further liberalize intra -regional trade- in goods and services on the basis of fair, mutually equitable and beneficial trade arrangements’ and ‘to establish a free trade area for the SADC region’.¹⁷⁷ In relation to this paper, the most important provisions of the Trade Protocol, being those that in some manner affect RI efforts are the following. Firstly, part 2 addresses the elimination of barriers to intra SACU trade. It provides that the elimination of barriers to trade shall take place within 8 years of the protocol.¹⁷⁸ Article 14 also calls upon member states to take measures to ‘facilitate the simplification and harmonization of trade documentation and procedures.’¹⁷⁹

Part 6 addresses some new generation trade issues, and consequently covers trade in services, intellectual property rights and competition policy. More specifically, Article 23 addresses trade in services recognizing the importance of this sector and furthermore

¹⁷³ Supra.

¹⁷⁴ M Meyn (note 172) at188.

¹⁷⁵ M Soko (note 138) at10

¹⁷⁶ Supra.

¹⁷⁷ SADC Trade Protocol, Article 2.

¹⁷⁸ SADC Trade Protocol, Part 2, Article 3.

¹⁷⁹ SADC Trade Protocol, Part 2 Article 14.

undertaking to implement the GATS mandate to liberalize the sector.¹⁸⁰ Intellectual Property Rights (IPR) is covered by Article 24.¹⁸¹ In terms of the Article, there is an undertaking to ‘adopt policies and implement measures’ within the community to protect IPR as mandated by TRIPS. Alternatively, Article 25 deals with competition policy; it contains an undertaking to prohibit unfair practices and promote competition.¹⁸² Unlike the SACU Agreement though, part 6 does not make provision for common positions to be established in these areas.

Part 8 governs trade relations among member states and third countries. In dealing with this, Article 27 permits member states to maintain RTAs that were in place when the protocol was entered into. There is however, a caveat to this, members who are party to existing arrangements will be required to review them ‘with a view to attaining the objectives of this protocol’.¹⁸³ Over and above this member states are allowed to enter into new arrangements as long as ‘they are not inconsistent with the objectives of the protocol.’¹⁸⁴ The co-ordination of trade policies is addressed in Article 29. It calls for member states to ‘co-ordinate their trade policies and negotiating positions in respect of relations with third countries and international organizations as provided for in Article XXIV of the treaty’ this is to take place in order to further the objectives of the protocol.¹⁸⁵

In accordance with the Trade Protocol in August 2008, the SADC FTA was launched between eleven of the fourteen members of SADC.¹⁸⁶ Therefore, from this date, producers and consumers have paid significantly reduced tariffs on 85% of all trade on goods between the eleven countries.¹⁸⁷ The FTA is a coup for the organization and demonstrates SADC’s continued efforts to foster deeper RI efforts, accelerate economic growth and reduce poverty.¹⁸⁸ According to the ‘ambitious’ roadmap, a customs union would then follow by 2012, this would then become a common market in 2015. This would cumulate in the establishment of a political union accompanied by one central bank with a single currency by 2016.

¹⁸⁰ SADC Trade Protocol, Part 6, Article 24.

¹⁸¹ SADC Trade Protocol, Part 8, Article 24.

¹⁸² SADC Trade Protocol, Part 8, Article 25.

¹⁸³ SADC Trade Protocol, Part 8, Article 27.

¹⁸⁴ Supra.

¹⁸⁵ SADC Trade Protocol, Part 8, Article 29.

¹⁸⁶ Regional Trade Facilitation Program ‘Tripartite talks set new trade path’ available online at <http://www.rtfp.org/news.php?id=78> [accessed 22 May 2009].

¹⁸⁷ The countries are Botswana, Lesotho, Madagascar, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

¹⁸⁸ B Mabola ‘SADC launches Free Trade Area’ available online at <http://www.southafrica.info/africa/sadc-fta.htm> [accessed 22 May 2009].

Another indication of how SADC has employed RI is the Regional Indicative Strategic Development Plan (RISDP). This is SADC's strategy for socio-economic development. It is

designed to provide strategic direction with respect to SADC programs, projects and activities outlines the necessary conditions that should be realised towards the attainment of SADC's regional integration and development goals¹⁸⁹

The ultimate objective of RISDP is to strengthen integration efforts within SADC, put poverty alleviation at the forefront as well as fast track the attainment of other economic, as well as non-economic development goals.¹⁹⁰

One of the SADC's greatest achievements is considered its role in fostering a sense of regional identity and a common political outlook on some issues. In recent years however, SADC has experienced trenchant divisions. These have been particularly palpable from a political front as has been seen in the different stances adopted towards the socio-economic crisis in Zimbabwe.¹⁹¹ In addition to this, there remain discrepancies between SADC's vision, and what it has in fact achieved. For example, despite the implementation of the Trade Protocol there remain abnormally low levels of intra SSA trade with over 80% of the SSA trade taking place outside the region.¹⁹² It should be borne in mind though that the organization remains relatively young and as a result, still represents a regional community, which is largely in its formative stages.

From the above examination of SACU and SADC the following conclusions can be drawn.

The new SACU agreement is testament to the fact that the organization has taken firm steps away from initially 'being an arrangement of convenience' for the administrative purpose of colonial administrators, and establishing the foundation for deeper RI. The agreement provides for increased membership, the adoption of common positions, and exercises control over the trade agreements undertaken by its members. These factors have to be assessed in conjunction with the following considerations. Firstly, SACU has considerable

¹⁸⁹ SADC RISDP 109

¹⁹⁰ SADC RISDP 110

¹⁹¹ Institute for War and Peace Reporting 'SADC split over Zimbabwe' available online <http://ocha-gwapps1.unog.ch/rw/rwb.nsf/db900sid/RMOI-7L635J?OpenDocument>. [accessed 10 January 2010]

¹⁹² P Manners and A Behar World Development Report 'Trade within Sub-Saharan countries, opportunities for low income countries' accessed online available at <http://siteresources.worldbank.org/INTWDR2009/Resources/4231006-1204741572978/mannersbehar.pdf> [accessed 5th May 2009].

institutional memory, and the Common Monetary Area, which displays elements of an economic union, is the most integrated region within Southern Africa. The helps to yet again relay the extent to which the organization is deeply enmeshed in the region's economic fibre. In addition to this, the SACU has begun the process of notifying the customs union to the WTO. This would not only give SACU legal standing within multilateral negotiations, but it would furthermore help in the co-ordination efforts amongst members.¹⁹³

Therefore *de facto* this more intensive level of integration within the larger SADC group is an application of variable geometry. Variable geometry refers to the 'sequencing [of] integration in geographic space, allowing subsets of countries to move faster and deeper in certain areas'.¹⁹⁴ Suggestions have therefore been rampant for SACU to introduce formally an application of variable geometry. It should be remembered that within the framework of SACU 2002 agreement, provision has already been made for the acceptance of new members. In addition to this, SACU used as a basis for integration within the area would help allay the problem of overlapping memberships within the area. It is therefore clear that SACU used as a vehicle for deeper RI would be advantageous to Southern Africa.

Turning to SADC, the importance that is accorded to RI is particularly palpable in light of the significant legal obligations that the organization has set itself. The importance that the organization has accorded RI is articulated not only in terms of the Trade Protocol but by the RISDP. The preeminence of RI in the context of SADC can therefore not be disputed.

When comparing the legal obligations relating to RI that both organizations have undertaken, an important distinction emerges. The SADC has laid down far more comprehensive legal commitments explicitly addressing their RI than SACU. For example within the SACU 2002 Agreement there is no mention of RI. It is submitted that despite this though the organization is committed to integration. This is seen from the Council of Ministers' undertaking to 'define a roadmap for moving towards an Economic Community

¹⁹³ SACU 'Trade Negotiations' available online

<http://www.sacu.int/traden.php?include=about/traden/multilateral.html> [accessed 10 January 2010].

¹⁹⁴ Lolette Kritzinger-van Niekerk 'Regional Integration: Concepts, Advantages, Lessons of experience' 9 available online at <http://siteresources.worldbank.org/EXTAFRREGINICOO/Resources/Kritzinger.pdf> [accessed 30 November 2009] The most adept example of an application of variable geometry is the EU. Within the union the Euro has been adopted as the official currency, this is however only in place in 16 out of 27 member countries. See further http://europa.eu/scadplus/glossary/variable_geometry_europe_en.htm.

and Monetary union'¹⁹⁵ as well as the various legal commitments that are laid down by the 2002 Agreement which lay a foundation for the organization's future RI efforts.

A criticism which can be leveled at both organizations is that they fail to sufficiently address Singaporean issues. The Singaporean issues refer to the new generation trade issues of trade and competition policy, trade and investment and transparency and government procurement. The name association arises because it was at the 1996 Singaporean Ministerial conference that a decision was taken to set up working parties in these fields.¹⁹⁶ Some authors though include also define Singaporean issues to include trade in services, the environment and labour. Although Article 40 of the SACU agreement addresses competition policy, all it mandates is that there should be cooperation in the development of competition law and regulation. Alternatively, Article 25 of the SADC Protocol merely requires that members promote competition. Although the Singaporean issues *within the context of the EPAs* [my emphasis] have had a negative impact on RI, if SACU and SADC are to achieve a deeper level of integration at some point in the future these organizations will have to more purposefully engage in these issues. This is because 'the future trade agenda will arguably be defined by new generation issues'.¹⁹⁷ As it stands though it is likely that SACU and SADC do not have the capacity to engage in these new areas, nonetheless, they should still be looked at as a long term goal. What does signify a step in the right direction the SACU's Council of Ministers has recognized 'the importance of developing a common strategy on new generation issues, such as services, investment, and intellectual property rights'.¹⁹⁸

The above section provided a historical context for SACU, SADC and RI. In the following sections, the focus then turns to an examination of the other organizations pertinent to this dissertation, namely the ACP and the EU. In this section, a comprehensive analysis as the relationship of the two blocks is traced from the Lome Agreement, through to the EPAs.

¹⁹⁵ SACU (note 12) at 5.

¹⁹⁶ Ron Sundrey 'WTO and Singaporean issues' in R Cassim et al *The WTO an African perspective, more than a decade later* 2009 252.

¹⁹⁷ Trudi Hartzenburg 'Global governance and regionalism: A Southern (SACU) African perspective' 2006 *Latin American Trade Network Working Paper* 61 available online at http://www.latn.org.ar/archivos/documentacion/PAPER_DOC61_WP_Hartzenberg_Global%20governance%20and%20regionalism.pdf [accessed 15 January 2010].

¹⁹⁸ SACU (note 12) at 2.

3.2 African Caribbean Pacific group and European Union

The Treaty establishing the European Community, one of two Rome treaties,¹⁹⁹ was signed in 1957 and established the European Economic Community (EEC) between the signatories; namely Germany, France, Italy, Belgium, Luxemburg and the Netherlands. The Treaty was established after Europe had witnessed two world wars and the need to avoid any future conflicts was paramount.²⁰⁰ Consequently, the EEC endeavoured to align European countries together. This would take place primarily through the establishment of a common market aimed at developing the cohesiveness of the countries' economic policies.²⁰¹ Part IV of the Treaty made provision for an 'Association of Overseas Countries and Territories' (OCT). This provision was prompted by France, which had wanted to maintain relations with countries that it still identified with.²⁰² The objective of the Association was to 'promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole'. In this regard, the association made provision for commercial exchanges, investment opportunities and the abolition of customs duties.²⁰³ The Association agreement was both negotiated and signed without any input on part of the OCTs.

From the 1950s the 'winds of change' began to blow through Africa, as countries began to gain their independence.²⁰⁴ This necessitated the terms of the Treaty of Rome, having in many ways been imposed upon the OCTs to be redrafted.²⁰⁵ During the redrafting process, the countries which had formed part of the Association Agreement would continue in terms of the agreement on a provisional basis. However, amendments would be made to give cognizance to the newly independent countries. This process cumulated in the signing of the Yaoundé Convention in 1963 between the representatives of the EEC Member States, 17 African countries and Madagascar. In terms of the Convention, it was furthermore agreed that financial support would be provided to the countries through the European Development

¹⁹⁹The Treaty establishing the European Economic Community 1956 EU C325/36 EN

²⁰⁰ The European Commission 'Overview of the EU-ACP Partnership Agreement' available online at http://ec.europa.eu/development/geographical/cotonouintro_en.cfm [accessed 10 May 2009].

²⁰¹ Article 2 stated that 'It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.'

²⁰²The Treaty establishing the European Economic Community 1956 EU C325/36 EN Part IV.

²⁰³Supra.

²⁰⁴ The Southern African countries though would only gain their independence later on in the 1960s.

²⁰⁵ European Commission (note 200) at 1.

Fund.²⁰⁶ As the original document was only valid for 5 years, it was revised in terms of the Yaoundé II. The emphasis of the Yaoundé Convention fell on trade. In terms of the Agreement, a reciprocal, preferential trading relationship was established between the ACP countries and the EEC.²⁰⁷

The Yaoundé Convention did not sit well with the former English colonies. Although some efforts were made to address this situation, they were largely not effective.²⁰⁸ This situation came to a head in 1973 when the United Kingdom joined the European Community. As a result of this, the terms of the protocols provided for the extension of the European development strategies to Commonwealth nations. This included the African, Caribbean and Pacific nations (ACP). The formal association of these countries would be later be cemented by the signing of the Georgetown Agreement in 1975.²⁰⁹ After extensive negotiations, this developed into the Lome Agreement. This agreement was signed by 9 EEC and 46 ACP States. Of particular significance in the Lome 1 Agreement was Article 7 which introduced the principle of non-reciprocity. It stated that

In view of their present development needs, the ACP shall not be required, for the duration of this Convention, to assume, in respect of imports of products originating in the Community, obligations corresponding to the commitments entered into by the Community in respect of imports of the products originating in the ACP States²¹⁰

This agreement heralded what would be the beginning of a long relationship between the EU and the ACP countries. This relationship was not only sustained in terms of the Lome Agreement which was revisited in Lome II, Lome III and Lome IV; it was further entrenched in terms of the European Development Fund (EDF) initiative. This initiative saw substantial funds allocated to the ACP countries.²¹¹

²⁰⁶ Supra.

²⁰⁷ Supra.

²⁰⁸ For example a special bilateral agreement was signed with Nigeria in 1969 but was never ratified due to the civil war in Biafra. Another agreement, separate from the Yaoundé Convention, the Arusha (Trade) Agreement, was signed in 1969 with three East African countries – Kenya, Uganda and Tanzania.

²⁰⁹ European Commission (note 200) at 1.

²¹⁰ Supra.

²¹¹ M Meyn 'Economic Partnership Agreements: A 'historic step' towards a 'partnership of equals'? 7 *Working Paper* 288

available online at <http://www.odi.org.uk/resources/details.asp?id=1088&title=economic-partnership-agreements-historic-step-towards-partnership-equals> [accessed 12th May 2009].

For the purposes of this paper, it is not important to review the provisions of *each* of the various Lome Agreements.²¹² It is however imperative to have an understanding of key points. Firstly, the Lomé Conventions provided 25 years of development cooperation between the ACP States and the EU.²¹³ The principle of non-reciprocity introduced in the Lome 1 Convention was carried through to Lome IV. The Lome Conventions were coupled with Trade Protocols on products that were deemed to be sensitive. These protocols covered beef, run, veal, sugar and bananas.²¹⁴ In addition to this, the Lome Conventions introduced a compensatory mechanism for the ACP countries which accounted for the fluctuations in the commodity prices in agricultural and mineral exports.²¹⁵ The nature of the conventions evolved as it began to encompass more non-trade issues for example, Lome III incorporated clauses relating to human dignity, economic, cultural and social rights, and political dialogue.²¹⁶

At the time the Lome Convention represented the ‘most ambitious North-South trade agreement to date’.²¹⁷ It provided largely duty-free access to the European market, save for a few ‘sensitive agricultural products’. The objective of the conventions had been to ‘integrate the ACP countries into the global markets and to diversify their export base’.²¹⁸ However, despite this stated aim, the countries’ share in the EU market has fallen from 6.7 per cent in 1976 to 3.0 percent in 2005.²¹⁹ A particularly striking comparison is that many non-ACP countries, not privy to preferential access, have managed to export more goods to the EU.²²⁰ This has been attributed to a number of reasons. The European Union in a 1996 Green Paper submission identified some of these reasons.²²¹ For example the paper noted that the preferential access given to the ACP countries contributed towards the highly protectionist and uncompetitive industries, or alternatively that the ACP countries did not have an

²¹² For a more detailed account of the Lome Conventions see B Onguglo (note 18) at 16.

²¹³ B Onguglo (note 18) at 17.

²¹⁴ Supra.

²¹⁵ Supra.

²¹⁶ Geert Laporte ‘The Cotonou Partnership Agreement: What role in a changing world? Reflections on the future of ACP-EU relations’ 22 *ECDPM Policy Management Report* 13 available at www.ecdpm.org/pmr13 [accessed 14 November 2009].

²¹⁷ Supra.

²¹⁸ M Meyn ‘Are Economic Partnership Agreements likely to Promote or Constrain Regional Integration in Southern Africa?’ 31 in A Bosl, *et al* *Monitoring Regional Integration in Southern Africa yearbook Volume 4 2004*

²¹⁹ Supra

²²⁰ G Laporte (note 216) at 72.

²²¹ European Union ‘Green Paper on relations between the European Union and the ACP countries on the eve of the 21st century: Challenges and options for a new partnership’ Chapter 3 available online at http://europa.eu/documentation/official-docs/green-papers/index_en.htm [accessed 7 October 2009].

environment that was conducive to the development of competitive sectors, investment growth or the diversification of production.²²²

The historical overview of the EU-ACP relationship highlights the following. Firstly, the two blocks have a long-standing relationship. This was founded primarily during the colonial periods and then later through a series of conventions. The Lome Conventions that sustained the trade relationship gave the ACP group preferential access to the EU market. This access therefore explains why it is that many countries within this group have come to be structurally dependent on European trade. When assessing the above factors collectively, Southern Africa's countries endemic dependence on EU trade is a product of the areas' economic history, in light of all factors a likely outcome. This kind of endemic dependence has resulted in the ACP's desperately seeking ways to securing ongoing preferential market access to the EU market. This would even led Southern African countries to be tied to a trade arrangement which may have the potential to adversely impact on regional integration efforts; this despite the importance of RI in the region. As advanced earlier, this is *not* to suggest that the EPAs will be without benefits, but rather to indicate that RI efforts that have been poised to play such a central role within both organizations would lose their supremacy.

3.3 The Economic Partnership Agreements

3.3.1 Background and provisions of the EPAs

The preferential access the ACP countries had with the EU, originating in the 1960s predated the WTO rules based dispensation. It has largely been legitimized by a series of waivers. These waivers however were not only becoming exceedingly vulnerable to legal scrutiny²²³; but furthermore, were overwhelmingly more difficult to obtain. This, together with the failure of the Lome Conventions to substantially impact on the development of the ACP group gave the EU the momentum to adopt a new approach.

The Cotonou Partnership Agreement²²⁴, replacing Lome IV, was concluded in 2000 and with the exception of South Africa, all SADC countries were signatories.²²⁵ The Cotonou Partnership Agreement heralded a new era in the trade relationship of the EU and the ACP countries. The entire basis of the relationship metamorphosed from one based on the

²²² *Supra*.

²²³ This is discussed in further detail in the next chapter.

²²⁴ The full title is Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its member states, of the other part

²²⁵ Cotonou Partnership Agreement, Article 1.

preferential access of the ACP countries, to reciprocity.²²⁶ Notwithstanding this, it is important to remember the EPAs will both maintain, and improve upon the preferential market access of the ACP group.

The Regional Economic Partnership Agreements are the trade dimension of the CPA. In terms of the Cotonou Agreement, the EPAs are ‘asymmetrical trade agreements which not only cover trade in goods and services, but also extend to Singaporean issues which include ‘competition, government procurement, intellectual property, and trade facilitation’.²²⁷ The inclusion of the ‘Singaporean issues’ makes the EPAs unique in that they go *beyond* the traditional trade dimensions of FTAs. In this manner, the EU proposes that the EPAs adopt a comprehensive approach towards the ACP countries simultaneously targeting trade, politics and governance as well as development.²²⁸ The EU has adopted this broad based approach in order to circumvent the failures of previous trade arrangement. The EU believes that this multi-faceted approach will allow ‘certain policy reform measures to be ‘locked in’.²²⁹

The EPAs are international agreements and thus once ratified are binding on member countries. The objectives of the EPAs include poverty reduction; promoting regional integration; fostering sustainable economic and social development; ensuring compatibility with WTO rules, as well as the adoption of a supervisory role in the gradual transition of the ACP countries into the world economy.²³⁰

The EPAs shall be built upon the following key principles:

- Development

The agreement highlights that the EPA need to be developmentally orientated. The central objective of the Cotonou Partnership ‘is the reduction and eventual eradication of poverty’.²³¹ It has been constantly reiterated that the EPAs ‘are not just common agreements on trade.’²³² This dictum forms part of the rhetoric constantly reinforced by the EU.²³³

²²⁶ Meyn (note 218) at 31.

²²⁷ Meyn (note 218) at 35.

²²⁸ A Borrmann and M Busse ‘The institutional challenges of the EU/ACP Economic Partnership Agreements’ 8 available online at http://www.fes.de/aktuell/focus_europa/4/Docs/FES_HWWA_Institutional_Challenge_EPA.pdf [accessed 13th May 2009].

²²⁹ Keet (note 1) at 8

²³⁰ Cotonou Partnership Agreements, Article 1.

²³¹ Supra.

²³² G Laporte (note 216) at 75

- Reciprocity

As stated before the reason *de entrée* for the EPAs has been framed around the need to secure WTO compatibility. The trade relationship will ultimately cumulate in the establishment of FTA. In terms of Article 37.7, the establishment of the FTA will involve the progressive abolishment of trade restrictions.²³⁴ Throughout the agreement reciprocity, and the consequent trade liberalization, is identified as unleashing a host of benefits for the ACP countries. These include enhancing supply and production efficiencies, attracting investment, improving market access as well as enhancing co-operation.²³⁵ This would then contribute to the growth and development of the countries.²³⁶

The vast majority of goods from the ACP countries entering the EU already have duty free and quota free access. Therefore, the most substantial degree of liberalization would be undertaken by the ACP countries that now have to provide better market access terms to the EU.²³⁷ The requirement of reciprocity has gained much attention and its impact on the integration efforts of SACU and SADC will be examined in chapter 5.

- Differentiation

The agreement undertakes to account for the different levels of development of the contracting parties. This is then articulated in a number of ways. Firstly, the agreement states that Special and Differential treatment (SDT) allowed within the WTO will be adopted. Provision for SDT is built into the agreement in the form of flexibilities. These flexibilities will be extended in terms of transitional periods, the observance of sensitive sectors, asymmetry in terms of tariff liberalization, the provision of technical assistance and the meeting of obligations by the ACP countries.²³⁸ Article 41.2 underlines the importance of SDT to be extended to ACP suppliers in the field of trade in services.²³⁹ In addition to this,

²³³ Supra.

²³⁴ Cotonou Partnership Agreement Article 37.7.

²³⁵ Cotonou Partnership Agreement Article 36.1, 36.4, 34.3

²³⁶ G Laporte (note 216) at73.

²³⁷ Sanoussi Bilal and Francesco Rampa ‘ Alternative (to) EPAs. Possible scenarios for the future ACP trade relations with the EU’ *1Policy Management Report 11* Maastricht: ECDPM available online at http://www.ecdpm.org/Web_ECDPM/Web/Content/Navigation.nsf/index2?readform&http://www.ecdpm.org/Web_ECDPM/Web/Content/Content.nsf/7732def81ddd7ac1256c240034fe65/ef21975bac4deaadc1257115004cd88a?OpenDocument [accessed 30 October 2009].

²³⁸ Cotonou Partnership Agreement, Article 37.

²³⁹ Cotonou Partnership Agreement, Article 41.1.

particular attention is given to plight of LDCs as well as the overly precarious situation of small, landlocked and island states.²⁴⁰

- Regionalism

The Partnership agreement purports to advance economic and trade co-operation while cognizant of the fact that ‘regional integration is a key instrument in the integration of ACP countries into the world economy’.²⁴¹ In addressing the RI agenda of the ACP countries, the following measures are therefore in place. To begin with, there is a commitment to provide assistance, and to develop capacities for the various objectives that the ACP countries have identified as being within the ‘context of regional and sub-regional co-operation and integration’.²⁴² Furthermore, the negotiations would be framed in a manner that *accords importance to the RI processes in the ACP countries* [in emphasis]. Support for the ACP countries’ RI efforts however is not only captured within the agreement itself but is a sentiment that has been expressed through a variety of forums.²⁴³

In the next section a brief detour is taken as an examination of the TDCA, South Africa’s FTA with the EU, takes place. This will be done in order to shed light as to how the agreement came about and its relation with the rest of the BNLS states.

3.3.2 The Trade, Development and Co-operation Agreement (TDCA)

The TDCA is an FTA between South Africa and the EU, primarily dealing with trade in goods, although some provision is made for services and investment.²⁴⁴ The primary reason that South Africa’s trade relationship is not governed in terms of the Lome Convention is because once the country had emerged from apartheid, and negotiations thus began feasible, the EU felt that its economy was relatively stronger to that of the ACP countries. It therefore preferred to negotiate an agreement outside of the EU-ACP structures.²⁴⁵

²⁴⁰ Cotonou Partnership Agreement, Article 35.3.

²⁴¹ Cotonou Partnership Agreement, Article 35.2.

²⁴² Cotonou Partnership Agreement Article 29.

²⁴³ See further European Commission

http://ec.europa.eu/development/icenter/repository/Communication_on_Regional_Integration_COM-2008-604_EN.pdf [accessed 22 October 2009].

²⁴⁴ TDCA, Article 5.

²⁴⁵ C Grant (note 145) at 4

Negotiations for the TDCA began in 1996 and despite South Africa's membership to SACU, the EU's negotiating mandate explicitly excluded the possibility of incorporating the BNLS states into any kind of arrangement.²⁴⁶ South Africa therefore negotiated the terms of the agreement without consulting the BNLS states. As a result of this, not only did the BNLS states view the TDCA agreement with some degree of animosity, but it also created confusion as to what the status of the relationship between the BNLS states and the EU was.²⁴⁷ Attention should be drawn to the fact that as the TDCA was concluded in 1999, the TDCA fell under the auspices of the 1969 SACU agreement. It was therefore not bound to seek permission from the BNLS states prior to negotiating with a third party as is mandated by the 2002 Agreement²⁴⁸.

As the BNLS states are part of SACU, they have the same economic policy as South Africa and have *de facto* incorporated many elements of the TDCA albeit, without the requisite consultation, compensation or consent.²⁴⁹ Therefore, the majority of the BNLS states imports, coming in through South Africa; enter in terms of TDCA trade liberalization schedule. It is only the exports from these countries that enter the EU on more favourable terms.²⁵⁰ The implication for the BNLS countries is substantial. The countries have been forced to reduce their tariffs, liberalizing their economies at an accelerated rate agreed upon in terms of the TDCA. This will reduce the monies generated by common external tariff (CET) which will, in turn have a dismal impact on the government revenues of the BNLS states, which substantially rely on the CET as a source of income. In addition to this because the TDCA was accompanied by such restrictive ROO, the BNLS states were not able to benefit from preferential access given to South Africa.²⁵¹

Although South Africa had originally only been granted observer status in 2006, it formally became part of an EPA.²⁵² This took place in order to curb the anomaly resulting from South Africa having its trading relationship with the EU being governed on a different

²⁴⁶ C Grant (note 145) at 4.

²⁴⁷ Supra.

²⁴⁸ In terms of Article 19 (1) of the SACU 1969 Agreement South Africa though was required to consult with the organization prior to entering into a trade agreement with a third party See further C McCarthy (note 156) 160.

²⁴⁹ TRALAC 'EPA background: The Trade Development and Cooperation Agreement' available online at http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=36881&cat_id=1052 [accessed 20th May 2009]

²⁵⁰ Supra.

²⁵¹ For a more detailed analysis of the BNLS states dependence on income generated by the CET see further F Flatters (note 148) at 4.

²⁵² SADC EPA Group - EC Negotiations: Assessing the Emerging Outcome available online at <http://www.thedti.gov.za/parliamentary/EPAoutcomes.pdf> [accessed 25th May 2009].

basis to the rest of SACU.²⁵³ In addition to this a working group had been established to coordinate the SADC EPA negotiations and a TDCA review process.²⁵⁴

3.3.3 The negotiation process

In order to ensure that the negotiations did not exceed the allocated timeframe, and consequently disturb the continual flow of trade between the two blocks, a ‘two step’ approach was adopted.²⁵⁵ Accordingly, the immediate focus of the negotiations was geared towards signing an interim EPA that would focus on trade in goods. The interim EPA is thus a ‘stop gap’ measure to facilitate the continuation of trade.²⁵⁶ The interim EPAs would then be followed by a subsequent round of negotiations geared towards the signing of a full EPA, which would then thrash out all remaining details.

To mitigate against skewed power relationship during the negotiation stages the EPAs were to be concluded by ‘regional blocks’ of the ACP countries.²⁵⁷ Ideally the EPAs were to be negotiated through pre-existing customs unions of the ACP countries. However, given that within the ACP group very few regions had integrated to such a level, this was largely not possible.²⁵⁸ Therefore, countries had to adopt a ‘second best’ strategy in organizing negotiating groups.

A number of considerations ultimately determined the manner through which regional blocks for the purpose of EPAs would emerge. Southern Africa is plagued by a ‘spaghetti bowl’ of overlapping memberships; in addition to this, authors have asserted that national interests proved to be paramount over regional considerations.²⁵⁹ Consequently, it was found to be unfeasible to negotiate within existing structures. Southern and Eastern African region are therefore the only countries within the ACP group to negotiate outside of existing regional integration arrangements.²⁶⁰

This then lead to the creation of two new bodies whose *sole purpose* [my emphasis] was to facilitate EPA negotiations; the SADC EPA and the Eastern and Southern African EPA. The SADC EPA consisted of the BNLS states together with Angola, Mozambique, and Tanzania. Alternatively, the ESA EPA is made up of Burundi, Comoros, DRC, Djibouti, Eritrea,

²⁵³ Supra.

²⁵⁴ C Grant (note 145) at 4

²⁵⁵ Supra.

²⁵⁶ Supra.

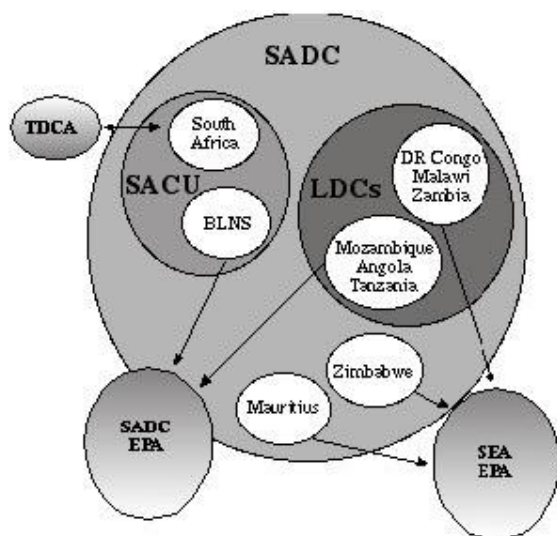
²⁵⁷ M Meyn ‘Regional integration and EPA configuration in Southern and Eastern Africa-what are the feasible alternatives’ in A Bosl, *et al Monitoring Regional Integration in Southern Africa yearbook Volume 6 2006* 140

²⁵⁸ Supra.

²⁵⁹ Supra.

²⁶⁰ Supra,

Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe.²⁶¹ At a later stage though Tanzania pulled out of the SADC-EPA configuration and began negotiations with the EU as part of EAC group.



The above represents how the SADC group has chosen to negotiate the EPAs²⁶²

The 'two step' approach to the EPAs allowed 35 of the 77 ACP countries to initial interim EPAs in time for the deadline.²⁶³ Consequently, in June 2009 a SADC interim EPA was signed by the BLS states, Mozambique and the EU.²⁶⁴ Namibia choose to initial the agreement, this was however done with reservations. The implication of this appears to be that should the impugned issues are not addressed; the country would then not sign a full EPA.²⁶⁵ Angola and South Africa did not sign the interim EPA; the EU had however indicated that it would sign an interim EPA regardless of their participation.²⁶⁶ In a joint declaration issued by the EC-SADC, it was however indicated that Angola might join the interim EPA at a later stage and participate in negotiations leading to the conclusion of a full

²⁶¹ C Jacobeit (note 168) at 46.

²⁶² The above image is extracted from an article by M Meyn (note 218) at 57.

²⁶³ Keet (note 1) at 13.

²⁶⁴ Full title is the 'Interim Economic Partnership Agreement between the SADC EPA states, on the one part, and the European Community and its member states, on the other part'. L319 04/12.2009 3

²⁶⁵ TRALAC 'The interim SADC EPA Agreement: Legal and Technical issues and challenges' 5 available online [accessed 22 October 2009].

http://www.tralac.org/unique/tralac/pdf/20080129_Erasmus_Discussion_InterimSADC_EPA.pdf.

²⁶⁶ European Center for Policy and Development Management' State of EPA negotiations at January 2009' 5 available online at

http://www.fes.de/cotonou/DocumentsEN/ThematicFocus/trade_finance_economy/StateofEPAnegotiations.pdf [accessed 28th May 2009].

EPA.²⁶⁷ Consequently, though it was termed an SADC interim EPA, the absence of all the SADC members has resulted in a ‘SADC minus configuration’.

The initialing of the interim document does not automatically give rise to legal obligations, but it does require that the countries do ‘not defeat its object and purpose prior to its entry into force’.²⁶⁸ By initialing the interim EPA, the BLS states have indicated ‘their commitment to engage with the EU in negotiations on trade in services, and investment, government procurement and competition towards a ‘full’ EPA’ while addressing the various outstanding issues pertaining to trade in goods. In order to ensure the legitimacy of the interim EPA, the individual national legislative processes would have to take place. On the European Union front, Council Regulation 1528/2007 known as the ‘Market access regulation’ has been adopted to provide secure market access to those ACP countries that have initialled WTO-compatible agreements. This regulation though can be suspended on certain grounds.²⁶⁹

3.3.4 Contentious issues

As was discussed in the previous section a number of countries had chosen not to sign the interim EPA. The following section brief outlines the reasons leading to this anomalous situation.

The absence of South Africa as a signatory to the interim EPA is a flagrant omission. The most palpable consequence of this is that the aim of the EPAs as a proposed solution to harmonize trade arrangements within SACU has failed.²⁷⁰ There are a number of reasons why South Africa did not sign the interim EPA. Firstly, South Africa through the TDCA already had an FTA with the EU. Therefore, unlike the BNLS states it was not subject to the 2008 deadline and the accompanying fear of interfere in the flow of trade. Moreover, South Africa has stated that it did not sign the interim EPA as it felt that the some conditions were too harsh and inclusive.²⁷¹ Terms which proved to be particularly problematic was the coverage of services, Singaporean issues, and the inclusion of the MFN clause. These were issues that

²⁶⁷ Interim EPA, Joint EC-SADC Declaration on Angola and Tanzania 90.

²⁶⁸ CONCORD Cotonou Working Group ‘Initialing, notifying, signing, ratifying and giving assent or the complexity of concluding EPAs’ available online at www.concordeurope.org/Files/media/internetdocumentsENG/4_Publications/3_CONCORDs_positions_and_studies/.../EPA-ENG.doc [accessed 25th May 2009].

²⁶⁹ Lesotho Ministry of Trade and Industry, Cooperatives and Marketing ‘The Economic Partnership Agreement: its core elements, meaning and implications for Lesotho’ 1 available online [accessed 18 January 2010 http://www.trade.gov.ls/documents/The_European_Partnership_Agreement.pdf].

²⁷⁰ Supra

²⁷¹ SADC EPA Group (note 252)at 3.

South Africa had not encountered fully, given that the TDCA had largely limited to trade in goods.

South Africa has argued that the inclusion of trade in services is problematic because they already constitute part of ongoing negotiations at a multilateral trading level.²⁷² The Singaporean issues are opposed on the basis that they are not required for either WTO compliance, and furthermore they do not form a part of the Cotonou Agreement.

The MFN clause would require that the countries extend to the EU any trade concession granted to a significant trading partner.²⁷³ A country is regarded as a significant trading partner if it accounts for more than 1% of global trade. Given that, South Africa is pursuing an expansionist trade policy and therefore looking to trade with larger economies such as China, India and Mercosur, such a clause would affect it the most.²⁷⁴

Namibia initialed the document at a later stage with reservations. The text of the interim EPA takes note of the fact that initialing of the document is based

on the understanding that concerns which Namibia had identified throughout the negotiations of the Interim Economic Partnership Agreement would be addressed through the negotiations towards a comprehensive Economic Partnership Agreement²⁷⁵

While many applauded Namibia's decision to not initial the interim EPA the EU has indicated that Namibia should either initial the interim EPA, or issue a statement confirming that it is not a party to the agreement.²⁷⁶ Furthermore, Namibia unlike South Africa is in a precarious situation, it does not have a comparable trade arrangement to turn fall back on. This discussion continues in the following chapter.

The BLS states and Mozambique have been criticized for signing the interim EPA in some sectors, as they are accused of prioritizing the trade relationship with the EU over regional agenda. Regardless of this, the states have forged ahead and are currently focused on

²⁷² Supra.

²⁷³ Supra.

²⁷⁴ Marieke Holst 'EPA negotiations between EU/SADC SACU partnership or asymmetry?' (2009) 88.

²⁷⁵ Final Act IEPA these issues include, but are not limited to, the non-negotiable Most Favoured Nation treatment provision sought by the EC; the freezing of export taxes/levies/charges and thus our ability to use such measures as incentives for value addition and manufacturing; the abolition of quantitative restrictions on imports with impacts on cereal production and thus food security in Namibia; inadequate provision made for Infant Industry Protection; the abolition of restrictions on local content in manufactured or processed goods; and the modalities of administering the free movement of goods within the SADC EPA States in a manner that may not be compatible with our current Southern Africa Customs Union (SACU), or would predicate the modalities for a future SADC Customs Union."

²⁷⁶ SADC EPA Group (note 252)at 3.

the negotiation of outstanding issues, as well as the implementation, notification and ratification of the agreement.²⁷⁷

In the above section, an examination of the Cotonou Agreement was undertaken where the objectives and key principles of the EPAs were outlined. From this, it became apparent that in principle, RI efforts should have been greatly bolstered by the EPAs, although this would prove not to be the case. The subsequent section briefly looked at the negotiating process and the emergence of various contentious issues. This outline is important in that it will help to frame some of the key issues, which affect adversely on RI efforts.

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²⁷⁷ Supra.

CHAPTER 4

THE LEGAL MILIEU

4.1 Exceptions to MFN

The preferential access that the ACP countries enjoyed was controversial in that it *prima facie* violated the principle of non-discrimination, which is central to WTO jurisprudence.²⁷⁸ It violated the principle by not adhering to a core tenant of non-discrimination being the Most Favoured Nation (MFN) principle. This principle is recognised as one of the oldest, and most important legal obligations within international economic law.²⁷⁹ It requires that a country's trade relationship with *all other countries* [my emphasis] be equal to the manner that it treats its 'most favoured' nation.²⁸⁰ Therefore, any trade concession that is granted towards one country must be extended to all others. The MFN principle is instrumental in preventing non-discrimination amongst trading partners.²⁸¹ It is articulated, albeit in various forms, in three of the most important agreements covered by WTO; Article 1 of the General Agreement on Trade in Services (GATS), Article 2 of General Agreement on Trade in Services (GATS) and Article 4 of Trade Related Aspects of Intellectual Property Rights (TRIPS).²⁸²

Despite the importance of this rule, it is not applied *absolutely*. There are certain circumstances in which WTO rules allow for derogations. There are two general accepted categories: RTAs and the Special and Differential Treatment (SDT) of developing countries. The following section examines these accepted derogations, with a view to establishing why the Lome preferences could be justified under either basis. In the following section, given the predominance of developing and LDCs in Southern Africa, particular importance will be placed on the examination of SDT terms.

²⁷⁸WTO 'Understanding the WTO: Principles of the trading system' available online http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm [accessed 17 September 2009].

²⁷⁹ S Lester et al 'World Trade Law: Texts, Materials and Commentary' 278.

²⁸⁰ Supra.

²⁸¹ Supra.

²⁸² The pertinent section of Article I of GATT states that 'any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties', Article II of GATS states that 'With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country'.

4.1.1 Regional Trade Agreements

Article 24 of GATT, read together with the Understanding on Article XXIV attached to the Marrakech Agreement, provides the conditions under which RTA may be exempt from the application of the MFN clause in relation to trade in goods. A similar exemption regarding trade in services is found in Article V of GATS.²⁸³ The underlying rationale for this exemption is the belief that ‘under certain conditions free trade agreements benefit not only their members, but also the global economy as a whole through trade creation which results in increased overall welfare’.²⁸⁴ Therefore, the main objective to Article XXIV had been to ensure that RTAs did not become obstacles to the multi-lateral trading system.

In order to qualify for the exemption granted to RTAs, the following requirements should be fulfilled. The main criteria is contained in Article XXIV: 5C and Article XXIV: 8. Article XXIV:8 requires that a country entering into regional trading agreements need to ensure that there is an ‘elimination of duties and other restrictive regulations of commerce on ‘substantially all trade’ between the different parties.’²⁸⁵ The elimination of duties and restrictive regulations must furthermore in terms of Article XXIV: 5c take place within a ‘reasonable length of time’.²⁸⁶ Other requirements are mandated by article XXIV: 5a, which calls for the ‘neutrality of trade restrictiveness’ requirement.²⁸⁷ This entails that any duties or other regulations, which are imposed on the contracting parties prior to the formation of the RTA, should not overall be higher. In addition to this, if in the formation of the RTA overall, it is found to necessary to increase tariff rates, members may have a claim for compensation.²⁸⁸ Lastly, contracting parties are required to notify WTO members’ who can then examine the RTAs for compliance with stipulated rules.²⁸⁹

The EU-ACP relationship failed to qualify under Article XXIV as a FTA primarily because the relationship was premised on a non-reciprocal basis. It is not possible to extend

²⁸³ GATS, Article V.

²⁸⁴ Stephen Karingi and Remi Lang ‘Economic and Welfare Impacts of the EU-ACP Africa Economic Partnership Agreement’ *United Nations Economic Commission for Africa 2*.available online www.uneca.org/atpc/Work%20in%20progress/10.pdf [accessed 22 October 2009].

²⁸⁵ GATT Article XXIV: 8.

²⁸⁶ GATT Article XXIV: 5c

²⁸⁷ Food and Agricultural Organization of the United Nation ‘Legal aspects of regional integration’ available online at <http://www.fao.org/docrep/004/y4793e/y4793e0a.htm#bm10> [accessed 18 October 2009].

²⁸⁸ Supra.

²⁸⁹ GATT Article XXIV: 5 and Understanding of Article XXIV: 5(3)

non-reciprocal preferences when there is a requirement laid down to liberalize substantially all trade.

For developing countries, the most controversy exists behind the interpretation of the phrases ‘substantially all trade’ as well as ‘within a reasonable period of time’ In a number of FTAs, the phrase ‘substantially all trade’ has been interpreted to mean the elimination of 86-90% of duties. Alternatively, ‘reasonable length of time’ in terms of the Understanding on Article XXIV is regarded as a period of 10 years.²⁹⁰ Where a reasonable period exceeds 10 years will only be allowed in exceptional cases, in reality though many FTAs often exceed the 10-year limit.²⁹¹ It is partly because of the varying interpretations that have been given to Article XXIV that no FTA has ever been challenged for WTO compliance. The interpretation given to the various criteria has been the subject of much controversy.

4.1.2 Special and Differential treatment of developing countries

The second generally accepted departure from the principle of non-discrimination is the special status that is accorded to developing countries. This group of countries now constitutes up to two thirds of the WTO. When the GATT had originally been negotiated 11 of the 23 contracting parties would have been classified as developing countries, this however proved to be immaterial.²⁹² Developing countries are playing an increasingly important role within the global economy, and many of them have begun to seek trade as a developmental tool. In light of this, the WTO has made a host of concessions so as to take into account their particular needs and circumstances.

One of the central ways through which this special status is articulated is by affording developing countries Special and Differential Treatment (SDT). The fundamental justification for extending SDT is that ‘equal treatment could secure equality only among identical parties’.²⁹³ Developing countries are ‘intrinsically disadvantaged in their participation in international trade and therefore any multilateral agreement involving them and developed countries must take into account [this] weaknesses’.²⁹⁴

²⁹⁰ Understanding on Article XXIV: 5 (3).

²⁹¹ Ochieng (note 2) at 3.

²⁹² Supra.

²⁹³ Ochieng (note 2) at 3.

²⁹⁴ Constantine Michalopoulos ‘Trade and Development in GATT and WTO: The role of Special and Differential Treatment for Developing countries’ 15 available online at

There are 145 SDT clauses spread across the various WTO texts.²⁹⁵ In general, there are two different categories of SDT provisions given to developing countries. In the first category fall all the positive actions that developed countries have the *freedom* to extend to developing countries.²⁹⁶ These include preferential access to markets, the provision of technical as well as other forms of assistance that enable developing countries to undertake their WTO obligations. Developed countries are also called to implement obligations in such a manner as to not damage the interests of developing countries

The second category of SDT includes exceptions to rules that can be claimed by developing countries.²⁹⁷ Therefore encompasses the differential commitments that developing countries are given. They include exceptions from certain disciplines and time extensions. In addition, they extend to the adoption of certain measures to protect domestic industries, such as the application of quantitative restrictions.

4.1.3 The History of Special and Differential treatment

Part IV of the GATT initially introduced the SDT terms in 1964. Of particular significance are its principles and objectives, as well as Article 8, which states that ‘developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade of less-developed countries’.²⁹⁸

Despite the introduction of Part IV, many developed countries still appeared to be uncertain as to whether it provided a legal basis to accord non-reciprocal treatment to developing countries. They were therefore hesitant to accord preferential treatment, lest this would represent an unlawful departure from the MFN principle. This problem was in part addressed in 1968 with the assistance of United Nations Committee on Trade and Development developing countries were able to establish a General System of Preferences (GSP).²⁹⁹ Although they were not legally binding, the GSP allowed developing countries the option of granting more favourable trade terms to developing countries To further dispel any lingering questions of the legality of the GSP in light of MFN obligations, the Council of

<http://siteresources.worldbank.org/INTARD/8258261111405593654/20432097/TradeanddevelopmentintheGATTandWTO.pdf> [accessed 10 January 2009].

²⁹⁵ Supra.

²⁹⁶ Supra.

²⁹⁷ C Michalopoulos (note 294) at 18.

²⁹⁸ GATT Part IV.

²⁹⁹ C Michalopoulos (note 294) at 6.

Ministers, issued a waiver in 1971 which would extend over a period of ten years.³⁰⁰ The GSP then became a permanent derogation from the MFN principle with the Council of Ministers 1979 Differential and More Favourable Treatment and Fuller Participation of Developing Countries decision ('the Enabling Clause').³⁰¹

The Enabling Clause represented a summation of all the efforts that had been made to account for developing countries' concerns.³⁰² As it is not obligatory, it has been described as a 'negative right for preference giving developed countries'.³⁰³ It did not extend any additional rights, but explicitly clarified what was permissible. It spelt out the following categories of exceptions. It firstly, allowed for greater market access for developing countries, which would be granted on a non-reciprocal basis; therefore explicitly legitimizing the GSP.³⁰⁴ Secondly, the Enabling clause made provision for more favourable treatment for developing countries in terms of the rules relating to Non Trade Barriers.³⁰⁵ Preferential RTAs between developing countries, or so-called 'South-South' agreements were permissible.³⁰⁶ The Enabling clause moreover took special cognizance of the plight of LDCs.³⁰⁷

From the above section, it can be seen that SDT treatment of developing countries has developed into an important WTO principle. In particular, GSP has provided developed countries with a permanent derogation from the application of the MFN principle. The following section outlines the EU's GSP system.

4.1.4 The EU's preference regime

The EU has a three-tiered GSP program. At the bottom of the preference, hierarchy is the standard GSP program. This provides preferential access in the form of reduced tariffs for goods to 176 developing countries. It is implemented in terms of a European Union Council

³⁰⁰ AllAfrica.Com 'Economic Partnership Agreements And Preferential Treatment' <http://allafrica.com/stories/200712180472.html> [accessed 10 January 2009].

³⁰¹ Decision of 28 November 1979 (L/4903) Council of Ministers

³⁰² B Onguglo (note 18) at 26.

³⁰³ Supra.

³⁰⁴ Enabling Clause paragraph 1.

³⁰⁵ Enabling Clause paragraph 5.

³⁰⁶ Enabling Cause paragraph 2C.

³⁰⁷ Enabling Clause paragraph 2d.

regulation for three-year blocks.³⁰⁸ The latest standard GSP regulation has been issued from the 1 January 2009- 31 December 2011.

The second tier of the EU's GSP program is the GSP plus initiative. This is a 'special incentive arrangement for sustainable development and good governance',³⁰⁹ which is available to all developing countries as long as fulfil certain criteria.³¹⁰ From the outset, prospective beneficiaries must be classified as vulnerable. Vulnerability is determined by assessing the degree of diversification and integration within the multi-lateral trading system. In addition to this, the aspirant state would need to display a commitment to human rights, labour rights, the environment and good governance.³¹¹ The commitment to these various fields would then be substantiated by the signing, ratification, and implementation of 16 conventions on core human and labour rights, and at least seven of the conventions related to the environment and governance principles.³¹²

The third tier of the EU's system of preferences is the 'Everything But Arms' initiative (EBA). It provides duty free access to all LDCs imports apart from arms and ammunitions.³¹³ The EBA is an improvement from the standard GSP arrangement, and has accordingly been far more influential.³¹⁴ Unlike the other forms of the GSP program, EBA is not linked to a time line and preferences afforded to LDCs are 'maintained indefinitely'.³¹⁵ Although the EBA is discriminatory, by distinguishing between developing countries and LDCs, this is permitted because it grants 'special preferences to a permissible grouping of countries, the LDCs'.³¹⁶ In terms of the EBA, LDCs in Southern Africa already have secured duty free and quota free access to the EU market.

4.1.5 Critique of the EU's system of preferences

The following criticisms can be issued in relation to the EU's GSP program. Firstly, the GSP system has 'particularly restrictive rules of origin'.³¹⁷ This explains why it is that some LDCs

³⁰⁸ European Commission on Trade 'Generalised System of Preferences' <http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/> [accessed 20 January 2010].

³⁰⁹ Supra.

³¹⁰ S Bilal (note 237)at 88.

³¹¹ S Bilal (note 237) at 89.

³¹² European Commission on Trade (note 308)at 1.

³¹³ Supra.

³¹⁴ Supra.

³¹⁵ B Ongloglo (note 18)at 29.

³¹⁶ C Michalopoulos (note 294)at 24.

³¹⁷ C Michalopoulos (note 294)at 25.

choose to export under Lome preferences as opposed to the more beneficial EBA.³¹⁸ Secondly, as is the hallmark with many of SDT terms within the WTO the preferences are not contractual, and are therefore tantamount to a ‘non-binding best endeavour clause’.³¹⁹

While the GSP plus program represents significant improvements, it is problematic in a number of respects. Firstly, many countries find the rigorous application process onerous to comply with. It should be remembered that countries are constantly monitored for compliance with the various requirements; therefore there is always the possibility of preferences being withdrawn. For example, in 1992 the United States terminated India’s GSP privileges pertaining to \$60 million worth of exports on pharmaceutical products. This termination allegedly arose as result of India not according sufficient intellectual property protection.³²⁰ If countries within Southern Africa applied for the program they would need to do so mindful of these pitfalls.³²¹

In relation to the standard GSP and the EBA the following can be said. Firstly the product eligibility requirements have greatly limited the scope of the program. In support of this, research has furthermore shown that many areas where developing countries display a comparative advantage in production of a good; it is classified as a competitive product, the GSP system does not apply. This explains why it was that for a significant period of time the EU’s GSP had excluded agriculture, a sector where many African countries are efficient producers.³²² Another contributing factor lessening the ambit of the programs is the system of ‘graduations’. Once a country graduates from the United Nations list of LDC, it is then ineligible for the GSP program.³²³

The following comments are made based on an examination of SDT provisions, and the EU’s GSP system. In terms of the WTO, permitted preferences are those which are granted on a *generalised* [my emphasis] basis, and do not discriminate *among* developing countries.³²⁴ This is the central reason why the Lome preferences could not be justified in terms of the EU’s GSP. The preferential access that the ACP countries enjoyed placed them at the apex of the preferences given by the EU. Not only did this discriminate against other

³¹⁸ C Michalopoulos (note 294) at 27.

³¹⁹ Supra.

³²⁰ P Sutherland (note 33) at 25

³²¹ Supra

³²² Supra.

³²³ European Commission on Trade (note 308) at 1.

³²⁴ B Onguglo (note 18) at 26.

developing countries, but in some instances against LDCs. This form of arbitrary discriminatory was therefore very problematic.

The legal vulnerability of the preferences was aptly displayed by the successive legal challenges to the EU banana regime. The basis of the dispute arose from the Protocol 5 contained in Lome IV. Article 1 of this Protocol states that

In respect of its banana exports to the Community markets, no ACP State shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present³²⁵

The ACP countries were consequently given duty free access. However, non-ACP countries faced either quantitative restrictions or licensing agreements. This led to a group of Latin American countries challenging the legality of the regime, as a member of the WTO, the EU would ordinarily be obligated to apply the MFN principle.³²⁶ The dispute surrounding the EU banana regime is long and convoluted, having resulted in cases at GATT, WTO and the European Court of Justice. However, the result was that the Banana producers were able to establish successfully the discriminatory nature of the EU-ACP trading relationship.³²⁷

The banana dispute demonstrated that the Lome regime was incongruent with the multilateral trading rules. This legal precedent meant that many other aspects of the Lome Conventions, and the accompanying trade conventions were potentially subject to legal review. This, coupled with the establishment of the WTO system, an empowered dispute resolution mechanism, increased the imperative to comply with WTO rules. In order to avoid any future legal entanglements, the EU undertook to secure a WTO waiver. This was secured in 2001 with the express instruction that a new WTO compliant trading arrangement should be negotiated.³²⁸ The impetus for renegotiating the EPAs had already been created.

³²⁵ Supra.

³²⁶ Colombia, Guatemala, Nicaragua, Venezuela, and Costa Rica.

³²⁷ R Grynberg 'WTO incompatibility of Lome Convention Trade provisions' 3 *Asia Pacific School of Economics and Management* available online at <http://dspace.anu.edu.au/bitstream/1885/40346/1/sp98-3.pdf> [accessed 17 February 2010].

³²⁸ Supra

4.2 Investigating legal alternatives and safeguards

It needs to be emphasised that in terms of the Cotonou agreement, there is no legal obligation to conclude an EPA. In support of this Article 37(6) of Cotonou Agreement states that the EU ‘should examine all alternatives possible in order to provide ACP countries with a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules’.³²⁹ Article 37(6) had envisaged that this review would take place in 2004, this deadline was since been extended. On the basis of this provision, there has been much criticism for the EU who have purportedly not exhausted alternative strategies³³⁰

Recently the EU has however indicated that Article 37.6 was *only* to be instituted in ‘exceptional circumstances’ at the instance of a non LDC ACP country. Peter Madelson, the former EU Commissioner has furthermore continuously emphasized that taking such a route would be settling for a ‘second best’ solution. He has further indicated that to date, no ACP country has requested the EU to examine alterative scenarios.³³¹

It however remains important to investigate the legal avenues, which ACP countries would have to navigate, either in the absence of the EPAs, or alternatively to negate certain effects. Mindful of this, the following section briefly investigates four alternative legal regimes that could potentially avail themselves. These alternatives have not been tersely selected. They represent the options that are most frequently discussed by scholars and authors, as well of being flagged by civil society groups as solutions. The objective of this section is twofold. It aims to clarify the legal veracity of some of the alternatives offered. As well as assessing what broader ramifications these alternatives would have.

4.2.1 Extension of a waiver

This is a measure that has already been pursued by the EU in order to legitimize the Lome preferences. In addition to this, it has also allowed countries such as the United States to continue a number of its preferential trading regimes.³³² The possibility of extending a waiver raises a number of problematic issues. Firstly, under GATT, waivers had previously been granted under Article XXIV. However, upon the establishment of WTO, waivers now

³²⁹ Cotonou Partnership Agreement, Article 37.6.

³³⁰ D Keet (note 1) at 8

³³¹ B Onguglo (note 18) at 15

³³² The United States has a waiver for its former Trust territory of the Pacific Islands which is valid until 2016. The United States also extended trade preferences to the Caribbean under the Caribbean Basin Economic Recovery Act.

fall under the auspices of the Understanding in respect of Waiver as well as Article IX of the WTO agreement.³³³ The new waiver mechanism is far more rigid. One of the implications of this is that waivers are no longer granted for infinite periods. They are instead subject to annual reviews. Furthermore, they are only granted in exceptional circumstances with the support of three quarters of the WTO members.³³⁴

In light of this, if the EU was to seek a waiver to continue with the Lome preferences conditions such as annual reviews would create instability. The annual review 'acts as a built-in disincentive'.³³⁵ It has consequently been argued that the new mechanism 'reduces the commercial value of a waiver'.³³⁶ As many potential investors would be intimidated by a regime which is subject to such a degree of volatility.

Secondly, the EU had encountered great difficulty in securing the 2001 waiver, which had only been granted after protracted negotiations and certain concessions had been offered.³³⁷ It is highly doubtful that the EU possesses the political will needed to successfully push through a waiver application. In addition to this, the precedent that has been set by recent waiver applications is not promising. Although the United States had requested a waiver for its African Growth and Opportunity Act in 2005, this still has not been addressed.
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Assessing the above factors together, it is thus clear that obtaining a waiver is not a satisfactory long-term solution. It is thus an alternative that would most likely encounter opposition from both the EU and the ACP countries.

4.2.2 GSP system

The GSP system presents the simplest alternative to the EPAs. Part of this is attributed to the fact that most of the ACP countries in the absence of an EPA, or any another trade regime, have their market access provisions automatically reverted to standard GSP

³³³ B Onguglo (note 18) at 15

³³⁴ Supra.

³³⁵ B Onguglo (note 18) at 21.

³³⁶ R Grynberg (note 327) at 20

³³⁶ C Ochieing (note 2) at 3.

³³⁷ R Grynberg (note 327) at 21.

³³⁷ EU agreeing to grant tariff free access for tuna products to Thailand, Indonesia and the Philippines See further C Ochieing (note 2) at 3.

³³⁸ Sanoussi Bilal 'Concluding EPA Negotiations Legal and institutional issues' 49 *ECDPM Policy Management Report 12* available online at www.ecdpm.org/pmr12 [accessed 22 October 2009].

provisions. This would take place without any negotiation required.³³⁹ However, as outlined above there are a number of challenges relating to the system. It is non-contractual, this coupled with product exclusions and graduation systems render the system erratic. Additionally the requirements of the GSP plus would be too onerous for many countries. Therefore, although it may be fallback position, the GSP system is not an ideal option.

4.2.3 Amendment of the Enabling clause

Both the procedural and substantive requirements of the Enabling clause are significantly less onerous than Article XXIV.³⁴⁰ However, the Enabling clause as earlier discussed only extends to South-South RTAs. The issue then becomes whether the Enabling clause could be extended to make provision for North-South RTAs.

Onguglo has pointed out that a serious problem with extending the scope of the Enabling clause is that its coverage of South-South agreement is increasingly being subject to legal challenge.³⁴¹ Furthermore, given that the section has no formal linkages to Article XXIV, it therefore could be perceived as providing a mechanism for bypassing the requirement for waivers, and inconspicuously reintroducing non-reciprocal preferences.

In addition to this, if the Enabling clause was extended to include RTAs between developed and developing countries with provision made for preferential treatment, this would constitute a gross assault on MFN principle by allowing for 'discretionary discrimination'.³⁴² In light of the above, the Enabling clause is not a viable option.

4.2.4 Amending Article XXIV and the incorporation of SDT

The ambiguity relating to Article XXIV and the corresponding Understanding on Article XXVI has been the subject of much debate. What has drawn particular attention has been the definition of 'substantially all trade' and 'within a reasonable period of time'. It is clear that 'substantially all trade' amounts to more than merely some trade.³⁴³ However, the section provides no clarity as to how this should be measured. Would it require that both parties liberalize the same volume or percentage of trade? Alternatively, could this be calculated differently, excluding certain tariff lines?

³³⁹ Supra.

³⁴⁰ Supra.

³⁴¹ For a more detailed discussion on this refer B Onguglo (note 18) at 48.

³⁴² Bilal an Pampa (294) at 29.

³⁴³ Supra.

In terms of the requirement that trade liberalization takes place within a reasonable period of time. The Understanding issued in relation to Article XXIV indicates a 10-year period. However in even in the absence of exceptional circumstances needed to go beyond a 10 year period many RTAs have exceeded these time frames. There are many examples of countries which have taken more than a 10 year transitional period. This includes the TDCA, which has provided for a 12-year transition period. Although this may have become a practice, it has not created a legal guarantee.³⁴⁴

The EU has traditionally understood the ‘substantially all trade’ requirement as directing 90% of trade to be liberalized. Their interpretation provides for some asymmetry to be adopted as 90% is only required to be an average. For example within the SADC interim EPA the EU has agreed to 100% liberalization, while the BLS and Mozambique have agreed to 80% liberalization.³⁴⁵ The ACP countries are seeking for more asymmetry then this would provide.

Academics argue that the different interpretive devices that are utilized by the two blocks are reflective of the different sets of interests being advanced. The EU is perceived as pushing for a more literal interpretation of Article XXIV which would allow it greater access to the ACP markets.³⁴⁶ While the ACP countries, fearful of the effect of reciprocity, are advocating for a more liberal interpretation to be adopted.

Another matter that has caused controversy is the absence of any SDT terms in Article XXIV. SDT is an integral part of the trading system. The ACP countries represent some of the world’s poorest nations. Thus if provisions favouring developing countries are not taken into account within the context of the EPAs, these provisions run the risk being rendered obsolete. It has therefore been argued that its absence ‘constitutes a *prima facie* case for reforming and injecting SDT provisions into the WTO’.³⁴⁷ This anomaly becomes particularly obvious if compared to Article V of GATS, were distinction is drawn between North-South RTA and South-South RTAs. The resulting imbalance that is created as a result of the degree of flexibilities that are available under Article V as opposed to Article XXIV constitutes ‘a legal inconsistency in the architecture of WTO rules in goods and services.’³⁴⁸

³⁴⁴ S Bilal (note 338)at 49.

³⁴⁵ TRALAC (265)at 3.

³⁴⁶ C Ochieng (note 2)

³⁴⁷ B Onguglo (note 18) at36

³⁴⁸ Supra.

The legality of Article XXIV and the absence of SDT terms were further questioned by the United Nations Economic Commission for Africa which found that ‘in its un-amended form Article XXIV should not provide the rules with which EPAs should be compatible’.³⁴⁹ It has further been said that Article XXIV was designed with developed nations in mind and that it therefore lacks context at a time when developing countries constitute the majority member of the WTO.³⁵⁰ To a degree, this is substantiated by the fact that Article XXIV predates the introduction of SDT in the WTO by three decades.³⁵¹ However, what is problematic about this contention is that at the Uruguay Round of negotiations, where SDT terms were integrated into the WTO, Article XXIV was never amended.

It has been proposed that Article XXIV embraces sufficient flexibilities to incorporate a trading relationship of this nature.³⁵² This argument is however flawed. The existing flexibility in Article XXIV is created largely by the ambiguity in the language and the resulting conflicting interpretations.³⁵³ This *de facto* flexibility in the face of a rules-based dispensation, such as the WTO, with an accompanying enforceable dispute resolution mechanism is ‘inadequate in providing sound a legal basis and security for the flexibilities that would be deemed necessary for ACP states under EPAs’.³⁵⁴ Additionally legal uncertainty has begun to arise as a result of excessive reliance on the tolerance by WTO members under the cover of existing flexibilities in Article XXIV.³⁵⁵

In April 2004, the ACP countries had submitted a document to the WTO, which proposed the introduction of SDT into Article XXIV and the Enabling Clause.³⁵⁶ One of the core submissions of the ACP countries calls for the incorporation of SDT in to the substantially all trade requirement, and the in relation to transition periods. The EU has also acknowledged the need for SDT.³⁵⁷

³⁴⁹ Keet (note 1) at 1.

³⁵⁰ W Roux ‘An alternative to the EPAs proposal a provision dropped from the EU’s EPA negotiation manual paper’ 7 http://www.vcsv.co.za/unique/tralac/pdf/20051018tralac_speech_final.pdf [accessed 10 January 2009].

³⁵¹ Supra

³⁵² Supra.

³⁵³ B Onguglo (note 18) at 6

³⁵⁴ B Onguglo (note 18) at 6

³⁵⁵ B Onguglo (note 18) at 34

³⁵⁶ Bonapas Onguglo and Taisuke Ito ‘In defence of the ACP submission on Special and Differential Treatment in GATT Article XXIV’ 4 *ECDPM Discussion Paper* 67 available online at http://www.ecdpm.org/Web_ECDPM/Web/Content/Navigation.nsf/index2?readform&http://www.ecdpm.org/W eb_ECDPM/Web/Content/Content.nsf/0/B6C8D197EC5E848BC12570AF004211F5?Opendocument [accessed 22 October 2009]

³⁵⁷ Supra.

From the above, it is clear that a bevy of challenges would arise if either a waiver or the GSP system was adopted, or alternatively the Enabling clause was amended. The amendment of Article XXIV therefore appears to be this less problematic manner to approach this problem.³⁵⁸ A possible amendment to Article XXIV in a strict sense is not an alternative, but it would cushion the blow to the ACP countries. This would merely be an application of Article XXIV, in a less onerous manner. An examination of Article XXIV forms part of the Doha Development round of negotiations; the potential of these negotiations is briefly discussed in the next section.

4.2.5 The Doha Development round of negotiations

An examination of Article XXIV, as well as SDT is part of the stalled Doha Development round. It forms part of one of the unresolved issues which have been taken to accommodate developing countries. This round of negotiations has committed itself to clarifying the interpretation of the impugned article as well as what role SDT of developing countries are accorded within RTA.³⁵⁹ In this regard the ACP Council of Ministers has called on the EU to support the modification of RTA rules as well as

stressing the need for WTO rules to be modified to incorporate legal binding operational S&D provisions in order to create flexibilities for developing countries engaged in Regional Trade Arrangements with developed countries.³⁶⁰

The importance of SDT was recently reaffirmed by the Doha Ministerial Declaration which stated that ‘provisions for special and differential treatment are an integral part of the WTO agreements’. It called for a review of WTO SDT provisions with the objective of ‘strengthening them and making them more precise, effective and operational’.³⁶¹

There is no doubt that the outcome of the round of negotiations will have a significant impact on the EPAs. Currently the WTO negotiations are suspended and even when they take place, they are admittedly stagnant. The outcome of the negotiations could take years. In the meantime, the EU/ACP trade relationship requires restructuring, and must therefore comply with the WTO rules *as they stand* [my emphasis]. From this, it is clear that although the Doha

³⁵⁸ Ochieng (note 2) at 5.

³⁵⁹ B Onguglo (note 356) at 5.

³⁶⁰ Supra.

³⁶¹ Doha Ministerial Declaration Ministerial Declaration adopted on 14 November 2001 (WT/MIN(01)/DEC/1), 20 November 2001. [para 44].

Development Round is imbued with potential to alter the interpretation of Article XXIV, it is insufficient to peg efforts on the conclusion of negotiations.

In concluding this section, the following remarks can be made. *Strictly speaking* [my emphasis] there is truth to the arguments that there are a number of legal alternatives to the EPAs. However, these arguments fail to give sufficient regard to the number of problems associated with these alternatives. A possible extension of the waiver would expose both the EU and the ACP countries to a host of problems. Not only is it probable that the EU lacks the political will to secure another extension, but furthermore both trading blocks would be faced with stringent waiver provisions and annual reviews. Alternatively, the GSP system, in all its various guises, would subject the ACP countries to a system plagued by uncertainty. On the other hand attempting to amend the Enabling clause would be extremely unlikely, particularly considering that it is the subject of legal scrutiny.

Of all the alternatives discussed, an amendment of Article XXVI stands out as the most viable alternative. From the above discussion, it can clearly be seen that the interpretation pertaining to Article XXIV is extremely problematic and *may be* addressed through the Doha negotiation.

CHAPTER 5

THE IMPACT ON REGIONAL INTEGRATION

In light of the preceding chapters, the impact that the EPAs will have on RI efforts within SACU and SADC can be assessed under the following headings.

5.1 THE SPLINTERING OF SACU and SADC

The SACU has broken into two sects. The BLS states on one hand, and South Africa and Namibia on the other. There are many implications arising from this. Firstly, the BLS states have been segregated from South Africa, the regional hegemony that contributes over 95% of the SACU's GDP.³⁶² An EPA that excludes the most important economy in the regional is not an ideal situation and may complicate future regional relations

Secondly, the attempt to harmonize the trade relationship between the BNLS states, the EU, and South Africa has failed. The harmonization of the relationship had been initiated when South Africa had formally joined the SADC EPA. If successful, the harmonization was poised to be one of the greatest benefits of the EPAs within Southern Africa. South Africa has failed to sign the SADC EPA. The BNLS states and South Africa therefore continue to have their relationship with the EU regulated in terms of two different trade arrangements; this is an untenable position. The confusion relating to the status between the BNLS states and the EU thus continues.

It has been proposed that the two different trade relationships will necessitate the need for more stringent application of border control and rules of origin.³⁶³ This results because of the need to apply the different trade terms of the TDCA, as opposed to the SADC EPA. This is an affront to the objectives of RI. An interesting question in this regard is whether the TDCA relationship constitutes a violation of Article 31 of the SACU agreement. An analysis of the first paragraph of section 31 is to no avail. It states that 'member states may maintain preferential trade and other related arrangements existing at the time of entry into force of this Agreement'.³⁶⁴ The difficulty with this section is that it gives the members of the customs

³⁶² P Draper (note 11) at 1.

³⁶³ Mathabo Le Roux 'Southern Africa: Threat of Regional Upheaval If SA Torpedoes Customs Union' <http://allafrica.com/stories/printable/200906080012.htm> [accessed 7 February 2010].

³⁶⁴ SACU 2002 Agreement, Article 31.

union an *unqualified right* [my emphasis] to maintain existing preferential arrangements. By not limiting the type of membership that the SACU states may undertake, there is therefore no requirement to ensure compatibility, or cohesiveness of different arrangements such as the TDCA. There is therefore a possibility of member states being party to conflicting arrangements.

Another problem that arises is not so much that a country, which is a member of a customs union, is individually a member of an FTA. Rather, it is that where there are multiple memberships to different organizations there is an *inevitable* [my emphasis] impact on the CET as the different rules of origin render the original customs union unrecognizable. The definitive question is whether SACU would be able to survive the fragmentation between South Africa, Namibia and the BLS. Will the organization still comply with the legal definition of a customs union –as described in chapter 2; which if recapped, requires a CET in relation to third party states, and that no tariffs are adopted between member countries.³⁶⁵

As was also earlier outlined in chapter 2, Article 31 of the SACU agreement requires that members secure permission prior to undertaking agreements with third parties. In a worst case scenario what would happen if South Africa refused to give the BLS states permission to negotiate towards a full EPA. Although highly unlikely, this would lead to the disintegration of the organization. This disintegration would additionally shut the door on SACU being used as a vehicle for deeper regional integration efforts within the SADC in terms of the application of variable geometry. Not only is this a viable option, but takes advantage of SACU's potential, and furthermore help address the problem of overlapping memberships.

The disintegration of SACU would be an immeasurable loss, robbing the region of the oldest and most effective RI arrangement that represents one of only two monetary integration schemes in Africa.³⁶⁶

The SADC group now has established four separate negotiating configurations in relation to the EU. The SADC EPA, the TDCA, the EBA and EAC EPA, Each of these configurations have their own different tariff schedules. The SADC-EPA, instead of encompassing all members of the organization, excludes four of its original founders, Zimbabwe, Mauritius, Malawi and Zambia.

³⁶⁵ C Jascobeit (note 168) at 49.

³⁶⁶ Colin McCarthy 'Monetary Integration in Africa (IV)' http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=78723&cat_id=0 [accessed 7 February 2010].

This will impact on SADC's plan for the formation of customs union. Ideally, all members of the union have the same trade commitments. This allows for easier administration and evades the possibility of different configurations creating conflicting trade commitments. Consequently, countries, which are planning to establish a customs union, should be party to the same EPA. This would require that members of the countries who are intent on being part of the SADC CU to have negotiated an EPA within the SADC framework. In terms of the SADC Trade Protocol, the SADC CU will be formed in 2012. However, this is not the case. The membership of SADC is currently split between the SADC EPA and the ESA EPA. SADC countries who have been included in the ESA EPA are Zambia, Zimbabwe, Malawi, Seychelles, Mauritius and the DRC. Furthermore, Zambia, Zimbabwe and Mauritius were part of the eleven countries who have recently established the SADC FTA. It can therefore be seen that although the SADC EPA and the ESA EPA have in subsumed members of existing integration arrangements, this arrangement though 'hardly [accounts for] countries' economic and strategic interests and the consequences for deeper regional integration'.³⁶⁷ In light of the above, it is worth asking whether in determining these negotiating blocks SADC members had any regard of Part 8 of the Trade protocol, which requires member countries in negotiating with third parties to consider its objectives.

The EPAs have further contributed to the splintering of SACU and SADC in the following ways.

5.1.1 Negotiations taking place outside of existing regional structures

The EPAs have contributed another layer of complexities to the 'spaghetti bowl' arrangement of regional organizations on the continent. Regional groupings through which the EPAs are being discussed do not embrace existing organizations. It would appear that many African countries opted to favour national interest as opposed to advancing the regional agenda when choosing negotiating partners.³⁶⁸ This has already fallen foul of the pillars of the EPAs, which is discussed in chapter 3 were said to account for existing regional integration agendas.

In addition to this, another arising problem is that within the text of the interim EPA the BLS and Mozambique have been defined as the 'SADC EPA'. This reference though is made to an organization that does not actually exist, and therefore has no legal status. How the

³⁶⁷ Meyn (note 257) at 140.

³⁶⁸ Supra.

obligations that are placed on the SADC EPA relate to SACU and SACU is not clear. This adds another element of uncertainty to the EPAs.

5.1.2 Divide between LDCs and non LDCs

The different classification of countries as non-LDC and LDC could further exacerbate the splintering of SACU and SADC. It has been noted that ‘least developed countries currently have little incentive to participate in an EPA purely from a trading perspective, as they would hardly gain any additional market access in the EU in return for opening up their market’.³⁶⁹ As noted earlier, unlike other GSP systems, the EBA initiative is purported to be maintained for an unlimited period. In addition to this, previous stringent rules of origin have been liberalized making the initiative even more appealing.³⁷⁰

Despite this, the BLS states have however chosen to enter into an EPA, negating the incentives that they have under the EBA program. There are possible explanations for this. Perhaps the BLS states found that the stability of the EPAs to be appealing. However it is more likely that although development finance has not been made conditional on the conclusion of an EPA, LDCs may fear that there would be repercussions of some sort for not participating in what the EU has admitted to be its preferred arrangement.

That being said though, Lesotho and Swaziland would still have recourse to the EBA program lest they pull out of the EPA. This would throw SACU into complete disarray as it would be scattered into three different groups, Namibia and South Africa; Botswana, and then the two LDCs, Lesotho and Swaziland.

It remains to be seen what measures Namibia will adopt. Namibia is not regarded as a LDC, although this classification has been controversial, what it does mean is that the country does not have recourse to the EBA, and would be relegated to the terms of the less favourable standard GSP.³⁷¹ As Namibia has initialled the interim EPA with reservations, the arising legal ambiguity perpetuates the uncertainty surrounding this trade regime. One wonders whether the country will finally relent and sign the full EPA.

5.1.3 The Singaporean issues

The Singaporean issues also known as ‘WTO –plus’ or ‘new generation issues’ as they go beyond the realm of what is required by the WTO. In addition to this, they do not form part

³⁶⁹ A Borrmann (note 3) at 172.

³⁷⁰ A Borrmann (note 3) at 173.

³⁷¹ NAMIBIA: UN country office supports bid for "LDC-like" status
<http://www.irinnews.org/report.aspx?reportid=57093> [accessed 13 February 2010].

of the Cotonou Agreement. They have however been incorporated into the EPAs as part of the EU's holistic strategy for the ACP countries.

The brief history of the Singaporean issues within trade negotiations is controversial. The EU has been a most ardent supporter. It has thus been campaigning for their inclusion in multilateral negotiations. At this level however many countries, particularly developing countries, have been vehemently opposed to them. Developing countries opposition was based on the argument that they felt that the scope of the issues 'was unclear and that they lacked the technical capacity to implement them'.³⁷² The Ministerial Conference in Cancun had in part collapsed because of the EU's insistence that Singaporean issues form part of negotiations.³⁷³ The rejection of Singaporean issues is a sentiment that has been levelled equally by both the ACP group and the AU.³⁷⁴ In spite of this, the Singaporean issues are being discussed through the artificial bodies of the ESA EPA and the SADC EPA.

Assessed in relation to RI efforts, Singaporean issues are problematic in a number of respects. Firstly, as discussed in chapter 3 in order for both SACU and SADC to attain significant levels of integration these areas will have to be engaged in a significant manner. However, this *has not yet taken place* [my emphasis]. Negotiating with a third party prior to securing regional cohesion will constrain the negotiation process in these areas. As Mozambique and the BLS states will already have pre-existing obligations, the policy space for negotiations within these areas is limited. Divisions may arise between SACU members who are willing to acquiesce to a pre-negotiated set of rules and regulations, and those who are not. For example, within the field of competition law and policy, developing countries have been cautioned against the temptation to 'copy and paste' competition models from developed countries.³⁷⁵ The set of policies and law needs to be framed against the specific needs of the particular area. To have pre-existing commitments in such a field could prove to be extremely debilitating

The Singaporean issues have already been identified as one of the 'contentious issues' which have prevented South Africa and Namibia from initialing the interim EPA. In addition to this, it is doubtful whether the BLS and Mozambique have the necessary funding, or

³⁷²R Sundrey (note 196) at 253

³⁷³Supra

³⁷⁴Supra.

³⁷⁵Supra.

capacity to institute the institutional and legal amendments that will be required to implement the various rules and regulations.³⁷⁶

From this, it can be seen overarching criticism that can be levelled against the inclusion of the Singaporean issues into the EPAs is that it is incongruent to the pace of RI. It would appear that although the Singaporean issues have all but been scrapped from multilateral negotiating table, they have re-emerged ‘through the backdoor door of regional agreements’³⁷⁷ where developing countries seem to not have the collective bargaining power to oppose them.

In the above discussion it was highlighted how by splintering regional organizations the EPAs have adversely affected both existing, and future RI efforts in a number of ways. They have prevented the harmonization of trade relationships between the BNLS, EU and South Africa; possibly rendered SACU unrecognizable in terms of the legal definition of a customs union; and furthermore stifled the negotiation space that SACU and SADC would have regarding Singaporean issues. Over and above this the EPAs have undermined the legal obligations and goals that both SACU and SADC have set out as assessed in chapter 3. Although this signing of a treaty or a protocol does not of itself give rise to integration, the dignity and sacredness of both legal texts has been compromised.

5.2 Reciprocity

The emphasis on reciprocity has by far been the most controversial consequence of the EPAs. It has elicited concern from countless civil society groups who question the impact that reciprocity will have on the developmental aspirations of the ACP countries. The developmental impact of the EPAs, within the context of this paper, is important because as was demonstrated in chapter 2 one of the central objectives of RI, particularly within an African context, has been the need to facilitate the development of the region. The imperative for RI efforts to adopt a developmental focus has been emphasized emphatically within SACU, SADC, and the EPAs as outlined in chapter 2 and 3. This yet again, bears testament to the intrinsic relationship that RI and development have come to share. Therefore it is important to understand the impact that the EPAs may have on the developmental efforts of the ACP countries.

³⁷⁶ TRALAC (note 265) at 2.

³⁷⁷ R Sundrey (note 196) at 252.

When discussing reciprocity it is important to frame this discussion within the appropriate context. It is essential to bear in mind that there has been a litany of theories, debates and discussions which have questioned the efficacy of employing liberalization strategies as components of economic policies. These debates have raged since the 1990s when Structural Adjustment Programs, which called for the liberalization of economies, were popularized.³⁷⁸

In this regard the following should be noted. Firstly, ‘whilst no country has developed by turning its back on international trade, none has developed *by simply liberalizing trade either*’ [my emphasis].³⁷⁹ It is therefore overly simplistic to believe that reciprocal trade liberalization would naturally lead to greater trade and economic growth, a criticism that has been leveled at the EU.³⁸⁰

Secondly, the negative impact that reciprocity may have on Southern Africa should not be understated. The negative impact can be grouped into the direct and the indirect effects. Directly, reciprocity will expose the local economies to more competitive European producers; as well as adversely affecting government revenue, particularly in countries such as Lesotho and Swaziland. The indirect impact of reciprocity would potentially compromise efforts geared towards stimulating growth, employment as well as poverty reduction.³⁸¹

Reciprocity has therefore received untoward criticism. From the onset the ACP countries were concerned about the implications of such a requirement on the development front, stating that ‘given the possible adverse effect of reciprocity on domestic production and fiscal stability in ACP states, the latter cannot *a priori* accept to provide reciprocity in EPAs with the EU.’³⁸² Furthermore, the United Nations Economic Commission for Africa has observed in regards to the EPAs that ‘for the Southern Africa region, the benefits that SADC region expects are not guaranteed to be substantial enough to outweigh the potential costs.’³⁸³

It has further been argued that reciprocity should not be arbitrarily linked to time frames, figures or the interpretation of provisions of the WTO.³⁸⁴ Rather, it should be determined by taking into account ‘levels of trade, development and financial need’,³⁸⁵ as is

³⁷⁸ S Radelet (note 36) at 5.

³⁷⁹ C Ochieng (note 2) at 6

³⁸⁰ B Onguglo (note 356) at 4

³⁸¹ Aurelie Walker ‘The EU-SADC EPA: The moment of truth for regional integration’ August 2009 page 3

³⁸² D Keet (note 1) at 23.

³⁸³ Economic Commission for Africa (note 39) at 33.

³⁸⁴ Supra

³⁸⁵ Ochieng (note 2) at 4.

mandated in terms of the principle of differentiation encompassed in the Cotonou Agreement. This is furthermore in line with the Nairobi Declaration which expressed the hope that ‘the African regions should be allowed to pursue their regional integration processes at a pace that is commensurate with their political, economic and social capacities’.³⁸⁶ Critics have accordingly called for reciprocity to be cautiously approached, and all measures taken to avoid prioritizing a relationship with the EU over the regional agenda. Only once RI has progressed substantially should integration within the world economy become a goal.³⁸⁷

There is merit to the above criticisms. Notwithstanding this, there remains an understated dimension to this quandary. There is the need for developing countries to be wary of only looking towards non-reciprocal trade obligations and begin to adopt asymmetries, flexibilities or something ‘less than full reciprocity’ as opposed to non-reciprocity. Although asymmetric trade obligations are still preferential, they require a measure of *quid pro quo*. The need to move away from completely non-reciprocal obligations is created by the following considerations. As members of the WTO, both the SACU and the SADC members have committed themselves to the multi-lateral trading system. One of the reasons *de entrée* underpinning the system is the imperative to promote openness and trade liberalization.³⁸⁸ The SDT treatment of developing countries is an established doctrine within WTO jurisprudence and the need to clarify SDT rules has been highlighted. However, non-reciprocal obligations as a component of SDT needs to be juxtaposed against the consideration of how long developing countries will be given leeway to evade such an instrumental element of the WTO.

It seems to be taken for granted that the EU is not under a legal obligation to seek ways to legitimise preferential access for the ACP countries. Although, perhaps partly motivated by the dire socio-economic circumstance of some of the ACP countries, trade with the block cannot be simply understood as a philanthropic exercise. In terms of its WTO rules the EU obligations are clear; the pinnacle obligation is to apply the MFN principle towards trading partners. In relation to developing countries in terms of Part IV of GATT, and the Enabling clause, the EU is called to accord favourable treatment, this is however *not an obligation* [my emphasis]

³⁸⁶ Keet (note 1) at 23

³⁸⁷ Supra

³⁸⁸ P Sutherland (note 33) at 22.

Some scholars have suggested that one of the underlying rationales underpinning the Lome Convention was to guarantee that the European markets had markets for their products.³⁸⁹ Perhaps, this explains why the EU exhibited the political will needed to continuously justify this trade relationship to the WTO. However, within the present day global economy, where EU is seeking closer economic ties with other countries such as Brazil and India, this is no longer a concern.³⁹⁰

In addition to this, irrespective of the outcome of the Doha Development round, the commercial value of trade preferences is becoming exceedingly limited as the push for multilateral trade liberalization continues. Should globalization facilitate the complete elimination of barriers to trade, these preferences would then have absolutely no commercial value, given that the appeal of a preference lies in the fact that it is available to few.

Furthermore, in recent times it has been noted that there is a tendency for developing countries to be over-dependent on non-reciprocal preferences and thus ‘became trapped by the nature of the system’.³⁹¹ The structural dependence on non-reciprocal preferences substantiates the proposition that they have become exaggerated. Instead of being viewed as opportunities for developing countries, they are now being pursued as ends in themselves. This disregards the fact that preferences will not *necessarily* translate into practical gains. A lesson clearly exhibited by the failure of the Lome preferences to improve the circumstances of the ACP countries.

A warning against placing too much importance on non-reciprocal trade preferences was issued as early on as 1985 in the Leutwiler Report. It stated that

‘...For greater emphasis should be placed on permitting and encouraging developing countries to take advantage of their competitive strengths and on integrating them more fully into the trading system with all the appropriate rights and responsibilities’.³⁹²

While developing countries continue to approach reciprocity with extreme hesitation it is important to bear in mind that the longer they procrastinate, the longer the benefits of trade liberalization will be eluded. In this regard the World Bank has also stated that

‘long term competitiveness and sustainable development cannot be built solely upon special preferences allowing SSA [Sub-Saharan African] countries to

³⁸⁹ R Grynberg (note 327)at 3.

³⁹⁰ R Grynberg (note 327)at 3.

³⁹¹ C Michalopoulos (note 294)at 27.

³⁹² Supra.

benefit from transient distortions in world trade policies. Adjustment to preference erosion is going to be necessary sooner or later in any case.³⁹³

In light of this, the focus should not be on evading reciprocity. While allowing for asymmetries within trade relations the focus should be on ensuring that there is sufficient provision of financial and technical support and that furthermore these form part of legally binding obligations. It is important to highlight that this suggestion does not negate the importance of SDT provisions; it rather challenges the infallibility of non-reciprocity. A caveat though should be issued in this regard. This suggestion is levelled at developing countries. The nonreciprocal preferences that are offered to LDC in light of their dire economic and development levels are excluded from this discussion.

What has emerged from this discussion is that the introduction of reciprocity by the EPAs will have negative consequences for RI *vis a vis* development efforts of SACU and SADC. However the admittedly onerous adjustment costs would be a consequence of having ascribed to a global system which prioritizes trade liberalization.

It is therefore tentatively suggested that it would be prudent for such a transition to occur in an incremental way with the necessary funding to ease the arising costs.

³⁹³ C Michalopoulos (note 294)at 28.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

The central thrust of this paper argued that the most negative consequences of Economic Partnership Agreements will reverberate through the regional integration efforts of SACU and SADC.

In developing this argument, the following main themes arose.

6.1 The significance of regional integration within SACU and SADC

The advantages of regional integration discussed earlier in this paper have led many developing countries to adopt RI as an economic tool. Within an African context, the allure of RI was burgeoned by the Pan-African philosophy. This historical context, to some degree explains the continent's penchant for regional integration. Despite much enthusiasm, Africa's experience with regional integration has been found wanting. This has however not deterred African leaders from turning to regional integration as the 'trump card' in their efforts towards the economic liberation of the continent. SACU represents the highest level of integration within the SSA region. It is a functioning customs union with a CET, and a combined revenue pool. In addition to this, the organization encompasses a Common Monetary Area between Lesotho, Swaziland and South Africa. This is an achievement particularly within a region which is fraught with examples of failed integration schemes. This high level of integration furthermore raises the possibility of SACU serving as a basis for RI within the larger SADC area. Over and above this, the organization has laid down legal commitments within the SACU agreement which lay the ground work for more intensive integration efforts.

SADC has taken significant steps towards advancing its RI agenda. The establishment of its Trade Protocol paved the way for a market integration approach to RI. The inception of the

FTA, and the consequent tariff liberalization that has taken place displays that the intention to establish a customs union, though ambitious, undertaken seriously

6.2 The imperative to establish a WTO compliant regime

There is an undeniable need for the ACP countries to establish a WTO compatible trading relationship with the EU. This requires restructuring the basis of the trade relationship from the non-reciprocal preferential access granted under the Lome Conventions. This need to restructure the relationship exists despite the fact that many of the ACP countries are developing countries, or even LDCs. Though the SDT provisions are an important part of WTO jurisprudence, in their current form they of no avail. This is because the Lome Convention constitutes a discriminatory preferences regime which is incompatible with the WTO system as was aptly demonstrated by the Banana dispute. By investigating the various legal options it was found that though in principle there are alternative to the EPAs, these alternatives are either flawed, or the subject of protracted multi lateral negotiations. This therefore requires that countries as opposed to searching for mechanism to oppose the EPAs, find a means of making them work.

6.3 The impact that the Economic Partnership Agreements will have on Regional integration in SADC and SACU

The impact that EPAs will have on RI was investigated under two headings. Analysed first was the splintering of SACU and SADC. This was assessed from various perspectives. Within SSA the EPAs have been negotiated outside of existing regional organizations. In addition to this they have failed to harmonize relations between the BNLS states and the TDCA In addition to this the EPAs have managed to exacerbate schisms between LDC and non-LDC countries, SACU and SADC. The negative impact that the EPAs will have in this regard is clear.

It bears mention though that it would be unfair to attribute all the existing infirmities with regional organizations to the EPAs. There was already a thicket of challenge that the both SACU and SADC faced, as was demonstrated in the chapter 3. What the EPAs have done though is trenchantly bring to surface, what was in some cases, already existing fault lines.

The impact of the Singaporean issues was then examined. The overarching criticism levelled against them is that their inclusion into the EPAs is incongruent to the pace of region integration within SACU and SADC. Negotiating with a third party *prior* to securing regional cohesion will constrain the negotiation process. Primarily because Mozambique and the BLS states will already have pre-existing obligations. Not only does this limit the policy space of SACU and SADC, but it furthermore increases the likelihood that the countries will fail to reach convergence in these fields.

The discussion then turned to examine the effect of reciprocity on regional integration. The potential socio-economic consequences that would accompany trade liberalization have been the subject of much angst from various civil society groups. Such concerns are indeed warranted. This is primarily exhibited by the very real and substantial adjustment costs that SSA countries will have to make. However it is important to bear in mind that the future of non-reciprocal preferences is extremely glum. This conclusion is drawn to in light of the fact that not only is there no political will to pursue such preferences, but the effect of the multilateral trade liberalization would in any case negate their benefit. In recognition of this, it is suggested that the appropriate stance to take is to focus on how to alleviate some of the pressures that will inevitably occur, as opposed to evading them however a number of other issues were highlighted. Firstly, the future of trade preferences is extremely precarious as multi lateral trade liberalization progresses. Secondly trade preferences do not independently deliver benefits such as increased trade or economic development. They merely assist in creating a climate conducive to securing such benefits. In addition to this, the longer developing countries such as SSA continue to evade reciprocity; the benefits of trade will not be reaped.

6.4 Recommendations

In light of the above, one of the primary considerations that should be extracted from this dissertation is that there are no easy answers to many of the issues that have been addressed. The following suggestions are however tentatively offered in order to either prevent, or alternatively mitigate on some of the adverse effects discussed in this paper from being realised.

The SACU is currently facing an onslaught of challenges, many of which have the potential to do irreparable damage to the organization. In this regard, the following must be

emphasised. The SACU Council of Ministers has recently announced the intention to ‘redouble their collective efforts to resolve the outstanding issues in the SADC-EC Interim (IEPA) and Final Economic Partnership Agreement (EPA) negotiations’.³⁹⁴ Such efforts should be undertaken seriously with a view to resolving the current impasse within SACU, bringing an end to the untenable exclusion of South Africa.

For the BNLS states to have such a significant portion of government revenue dependent on external customs union is neither a desirable or sustainable situation. The need for the BNLS states, but more particularly Swaziland and Lesotho, to diversify their income basis is of critical importance. Even if South Africa does continue, to contribute significantly through the revenue sharing formula, all indications point towards the fact this will not take place at the levels that the states have become accustomed to. One possible option is that the BNLS states should ensure that seek technical assistance to enable them to strengthen, among others, tax collection mechanism.

Although South Africa’s economic policy looking outwards, as it aims to woo economic partners from a wider spectrum, regional realities cannot be ignored. The economies of Southern Africa are intricately linked consequently ‘South Africa’s stability and development cannot, for example, be promoted if surrounded by a regional sea of instability and squalor’³⁹⁵. It is therefore also important for South Africa’s interests to see to the development of the neighbouring countries.

Within the SADC EPA configuration, as negotiations continue towards the conclusion of a full EPA, much greater emphasis should be placed on securing all necessary funding to assist countries in countering the negative effects of trade liberalization. The ACP countries should lobby for more financial assistance in terms of the 10th European Development Fund. In addition to this ACP countries should lobby the World Bank and International Monetary Fund who have indicated a willingness to help in transitional costs.³⁹⁶

³⁹⁴ SACU (note 12) at 5.

³⁹⁵ Gerhard Erasmus ‘Variable Geometry, South-South Solidarity and Regional Integration: New Themes and old Agendas’

http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&news_id=75314&cause_id=1694 available online [accessed 17 February 2010].

³⁹⁶ C Michalopoulos (note 294) at 29

Additionally the ACP group should continue in its efforts to lobby for inclusion of SDT in Article XXIV. This should however be done mindful of the limitations of non-reciprocal trade preferences.

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